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# Presidential Documents

**Title 3—**

## The President

**Proclamation 10417 of June 17, 2022**

## Father's Day, 2022

**By the President of the United States of America**

**A Proclamation**

Every year on Father's Day, we honor the men who help shape our character through their love, guidance, and devotion. Dads and father figures across the country sacrifice so much to support their families and to ensure that their children can lead fulfilling lives.

I remember my own father, who instilled in me some of the most important values that guide me to this day. He taught me to treat all people with dignity, and that there is no higher calling than to be a good parent. He informed the way that I raised my own children—and how they continue to raise theirs. Just like my father, dads all over our country help teach their kids a sense of right and wrong that stays with them their entire lives. We owe these wonderful fathers a great deal of respect and gratitude.

For many of us, Father's Day is an opportunity to pause and remember the fathers, stepfathers, father figures, grandfathers, brothers, and children that we have lost—but who are never gone. Too many of us know a dad who was lost too soon or a father who has lost a child. The pain runs deep, but we draw strength from knowing that our loved ones will always remain with us.

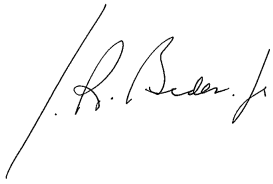
Like so many Americans, I am thankful for the precious time I have had both as a son and as a father. The unique challenges of the last few years have reminded us to cherish the time we have with our dads—learning more from them, showing them more gratitude, and showering them with more love.

My Administration is dedicated to supporting our Nation's fathers and families. We provided historic funding to help parents access child care during the pandemic, and we continue to fight for lower costs and higher quality child care for the long term. We are working to ensure that parents can access paid leave as they welcome a new child or care for a sick loved one. Additionally, we are working tirelessly for safer communities so that all fathers can raise their children in flourishing neighborhoods. From my own personal experience as a single dad, I know how critical support is when raising a family. That is why we remain committed to helping single parents ensure that their children have equal opportunities to thrive.

On Father's Day, we pay tribute to the dads, stepdads, grandfathers, and father figures who lift us up on their shoulders so that we can reach our full potential. We express our gratitude for all that they sacrifice on our behalf. We honor the contributions they make every day to strengthen their families and our Nation.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, in accordance with a joint resolution of the Congress approved April 24, 1972, as amended (36 U.S.C. 109) do hereby proclaim June 19, 2022, as Father's Day. I direct the appropriate officials of the Government to display the flag of the United States on all Government buildings on this day. Let us honor our fathers, living and deceased, and show them the love and gratitude they deserve.

IN WITNESS WHEREOF, I have hereunto set my hand this seventeenth day of June, in the year of our Lord two thousand twenty-two, and of the Independence of the United States of America the two hundred and forty-sixth.



[FR Doc. 2022–13545
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# Presidential Documents

**Proclamation 10418 of June 17, 2022**

## Juneteenth Day of Observance, 2022

**By the President of the United States of America**

**A Proclamation**

After the Union Army captured New Orleans in 1862, slave owners in Confederate states migrated to Texas with more than 150,000 enslaved Black persons. For 3 years, even after President Abraham Lincoln issued the Emancipation Proclamation, enslaved Black Americans in Texas remained in brutal bondage, immorally and illegally deprived of their freedom and basic dignity. On June 19, 1865—over 2 years after President Lincoln declared all enslaved persons free—Major General Gordon Granger and Union Army troops marched to Galveston, Texas, to enforce the Emancipation Proclamation and free the last enslaved Black Americans in Texas.

Those who were freed from bondage celebrated their long-overdue emancipation on June 19. Today, our Nation commemorates Juneteenth: a chance to celebrate human freedom, reflect on the grievous and ongoing legacy of slavery, and rededicate ourselves to rooting out the systemic racism that continues to plague our society as we strive to deliver the full promise of America to every American.

This Juneteenth, we are freshly reminded that the poisonous ideology of racism has not yet been defeated—it only hides. Our Nation continues to mourn the 10 lives senselessly taken in Buffalo, New York, and grieve for the families who have lost a piece of their soul. As we confront the awful reality of yet another gunman massacring innocent people in the name of hatred, racism, and fear, we must meet this moment with renewed resolve. We must stand together against white supremacy and show that bigotry and hate have no safe harbor in America.

Juneteenth is a day to reflect on both bondage and freedom—a day of both pain and purpose. It is, in equal measure, a remembrance of both the long, hard night of slavery and subjugation, as well as a celebration of the promise of a brighter morning to come. On Juneteenth, we remember our extraordinary capacity to heal, to hope, and to emerge from our worst moments as a stronger, freer, and more just Nation. It is also a day to celebrate the power and resilience of Black Americans, who have endured generations of oppression in the ongoing journey toward equal justice, equal dignity, equal rights, and equal opportunity in America.

Last year, I was proud to sign bipartisan legislation establishing Juneteenth as our newest Federal holiday, so that all Americans can feel the power of this day, learn from our history, celebrate our progress, and recognize and engage in the work that continues. Great nations do not ignore their most painful moments—they face them. We grow stronger as a country when we honestly confront our past injustices, including the profound suffering and injustice wrought by slavery and generations of segregation and discrimination against Black Americans. To heal, we must remember. We must never rest until the promise of our Nation is made real for all Americans.

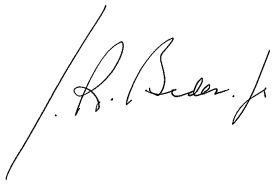
The emancipation of enslaved Black Americans was not the end of our Nation's work to deliver on the promise of equality—it was only the beginning. On Juneteenth, we recommit to our shared work to ensure racial justice, equity, and equality in America. We commemorate the centuries of struggle and progress led by abolitionists, educators, civil rights advocates,

lawyers, activists, trade unionists, religious leaders, public officials, and everyday Americans who have brought our Nation closer to fulfilling its promise.

As my good friend, the late Congressman Elijah Cummings, said, ''Our children are the living messengers we send to a future we will never see.'' Together as a Nation, let us continue our work together to build a country we are all proud to pass along to our children—one where the foundational promises and ideals of America ring true for every child and every family.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim June 19, 2022, as Juneteenth Day of Observance. I call upon the people of the United States to acknowledge and condemn the history of slavery in our Nation and recognize how the impact of America's original sin remains. I call on every American to celebrate the emancipation of all Black Americans and commit together to eradicate systemic racism and inequity that can never be tolerated and must always be fought against.

IN WITNESS WHEREOF, I have hereunto set my hand this seventeenth day of June, in the year of our Lord two thousand twenty-two, and of the Independence of the United States of America the two hundred and forty-sixth.



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# Rules and Regulations

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

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2022–0239]**

## Safety Zones; Fireworks Displays in the Fifth Coast Guard District

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of enforcement of regulation.

**SUMMARY:** The Coast Guard will enforce safety zones for five fireworks displays as described in the table to 33 CFR 165.506 on multiple dates on and around July 4, 2022. Our regulation for marine events within the Fifth Coast Guard District identifies the regulated areas for these fireworks displays. During the enforcement periods, vessels may not enter, remain in, or transit through the safety zones unless authorized by the Captain of the Port or designated Coast Guard patrol personnel on-scene.

**DATES:** The regulations in table 1 to paragraph (h)(1) to 33 CFR 165.506, will be enforced for the safety zones identified in the **SUPPLEMENTARY INFORMATION** section below for the dates and times specified.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this notice of enforcement, you may call or email Petty Officer Thomas Welker, U.S. Coast Guard, Sector Delaware Bay, Waterways Management Division, telephone 215–271–4814, email *Thomas.J.Welker@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

The Coast Guard will enforce the safety zones established in table 1 to paragraph (h)(1) to 33 CFR 165.506, for the following five fireworks displays during the dates, times, and at the locations listed in the following table:

DATES AND TIMES OF ENFORCEMENT OF CERTAIN 33 CFR 165.506 SAFETY ZONES FOR FIREWORKS DISPLAYS IN THE COAST GUARD SECTOR DELAWARE BAY COTP ZONE IN JULY 2022

| Date | Time | Location | Safety zone |
|---|---|---|---|
| July 1, 2022 | 9:30 p.m. to 10:15 p.m | Delaware River, Philadelphia, PA; Safety Zone. | All waters of Delaware River, adjacent to Penn's Landing, Philadelphia, PA, within a 500-yard radius of a fireworks barge at approximate position latitude 39°56′49″ N, longitude 075°08′11″ W. |
| July 4, 2022 | 9 p.m. to 10 p.m | Little Egg Harbor, Parker Island, NJ; Safety Zone. | All waters of Little Egg Harbor within a 500-yard radius of the fireworks barge in approximate position latitude 39°34′18″ N, longitude 074°14′43″ W, approximately 50 yards north of Parkers Island. |
| July 4, 2022 | 9 p.m. to 10:30 p.m | Delaware River, Philadelphia, PA; Safety Zone. | All waters of Delaware River, adjacent to Penn's Landing, Philadelphia, PA, within a 500-yard radius of a fireworks barge at approximate position latitude 39°56′49″ N, longitude 075°08′11″ W. |
| July 4, 2022 | 8:45 p.m. to 9:30 p.m | Delaware Bay, Lewes, DE; Safety Zone. | All waters of Delaware Bay off Lewes, DE, within a 350 yard radius of the barge anchored in approximate position 38°47′12″ N, 075°07′48″ W. |
| July 4, 2022 or rain date of July 5, 2022. | 9 p.m. to 10 p.m | North Atlantic Ocean, Avalon, NJ; Safety Zone. | The waters of the North Atlantic Ocean within a 500-yard radius of the fireworks barge in approximate location latitude 39°06′19.5″ N, longitude 074°42′02.15″ W, in the vicinity of the shoreline at Avalon, NJ. |

During the enforcement period, as reflected in § 165.506(d), vessels may not enter, remain in, or transit through the safety zone unless authorized by the Captain of the Port or designated Coast Guard patrol personnel on-scene.

In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide notification of this enforcement period via broadcast notice to mariners.

Dated: June 16, 2022.

**Jonathan D. Theel,**

*Captain, U.S. Coast Guard, Captain of the Port Delaware Bay.*

[FR Doc. 2022–13339 Filed 6–22–22; 8:45 am]

BILLING CODE 9110–04–P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 225 and 252**

**[Docket DARS–2021–0012]**

**RIN 0750–AK85**

# Defense Federal Acquisition Regulation Supplement: Maximizing the Use of American-Made Goods, Products, and Materials (DFARS Case 2019–D045)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement an Executive order regarding maximizing the use of American-made goods, products, and materials.

**DATES:** Effective June 23, 2022.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly Bass, telephone 571–372–6174.

**SUPPLEMENTARY INFORMATION:**

## I. Background

DoD is issuing a final rule amending the DFARS to implement Executive Order (E.O.) 13881, Maximizing Use of American-made Goods, Products, and Materials, which calls for more aggressive implementation of the Buy American statute (41 U.S.C. chapter 83) to maximize the Government's procurement of American-made goods, products, and materials. The Buy American statute requires the purchase of domestic products (both end products and construction materials), except when the domestic product is not available, the domestic product is only available at an unreasonable cost, or it would not be in the public interest to buy the domestic product.

E.O. 13881 supersedes E.O. 10582, Prescribing Procedures for Certain Determinations under the Buy American Act. E.O. 13881 establishes that under the Buy American statute a product is foreign if the cost of all foreign components used in such product constitutes 45 percent or more of the cost of all components, except that iron and steel products are foreign if the cost of foreign iron and steel equals or exceeds 5 percent of the cost of all components. This rule strengthens domestic preferences under the Buy American statute, as required by E.O. 13881, by changing how a domestic product is defined, while also maintaining the exception for qualifying countries.

DoD published a proposed rule in the **Federal Register** at 86 FR 48370 on August 30, 2021. Five respondents submitted public comments in response to the proposed rule.

## II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments is provided. There were no changes made to the proposed rule as a result of those comments.

### *A. Analysis of Public Comments*

1. Support for the Rule

*Comment:* Several respondents expressed support for the rule, and stated that the United States Government should maximize the use of goods, products, and materials produced in the United States; the rule benefits the overall intent of the strategic national defense policy; and is an effective regulatory technique for incentivizing the domestic industry as a whole. A respondent further stated the overall public policy and public opinion are already gravitating toward the increase of domestic production, which only serves to further incentivize the increase in this type of production. This respondent supports the increased domestic content requirements for iron and steel and iron and steel products such as fasteners.

*Response:* DoD acknowledges the respondents' support for the rule.

2. Commercially Available-Off-the-Shelf (COTS) Items Exception—COTS Waiver for Fasteners

*Comment:* A couple of respondents conveyed that the waiver of the domestic content test of the Buy American statute for the acquisition of COTS fasteners would create a competitive disadvantage for domestic fastener manufacturers, especially when all other COTS waivers were removed for iron and steel products in Federal Acquisition Regulation (FAR) Case 2019–016 (86 FR 6180, January 19, 2021). A respondent further stated that to keep the COTS waiver for fasteners but remove it for all other iron and steel products only further worsened the competitive field for fastener manufacturers.

A respondent further stated that currently, a COTS item is considered compliant with the Buy American statute if its final stage of manufacturing occurs in the United States, without regard for the origin of the COTS components. The respondent also stated that this policy stands in stark contrast with the goals of other domestic content preferences, particularly the Buy America statute that applies to Federal assistance infrastructure programs that explicitly provides that products are only considered American-made if all manufacturing processes from the initial melting stage through the application of coatings take place in the United States. The COTS waiver takes the opposite approach with negative consequences for upstream suppliers of raw materials and subcomponents of products and allows for products that are entirely comprised of foreign material to be considered American-made so long as the final processing stage occurs in the United States.

*Response:* The roll-back of the COTS waiver is necessary to give full effect to the E.O. 13881 requirement. The fasteners being exempted from the domestic content requirement are those that are COTS items. The current FAR contract clauses implementing the Buy American statute apply to a narrow set of procurements. In addition, because the Federal Acquisition Regulatory Council retained the COTS items exception for most COTS items in its implementation of the E.O. in the FAR, the heightened domestic content requirements will not be applicable to those procurements. (See the final rule for FAR Case 2019–016 published at 86 FR 6180 on January 19, 2021.) This DFARS rule takes the same approach.

3. Unreasonable Cost

*Comment:* A respondent stated that the Buy American statute requires the purchase of domestic products, except if the product is only available at an unreasonable cost, and recommended the addition of a percent cost above nondomestic goods, products, and materials to ensure it is followed more specifically. The respondent further recommended the inclusion of a financial credit for those that comply with the Buy American statute.

*Response:* To implement E.O. 13881 no revisions were required in the rule to change the percentage factor used to determine whether the offered price of material of domestic origin is unreasonable or inconsistent with public interest. In order to determine whether the cost of a domestic product is unreasonable, E.O. 13881 increased the minimum percentage factor from 6 percent to 20 percent for other than small businesses and from 12 percent to 30 percent for small businesses (86 FR 6180, January 19, 2021). If the price of the domestic product exceeds the price

of the foreign product by more than 20 percent for other than small businesses, then the price of the domestic product is unreasonable. This does not apply to DoD, since DoD already uses a 50 percent factor for both small and other than small businesses.

4. Public Interest Definition

*Comment:* A respondent recommended a better definition of what would not be in the public interest.

*Response:* DoD acknowledges the comment regarding creation of a new public interest definition. A definition to determine what would not be in the public interest is not required and would be inconsistent with the implementation in the final rule for FAR case 2019–016 published at 86 FR 6180, on January 19, 2021.

5. Outside the Scope of the Rule

*Comment:* A respondent conveyed that excluding COTS items from the Buy American statute impairs the statute from achieving the stated purpose of the E.O. 14005, Ensuring the Future Is Made in All of America by All of America's Workers. Another respondent stated that the continuation of a COTS waiver for fasteners is no longer valid.

Additionally, a respondent provided comments regarding the OMB Memorandum M–21–26, Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws, and impacts on COTS waivers. The respondent also recommended keeping the fastener language in DFARS 252.225–7009, Restriction on Acquisition of Specialty Metals, for fasteners provided to the six major DoD programs as it allows for improved efficiency for U.S. fastener manufacturers providing both commercial and defense applications to the same prime contractor, while still protecting the domestic steel and fastener industries.

Another respondent provided comments in response to the final rule for FAR case 2019–016 published at 86 FR 6180 on January 19, 2021.

*Response:* This final rule implements E.O. 13881, Maximizing Use of American-made Goods, Products, and Materials, in the DFARS in accordance with the E.O. requirements, and supplements the FAR in accordance with the final rule as published implementing E.O. 13881 (86 FR 6180, dated January 19, 2021). The respondent's comment that excluding COTS items from the Buy American statute impairs the statute from achieving the stated purpose of the E.O. 14005, Ensuring the Future Is Made in All of America by All of America's Workers, is outside the scope of this rule.

The respondent's comment referencing the OMB Memorandum M–21–26, Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws, is outside the scope of this rule.

Lastly, the comment referencing the requirements in DFARS 252.225–7009, Restriction on Acquisition of Specialty Metals, is outside the scope of this rule.

*B. Other Changes*

Paragraph (2) of the definition of ''domestic construction material'' has been revised in the following clauses to refer to the definition of ''cost of components'' instead of paragraph (1)(ii)(A) of the definition of ''domestic construction material'': 252.225–7044 (basic clause and alternate I) and 252.225–7045 (basic clause and alternates I through III). Paragraph (1)(ii)(A) does not provide information regarding the cost of components, which is located in the definition of that term.

## III. Applicability to Contracts at or Below the Simplified Acquisition Threshold, for Commercial Products Including Commercially Available Off-the-Shelf Items, and for Commercial Services

This final rule does not add any new provisions or clauses, nor change the applicability of existing provisions or clauses to contracts at or below the simplified acquisition threshold, contracts for the acquisition of commercial products including commercially available off-the-shelf items, and for commercial services.

## IV. Expected Impact of the Rule

The current FAR contract clauses implementing the Buy American statute apply to a narrow set of procurements. In addition, because the Federal Acquisition Regulatory Council retained the COTS items exception for most COTS items in its implementation of E.O. 13881 in the FAR, the heightened domestic content requirements will not be applicable to those procurements. (See the final rule for FAR Case 2019–016 published at 86 FR 6180 on January 19, 2021.) This final DFARS rule takes the same approach.

Domestic industries supplying domestic end products are likely to benefit from a competitive advantage as a result of the FAR and DFARS implementation. Based on the E.O., it is unclear if the pool of qualified suppliers would be reduced, resulting in less competition and a possible increase in prices that the Government will pay to procure these products. At least three arguments point to the likelihood that any increase in burden on contractors would be small, if not de minimis:

(1) Familiarization costs should be low.

(2) Some, if not many, contractors may already be able to meet the more stringent threshold.

(3) Costs incurred by contractors who adjust their supply chains, so that their end products qualify as domestic, will enjoy a larger price preference that should help to offset these costs over time.

Each of these arguments is explained below.

First, DoD does not anticipate significant costs from contractor familiarization with the rule given the publication of the FAR final rule implementing E.O. 13881 and the history of rulemaking and E.O.s in general in this area. The basic mechanics of the Buy American statute (*e.g.,* how and when the price preference is used to favor domestic end products, certifications required of offerors to demonstrate end products are domestic) continue to reflect processes that have been in place for decades and are not new to contractors.

Second, some, if not many, contractors may already be able to comply with the lower foreign content requirement needed to meet the definition of domestic end product under E.O. 13881 and the final rule. Laws such as the SECURE Technology Act (Pub. L. 115–390), which requires a series of actions to strengthen the Federal infrastructure for managing supply chain risks, are placing significantly increased emphasis on Federal agencies and Federal Government contractors to identify and reduce risk in their supply chains.

One way to reduce supply chain risk is to increase domestic sourcing of content. In addition, in the context of iron and steel, many laws already in place call for more stringent accounting of domestic sourcing of content. For example, the Recovery Act required that all construction material for a project for the construction, alteration, maintenance, or repair of a public building or a public work in the United States, consisting wholly or predominantly of iron or steel, had to be produced in the United States when using Recovery Act funds, to the extent consistent with trade agreements (see FAR 25.602–1, implementing section 1605 of the Recovery Act).

In addition, Federal contractors who also work on contracts funded under Federal grants may, in some cases, find

that the steel, iron, and manufactured goods used in the project must be produced in the United States, as is the case for certain funding administered by the Federal Transit Administration for public transportation projects (see 49 U.S.C. 5323(j)).

Third, it is anticipated that some contractors' products and construction materials may not meet the definition of domestic end product and domestic construction material unless the contractors take steps to adjust their supply chains to increase the domestic content. Those contractors that make a business decision not to modify their supply chains will still be able to bid on DoD contracts but will no longer enjoy a price preference.

Accordingly, it is likely that the Federal market for iron and steel has already completed significant retooling and could meet the requirements of E.O. 13881 without too much additional effort.

This rule amends the clauses that implement the Buy American statute. There are four clauses affected by the changes in this rule:

(1) 252.225–7001, Buy American and Balance of Payments Program (Basic and Alternate I).

(2) 252.225–7036, Buy American—Free Trade Agreements—Balance of Payments Program (Basic and Alternates I–V).

(3) 252.225–7044, Balance of Payments Program—Construction Material (Basic and Alternate I).

(4) 252.225–7045, Balance of Payments Program—Construction Material (Basic and Alternates I–III).

This rule changes the definitions of ''domestic end product'' and ''domestic construction material.'' The rule also adds the definitions of ''steel'' and ''predominantly of iron or steel or a combination of both'' in the clauses to conform the DFARS with the FAR implementation of E.O. 13881.

According to the Federal Procurement Data System (FPDS) data for fiscal year (FY) 2017, FY 2018, and FY 2019 for new awards with a foreign place of performance for construction valued over the micro-purchase threshold and for awards for supplies, DoD awarded an average of 3,222 construction contracts with a foreign place of performance per year. In addition, DoD awarded an average of 332,607 supply contracts per year during FY 2017 through FY 2019.

In summary, the rule will strengthen domestic preferences under the Buy American statute and provide both large and small businesses the opportunity and incentive to deliver U.S. manufactured products from domestic suppliers. It is expected that this rule will benefit large and small U.S. manufacturers, including those of iron or steel.

Therefore, based on public comments received, DoD has concluded that the initial assessment is correct that the cost impact of this rule is not significant, and any impact is predominantly positive.

## V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

## VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

## VII. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule is required to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Executive Order (E.O.) 13881, Maximizing Use of American-Made Goods, Products, and Materials, and also to make conforming changes to the applicable clauses as a result of implementation of the E.O. in the Federal Acquisition Regulation (FAR).

The objective of this rule is to strengthen domestic preferences under the Buy American statute, as required by E.O. 13881, by changing how a domestic end product and domestic construction material are defined.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

Data was obtained from the Federal Procurement Data System (FPDS) for new awards valued over the micro-purchase threshold in fiscal year (FY) 2017, FY 2018, and FY 2019 that had a foreign place of performance and were for construction. DoD awarded an average of 3,222 construction contracts with a foreign place of performance per year during FY 2017 through FY 2019. Of those construction contracts, approximately 65 were awarded to 32 unique small entities per year.

Data was also obtained from FPDS for FY 2017 through FY 2019 for new awards valued over the micro-purchase threshold for supplies made in the United States. DoD awarded an average of 332,607 supply contracts per year during FY 2017 through FY 2019. Of those supply contracts, approximately 154,422 supply contracts were awarded to 13,480 unique small entities per year.

The rule will strengthen domestic preferences under the Buy American statute and provide small businesses the opportunity and incentive to deliver U.S. manufactured products from domestic suppliers. It is expected that this rule will benefit U.S. small business manufacturers, including those of iron or steel. Small business manufacturers who do not already meet the increased domestic content requirements of this proposed rule may need to adjust their supply chains. DoD does not have data on how many small business manufacturers may decide to make such adjustments.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses, other than to increase the percentages used in the domestic content test applied to offers of manufactured end products.

There are no known significant alternative approaches to the rule that would meet the requirements of E.O. 13881.

## VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

**List of Subjects in 48 CFR Parts 225 and 252**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 225 and 252 are amended as follows:

■ 1. The authority citation for parts 225 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

## PART 225—FOREIGN ACQUISITION

■ 2. Amend section 225.003 by—

■ a. Revising the definition of ''Domestic end product'';

■ b. Removing the definition ''Qualifying country component and qualifying country end product''; and

■ c. Adding definitions for ''Qualifying country component'' and ''Qualifying country end product'' in alphabetical order.

The revision and additions read as follows:

**225.003 Definitions.**

* * * * *

*Domestic end product* means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(*1*) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(*2*) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a commercially available off-the-shelf (COTS) item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States or a qualifying country constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States or a qualifying country means that all manufacturing processes of the iron or steel must take place in the United States or a qualifying country, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the explanation of cost of components in paragraph (1)(ii)(A) of this definition.

* * * * *

*Qualifying country component* means a component mined, produced, or manufactured in a qualifying country.

*Qualifying country end product* means—

(1) An unmanufactured end product mined or produced in a qualifying country; or

(2) An end product manufactured in a qualifying country if—

(i) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States. Components of unknown origin are treated as foreign; or

(ii) The end product is a COTS item.

* * * * *

■ 3. Amend section 225.101 by revising paragraph (a)(ii) to read as follows:

**225.101 General.**

(a) * * *

(ii)(A) Except for an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of its U.S. and qualifying country components exceeds 55 percent of the cost of all its components. This test is applied to end products only and not to individual components.

(B) For an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of iron and steel not produced in the United States or a qualifying country must constitute less than 5 percent of the cost of all the components used in the end product. The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding commercially available off-the-shelf (COTS) fasteners. The domestic content test of the Buy American statute has not been waived for acquisitions of COTS items in this category, except for COTS fasteners.

* * * * *

**225.502 [Amended]**

■ 4. Amend section 225.502 by—

■ a. In paragraph (c)(ii)(B), removing ''225.504(1)'' and adding ''PGI 225.504(1)'' in its place;

■ b. In paragraph (c)(ii)(D), removing ''225.504(2)'' and adding ''PGI 225.504(2)'' in its place;

■ c. In paragraph (c)(ii)(E)(*1*), removing ''225.504(3)'' and adding ''PGI 225.504(3)'' in its place; and

■ d. In paragraph (c)(ii)(E)(*2*), removing ''225.504(4)'' and adding ''PGI 225.504(4)'' in its place.

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend section 252.225–7001 by—

■ a. Removing the clause date of ''(MAR 2022)'' and adding ''(JUN 2022)'' in its place;

■ b. In paragraph (a)—

■ i. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C),

and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;

■ ii. Revising the definition of ''Domestic end product'';

■ iii. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';

■ iv. Revising the definition of ''Qualifying country end product''; and

■ v. Adding, in alphabetical order, the definition of ''Steel''; and

■ c. In Alternate I—

■ i. Removing the clause date of ''(MAR 2022)'' and adding ''(JUN 2022)'' in its place; and

■ ii. In paragraph (a)—

■ A. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;

■ B. Revising the definition of ''Domestic end product'';

■ C. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';

■ D. Revising the definition of ''Qualifying country end product'';

■ E. In the definition of ''South Caucasus/Central and South Asian (SC/CASA) state end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively; and

■ F. Adding, in alphabetical order, the definition of ''Steel''.

The revisions and additions read as follows:

**252.225–7001 Buy American and Balance of Payments Program.**

* * * * *

(a) * * *

*Domestic end product* means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(*1*) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(*2*) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States or a qualifying country constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States or a qualifying country means that all manufacturing processes of the iron or steel must take place in the United States or a qualifying country, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the explanation of cost of components in paragraph (1)(ii)(A) of this definition.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Qualifying country end product* means—

(1) An unmanufactured end product mined or produced in a qualifying country; or

(2) An end product manufactured in a qualifying country if—

(i) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States. Components of unknown origin are treated as foreign; or

(ii) The end product is a COTS item.

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate I.** * * *

* * * * *

(a) * * *

*Domestic end product* means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(*1*) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(*2*) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States or a qualifying country constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States or a qualifying country means that all manufacturing processes of the iron or steel must take place in the United States or a qualifying country, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the explanation of cost of components in paragraph (1)(ii)(A) of this definition.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Qualifying country end product* means—

(1) An unmanufactured end product mined or produced in a qualifying country; or

(2) An end product manufactured in a qualifying country if—

(i) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States. Components of unknown origin are treated as foreign; or

(ii) The end product is a COTS item.

* * * * *

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

■ 6. Amend section 252.225–7036 by—

■ a. Removing the clause date of ''(MAR 2022)'' and adding ''(JUN 2022)'' in its place.

■ b. In paragraph (a)—

■ i. In the definition of ''Bahrainian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;

■ ii. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;

■ iii. Revising the definition of ''Domestic end product'';

■ iv. In the definition of ''Free Trade Agreement country'', removing the semicolon and adding a period in its place;

■ v. In the definitions of ''Free Trade Agreement country end product'', ''Moroccan end product'', ''Panamanian end product'', and ''Peruvian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;

■ vi. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';

■ vii. Revising the definition of ''Qualifying country end product''; and

■ viii. Adding, in alphabetical order, the definition of ''Steel''.

■ c. In Alternate I—

■ i. Removing the clause date of ''(MAR 2022)'' and adding ''(JUN 2022)'' in its place; and

■ ii. In paragraph (a)—

■ A. In the definitions of ''Bahrainian end product'' and ''Canadian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;

■ B. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;

■ C. Revising the definition of ''Domestic end product'';

■ D. In the definition of ''Free Trade Agreement country'', removing the semicolon and adding a period in its place;

■ E. In the definitions of ''Free Trade Agreement country end product'', ''Moroccan end product'', ''Panamanian end product'', and ''Peruvian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;

■ F. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';

■ G. Revising the definition of ''Qualifying country end product''; and

■ H. Adding, in alphabetical order, the definition of ''Steel''.

■ d. In Alternate II—

■ i. Removing the clause date of ''(MAR 2022)'' and adding ''(JUN 2022)'' in its place; and

■ ii. In paragraph (a)—

■ A. In the definition of ''Bahrainian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;

■ B. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;

■ C. Revising the definition of ''Domestic end product'';

■ D. In the definition of ''Free Trade Agreement country'', removing the semicolon and adding a period in its place;

■ E. In the definitions of ''Free Trade Agreement country end product'', ''Moroccan end product'', ''Panamanian end product'', and ''Peruvian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;

■ F. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';

■ G. Revising the definition of ''Qualifying country end product'';

■ H. In the definition of ''South Caucasus/Central and South Asian (SC/CASA) state end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively; and

■ I. Adding, in alphabetical order, the definition of ''Steel''.

■ e. In Alternate III—

■ i. Removing the clause date of ''(MAR 2022)'' and adding ''(JUN 2022)'' in its place; and

■ ii. In paragraph (a)—

■ A. In the definitions of ''Bahrainian end product'' and ''Canadian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ B. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;
■ C. Revising the definition of ''Domestic end product'';
■ D. In the definition of ''Free Trade Agreement country'', removing the semicolon and adding a period in its place;
■ E. In the definitions of ''Free Trade Agreement country end product'', ''Moroccan end product'', ''Panamanian end product'', and ''Peruvian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ F. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';
■ G. Revising the definition of ''Qualifying country end product'';
■ H. In the definition of ''South Caucasus/Central and South Asian (SC/CASA) state end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively; and
■ I. Adding, in alphabetical order, the definition of ''Steel''.
■ f. In Alternate IV—
■ i. Removing the clause date of ''(MAR 2022)'' and adding ''(JUN 2022)'' in its place; and
■ ii. In paragraph (a)—
■ A. In the definition of ''Bahrainian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ B. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;
■ C. Revising the definition of ''Domestic end product'';
■ D. In the definition of ''Free Trade Agreement country'', removing the semicolon and adding a period in its place;
■ E. In definitions of ''Free Trade Agreement country end product'', ''Korean end product'', ''Moroccan end product'', ''Panamanian end product'', and ''Peruvian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ F. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';
■ G. Revising the definition of ''Qualifying country end product''; and
■ H. Adding, in alphabetical order, the definition of ''Steel''.
■ g. In Alternate V—
■ i. Removing the clause date of ''(MAR 2022)'' and adding ''(JUN 2022)'' in its place; and
■ ii. In paragraph (a)—
■ A. In the definition of ''Bahrainian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ B. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;
■ C. Revising the definition of ''Domestic end product'';
■ D. In the definition of ''Free Trade Agreement country'', removing the semicolon and adding a period in its place;
■ E. In the definitions of ''Free Trade Agreement country end product'', ''Korean end product'', ''Moroccan end product'', ''Panamanian end product'', and ''Peruvian end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ F. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';
■ G. Revising the definition of ''Qualifying country end product'';
■ H. In the definition of ''South Caucasus/Central and South Asian (SC/CASA) state end product'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively; and
■ I. Adding, in alphabetical order, the definition of ''Steel''.

The revisions and additions read as follows:

**252.225–7036 Buy American—Free Trade Agreements—Balance of Payments Program.**

* * * * *

(a) * * *

*Domestic end product* means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(*1*) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(*2*) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States or a qualifying country constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States or a qualifying country means that all manufacturing processes of the iron or steel must take place in the United States or a qualifying country, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the explanation of cost of components in paragraph (1)(ii)(A) of this definition.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill

products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Qualifying country end product* means—

(1) An unmanufactured end product mined or produced in a qualifying country; or

(2) An end product manufactured in a qualifying country if—

(i) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States. Components of unknown origin are treated as foreign; or

(ii) The end product is a COTS item.

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate I. * * ***

(a) * * *

*Domestic end product* means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(*1*) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(*2*) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(C) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States or a qualifying country constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States or a qualifying country means that all manufacturing processes of the iron or steel must take place in the United States or a qualifying country, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the explanation of cost of components in paragraph (1)(ii)(A) of this definition.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Qualifying country end product* means—

(1) An unmanufactured end product mined or produced in a qualifying country; or

(2) An end product manufactured in a qualifying country if—

(i) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States. Components of unknown origin are treated as foreign; or

(ii) The end product is a COTS item.

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate II. * * ***

(a) * * *

*Domestic end product* means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(*1*) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(*2*) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United

States, if the cost of iron and steel not produced in the United States or a qualifying country constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States or a qualifying country means that all manufacturing processes of the iron or steel must take place in the United States or a qualifying country, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the explanation of cost of components in paragraph (1)(ii)(A) of this definition.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Qualifying country end product* means—

(1) An unmanufactured end product mined or produced in a qualifying country; or

(2) An end product manufactured in a qualifying country if—

(i) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States. Components of unknown origin are treated as foreign; or

(ii) The end product is a COTS item.

* * * * *

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate III. * * ***

(a) * * *

*Domestic end product* means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(*1*) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(*2*) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States or a qualifying country constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States or a qualifying country means that all manufacturing processes of the iron and steel must take place in the United States or a qualifying country, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the explanation of cost of components in paragraph (1)(ii)(A) of this definition.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Qualifying country end product* means—

(1) An unmanufactured end product mined or produced in a qualifying country; or

(2) An end product manufactured in a qualifying country if—

(i) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States. Components of unknown origin are treated as foreign; or

(ii) The end product is a COTS item.

* * * * *

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate IV. * * ***

(a) * * *

*Domestic end product* means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(*1*) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(*2*) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States or a qualifying country constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States or a qualifying country means that all manufacturing processes of the iron or steel must take place in the United States or a qualifying country, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the explanation of cost of components in paragraph (1)(ii)(A) of this definition.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Qualifying country end product* means—

(1) An unmanufactured end product mined or produced in a qualifying country; or

(2) An end product manufactured in a qualifying country if—

(i) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States. Components of unknown origin are treated as foreign; or

(ii) The end product is a COTS item.

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate V. * * ***

(a) * * *

*Domestic end product* means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(*1*) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(*2*) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States or a qualifying country constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States or a qualifying country means that all manufacturing processes of the iron or steel must take place in the United States or a qualifying country, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States or a qualifying country includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States or a qualifying country, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States or a qualifying country, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the explanation of cost of components in paragraph (1)(ii)(A) of this definition.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its

components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Qualifying country end product* means—

(1) An unmanufactured end product mined or produced in a qualifying country; or

(2) An end product manufactured in a qualifying country if—

(i) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States. Components of unknown origin are treated as foreign; or

(ii) The end product is a COTS item.

* * * * *

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

■ 7. Amend section 252.225–7044 by—

■ a. Removing the clause date of ''(NOV 2014)'' and adding ''(JUN 2022)'' in its place.

■ b. In paragraph (a)—

■ i. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;

■ ii. In the definition of ''Cost of components'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;

■ iii. Revising the definition of ''Domestic construction material''; and

■ iv. Adding, in alphabetical order, the definitions of ''Predominantly of iron or steel or a combination of both'' and ''Steel''.

■ c. In Alternate I—

■ i. Removing the clause date of ''(NOV 2014)'' and adding ''(JUN 2022)'' in its place; and

■ ii. In paragraph (a)—

■ A. In the definition of ''Commercially available off-the-shelf (COTS) item'', removing the quotation mark, redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;

■ B. In the definition of ''Cost of components'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;

■ C. Revising the definition of ''Domestic construction material'';

■ D. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';

■ E. In the definition of ''SC/CASA state construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively; and

■ F. Adding, in alphabetical order, the definition of ''Steel''.

The revisions and additions read as follows:

**252.225–7044 Balance of Payments Program—Construction Material.**

* * * * *

(a) * * *

*Domestic construction material* means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item; or

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in such construction material (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States, utilized in the manufacture of the end product and a good faith estimate of the cost of all iron or steel components not produced in the United States, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of ''cost of components'' in this clause.

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate I.** * * *

(a) * * *

*Domestic construction material* means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item; or

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in such construction material (produced in the United States means that all manufacturing processes of the iron or steel must take place in

the United States, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States, utilized in the manufacture of the construction material and a good faith estimate of the cost of all iron or steel components not produced in the United States, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of ''cost of components'' in this clause.

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

■ 8. Amend section 252.225–7045 by—
■ a. Removing the clause date of ''(AUG 2019)'' and adding ''(JUN 2022)'' in its place.
■ b. In paragraph (a)—
■ i. In the definition of ''Caribbean Basin country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ ii. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;
■ iii. In the definition of ''Cost of components'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ iv. In the definition of ''Designated country'', redesignating paragraphs (i), (ii), (iii), and (iv) as paragraphs (1), (2), (3), and (4), respectively;
■ v. Revising the definition of ''Domestic construction material'';
■ vi. In the definitions of ''Free Trade Agreement country construction material'' and ''Least developed country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ vii. Adding, in alphabetical order, the definitions of ''Predominantly of iron or steel or a combination of both'' and ''Steel''; and
■ viii. In the definition of ''WTO GPA country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively.
■ c. In Alternate I—
■ i. Removing the clause date of ''(AUG 2019)'' and adding ''(JUN 2022)'' in its place; and
■ ii. In paragraph (a)—
■ A. In the definitions of ''Bahrainian or Mexican construction material'' and ''Caribbean Basin country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ B. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;
■ C. In the definition of ''Cost of components'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ D. In the definition of ''Designated country'', redesignating paragraphs (i), (ii), (iii), and (iv) as paragraphs (1), (2), (3), and (4), respectively;
■ E. Revising the definition of ''Domestic construction material'';
■ F. In the definition of ''Free Trade Agreement country construction material'' and ''Least developed country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ G. Adding, in alphabetical order, the definitions of ''Predominantly of iron or steel or a combination of both'' and ''Steel''; and
■ H. In the definition of ''WTO GPA country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively.
■ d. In Alternate II—
■ i. Removing the clause date of ''(AUG 2019)'' and adding ''(JUN 2022)'' in its place; and
■ ii. In paragraph (a)—
■ A. In the definition of ''Caribbean Basin country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ B. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;
■ C. In the definition of ''Cost of components'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ D. In the definition of ''Designated country'', redesignating paragraphs (i), (ii), (iii), and (iv) as paragraphs (1), (2), (3), and (4), respectively;
■ E. Revising the definition of ''Domestic construction material'';
■ F. In the definitions of ''Free Trade Agreement country construction material'' and ''Least developed country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ G. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';
■ H. In the definition of ''SC/CASA state construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ I. Adding, in alphabetical order, the definition of ''Steel''; and
■ J. In the definition of ''WTO GPA country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively.
■ e. In Alternate III—
■ i. Removing the clause date of ''(AUG 2019)'' and adding ''(JUN 2022)'' in its place; and
■ ii. In paragraph (a)—
■ A. In the definition of ''Caribbean Basin country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ B. In the definition of ''Commercially available off-the-shelf (COTS) item'', redesignating paragraphs (i) introductory text, (i)(A), (B), and (C), and (ii) as paragraphs (1) introductory text, (1)(i), (ii), and (iii), and (2), respectively;
■ C. In the definition of ''Cost of components'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ D. In the definition of ''Designated country'', redesignating paragraphs (i), (ii), (iii), and (iv) as paragraphs (1), (2), (3), and (4), respectively;
■ E. Revising the definition of ''Domestic construction material'';
■ F. In the definitions of ''Free Trade Agreement country construction material'' and ''Least developed country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ G. Adding, in alphabetical order, the definition of ''Predominantly of iron or steel or a combination of both'';
■ H. In the definition of ''SC/CASA state construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively;
■ I. Adding, in alphabetical order, the definition of ''Steel''; and

■ J. In the definition of ''WTO GPA country construction material'', redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively.

The revisions and additions read as follows:

**252.225–7045 Balance of Payments Program—Construction Material Under Trade Agreements.**

* * * * *

(a) * * *

*Domestic construction material* means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item; or

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in such construction material (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States, utilized in the manufacture of the construction material and a good faith estimate of the cost of all iron or steel components not produced in the United States, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of ''cost of components'' in this clause.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate I. * * ***

(a) * * *

*Domestic construction material* means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item; or

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in such construction material (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States, utilized in the manufacture of the construction material and a good faith estimate of the cost of all iron or steel components not produced in the United States, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of ''cost of components'' in this clause.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate II. * * ***

(a) * * *

*Domestic construction material* means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item; or

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in such construction material (produced in the United States means that all manufacturing processes of the iron or steel must take place in

the United States, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States, utilized in the manufacture of the construction material and a good faith estimate of the cost of all iron or steel components not produced in the United States, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of ''cost of components'' in this clause.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

**Alternate III. * * ***

(a) * * *

*Domestic construction material* means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item; or

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in such construction material (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives). The cost of iron and steel not produced in the United States includes but is not limited to the cost of iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings, not produced in the United States, utilized in the manufacture of the construction material and a good faith estimate of the cost of iron or steel components not produced in the United States, excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of ''cost of components'' in this clause.

* * * * *

*Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

* * * * *

*Steel* means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

* * * * *

[FR Doc. 2022–13373 Filed 6–22–22; 8:45 am]

BILLING CODE 5001–06–P

# Proposed Rules

Federal Register
Vol. 87, No. 120
Thursday, June 23, 2022

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2022–0682; Project Identifier MCAI–2021–01271–T]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede Airworthiness Directive (AD) 2016–10–08, AD 2017–05–10, and AD 2019–01–05, which apply to certain Airbus SAS Model A330–200, –200 Freighter, and –300 series airplanes; and AD 2019–20–13, which applies to certain Airbus SAS Model A330–200, A330–200 Freighter, A330–300, A340–200, A340–300, A340–500, and A340–600 series airplanes. AD 2016–10–08 requires determining the flight cycles accumulated on certain trimmable horizontal stabilizer actuators (THSAs), and replacing the THSA if necessary. AD 2017–05–10, AD 2019–01–05, and AD 2019–20–13 require revising the existing maintenance or inspection program, as applicable. Since the FAA issued those ADs, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by August 8, 2022.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For EASA material that will be incorporated by reference (IBR) in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu*; internet *www.easa.europa.eu.* You may find this material on the EASA website at *https://ad.easa.europa.eu.* For Airbus SAS service information identified in this proposed AD, contact Airbus SAS, Airworthiness Office—EIAS, Rond-Point Emile Dewoitine No: 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com*; internet *https://www.airbus.com.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0682.

### Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0682; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

**FOR FURTHER INFORMATION CONTACT:** Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3229; email *vladimir.ulyanov@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2022–0682; Project Identifier MCAI–2021–01271–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

### Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3229; email *vladimir.ulyanov@faa.gov.* Any commentary that the FAA receives

which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

**Background**

The FAA issued AD 2016–10–08, Amendment 39–18519 (81 FR 31844, May 20, 2016) (AD 2016–10–08), which applies to certain Airbus SAS Model A330–200, A330–200 Freighter, A330–300, A340–200, A340–300, A340–500, and A340–600 series airplanes. Airbus SAS Model A340–200, A340–300, A340–500, and A340–600 series airplanes were included in AD 2016–10–08, but are not included in this proposed AD. Airbus SAS Model A340–200, A340–300, A340–500, and A340–600 series airplanes are not included in this proposed AD because EASA included these airplanes in EASA AD 2021–0250, dated November 17, 2021 (EASA AD 2021–0250), and the FAA has added the MCAI to the required airworthiness actions list (RAAL) for Model A340 airplanes. AD 2016–10–08 requires inspecting certain THSAs to determine the number of total flight cycles the THSA has accumulated, and replacing the THSA if necessary. The FAA issued AD 2016–10–08 to detect and correct premature wear of the carbon friction disks on the no-back brake of the THSA. Such a condition could lead to reduced braking efficiency in certain load conditions and, in conjunction with the inability of the power gear train to keep the ball screw in its last commanded position, could result in uncommanded movements of the trimmable horizontal stabilizer and loss of control of the airplane.

The FAA issued AD 2017–05–10, Amendment 39–18821 (82 FR 13379, March 13, 2017) (AD 2017–05–10), which applies to certain Airbus SAS Model A330–200, A330–200 Freighter, and A330–300 series airplanes. AD 2017–05–10 requires revising the maintenance or inspection program to incorporate new maintenance requirements and airworthiness limitations. The FAA issued AD 2017–05–10 to prevent reduced structural integrity and reduced control of these airplanes due to the failure of system components.

The FAA issued AD 2019–01–05, Amendment 39–19544 (84 FR 4310, February 15, 2019) (AD 2019–01–05), which applies to certain Airbus SAS Model A330–200, A330–200 Freighter, and A330–300 series airplanes. AD 2019–01–05 requires revising the existing maintenance or inspection program to incorporate new maintenance requirements and airworthiness limitations. The FAA issued AD 2019–01–05 to prevent reduced airplane control due to the failure of system components. AD 2019–01–05 specifies that accomplishing the revision required by paragraph (g) of that AD terminates all requirements of AD 2017–05–10.

The FAA issued AD 2019–20–13, Amendment 39–19766 (84 FR 56378, October 22, 2019) (AD 2019–20–13), which applies to certain Airbus SAS Model A330–200, A330–200 Freighter, and A330–300 series airplanes. AD 2019–20–13 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2019–20–13 to address the failure of system components, which could reduce the controllability of the airplane. AD 2019–20–13 specifies that accomplishing the actions required by that AD terminates all requirements of AD 2019–01–05. Additionally, AD 2019–20–13 specifies that accomplishing the action required by task number 274400–00004–1–E of Airbus A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 07, dated October 15, 2018, within the compliance time specified for that task in Airbus A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 07, dated October 15, 2018, terminates all requirements of AD 2017–25–13, Amendment 39–19127 (82 FR 59960, December 18, 2017) (AD 2017–25–13), for Airbus SAS Model A330–200, –200 Freighter, and –300 series airplanes only. Lastly, AD 2019–20–13 specifies that accomplishing the action required by task number 213100–00001–1–E of Airbus A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 07, dated October 15, 2018, within the compliance time specified for that task in Airbus A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 07, dated October 15, 2018, terminates all requirements of AD 2014–16–22, Amendment 39–17946 (79 FR 49442, August 21, 2014) (AD 2014–16–22) for Airbus SAS Model A330–200, –200 Freighter, and –300 series airplanes only.

**Actions Since AD 2016–10–08, AD 2017–05–10, AD 2019–01–05, and AD 2019–20–13 Were Issued**

Since the FAA issued AD 2016–10–08, AD 2017–05–10, AD 2019–01–05, and AD 2019–20–13, the FAA has determined that new or more restrictive airworthiness limitations are necessary. The required actions mandated in AD 2016–10–08 are incorporated into Airbus A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 08, dated July 1, 2021 (which is referred to in EASA AD 2021–0250, dated November 17, 2021) (EASA AD 2021–0250) (also referred to as the MCAI).

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0250 to correct an unsafe condition for all Airbus SAS Model A330–201, –202, –203, –223, and –243 airplanes; Model A330–223F and –243F airplanes; Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; Model A330–841 airplanes; and Model A330–941 airplanes.

Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after July 1, 2021, must comply with the airworthiness limitations specified as part of the approved type design and referenced on the type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is proposing this AD to address the failure of system components, which could reduce the controllability of the airplane. See the MCAI for additional background information.

**Related Service Information Under 1 CFR Part 51**

EASA AD 2021–0250 describes airworthiness limitations for system equipment maintenance requirements.

This proposed AD would require Airbus Service Bulletin A330–27–3199, dated July 15, 2014, which the Director of the Federal Register approved for incorporation by reference as of June 24, 2016 (81 FR 31844, May 20, 2016).

This proposed AD would also require A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 07, dated October 15, 2018, which the Director of the Federal Register approved for incorporation by reference as of November 26, 2019 (84 FR 56378, October 22, 2019).

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

**FAA's Determination**

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements in This NPRM**

This proposed AD would retain the requirements of AD 2016–10–08 and AD 2019–20–13. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, which are specified in EASA AD 2021–0250 described previously, as proposed for incorporation by reference. Accomplishing the actions required by this proposed AD would terminate all requirements of AD 2014–16–22 for Airbus SAS Model A330–200, –200 Freighter, and –300 series airplanes only, and would terminate all requirements of AD 2017–25–13 for Airbus SAS Model A330–200, –200 Freighter, and –300 series airplanes only. Any differences with EASA AD 2021–0250 are identified as exceptions in the regulatory text of this AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (s)(1) of this proposed AD.

**Explanation of Required Compliance Information**

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2021–0250 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2021–0250 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2021–0250 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2021–0250. Service information required by EASA AD 2021–0250 for compliance will be available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0682 after the FAA final rule is published.

**Airworthiness Limitation ADs Using the New Process**

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions and intervals are approved as an AMOC in accordance with the procedures specified in the AMOCs paragraph under ''Additional FAA Provisions.'' This new format includes a ''New Provisions for Alternative Actions and Intervals'' paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action or interval.

**Costs of Compliance**

The FAA estimates that this proposed AD affects 138 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA estimates the total cost per operator for the retained actions from AD 2016–10–08 to be $255 per product (3 work-hours × $85 per work-hour) for inspecting the THSA for a total cost for U.S. operators of $35,190. The retained on-condition cost for AD 2016–10–08 is $724,511 per product (23 work-hours × $85 per work-hour). The FAA estimates the total cost per operator for the retained actions from AD 2019–20–13 to be $7,650 (90 work-hours × $85 per work-hour).

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

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

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or

on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

## List of Subjects in 14 CFR Part 39

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

## The Proposed Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) AD 2016–10–08, Amendment 39–18519 (81 FR 31844, May 20, 2016); AD 2017–05–10, Amendment 39–18821 (82 FR 13379, March 13, 2017); AD 2019–01–05, Amendment 39–19544 (84 FR 4310, February 15, 2019); and AD 2019–20–13, Amendment 39–19766 (84 FR 56378, October 22, 2019); and

■ b. Adding the following new AD:

**Airbus SAS:** Docket No. FAA–2022–0682; Project Identifier MCAI–2021–01271–T.

**(a) Comments Due Date**

The FAA must receive comments on this airworthiness directive (AD) by August 8, 2022.

**(b) Affected ADs**

(1) This AD replaces the ADs identified in paragraphs (b)(1)(i) through (iv) of this AD.

(i) AD 2016–10–08, Amendment 39–18519 (81 FR 31844, May 20, 2016) (AD 2016–10–08).

(ii) AD 2017–05–10, Amendment 39–18821 (82 FR 13379, March 13, 2017) (AD 2017–05–10).

(iii) AD 2019–01–05, Amendment 39–19544 (84 FR 4310, February 15, 2019) (AD 2019–01–05).

(iv) AD 2019–20–13, Amendment 39–19766 (84 FR 56378, October 22, 2019) (AD 2019–20–13).

(2) This AD affects AD 2014–16–22, Amendment 39–17946 (79 FR 49442, August 21, 2014) (AD 2014–16–22); and AD 2017–25–13, Amendment 39–19127 (82 FR 59960, December 18, 2017) (AD 2017–25–13).

**(c) Applicability**

This AD applies to Airbus SAS airplanes specified in paragraphs (c)(1) through (5) of this AD, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before July 1, 2021.

(1) Model A330–201, –202, –203, –223, and –243 airplanes.

(2) Model A330–223F and –243F airplanes.

(3) Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(4) Model A330–841 airplanes.

(5) Model A330–941 airplanes.

**(d) Subject**

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

**(e) Unsafe Condition**

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address the failure of system components, which could reduce the controllability of the airplane.

**(f) Compliance**

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

**(g) Retained Inspection To Determine Trimmable Horizontal Stabilizer Actuator (THSA) Part Number and Accumulated Total Flight Cycles, With Removed References to Certain Models**

This paragraph restates the requirements of paragraph (g) of AD 2016–10–08, with removed references to certain models. For Model A330–200 Freighter, A330–200, and A330–300 series airplanes: Within 90 days after June 24, 2016 (the effective date of AD 2016–10–08), inspect the THSA to determine if it has part number 47147–500, 47147–700, 47172–300, 47172–500, 47172–510, or 47172–520, and to determine the total number of flight cycles accumulated since the THSA's first installation on an airplane, or since the most recent no-back brake (NBB) replacement. A review of airplane delivery or maintenance records is acceptable in lieu of this inspection if the part number of the THSA can be conclusively determined from that review. Accomplishing the revision of the existing maintenance or inspection program required by paragraph (o) of this AD terminates the requirements of this paragraph.

**(h) Retained THSA Replacement for Model A330–200 Freighter, A330–200, A330–300, With Removed References to Certain Models and Service Information**

This paragraph restates the requirements of paragraph (h) of AD 2016–10–08, with removed references to certain models and service information. For Model A330–200 Freighter, A330–200, and A330–300 series airplanes having a THSA with a part number specified in paragraph (g) of this AD: At the applicable time specified in paragraph (h)(1), (2), or (3) of this AD, replace each affected THSA with a serviceable THSA, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–27–3199, dated July 15, 2014. Accomplishing the revision of the existing maintenance or inspection program required by paragraph (o) of this AD terminates the requirements of this paragraph.

**Note 1 to paragraphs (h) and (i):** The THSA life limits specified in Part 4—Aging System Maintenance of the Airbus A330 Airworthiness Limitations Sections are still relevant, as applicable to airplane model and THSA part number.

(1) For a THSA that has accumulated or exceeded 20,000 total flight cycles since the THSA's first installation on an airplane, or since the most recent NBB replacement, whichever is later, as of June 24, 2016 (the effective date of AD 2016–10–08): Within 6 months after June 24, 2016.

(2) For a THSA that has accumulated or exceeded 16,000 total flight cycles, but less than 20,000 total flight cycles since the THSA's first installation on an airplane, or since the most recent NBB replacement, whichever is later, as of June 24, 2016 (the effective date of AD 2016–10–08): Within 12 months after June 24, 2016, but without exceeding 20,000 total flight cycles.

(3) For a THSA that has accumulated less than 16,000 total flight cycles since first installation on an airplane, or since the most recent NBB replacement, whichever is later, as of June 24, 2016 (the effective date of AD 2016–10–08): At the applicable time specified in paragraph (i) of this AD.

**(i) Retained Replacement Times for Model A330–200 Freighter, A330–200, and A330–300 Series Airplanes With THSAs Having Less Than 16,000 Total Flight Cycles as of the Effective Date of This AD, With Removed References to Certain Models and Service Information**

This paragraph restates the requirements of paragraph (i) of AD 2016–10–08, with removed references to certain models and service information. The requirements of this paragraph apply to Model A330–200 Freighter, A330–200, and A330–300 series airplanes having a THSA with a part number specified in paragraph (g) of this AD that has accumulated less than 16,000 total flight cycles since first installation on an airplane, or since the most recent NBB replacement, whichever is later, as of June 24, 2016 (the effective date of AD 2016–10–08). Not later than the date specified in paragraphs (i)(1), (2), and (3) of this AD, as applicable: For any THSA having reached or exceeded on that date the corresponding number of total flight cycles as specified in paragraphs (i)(1), (2), and (3) of this AD, as applicable, replace the THSA with a serviceable unit, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–27–3199, dated July 15, 2014. Accomplishing the revision of the existing maintenance or inspection program required by paragraph (o) of this AD terminates the requirements of this paragraph.

(1) As of 12 months after June 24, 2016 (the effective date of AD 2016–10–08): The THSA flight-cycle limit (since first installation on an airplane, or since last NBB replacement,

whichever occurs later) is 16,000 total flight cycles.

(2) As of July 31, 2017: The THSA flight-cycle limit (since first installation on an airplane, or since last NBB replacement, whichever occurs later) is 14,000 total flight cycles.

(3) As of July 31, 2018: The THSA flight-cycle limit (since first installation on an airplane, or since last NBB replacement, whichever occurs later) is 12,000 total flight cycles.

**(j) Retained THSA Replacement Intervals for Model A330–200 Freighter, A330–200, and A330–300 Series Airplanes, With Removed Service Information**

This paragraph restates the requirements of paragraph (k) of AD 2016–10–08, with removed service information. For Model A330–200 Freighter, A330–200, and A330–300 series airplanes with any part installed, as required by paragraph (h) or (i) of this AD, having a part number identified in paragraph (g) of this AD: From the dates specified in paragraph (i) of this AD, as applicable, and prior to exceeding the accumulated number of total flight cycles corresponding to each time, replace each affected THSA with a serviceable part, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–27–3199, dated July 15, 2014. Accomplishing the revision of the existing maintenance or inspection program required by paragraph (o) of this AD terminates the requirements of this paragraph.

**(k) Retained Definition of Serviceable THSA, With Updated Paragraph References**

This paragraph restates the requirements of paragraph (l) of AD 2016–10–08, with updated paragraph references. For the purposes of paragraphs (g) through (j) and (l) of this AD, a serviceable THSA is a THSA:

(1) Having a part number identified in paragraph (g) of this AD that has not exceeded any of the total accumulated flight cycles identified in paragraphs (i)(1) through (3) of this AD; or

(2) Having a part number that is not identified in paragraph (g) of this AD.

**(l) Retained Parts Installation Limitation, With Updated Paragraph References**

This paragraph restates the requirements of paragraph (m) of AD 2016–10–08, with updated paragraph references. For Model A330–200 Freighter, A330–200, and A330–300 series airplanes: From each date specified in paragraphs (i)(1), (2), and (3) of this AD, a THSA having a part number identified in paragraph (g) of this AD may be installed on any airplane, provided the THSA has not exceeded the corresponding number of accumulated total flight cycles. Accomplishing the revision of the existing maintenance or inspection program required by paragraph (o) of this AD terminates the requirements of this paragraph.

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

This paragraph restates the requirements of paragraph (g) of AD 2019–20–13, with no changes. For Model A330–200 Freighter, A330–200, and A330–300 series airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before October 15, 2018: Within 90 days after November 26, 2019 (the effective date of AD 2019–20–13), revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Airbus A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 07, dated October 15, 2018. The component life limits and the initial compliance time for doing the tasks are at the times specified in Airbus A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 07, dated October 15, 2018, or within 90 days after November 26, 2019, whichever occurs later. Accomplishing the revision of the existing maintenance or inspection program required by paragraph (o) of this AD terminates the requirements of this paragraph.

**(n) Retained Restrictions on Alternative Actions and Intervals, With a New Exception**

This paragraph restates the requirements of paragraph (h) of AD 2019–20–13, with a new exception. Except as required by paragraph (o) of this AD, after the existing maintenance or inspection program has been revised as required by paragraph (m) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions and intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (s)(1) of this AD.

**(o) New Revision of the Existing Maintenance or Inspection Program**

Except as specified in paragraph (p) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2021–0250, dated November 17, 2021 (EASA AD 2021–0250). Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraphs (g), through (j), (l), and (m) of this AD.

**(p) Exceptions to EASA AD 2021–0250**

(1) Where EASA AD 2021–0250 refers to its effective date, this AD requires using the effective date of this AD.

(2) The requirements specified in paragraphs (1) and (2) of EASA AD 2021–0250 do not apply to this AD.

(3) Paragraph (3) of EASA AD 2021–0250 specifies to ''revise the AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(4) The initial compliance time for doing the tasks specified in paragraph (3) of EASA 2021–0250 is at the applicable ''limitations and associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2021–0250, or within 90 days after the effective date of this AD, whichever occurs later.

(5) The provisions specified in paragraphs (4) and (5) of EASA AD 2021–0250 do not apply to this AD.

(6) The ''Remarks'' section of EASA AD 2021–0250 does not apply to this AD.

**(q) New Provisions for Alternative Actions and Intervals**

After the existing maintenance or inspection program has been revised as required by paragraph (o) of this AD, no alternative actions (*e.g.,* inspections) and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2021–0250.

**(r) Terminating Action for AD 2014–16–22 and AD 2017–25–13**

(1) Accomplishing the action required by task number 213100–00001–1–E of Airbus A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 07, dated October 15, 2018, or using ''The ALS'' specified in EASA AD 2021–0250, within the compliance time specified for that task terminates all requirements of AD 2014–16–22 for Airbus SAS Model A330–200, –200 Freighter, and –300 series airplanes only.

(2) Accomplishing the action required by task number 274400–000041–E of Airbus A330 Airworthiness Limitations Section (ALS) Part 4, System Equipment Maintenance Requirements (SEMR), Revision 07, dated October 15, 2018, or using ''The ALS'' specified in EASA AD 2021–0250, within the compliance time specified for that task terminates all requirements of AD 2017–25–13 for Airbus SAS Model A330–200, –200 Freighter, and –300 series airplanes only.

**(s) Additional FAA AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (t)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

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

**(t) Related Information**

(1) For EASA AD 2021–0250, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu*; internet

*www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0682.

(2) For more information about this AD, contact Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3229; email *vladimir.ulyanov@faa.gov.*

(3) For Airbus SAS service information identified in this AD, contact Airbus SAS, Airworthiness Office—EIAS, Rond-Point Emile Dewoitine No: 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com*; internet *https://www.airbus.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued on June 16, 2022.

**Christina Underwood,**

*Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2022–13306 Filed 6–22–22; 8:45 am]

**BILLING CODE 4910–13–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 54

**[WC Docket No. 21–450; FCC 22–44; FR ID 92237]**

### Affordable Connectivity Program

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission or FCC) seeks comments on the annual collection of data relating to price and subscription rates of internet service offerings received by households enrolled in the Affordable Connectivity Program, mechanism for collecting such data, and format for the data's publication, as required by Section 60502(c) of the Infrastructure Investment and Jobs Act.

**DATES:** Comments are due on or before July 25, 2022 and reply comments are due on or before August 8, 2022. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this document, you should advise the listed contact as soon as possible.

**ADDRESSES:** You may submit comments, identified by WC Docket No. 21–450, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the Electronic Comment Filing System (ECFS): *https://apps.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020) (*https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy*).

*People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

**FOR FURTHER INFORMATION CONTACT:** Eric Wu, Wireline Competition Bureau, 202–418–7400 or by email at *Eric.Wu@fcc.gov.* Requests for accommodations should be made as soon as possible in order to allow the agency to satisfy such requests whenever possible. Send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rulemaking (NPRM) in WC Docket No. 21–450; FCC 22–44, adopted on June 7, 2022, and released on June 8, 2022. The full text of this document is available for public inspection at the following internet address: *https://docs.fcc.gov/public/attachments/FCC-22-44A1.pdf.*

### I. Introduction

1. On November 15, 2021, the President signed the Infrastructure Investment and Jobs Act (Infrastructure Act or Act), which modified and extended the Emergency Broadband Benefit Program (EBB Program) to a longer-term broadband affordability program called the Affordable Connectivity Program (ACP). The Infrastructure Act also mandates that the Commission issue final ''broadband transparency rules'' regarding the annual collection of information about the price and subscription rates of internet service offerings received by households enrolled in the Affordable Connectivity Program. Consistent with the directive to adopt rules no later than one year after enactment of the Act, the Commission herein seek comment on the data to be collected, mechanism for collecting this data, and format for the data's publication.

### II. Discussion

2. *ACP Transparency Data to be Collect—Price and Subscription Rate Information.* The Act requires an ''annual collection by the Commission of data relating to the price and subscription rates of each internet service offering of a participating provider under the Affordable Connectivity Program . . . to which an eligible household subscribes.'' The Commission first seeks comment on the collection of price information. The Commission proposes that the price information include the monthly charge for the internet service offering that a household would be charged absent the application of the affordable connectivity benefit. How should the Commission collect promotional pricing or introductory rates? Should other price characteristics, such as whether the internet service offering is pre-paid or post-paid, be collected? Should taxes and fees be collected as part of price? If so, what price information should be included, and how can the Commission distinguish between the components of the price? For example, should the values of promotional discounts such as for streaming service (*e.g.,* Disney+, Spotify, Netflix, etc.) or modem rental, military discounts, or paperless billing discounts be collected? Should the collected price information reflect any discounts provided to households receiving a service offering under an extended service contract? Should whether a plan is designated as a plan for a low-income household be collected? Should the prices for associated equipment, such as modems or routers, be collected? How should the

price of service bundles (for example, voice/broadband or voice/broadband/cable) be collected? For those households who exceed their monthly data cap, should the cost of additionally purchased data be considered? Are there any other indicators of price that should be collected?

3. The Commission next seeks comment on the collection of subscription rates. The Commission interprets ''subscription rate'' as the total program subscribership to a unique internet service offering over time, and seek comment on this approach. In other words, the Commission proposes to collect the number of ACP households that subscribe to each unique internet service offering, where offerings are differentiated by price and service characteristics. Should the Commission collect the number of households of an internet service offering as of a certain moment in time (*e.g.,* as of a particular day), or should the Commission collect data on the number of households receiving the offering over a given period of time (*e.g.,* over a multiple month period)? What is the meaning of the statutory wording ''subscription rate''? Should the Commission require providers to submit annually such subscription rate data disaggregated by month or quarter? Will either of these approaches better enable the Commission to calculate the ''take rate'' (*i.e.,* the fraction of subscribers selecting the plan from those who could select the plan) and identify changes in the rate over time? Should the Commission collect any other data related to the growth or churn rate, which would show the net additions or drop-offs from plans over time? The Commission seeks comment on other interpretations of ''subscription rate.''

4. Some providers offer plans nationwide. How should that be taken into account when collecting subscription rate information? Should the subscription rate be for a particular geographic location if plans are offered nationally or across large geographic regions, such as statewide? Are large geographic regions (*e.g.,* state) most appropriate or would it be beneficial to collect this information on a more granular geographic level? If so, what geographic level (*e.g.,* study areas, designated market areas) would be most appropriate? What other information should the Commission collect about the subscription rate? Do providers collect and maintain household demographic information or information on a subscriber's past internet access, and if so should that information be collected here? The Commission proposes to have providers enrolling households in the Affordable Connectivity Program through an FCC-approved alternative verification process be required to submit information about how the household qualified for the Affordable Connectivity Program, and the Commission seek comment on this proposal.

5. *Plan Characteristics.* In the *ACP Order,* 87 FR 8346 (Feb. 14, 2022), FCC 22–2 (Jan. 21, 2022), the Commission determined that collecting data on service plan characteristics, including upload and download speeds, data allowances, and co-payments could help determine the value the Affordable Connectivity Program provides to households. Given the utility of such data, the Commission directed the Bureau and the Office of Economics and Analytics (OEA), with assistance from the program administrator, the Universal Service Administrative Company (USAC), to determine the appropriate way to collect service plan characteristics while minimizing the burden to service providers. The Infrastructure Act also anticipates that the Commission may engage in other data collection activities, specifically including a redundancy avoidance provision stating that nothing ''shall be construed to require the Commission . . . to duplicate an activity that the Commission is undertaking as of the date of enactment'' of the Act if ''the Commission refers to the activity in the'' final broadband transparency rules issued by the Commission, if ''the activity meets the requirements of'' the broadband transparency rules, and if ''the Commission discloses the activity to the public.'' The Commission seeks comment on whether and how this provision affects the collection of service plan characteristic data. Plan characteristics data arguably falls within the scope of ''data relating to the price and subscription rates'' of internet service offerings to which households subscribe. The Commission thus seeks comment on using this ACP transparency annual data collection to collect information on plan characteristics, as required by the Commission in the *ACP Order.*

6. The Commission seeks comment on what ACP plan characteristics the Commission should collect. The Commission first proposes to collect upload and download speeds. For upload and download speeds, should the Commission collect the advertised or maximum speeds? Are there other speed measurements the Commission should consider collecting instead? Should the Commission collect information about ACP service plan data caps, including the amount of the data cap and the number of subscribers who have reached their cap? What about information concerning associated equipment, including whether or not a plan includes or requires a modem or router rental? For bundled service plans should the Commission collect information concerning the characteristics of the bundle, including whether voice is included in the bundle, voice characteristics (*e.g.,* total minutes), whether video is included, video characteristics (*e.g.,* total channels, channels included)? Are there other plan characteristics that the Commission should collect as part of the ACP transparency data collection?

7. *Broadband Consumer Labels.* The Commission also seeks comment on the interplay between the ACP transparency data collection and broadband consumer labels. The Infrastructure Act provides that the Commission ''shall rely on the price information displayed on the broadband consumer label under subsection (a) for any collection of data relating to the price and subscription rates of each covered broadband internet access service under section 60502(c).'' This language may mean that that the Commission must incorporate *price information* from broadband consumer labels in the section 60502(c) ACP transparency data collection but that this category of price information data is not coterminous with the data *related* to price that is referenced in section 60502(c). Are there alternative interpretations? For example, should the Commission interpret the ''shall rely'' language as meaning that the Commission should only rely on data contained in the broadband labels to meet the statutory requirement that the Commission collect data relating to price? Does the redundancy avoidance provision in section 60502(c) support this interpretation? The Commission seeks comment on this language and request that commenters also suggest ways in which the Commission can use broadband label information as part of the ACP transparency data collection. The Commission also seeks comment on whether the redundancy avoidance language could be interpreted to mean that the Commission could rely on price information contained in consumer broadband labels. Does USAC collect any information about subscription rates to satisfy the ACP's other statutory requirements, rather than conducting a new data collection?

8. As proposed, the broadband labels may include information concerning plan pricing, performance, and data caps and will be required to be displayed at the point of sale. How

should the Commission structure the ACP transparency data collection to take advantage of information contained in the broadband labels? The *Broadband Labels NPRM* (87 FR 6827 (Feb. 7, 2022)) sought comment about whether the Commission should directly collect the information contained in the broadband labels with each plan having a unique identifier, or whether the Commission should require all participating internet service providers to make plan information publicly available via an Application Programming Interface (API) or other machine-readable format. If the Commission require labels in a machine-readable format, how would the Commission be able to match the labels to ACP subscribers? As a practical matter, is it possible for the information included in the broadband labels to meet the statutory requirement in section 60502(c) to collect price information for ''each internet service offering of a participating provider . . . to which an eligible household subscribes?'' If a provider is to submit a unique identifier for each plan, what naming convention should be used to identify the plan? Should there be a standardized naming convention used across providers, and if so, what should that format be? Absent a data collection of broadband labels or required availability of plan information via an API, can price information be obtained from the label on the provider's marketing materials? How could the Commission link the price information from the provider's marketing materials to the ''eligible household''? If available, would this price information accurately reflect the prices applicable to ACP subscribers? The Commission seeks comment on these approaches to leveraging information for the broadband labels and alternative approaches the Commission should consider in this proceeding. Should the Commission consider public sources for plan information? If so, how should the Commission link rate and plan characteristic information on a website label to an ACP subscriber?

9. *Performance Metrics.* The Commission proposes to use information in the ACP transparency data collection for the evaluation of the performance of the Affordable Connectivity Program in achieving the goals set in the *ACP Order.* Those goals are to (1) reduce the digital divide for low-income consumers, (2) promote awareness and participation in the Affordable Connectivity Program, and (3) ensure efficient and effective administration of the Affordable Connectivity Program. The Commission seeks comment on this proposal. What information should the Commission collect in the ACP transparency data collection to measure the performance of the Affordable Connectivity Program? Should the Commission collect information about whether a subscriber is a first-time subscriber to the provider? A first-time subscriber for fixed or mobile broadband? Whether a household subscribes to another broadband service? Should the Commission collect data on a subscriber's plan characteristics prior to ACP service to help identify the impact of the ACP benefit or information from providers on how many subscribers changed their data usage or plan once they received their ACP benefit? Is there information about subscribers that is not currently collected that would be helpful to evaluate the performance of the program? Should the Commission collect information concerning how a customer became aware of the Affordable Connectivity Program? What other information should the Commission to measure effectiveness in increasing awareness and participation in the Affordable Connectivity Program? What information should the Commission collect to measure the administrative efficacy of the program or otherwise help measure the performance of the Affordable Connectivity Program?

10. *Collection Structure—Data Collection Systems.* To allow providers to efficiently submit information for the ACP transparency data collection, the Commission proposes using the National Lifeline Accountability Database (NLAD) or other USAC systems to collect subscriber-level data. The NLAD is a centralized database through which all ACP providers must enter information about households to enroll them in the Affordable Connectivity Program. The Commission seeks comment on this approach. For example, providers currently submit to NLAD information regarding a subscriber's residential address, other contact information, whether the subscriber is receiving an ACP connected device from the provider, service type (cable, DSL, fiber, fixed wireless, mobile broadband, satellite), among other information necessary to administer the program and to prohibit members of the same household from receiving the affordable connectivity benefit at the same time. Both USAC and providers have experience using NLAD to submit and retrieve information about households' ACP service, and using this system for the collection would prioritize ease-of-use for service providers and minimize administrative burdens. Given the statutory constraints and need to collect this information quickly and efficiently after the final rules are adopted, using a system that is already familiar and that already contains information about the households enrolled in the Affordable Connectivity Program will benefit providers, the Commission, and USAC. The Commission seeks comment on these views and welcome comment on other data collection mechanisms. The Commission believes it will be less burdensome for providers to update their connections to NLAD and to continue to use a system they are familiar with to submit data collection information rather than requiring them to modify their processes and systems to transfer data to a new and unfamiliar system. The Commission seeks comment on this assumption. Additionally, receiving data from NLAD will allow the Commission to determine the rate of subscriptions of different plans, which otherwise could not be obtained in a static, aggregate collection. Are there alternative USAC-managed data upload systems that could be used for a subscriber-level collection? Would the creation of a new USAC-managed system be most appropriate for this data collection?

11. If the Commission was to collect the data at an aggregated level, and not at the subscriber level, what collection mechanism should the Commission use? It may be difficult to modify NLAD to collect data on an aggregated level within the time necessary to launch the ACP data collection and, thus, USAC or the Commission may have to develop a new system. The Commission seeks comment on this view. The Commission also seeks comment on the ways that USAC could modify NLAD or another existing system to collect aggregate plan data. Are there ways that USAC could collect subscriber level information via NLAD and aggregate that data? Should the Commission collect this aggregated data instead of USAC? Developing a new system and standing up a collection of this magnitude would require significant resources, so the Commission seeks comment on the feasibility of the Commission hosting this collection. Finally, the Commission seeks comment on how the level of aggregation impacts the collection mechanism the Commission should employ. Commenters are encouraged to explain whether their suggested collection mechanism is particular to a specific level of aggregation, or if it can

accommodate a wide swath of possible aggregation levels.

12. *Data Filers.* The Commission next seeks comment on which providers will need to submit data to the ACP transparency data collection. The Infrastructure Act requires collecting data ''relating to the price and subscription rates of each internet service offering of a participating provider under the Affordable Connectivity Program . . . to which an eligible household subscribes.'' The Commission views the Infrastructure Act as requiring every provider participating in the Affordable Connectivity Program to provide such data, regardless of the number of enrolled households. The Commission seeks comment on that view and the benefits of that approach. The Commission did not read the Infrastructure Act as permitting us to limit the number of providers that must participate in this data collection. The Commission seeks comment on this interpretation and encourage commenters suggesting otherwise to explain how to limit participation without jeopardizing the integrity of the collection and ensuring that sufficient information is collected to provide the price and subscription rate information required by Congress.

13. *Data Updates.* Using the existing NLAD system will allow us to collect data at enrollment for all new participants but may not easily allow for the collection of newly required information about existing ACP households. The Commission therefore seeks comment on how providers should be required to backfill data for the millions of existing households that have already enrolled in the Affordable Connectivity Program. When the rules for the ACP transparency data collection go into effect, what should providers be required to do for these existing households? The Commission seeks comment on the best ways to obtain data from providers about the price and subscription rate of existing ACP households and on an appropriate amount of time to submit information into the NLAD system. Are there other alternative methods for collecting newly required information? For all households, should the Commission require providers to submit and/or update plan information continuously throughout the Affordable Connectivity Program? What are the benefits of requiring providers to continuously update this information throughout the year rather than collecting it during a filing window? Should providers be required to update plan information when that plan information changes? If so, how soon after the plan change should providers submit that new information? The Commission also seeks comment on whether to require providers to continue to maintain, update, or correct relevant information for the ACP transparency data collection after a provider exits the Affordable Connectivity Program.

14. *Collection Approaches.* The Commission proposes that information about the price and subscription rate of internet service offerings to which enrolled ACP households subscribe be collected at the subscriber level. In a subscriber-level approach, data would be provided for each household enrolled in the Affordable Connectivity Program for that provider. The Infrastructure Act does not specify the level at which data should be collected. Further, by prohibiting the Commission from ''risking the disclosure of personally identifiable information'' when making data public, Congress necessarily contemplated that the Commission might collect subscriber-specific information. Recognizing the paramount importance of consumer privacy, the Commission seeks comment on any statutory or regulatory restrictions on the collection of subscriber-level data beyond what participating providers already provide, including privacy statutes.

15. In a subscriber-level collection, the provider would submit plan information to NLAD for each subscriber enrolled in the Affordable Connectivity Program. Having plan information for each subscriber would allow Commission staff to track the subscriber take-up rate of different plans over time and study how subscriber plan choices and preferences for plan characteristics vary by geographic area and household demographics. Subscriber-level information would provide insight into whether the Affordable Connectivity Program is meeting the broadband needs of eligible households and how those needs change over time, and would assist our understanding of whether plan choice is influenced by available technologies and speeds in a geographic area. For example, subscriber-level data would allow us to examine the preference for fixed versus mobile plans across geography and demography.

16. In addition to helping the Commission understand what choices subscribers have available to them and their preferences, subscriber-level data would also help us understand how the Affordable Connectivity Program affects overall broadband adoption and how the program furthers the Commission's efforts to close the digital divide. Subscriber-level plan information would more easily be combined with subscription data already collected by the Commission, which could improve estimates of ACP subscribers that are first time broadband adopters. Subscriber-level data may also improve consumer outreach efforts, including the outreach efforts the Infrastructure Act permits the Commission to pursue, as described in the *ACP Order* by targeting geographic areas and particular demographics that lag behind in ACP adoption. Finally, subscriber-level data may facilitate analysis of the connection between Lifeline and the Affordable Connectivity Program. By matching subscriber-level plan information across the two programs, the Commission could study how subscribers are using both subsidies to meet their broadband needs and whether their plan choices take full advantage of the ACP subsidy.

17. The Commission also seeks comment on benefits and drawbacks of collecting more aggregated data. If the Commission did not collect subscriber-level data from providers, the Commission will need to collect the data at some level of aggregation. For an aggregated data approach, the Commission seeks comment on the level of data aggregation and what, if any, other information should be collected from providers. Should aggregated data be the number of individuals in a geographic area subscribed to a unique plan? And if so, what is the appropriate geographic level (*e.g.,* census block, census tract, city (census place), county) for aggregated data? Is there some way other than geographic area that data should be aggregated? Should the plan characteristics still be collected at the subscriber level if collected through the ACP transparency data collection? Under the aggregated-level approach, how should subscribers that are on the same plan with respect to service characteristics, but who pay different amounts, be treated? Under an aggregated approach, each field could be submitted as an average or by category (*e.g.,* speed tier). Are there specific fields that would be best suited for categorization? Should providers aggregate at the price-geographic level, the speed-geographic level, or the price-speed-geographic level? Or some other combination of variables? For example, should aggregate-level data be categorized by census tract, download speed, and upload speed, with other fields submitted as averages? The Commission seeks comment on the key fields for aggregation. The Commission also seeks comment on how collecting aggregated-level data as compared to

subscriber-level data would impact our ability to use this data collection to fulfill the requirements in the *ACP Order* to collect service plan characteristics and to evaluate the performance of the Affordable Connectivity Program.

18. The Commission further seeks comment on how useful aggregated data of providers' ACP offerings would be in evaluating the performance and administration of the Affordable Connectivity Program as compared to subscriber-level data. For example, at a high level of aggregation, such as the provider-state level, how could one analyze differences between rural and urban plan choices or subscription rates within a state? Even if aggregation were at the census tract level, the Commission may not be able to match subscribers between Lifeline and the Affordable Connectivity Program, and would be unable to determine if Lifeline subscribers are gaining additional value for their ACP subsidy. Would aggregated data make it easier for the Commission to analyze or publish the data? The Commission also seeks comment on the relative burdens to providers in submitting aggregated data of their ACP service offerings as compared with subscriber-level data. As discussed above, for subscriber-level data, providers would be required to input additional data in NLAD at enrollment in addition to the information already required to enroll a household. For aggregated data, providers may not need to enter additional data into NLAD, but they would be required to submit such aggregated data to the Commission. The Commission seeks comment on the burdens raised by these data collection approaches. Are there specific steps the Commission could take to the reduce such burdens (*e.g.,* offering tools to facilitate the collection)? Are there data that USAC already has access to from participating providers which could be used for aggregation without requiring additional data from providers? Are there circumstances or reasons where aggregated data would be preferred to subscriber-level data in evaluating the effectiveness of the Affordable Connectivity Program?

19. The Commission also seeks comment on other data collection alternatives. What about a collection that requires the production of a combination of both subscriber-level data and more aggregated data? What would be the benefits and challenges of a hybrid approach that collects aggregated data and subscriber-level information from all ACP subscribers? The Commission seeks comment on whether and in what circumstances a hybrid approach assists in evaluating the Affordable Connectivity Program.

20. *Collection Impact on Stakeholders.* The Commission seeks comment on what the impacts and costs would be to stakeholders (households, providers, the Commission, USAC) for the collection of subscriber-level data and how they compare to the benefits of the data and the statutory directive to collect and publish data to offer transparency about the service offerings ACP households receive. What are the benefits and burdens associated with requiring subscriber-level information from providers, and how can the Commission reduce burdens associated with providing subscriber-level plan information in addition to the subscriber-level information already collected? Are there differences in the benefits and burdens associated with requiring subscriber-level information from small providers? If so, how can the Commission structure this collection to minimize the economic impact on small providers? How should the Commission structure a subscriber-level collection to minimize the challenges associated with making subscriber-level information publicly available for analysis? To what extent can providers use an API or other tool to seamlessly submit and update plan information?

21. The Commission also seeks comment on what the impacts and costs would be to stakeholders for the collection of aggregated data. For aggregated data, providers would be responsible for collecting all the information of their ACP subscribers and compiling that information in the manner required by the Commission. The Commission seeks comment on our view that collecting aggregated data, especially depending on the level of aggregation, may be burdensome for providers. Are there any tools or steps USAC or the Commission can take to reduce burdens? The Commission seeks comment on the burdens of this data collection on providers. Does the burden vary depending on the level of data aggregation? Could any other of USAC's systems be modified to allow for aggregated data? Should the Commission requires providers to give us information in specific popular machine-readable formats? How could the Commission structure an aggregate-level broadband transparency data collection to minimize the burdens associated with handling the ACP transparency data? For small providers, what are the benefits and burdens associated with an aggregate level data collection? How can the Commission structure the collection to minimize any economic impact on small providers?

22. *Privacy and Proprietary Interests.* Congress indicated that the Commission should undertake the collection of data relating to ACP plan price and subscription rates while still protecting the privacy interests of individual subscribers. The Commission seeks comment on any privacy concerns that may arise from the collection of subscriber-level price, subscription rate, and plan characteristic information. As part of the ACP enrollment process, the Commission already collects, with subscriber consent, the subscriber's information. To what extent would a subscriber-level collection of price, subscription rate, and plan characteristics affect privacy interests of subscribers? Are there any unique privacy concerns related to a subscriber-level collection in areas or plans with low ACP enrollments? Can data masking methods be utilized by providers to address any privacy concerns? Are there alternative measures or safeguards that the Commission could adopt for the Commission, USAC, or providers to mitigate any harm to subscriber privacy? To what extent would a subscriber-level collection of price, subscription rate, and plan characteristics impact providers? The Infrastructure Act also seeks to ensure that the ACP data collection and publication do not harm proprietary interests. Would a subscriber-level collection of plan characteristics or other information raise issues related to providers' proprietary information? If so, how can the Commission balance these interests and/or mitigate the potential harm?

23. Additionally, the Commission seeks comment on the extent to which collecting additional subscriber-level data through the ACP transparency data collection implicates statutory privacy regimes, including the Electronic Communications Privacy Act (ECPA). The Commission concluded a decade ago that it had sufficient authority under the Communications Act to require eligible telecommunications carriers (ETCs) to provide Lifeline subscriber-specific information to the NLAD notwithstanding ECPA. The Commission explained that the Communications Act clearly demonstrated ''Congress's intent that other provisions of law should not be held to override our specific authority to access information needed to perform oversight, including non-content information, which generally is less sensitive than the contents of communications.'' The Commission also concluded that ETCs could divulge information about Lifeline and Link Up subscribers to the Commission under an

exception to ECPA that permits divulgence that is ''necessarily incident to the rendition of the service.'' Similar to our current practice in Lifeline, the Commission requires ACP providers to obtain consent from subscribers prior to transmitting certain subscriber-specific information to NLAD. The Commission request comment on whether the Commission can collect additional subscriber-level data regarding ACP households consistent with ECPA without obtaining additional consent. The Commission also seeks comment on whether participating providers may divulge ACP household price and plan data to the Commission as necessarily incident to the providers' rendering service under the Affordable Connectivity Program, given Congress's mandate to collect broadband data and the importance that subscriber-level data could have in evaluating the performance and value of the Affordable Connectivity Program.

24. To ameliorate privacy concerns and ensure that subscribers are cognizant of the uses of their personal information, the Commission currently requires subscribers to consent to the transmittal of their data to the Commission or USAC. In the Affordable Connectivity Program, prior to obtaining consent, a participating provider must describe to the subscriber the ''specific information being transmitted, that the information is being transmitted the Administrator to ensure the proper administration of the Affordable Connectivity Program and that the failure to provide consent will result in subscriber being denied the affordable connectivity benefit.'' The Commission seeks comment on the need for any additional subscriber consent as well as how that consent should be obtained.

25. The Commission further request comment on how to best balance the burdens for providers and subscribers associated with obtaining consent with the benefits of a subscriber-level collection. How would providers obtain such consent from new ACP applicants and from existing ACP households? Can consent be collected by USAC either when consumers complete an application in the National Verifier or at the time of their recertification? The Commission seeks comment on how consent can be collected at the time of recertification, particularly where a subscriber's eligibility is confirmed by querying the appropriate eligibility database. If consent can be obtained only for a portion of the ACP subscriber base, is it worth collecting partial subscriber-level data? The Commission seeks comment on other ways in which providers, the Commission, or USAC can obtain a consumer's consent to permit their provider to submit ACP service plan information consistent with any requirements the Commission adopt in this proceeding. How can the Commission structures the consent process to minimize the cost or burdens of consent? What burdens would be imposed on participating providers if they are required to provide additional notice to, and obtain additional consent from, existing ACP subscribers? Can the Commission collects opt-out consent, or should consenting to participation in a subscriber-level collection be strictly opt-in? For the millions of households that are already participating in the Affordable Connectivity Program, the Commission seeks comment on the process by which providers, USAC, or the Commission would collect consent for the subscriber-level data collection? Would requiring this additional consent from subscribers risk depressing subscriber participation in Affordable Connectivity Program? What role should providers play in obtaining consent from their existing ACP subscribers for a subscriber-level data collection? What is the cost to providers of any requirement that they play a part in obtaining consent? How long would it take for providers to obtain additional consents from existing subscribers? If subscriber-level information is collected outside of NLAD, should the Commission require providers to mask personally identifiable information? Would requesting consent bias the data in a way that would substantially reduce its usability?

26. If the Commission were to engage in an aggregate-level collection, are there any separate privacy concerns that would arise from such a collection? Are there any privacy concerns with the sharing of aggregated information for areas or plans with low ACP enrollments, including areas or plans with only a single subscriber? What is the minimum level of geographic data specificity (*e.g.,* census tract, census block) that can assist the Commission in answering questions of program performance, digital discrimination, digital divide, and other matters of importance in judging ACP efficacy without overly burdening subscriber privacy or provider confidentiality interests?

27. *Publication of Data—Public Availability of Data.* In addition to requiring the Commission to collect price and subscription rate data, Congress directed the Commission ''to make data relating to broadband internet access service collected'' in this collection ''available to the public in a commonly used electronic format without risking the disclosure of personally identifiable information or proprietary information, consistent with'' § 0.459 of the Commission's rules. The Commission seeks comment generally on what data should be made public, how subscriber privacy and provider interests can be protected, and the method and timing of publication. The Commission also seeks comment on how to best balance the benefits and burdens associated with the publication of information collected through the ACP transparency data collection. How should the Commission structure the publication of information to minimize the challenges in making subscriber-level information publishable? How should the Commission structure the publication of information from the ACP transparency data collection to minimize the challenges in making aggregate-level information publishable?

28. *Scope of Information Made Public.* Commenters should address what data collected by the Commission should be made public. The Commission did not interpret the Infrastructure Act as requiring the Commission to make publicly available all information collected under section 60502(c)(1). The Act requires the Commission to make ''data'' available, not necessarily all of the data collected. The Commission proposes that, at a minimum, only aggregated or masked data be made publicly available, even if subscriber-level data is collected. The Commission seeks comment on what data the Commission should make publicly available on an aggregated basis and at what geographic level (*e.g.,* ZIP code, county, state). Should the Commission only make price and subscription rate data public, because that is the scope of section 60502(c)(1) of the Infrastructure Act? Should the Commission also make public other data proposed to be collected, such as plan characteristics or program-performance-related data? Should the data published pursuant to the Infrastructure Act also include information collected outside of this collection? For example, should the Commission make available as part of this release data about the availability of plans fully covered by the ACP benefit? What public information would be most useful to consumers, providers, outside researchers, advocates, or governmental entities?

29. *Personally Identifiable Information.* The Infrastructure Act provides that in making data available to the public, the Commission must not ''risk the disclosure of personally identifiable information.'' The Act does not define ''personally identifiable information;'' rather, it requires the

Commission to define the term via notice and comment rulemaking. The Commission therefore seeks comment on how the Commission should define personally identifiable information for purposes of making data publicly available under section 60502(c) of the Infrastructure Act.

30. The Commission seeks comment on definitions of ''personally identifiable information'' that might be appropriate in this context. Should the Commission borrow a definition from another statute, regulation, Executive order, or Government-wide guidance? If so, which authority and why? For instance, Office of Management and Budget (OMB) Circular A–130 defines ''personally identifiable information,'' for purposes of agency information resources management activities, as ''information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual.'' Similarly, the E-Government Act of 2002, defines ''identifiable form'' as ''any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means.''

31. *Proprietary Information.* The Infrastructure Act also requires the Commission to avoid risking the disclosure of ''proprietary information'' when making data public under section 60502(c)(4). The Act does not define ''proprietary information,'' nor does it require the Commission to define the term. The Commission requests comment on how to interpret ''proprietary information'' under section 60502(c)(4). Should the Commission define the term at all, given that unlike ''personally identifiable information,'' a definition is not required? Further, whose ''proprietary information'' needs to be protected in this context? If it is subscriber proprietary information, how is proprietary information different than personally identifiable information? Or should the term be interpreted as meaning the proprietary information of participating providers, *i.e.,* proprietary business information? Alternatively, should the Commission interpret ''proprietary information'' to mean information covered by section 222 of the Communications Act? Under that approach, the Commission would need to avoid risking the disclosure of the proprietary information of subscribers, participating providers, and equipment manufacturers.

32. Additionally, regardless of whether proprietary information means that of subscribers, participating providers, or both, commenters should address what constitutes proprietary information. Should the Commission treat ''proprietary information'' as limited to trade secrets and or privileged or confidential commercial, financial, or technical data? If so, what type of participating provider data collected under section 60502(c) could be considered proprietary? What other statutes or regulations might the Commission look to in interpreting ''proprietary information'' in this context? Does aggregate data become proprietary, for either a subscriber or a participating provider, at a certain level of granularity? Is it sufficient if subscribers or participating providers have an opportunity to request non-publication of proprietary information under procedures such as § 0.459 of the Commission's rules?

33. *Protecting Personally Identifiable and Proprietary Information.* Because the Commission must not ''risk the disclosure of personally identifiable information or proprietary information,'' the Commission seeks comment on how the Commission should minimize the risk that such information would be disclosed when making data available to the public under section 60502(c)(4) of the Infrastructure Act. One way to protect subscriber personally identifiable information is to publish only aggregate data. Would doing so sufficiently protect personally identifiable or proprietary information? What level of aggregation would be sufficient? For what geographic area should data be published? With the EBB Program, USAC released information first by three-digit ZIP code areas, and then by five-digit ZIP code and county-level areas. For the Affordable Connectivity Program, USAC releases enrollments by five-digit ZIP code and county. What procedures should the Commission have in place to ensure that there is adequate ''masking'' for data in areas with few subscribers? For data that involves plan characteristics or prices, should the values be aggregated to further address any personally identifiable information or proprietary issues? For example, should prices be grouped into $10 increments with a plan costing $55.34 being put in a bin with all plans costing between $50 and $60? Are there other privacy concerns the Commission should consider when making data available to the public other than personally identifiable information and proprietary information?

34. *Effect of 47 CFR 0.459.* The Infrastructure Act states that the Commission's protection of personally identifiable and proprietary information must be consistent with § 0.459 of the Commission's rules. Section 0.459 of title 47 of the Code of Federal Regulations provides procedures for requesting that information submitted to the Commission be withheld from public inspection. The Commission seeks comment on whether and how this rule should be incorporated into the Commission's processes for publishing data under section 60502(c)(4) of the Act. Does the statute's reference to § 0.459 mean that a subscriber or participating provider should have the ability to request non-publication of certain collected information by submitting a request under § 0.459? If so, what provisions of section 0.459 should be applicable for requests of non-publication for purposes of section 60502(c)(4)? How should such a request be submitted, what information would a requester need to submit to justify a request for non-publication of data, and when should a request be submitted vis-à-vis the data publication date? That is, should a request for nonpublication be required to be submitted before a data publication date? In other contexts, the Commission allows filers of certain information to check a box to request nondisclosure of privileged or confidential information in lieu separately requesting confidentiality under 47 CFR 0.459. Should the Commission consider a similar ''check box'' approach for this data collection? If so, how would a checkbox be incorporated in the collection process? Additionally, should some data be deemed presumptively nonpublic, *i.e.,* ''not routinely available'' to the public under 47 CFR 0.457? If the reference in the Infrastructure Act does not mean that the procedures of § 0.459 need to be incorporated in making data available to the public, what meaning should the Commission give ''consistent with'' § 0.459 of the Commission's rules?

35. *Format of Publication.* The Commission must make data available to the public in a ''commonly used electronic format.'' Further, agencies must generally use a machine-readable format when making data publicly available. The Commission therefore seeks comment on what format the publisher of the data, whether it be the Commission or USAC, should use when making it available to the public. How should the Commission interpret ''commonly used electronic format?'' Should the Commission require that the data be made public in a machine-readable format with standard, labeled fields? Is the OPEN Government Data Act of 2018 applicable to our publication responsibilities under the

Infrastructure Act? What file formats should the Commission provide the data in? Both the Commission and USAC make datasets available for viewing in Open Data portals and provide downloadable data in Comma Separated Values (CSV), Extensible Markup Language (XML), Tab Separated Values (TSV), Resource Description Framework (RDF), and Rich Site Summary (RSS) formats. Should the Commission use different formats for making publicly available different types of data? For instance, should plan characteristic and provider enrollment data be published separately or together? Should plan and provider enrollment data be published at the same geographic level? The Commission proposes, at a minimum, making aggregated data publicly available in CSV format, given that this format is already used by the Commission and USAC. The Commission seeks comment on this proposal.

36. *Method of Publication.* The Commission also seeks comment on the method of making data available to the public. That is, who should host the data and where? The Infrastructure Act requires only that the Commission make data publicly available; it does not preclude publication via third parties. Should the Commission post the data on its website or Open Data portal? Or should the Commission direct USAC to publish the data on its Open Data portal?

37. *Timing of Publication.* Although the Infrastructure Act requires the Commission to make data available to the public, the Act does not specify when publication should occur, other than prohibiting publication prior to the Commission defining ''personally identifiable information.'' The Commission thus seeks comment on the timing of publication. Because Congress instituted an annual data collection, the Commission proposes making data publicly available at least annually. If data is collected on a more frequent basis, such as by participating providers providing data to NLAD on a rolling basis, should the Comission or USAC make data public more frequently than annually? If so, how often? Commenters should also address how long after collection data should be published. That is, how long after collection would data become ''stale'' and lack utility for consumers or others? Should time be built into the publication process to allow participating providers to protect proprietary information from disclosure? The Infrastructure Act is also silent as to how long the Commission must keep data available to the public. For how long should the Commission maintain the public-facing data? For a set amount of time? Until newer data is made public? Further, the Commission must revise its data collection rules no later than 180 days after they are issued. How, and to what extent, should the need for rule revisions affect the timing of making data available to the public?

38. *Proposed Collection Approach.* After weighing the benefits and burdens of the statutorily required data collection, the Commission proposes the most efficient and least burdensome approach is to modify NLAD to incorporate new data fields that would collect price, subscription rate information, and plan characteristics as discussed above. The Commission will collect subscriber-level data by having providers complete the new fields when enrolling households, and updating fields for households already enrolled in the Affordable Connectivity Program on a set time schedule. Under this approach, all data that is required to be collected for the ACP transparency data collection would be contained in NLAD, which would allow the Commission to publish the data in a manner consistent with the statute. Taking advantage of NLAD for this collection allows us to collect the information without requiring providers to produce large volumes of data each year. The Commission views the approach of submitting ACP transparency data collection information to the NLAD at the time of a transaction (*e.g.,* whether at the time of enrollment, as an update for a previously enrolled subscriber, or when necessary to update the fields due to a change in service plan) as being less burdensome to providers than the alternative option of compiling information for a bulk production during a limited filing window. Allowing providers to update the necessary fields at the time of the NLAD transaction also avoids any duplicitous efforts to recreate subscriber-level data for a separate submission. The Commission seeks comment on these views.

39. *Guidance.* The Infrastructure Act further provides that the Commission ''may issue such guidance, forms, instructions, publications, or technical assistance as may be necessary or appropriate to carry out the programs, projects, or activities authorized under this section, including to ensure that such programs, project, or activities are completed in a timely and effective manner.'' The Commission seeks comment on the meaning of this provision and what training, support, and guidance should be provided to support the ACP transparency data collection. What resources would be helpful to providers to facilitate this data collection?

40. *Enforcement.* The Commission seeks comment on issues related to enforcement of the annual data collection rules. Should the Commission adopt rules specifically governing the enforcement of the data collection requirement, or should the Commission employ the same enforcement position that it adopted for the Affordable Connectivity Program? Consistent with the approach in that program and its authorizing statute, the Commission proposes to treat failure to submit the data necessary for the ACP transparency collection, failure to respond to the Administrator's or the Commission's request for data, and failure to provide complete and accurate data as program rule violations that may result in forfeiture penalties pursuant to Section 503 of the Act. The Commission proposes establishing a base forfeiture amount that is proportionate to the level of data ultimately adopted, for example on a per-subscriber basis or higher level of aggregation. The Commission seeks comment on whether to assess the forfeiture on a per-subscriber basis to reflect the number of subscribers for which the provider has not submitted data. Alternatively, the Commission seeks comment on establishing a forfeiture amount at the state or study area level: that is, for any missing ACP data for subscribers within a state or study area, a base forfeiture penalty amount would be applied. Should the Commission consider establishing a base forfeiture amount of $50,000 per state or study area for which a provider is missing ACP transparency data collection information by the deadline, which is consistent with precedent for violations of Commission filing rules? The Commission seeks comment on other ways to calculate forfeiture amounts for failure to comply with the rules the Commission establishes for the ACP transparency data collection. In addition to a base forfeiture for non-filing, should the Commission impose additional fines each day a provider is not in compliance pursuant to Section 503(b)(2) of the Act? Given the importance of this congressionally mandated data collection, the Commission proposes requiring the submission of ACP transparency data collection information by the deadline to be established by the Bureau or the Commission. The Commission tentatively concludes that failure to meet the deadline will constitute a rule violation that may result in a monetary forfeiture penalty. The Commission

proposes to instruct USAC to provide the Enforcement Bureau a list of providers that have failed to submit ACP transparency data collection information by the deadline that identifies the subscribers, by state and study area, for which the data has not been properly filed.

41. Finally, the Commission seeks comment on how to evaluate and enforce the accuracy of the information presented in the ACP transparency data collection. How can the Commission verify the accuracy of the information that a broadband provider provides? How should the Commission protect against inaccuracies in the information provided? The Commission seeks comment on our proposal to require an officer of each provider to certify, under penalty of perjury, to the accuracy of the data and information provided prior to the submission of each data collection. The Commission seeks comment on further certifications and enforcement tools the Commission can use to ensure full and accurate participation in the data collection. The Commission seeks comment on whether a failure to comply with the rules the Commission establishes for the ACP data collection could subject a provider to the involuntary removal process the Commission established in the *ACP Order.*

42. *Timing.* The Infrastructure Act requires an ''annual collection'' relating to the price and subscription information. The Infrastructure Act further provides that, ''not later than 180 days after the date on which rules are issued . . . and when determined to be necessary by the Commission thereafter, the Commission shall revise the rules to verify the accuracy of data submitted pursuant to the rules.'' The Commission seeks comment on when the collection can begin in relation to the statutory requirement to revise the final rules within six months of adoption of final rules. Does this require the Commission to collect ACP data within a certain period of time? If so, by when should the Commission commence the inaugural data collection? For subsequent data collections, should the collection occur during the same window as the collection? The Commission also seeks comment on the filing window for collection. Should the Commission require providers to submit data for subscribers enrolled as of a particular date? How long should a filing window remain open?

43. The Commission also seeks comment on the statutory requirement to revise the rules to verify the accuracy of the data within six months from when the Commission adopts final rules and its impact on this proceeding. What is intended by the language providing that ''the Commission shall revise the rules to verify the accuracy of data submitted pursuant to the rules''? What is the purpose of the language limiting revisions to the final rules to verify accuracy? How should the Commission track and verify the accuracy of data submitted? What are the outer bounds on the period of time when the Commission must update its final rules? What circumstances should warrant revision of the rules? Should the updates to the rules include the possibility of adding new variables to improve or refine the data collected? How should the Commission determine when it is necessary to update the final rules? What other considerations should the Commission take into account when determining the necessity of updating the final rules for this data collection?

44. The Commission also seeks comment on the requirements of the Paperwork Reduction Act and the timing of the inaugural collection. In establishing the EBB Program and the Affordable Connectivity Program, the Consolidated Appropriations Act exempted the Commission from certain rulemaking requirements under the Administrative Procedure Act and the Paperwork Reduction Act. The Commission seeks comment on whether this exemption applies to rules established in this proceeding. Assuming the Paperwork Reduction Act requirements do apply to this collection, the Commission seeks comment on how this impacts the timing of the launch of the collection.

45. *Efforts to Promote Digital Equity and Inclusion.* The Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, the Commission seeks comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

## III. Procedural Matters

### *A. Initial Paperwork Reduction Act Analysis*

46. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

### *B. Initial Regulatory Flexibility Analysis*

47. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this notice of proposed rulemaking (NPRM). Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the notice of proposed rulemaking provided on the first page of the item. The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

a. Ex Parte Rules

48. This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, then the presenter may provide citations to such

data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with 47 CFR 1.1206(b). In proceedings governed by 47 CFR 1.49(f), or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable.pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

b. Need for, and Objectives of, the Proposed Rules

49. In the Infrastructure Investment and Jobs Act (Infrastructure Act), Congress established the Affordable Connectivity Program (ACP), which is designed to promote access to broadband internet access services by households that meet specified eligibility criteria by providing funding for participating providers to offer certain services and connected devices to these households at discounted prices. The Affordable Connectivity Program provides funds for an affordable connectivity benefit consisting of a $30.00 per month discount on the price of broadband internet access services that participating providers supply to eligible households in most parts of the country and a $75.00 per month discount on such prices in Tribal areas. The Commission established rules governing the affordable connectivity benefit and related matters in the ACP Report and Order, 87 FR 8346 (Feb. 14, 2022).

50. The Infrastructure Act also directs the Commission to issue ''final rules regarding the annual collection by the Commission relating to the price and subscription rates of each internet service offering of a participating provider under the Affordable Connectivity Program.''

51. This NPRM proposes rules to implement section 60502(c) of the Infrastructure Act, to provide greater transparency into broadband services provided by ACP participating providers, and to allow the Commission to assess its progress towards the ACP program goals. Specifically, the NPRM proposes establishing a mandatory annual data collection, collecting price, subscription rate, and plan characteristic information at the subscriber level through the National Lifeline Accountability Database (NLAD).

52. The NPRM seeks comment on what plan characteristics, data formats, and collection methods and timing should be collected or adopted. For example, the NPRM seeks comment on whether the Commission should collect information about plan speed or bundle characteristics, and it also seeks comment on what common data formats the Commission should collect and how the Commission should approach scheduling the annual collection of ACP transparency data. The NPRM also seeks comment on the burdens and benefits of requiring providers to submit information at the subscriber level, aggregate level, and alternative approaches.

53. In executing its obligations under the Infrastructure Act, the Commission intends to establish rules and requirements that implement the relevant provisions of the Infrastructure Act efficiently, with minimal burden on participating providers. These actions are consistent with our ongoing efforts to bridge the digital divide by ensuring that low-income households have access to affordable, high-quality broadband internet access service.

c. Legal Basis

54. The proposed actions are authorized pursuant to the Infrastructure Act, div. F, tit. V, sec. 60502(c).

d. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

55. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; (3) satisfies any additional criteria established by the Small Business Administration (SBA).

56. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 32.5 million businesses.

57. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

58. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicates that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

59. *Wired Broadband Internet Access Service Providers. (Wired ISPs).* Providers of wired broadband internet access service include various types of providers except dial-up internet access providers. Wireline service that terminates at an end user location or mobile device and enables the end user to receive information from and/or send information to the internet at

information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction is classified as a broadband connection under the Commission's rules. Wired broadband internet services fall in the Wired Telecommunications Carriers industry. The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 shows that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, according to Commission data on internet access services as of December 31, 2018, nationwide there were approximately 2,700 providers of connections over 200 kbps in at least one direction using various wireline technologies. The Commission does not collect data on the number of employees for providers of these services, therefore, at this time the Commission is not able to estimate the number of providers that would qualify as small under the SBA's small business size standard. However, in light of the general data on fixed technology service providers in the Commission's *2020 Communications Marketplace Report,* the Commission believes that the majority of wireline internet access service providers can be considered small entities.

60. *Wireless Broadband internet Access Service Providers (Wireless ISPs or WISPs).* Providers of wireless broadband internet access service include fixed and mobile wireless providers. The Commission defines a WISP as ''[a] company that provides end-users with wireless access to the internet[.]'' Wireless service that terminates at an end user location or mobile device and enables the end user to receive information from and/or send information to the internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction is classified as a broadband connection under the Commission's rules. Neither the SBA nor the Commission have developed a size standard specifically applicable to Wireless Broadband internet Access Service Providers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (except Satellite). The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 shows that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, according to Commission data on internet access services as of December 31, 2018, nationwide there were approximately 1,209 fixed wireless and 71 mobile wireless providers of connections over 200 kbps in at least one direction. The Commission does not collect data on the number of employees for providers of these services, therefore, at this time the Commission is not able to estimate the number of providers that would qualify as small under the SBA's small business size standard. However, based on data in the Commission's *2020 Communications Marketplace Report* on the small number of large mobile wireless nationwide and regional facilities-based providers, the dozens of small regional facilities-based providers and the number of wireless mobile virtual network providers in general, as well as on terrestrial fixed wireless broadband providers in general, the Commission believes that the majority of wireless internet access service providers can be considered small entities.

e. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

61. In this NPRM, the Commission seeks comment on its proposal to require providers to provide subscriber level price, subscription rate, and plan characteristic information to the Commission. To the extent the Commission imposes an annual data collection, participating providers of all sizes would be required to maintain and report information concerning plan prices, subscription rates, and plan characteristics. Any recordkeeping or reporting requirements adopted in this proceeding however will apply only to those providers that choose to participate in the Affordable Connectivity Program.

62. In assessing the cost of compliance for small entities, at this time the Commission cannot quantify the cost of compliance with the potential rule changes that may be adopted and is not in a position to determine whether the proposals in the NPRM will require small entities to hire professionals in order to comply. The Commission seeks comment on its proposals and their likely costs and benefits as well as alternative approaches. The Commission expects the comments received will include information on the costs and benefits, service impacts, and other relevant matters that should help us identify and evaluate relevant issues for small entities, including compliance costs and other burdens (as well as countervailing benefits), so that the Commission may develop final rules that minimize such costs.

f. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

63. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

64. The NPRM seeks comments from all interested parties. The Commission is aware that some of the proposed collections under consideration will impact small entities. The NPRM does seek comment on the impact of its proposed rules on providers, and small entities are encouraged to bring to the Commission's attention any specific concerns that they may have with the proposals outlined in the NPRM.

65. The Commission will evaluate the economic impact on small entities, as identified in comments filed in response to the NPRM and this IRFA, in reaching its final conclusions and taking actions in this proceeding.

g. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

66. None.

## IV. Ordering Clauses

67. *It is ordered,* pursuant to section 60502(c) of the Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429 (2021), that this Notice of Proposed Rulemaking is hereby *adopted.*

68. *It is further ordered* that, pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415, 1.419, interested parties may file comments on the notice of proposed rulemaking on or before 30 days after publication in the **Federal Register**, and reply comments on or before 45 days after publication in the **Federal Register**.

69. *It is further ordered* that the Commission *shall send* a copy of this notice of proposed rulemaking, including the Initial Regulatory

Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 54**

Internet telecommunications, Reporting and recordkeeping requirement, Telephone.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary.*

**Proposed Rules**

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 54 as follows:

## PART 54—UNIVERSAL SERVICE

■ 1. The authority citation for part 54 continues to read as follows:

**Authority:** 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 229, 254, 303(r), 403, 1004, 1302, 1601–1609, and 1752, unless otherwise noted.

■ 2. Amend § 54.1801 by revising paragraph (e)(2)(ii)(A) to read as follows:

**§ 54.1801 Participating providers.**

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(A) Violations of the rules or requirements of the Affordable Connectivity Program, including rules and requirements related to the Affordable Connectivity Program transparency data collection, the Emergency Broadband Benefit Program, the Lifeline program, the Emergency Connectivity Fund or successor programs, or any of the Commission's Universal Service Fund program.

* * * * *

■ 3. Add § 54.1813 to read as follows:

**§ 54.1813 Affordable Connectivity Program transparency data collection.**

Participating providers shall transmit to the National Lifeline Accountability Database in a format prescribed by the Administrator each new and existing Affordable Connectivity Program (ACP) subscriber's full name; contact information; total monthly charge for internet service prior to any discounts (including bundled components, associated equipment, taxes, and fees); itemized breakdown of monthly charge including cost of ACP-supported service, associated equipment, discounts, taxes, and fees; plan characteristics, including upload and download speeds, average latency and packet loss, data caps, associated equipment requirements, for bundles, voice and video characteristics (*e.g.,* number of minutes, number of channels offered); and plan coverage by geographic level as to be determined by the Commission.

[FR Doc. 2022–13438 Filed 6–22–22; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

### 48 CFR Parts 203 and 212

**[Docket DARS–2022–0013]**

**RIN 0750–AL36**

### Defense Federal Acquisition Regulation Supplement: Prohibition on Award to Contractors That Require Certain Nondisclosure Agreements (DFARS Case 2021–D018)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2021 that prohibits the award of any DoD contracts to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict its employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative of DoD authorized to receive such information.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before August 22, 2022, to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2021–D018, using any of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for ''DFARS Case 2021–D018.'' Select ''Comment'' and follow the instructions to submit a comment. Please include your name, company name (if any), and ''DFARS Case 2021–D018'' on any attached document.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2021–D018 in the subject line of the message.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly R. Ziegler, telephone 703–901–3176.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is proposing to amend DFARS subpart 203.9 to implement section 883 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). Section 883 prohibits the award of a DoD contract to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative within DoD authorized to receive such information. The statute also requires entities to inform their employees of the limitations on confidentiality agreements or other statements. Offerors are required to represent compliance with the statutory restrictions prior to submitting an offer or quote.

The requirements of section 883 closely resemble those provided in section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235), which was implemented at Federal Acquisition Regulation (FAR) 3.909, Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements (82 FR 4717, dated January 13, 2017).

Differences between the statutory requirements are negligible; the most notable is that section 743 applies the prohibition to entities who require their employees or contractors to sign the internal confidentiality agreements or statements. Section 883, however, applies the prohibition to entities who require their employees to sign them. Since the prohibition at section 743 applies Governmentwide, DoD is currently complying with section 883 based on the FAR application of section 743 to employees and contractors.

**II. Discussion and Analysis**

The proposed rule implements section 883 of the NDAA for FY 2021 by utilizing the existing Governmentwide prohibition at FAR subpart 3.9 and clarifies the applicability of Governmentwide statutory guidance at DFARS 203.900. Section 883 provides

DoD-specific statutory guidance that is almost identical to section 743, as implemented Governmentwide in FAR 3.909. Both statutes prohibit the award of a contract using appropriated funds to an entity that requires certain confidentiality agreements or statements. Given that the differences in the prohibitions are negligible and the FAR prohibition already applies to DoD contracts, a separate implementation of section 883 in the DFARS is unnecessary. As a result, the proposed rule will add the statutory citation for section 883 in DFARS 203.900 and update the language needed to ensure contracting officers comply with the applicable sections in FAR subpart 3.9.

FAR 3.909–2(a) provides the representation in the System for Award Management required by section 883(a)(1). The representation refers to Government contracts and Federal departments or agencies, which includes DoD. FAR 3.909–2(b) provides direction to the contracting officer regarding reliance on an offeror's representation, as required in section 883(b).

FAR 3.909–3 prescribes the use of the solicitation provision at 52.203–18, Prohibition on Contracting with Entities That Require Certain Internal Confidentiality Agreements or Statements–Representation, and the contract clause at 52.203–19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, in all solicitations and contracts except those for a personal services contract with an individual. The contract clause at 52.203–19 requires the contractor to notify its current employees and subcontractors of these prohibitions and restrictions, fulfilling the requirement at section 883(a)(2).

The proposed rule revises the scope of DFARS subpart 203.9 to reconcile with FAR 3.900. The clause prescription at 203.970 is revised to clarify that DFARS 252.203–7002, Requirement to Inform Employees of Whistleblower Rights, which implements 10 U.S.C. 2409 (redesignated as 10 U.S.C. 4701), is applicable to solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items. The rule makes a conforming change to DFARS 212.301, Solicitation provisions and contract clauses for the acquisition of commercial items. While the clause was always applicable to all solicitations and contracts, the proposed revision is intended to reduce the risk of noncompliance.

## III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This proposed rule implements section 883 of the NDAA for FY 2021 (Pub. L. 116–283) but does not create any new solicitation provisions or contract clauses. The rule revises the prescription for DFARS clause 252.203–7002, Requirement to Inform Employees of Whistleblower Rights, which implements 10 U.S.C. 2409, to require use of the clause in contracts valued at or below the simplified acquisition threshold and to acquisitions of commercial services and commercial products, including COTS items. Therefore, DoD intends to apply the rule to contracts at or below the SAT, and DoD intends to apply the rule to contracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services.

The proposed rule, at DFARS 203.909–3, also prescribes use of FAR solicitation provision 52.203–18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation, and FAR contract clause 52.203–19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements. The FAR clause and provision, except for personal services contracts, are already prescribed for use in acquisitions valued at or below the SAT; and the FAR clause 52.203–19 is also prescribed for use in commercial acquisitions.

### *A. Applicability to Contracts at or Below the SAT*

41 U.S.C 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD does intend to make that determination. Therefore, this rule will apply at or below the SAT.

### *B. Applicability to Contracts for the Acquisition of Commercial Services and Commercial Products, Including COTS Items*

10 U.S.C. 3452 (previously 10 U.S.C. 2375) exempts contracts and subcontracts for the acquisition of commercial products, including COTS items, and commercial services from provisions of law enacted after October 13, 1994, unless the Under Secretary of Defense for Acquisition and Sustainment (USD (A&S)) makes a written determination that it would not be in the best interest of DoD to exempt contracts for the procurement of commercial products and commercial services from the applicability of the provision or contract requirement, except for a provision of law that—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 4862 (previously 10 U.S.C. 2533c), or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 4863 (previously 10 U.S.C. 2533b); or
- Specifically refers to 10 U.S.C. 3452 and states that it shall apply to contracts and subcontracts for the acquisition of commercial products (including COTS items) and commercial services; or
- USD (A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial products or commercial services from the applicability of the provision or contract clause requirement.

The statutes implemented in this rule do not impose criminal or civil penalties, do not require purchase pursuant to 10 U.S.C. 4862 or 4863, and do not refer to 10 U.S.C. 3452. Therefore, 10 U.S.C. 2409 will not apply to the acquisition of commercial services or commercial products including COTS items unless a written determination is made. Due to delegations of authority, the Principal Director, DPC is the appropriate authority to make this determination. DoD intends to make a determination to apply this rule and the corresponding statutes (10 U.S.C. 2409 and section 883 of the NDAA for FY 2021) to acquisitions at or below the SAT and for commercial services and commercial products, including COTS items.

*C. Determination*

DoD is proposing to apply the requirements of 10 U.S.C. 2409 and section 883 of the NDAA for FY 2021 to contracts at or below the SAT and to the acquisition of commercial services and commercial products, including COTS items, because the statutory protections are intended to apply to any employee of a contractor or subcontractor who discloses or may be restricted from disclosing evidence of waste, fraud, or abuse. The statutes only exempt the application to elements of the intelligence community.

10 U.S.C. 2409 provides contractor employees protection from reprisal for disclosure of waste, fraud, and abuse to designated persons and bodies identified in the statute. An employee of a contractor or subcontractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for such a disclosure. The statute does not apply to elements of the intelligence committee.

Section 883 prohibits the award of any DoD contract to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict its employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative of DoD authorized to receive such information.

It is not in the best interest of the Federal Government to exempt application of this rule to actions below the SAT or to commercial services and commercial products, including COTS items. An exception for contracts below the SAT and those for commercial services and commercial products, including COTS items, would exclude the majority of the contracts and individuals intended to be protected under the laws, thereby undermining the overarching public policy purpose of the laws.

## IV. Expected Impact of the Rule

This proposed rule is not expected to have a significant impact on the public or Government agencies, because the requirements of section 883 have already been implemented Governmentwide at FAR 3.909. DoD-specific implementation of section 883 would duplicate the previous implementation of section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) as implemented Governmentwide in the FAR.

## V. Executive Orders 12866 and 13563

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

## VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

## VII. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because this rule does not implement new requirements on any entities beyond those already published in the FAR. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the DFARS to implement section 883 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). Section 883 prohibits the award of a DoD contract to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative within DoD authorized to receive such information.

The objective of the rule is to implement the DoD-specific statute that removes restrictions on the ability of employees to report waste, fraud, or abuse to the appropriate DoD authorities. The legal basis of the rule is section 883 of the NDAA for FY 2021.

This rule will apply to all small entities that are eligible to receive DoD contracts; however, the requirements of section 883 are already met through the Governmentwide implementation of a previously published prohibition at FAR 3.909 and in the System for Award Management (SAM) representations and certifications. As a result, the 361,000 unique small entities registered in SAM as of January 12, 2021, are already compliant with these requirements and will not be required to take any additional action to comply with the DoD-specific prohibition in section 883.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2021–D018), in correspondence.

## VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

## List of Subjects in 48 CFR Parts 203 and 212

Government Procurement.

**Jennifer D. Johnson,**
*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 203 and 212 are proposed to be amended as follows:

## PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 1. The authority citation for part 203 is revised to read as follows:

**Authority:** 41 U.S.C 1303 and 48 CFR chapter 1.

■ 2. Revise section 203.900 to read as follows:

**203.900 Scope of subpart.**

This subpart implements 10 U.S.C. 2409 and section 883 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283).

(a)(i) 10 U.S.C. 2409 provides DoD whistleblower protection policies and procedures for contractor employees. Use sections 203.901 through 203.906 of this subpart in lieu of FAR sections 3.901 through 3.906 to implement 10 U.S.C. 2409.

(ii) 10 U.S.C. 2409 does not apply to any element of the intelligence community, as defined in 50 U.S.C. 3003(4). Sections 203.901 through 203.906 do not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(A) Relates to an activity or an element of the intelligence community; or

(B) Was discovered during contract or subcontract services provided to an element of the intelligence community.

(c) Section 883 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283) prohibits the award of a DoD contract to contractors that require their employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative within DoD authorized to receive such information.

■ 3. Add sections 203.909 and 203.909–3 to read as follows:

**203.909 Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements.**

**203.909–3 Solicitation provision and contract clause.**

Use the provision at FAR 52.203–18, Prohibition on Contracting with Entities That Require Certain Internal Confidentiality Agreements or Statements—Representation, and the clause at FAR 52.203–19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, prescribed at FAR 3.909–3 to implement section 883 of the National Defense Authorization Act for Fiscal Year 2021.

■ 4. Revise section 203.970 to read as follows:

**203.970 Contract clause.**

Use the clause at 252.203–7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

## PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 5. The authority citation for part 212 continues to read as follows:

**Authority:** 41 U.S.C 1303 and 48 CFR chapter 1.

■ 6. Amend section 212.301 by—

■ a. Redesignating paragraphs (f)(i)(C) and (D) as paragraphs (f)(i)(D) and (E); and

■ b. Adding a new paragraph (f)(i)(C) to read as follows:

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

* * * * *

(f) * * *

(i) * * *

(C) Use the clause at 252.203–7002, Requirement to Inform Employees of Whistleblower Rights, as prescribed in 203.970, to comply with 10 U.S.C. 2409.

* * * * *

[FR Doc. 2022–13369 Filed 6–22–22; 8:45 am]

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

### 48 CFR Parts 213, 229, 232, and 252

**[Docket DARS–2022–0014]**

**RIN 0750–AL51**

### Defense Federal Acquisition Regulation Supplement: Reporting Tax Information on Certain Foreign Procurements (DFARS Case 2021–D029)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to allow for the efficient and accurate identification of contracts subject to excise tax withholding. DoD is also proposing to prohibit use of the Governmentwide commercial purchase card as a method of payment when the tax on certain foreign procurements applies. These changes will promote the efficient administration of the excise tax.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before August 22, 2022, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2021–D029, using any of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for ''DFARS Case 2021–D029'' in the search box and select ''Search.'' Select ''Comment'' and follow the instructions to submit a comment. Please include your name, company name (if any), and ''DFARS Case 2021–D029'' on any attached document.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2021–D029 in the subject line of the message.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** David E. Johnson, telephone 202–913–5764.

**SUPPLEMENTARY INFORMATION:**

### I. Background

DoD is proposing to revise the DFARS to allow for the accurate identification of contracts subject to excise tax withholding, as well as the proper identification of those contracts for which the contractor claimed a full exemption from the tax. Section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347), codified at 26 U.S.C. 5000C, imposes a two-percent excise tax on specified Federal procurement payments to certain foreign persons; it does not apply to payments to United States persons. With certain exceptions, to administer this tax DoD must withhold an amount equal to two percent of the amount of specified Federal procurement payments.

Federal Acquisition Regulation (FAR) solicitation provision 52.229–11, Tax on Certain Foreign Procurements—Notice and Representation, provides offerors an opportunity to claim a full exemption from the tax at the time of their offer. The proposed DFARS contract clause 252.229–70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, is needed because presently no guidance, requirement, or mechanism exists to document an offeror's claim of full exemption from the tax.

Currently, the contract clause at FAR 52.229–12, Tax on Certain Foreign

Procurements, requires the DoD payment office to withhold the two-percent excise tax if the contractor does not submit an Internal Revenue Service (IRS) Form W–14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments, with each invoice. However, if the contractor claimed a full exemption at the time of its offer, then the contractor is not required to submit IRS Form W–14 with each invoice. Accordingly, the DoD payment systems and networks may erroneously withhold the tax if the contractor's full exemption that was claimed at the time of its offer is not documented in the contract. Inclusion of the proposed clause at DFARS 252.229–70XX will ensure the DoD payment office and other DoD organizations are aware of contractors claiming a full exemption at the time of contract award.

DoD is also proposing to prohibit use of the Governmentwide commercial purchase card (GCPC) as a method of payment on contracts subject to the two-percent excise tax. When the GCPC is used as a method of payment, a third party, *i.e.,* the bank that issued the GCPC, and not the DoD payment office, processes the payment to the contractor. In this situation, the Government lacks a mechanism to withhold the tax prior to the contractor being paid.

This proposed rule is intended to promote efficient administration of the two-percent excise tax. It does not impose a new requirement or burden on contractors or the public. Rather, this proposed rule likely benefits contractors by minimizing the likelihood of erroneous withholding of the two-percent excise tax.

## II. Discussion and Analysis

This proposed rule applies to Federal Government contracts that include FAR clause 52.229–12, that are valued over $250,000, and that are awarded to foreign persons for goods or services, if the goods are manufactured or produced or the services are provided in any country that is not a party to an international procurement agreement with the United States (see FAR 25.003 for the definitions of ''World Trade Organization Government Procurement Agreement (WTO GPA) country'' and ''Free Trade Agreement country''). FAR 29.402–3(b) requires FAR clause 52.229–12 to be included in solicitations in which FAR provision 52.229–11 is included and in the resulting contract when the contractor represented that it is a foreign person.

Paragraph (d)(2) of FAR provision 52.229–11 allows the offeror to claim either a ''full exemption'' or a ''partial or no exemption'' from the excise tax. However, in accordance with FAR 29.402–3, FAR 52.229–12 will be included in the resulting contract where the offeror had indicated that it is a foreign person, regardless of whether the offeror may have claimed a full exemption as part of their offer.

The DoD finance and accounting systems utilize the presence of various FAR clauses in contracts to determine entitlement to payment, including required offsets and withholds. However, the presence or absence of FAR 52.229–12 in contracts does not in itself allow DoD payment systems or networks to determine whether withholding the two-percent excise tax is correct for a given contract or whether a contractor had claimed a full exemption in their initial offer.

The proposed clause at DFARS 252.229–70XX, by its inclusion in the contract, will provide for a simple and efficient method for contracting officers to alert the DoD payment systems and networks that a contractor claimed a full exemption in its offer, thereby preventing erroneous withholding of the two-percent excise tax. This clause would also complement FAR 52.229–12 in applicable contracts where FAR 52.229–12 requires contractors to notify contracting officers of a change in circumstances concerning the full exemption during the performance of the contract, causing the contractor to be subject to the tax.

## III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule proposes to create a new DFARS clause 252.229–70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, to implement section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347), codified at 26 U.S.C. 5000C. The clause at DFARS 252.229–70XX is prescribed at DFARS 229.402–70(k) for use in contracts that include the clause at FAR 52.229–12, Tax on Certain Foreign Procurements, for which the contractor represented in its offer that it is a foreign person and is fully exempt from the tax for reasons cited on their IRS Form W–14. FAR 52.229–12 is used when FAR 52.229–11, Tax on Certain Foreign Procurements—Notice and Representation, is used; and FAR 52.229–11 does not apply to acquisitions that do not exceed the simplified acquisition threshold. Accordingly, DoD does not intend to apply the rule to acquisitions at or below the SAT but does intend to apply the rule to the acquisition of commercial services and commercial products, including COTS items.

### *A. Applicability to Contracts at or Below the Simplified Acquisition Threshold*

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD does not intend to make that determination. Therefore, this rule will not apply at or below the SAT.

### *B. Applicability to Contracts for the Acquisition of Commercial Services and Commercial Products Including COTS Items*

10 U.S.C. 3452 (previously 10 U.S.C. 2375) exempts contracts and subcontracts for the acquisition of commercial products, including COTS items, and commercial services from provisions of law enacted after October 13, 1994, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it would not be in the best interest of DoD to exempt contracts for the procurement of commercial products and commercial services from the applicability of the provision or contract requirement, except for a provision of law that—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 4862 (previously 10 U.S.C. 2533c), or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 4863 (previously 10 U.S.C. 2533b); or
- Specifically refers to 10 U.S.C. 3452 and states that it shall apply to contracts and subcontracts for the acquisition of commercial products (including COTS items) and commercial services; or

• USD(A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial products or commercial services from the applicability of the provision or contract clause requirement.

Section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347), codified at 26 U.S.C. 5000C and implemented by this rule, does not impose criminal or civil penalties; does not require purchase pursuant to 10 U.S.C. 4862 or 4863; and does not refer to 10 U.S.C. 3452. Section 301 will not apply to the acquisition of commercial services or commercial products including COTS items unless a written determination is made. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make the written determination. DoD intends to make that determination to apply this rule to the acquisition of commercial services and commercial products including COTS items, if otherwise applicable.

*C. Determination*

The proposed clause at 252.229–70XX is intended to provide a simple and efficient way for contracting officers to alert the DoD payment systems and networks that a contractor claimed a full exemption from the two-percent excise tax in its offer, thereby preventing erroneous withholding of the tax. Not applying the clause to contracts for the acquisition of commercial services and commercial products, including COTS items, would exclude contracts intended to be covered by this proposed rule and undermine the overarching purpose of the rule. Consequently, DoD plans to apply the proposed rule to contracts for the acquisition of commercial services and commercial products, including COTS items.

## IV. Expected Impact of the Rule

This proposed rule will promote efficient administration of the two-percent excise tax. It imposes no new requirement or burden on contractors or the public. Rather, this proposed rule likely benefits contractors by minimizing the possibility of erroneous withholding of the two-percent excise tax. Additionally, the two-percent excise tax applies only to specified Federal procurement payments to certain foreign persons; it does not apply to payments to U.S. persons.

## V. Executive Orders 12866 and 13563

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

## VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

## VII. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule does not implement any requirements with which small entities must comply. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule aids the administration of the two-percent excise tax on specified Federal procurement payments to certain foreign persons by prescribing inclusion of a new DFARS clause in contracts when the tax on certain foreign procurements applies and the contractor claimed a full exemption from the tax. Further, this proposed rule prohibits use of the Governmentwide commercial purchase card as a method of payment when the tax on certain foreign procurements applies and the contractor did not claim a full exemption.

The objective of this proposed rule is to promote efficient administration of the two-percent excise tax on specified Federal procurement payments to certain foreign persons. The legal basis for the rule is 41 U.S.C. 1303 and section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347), codified at 26 U.S.C. 5000C.

The proposed rule applies to Federal Government contracts that include the clause at FAR 52.229–12, Tax on Certain Foreign Procurements; that are valued over $250,000; and that are awarded to foreign persons for goods or services, if the goods are manufactured or produced or the services are provided in any country that is not a party to an international procurement agreement with the United States (see FAR 25.003 for the definitions of ''World Trade Organization Government Procurement Agreement (WTO GPA) country'' and ''Free Trade Agreement country''). Data for fiscal year 2021 was obtained from the Federal Procurement Data System for contract awards reflecting these criteria. There were 123 total contract awards; 117 were awarded to 56 unique large entities and 6 were awarded to 4 unique small entities for a total of 60 unique foreign entities. Accordingly, the proposed rule is not expected to have a significant impact on small entities based in the United States.

This rule imposes no reporting, recordkeeping, or other compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known available alternatives to the proposed rule to accomplish the desired objective.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2021–D029), in correspondence.

## VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 1545–2263, entitled Tax on Certain Foreign Procurement.

## List of Subjects in 48 CFR Parts 213, 229, 232, and 252

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 213, 229, 232, and 252 are proposed to be amended as follows:

■ 1. The authority citation for parts 213, 229, 232, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

## PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 2. Amend section 213.301 by redesignating paragraph (4) as paragraph (5) and adding a new paragraph (4) to read as follows:

**213.301 Governmentwide commercial purchase card.**

* * * * *

(4) The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any contract period of performance if the contract includes the clause at FAR 52.229–12, Tax on Certain Foreign Procurements, unless the contract also includes the clause at 252.229–70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, indicating that the contractor is fully exempt from the tax.

* * * * *

## PART 229—TAXES

■ 3. Add subpart 229.2, consisting of section 229.204, to read as follows:

## SUBPART 229.2—FEDERAL EXCISE TAXES

**229.204 Federal excise tax on specific foreign contract payments.**

The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any contract period of performance if the contract includes the clause at FAR 52.229–12, Tax on Certain Foreign Procurements, unless the contract also includes the clause at 252.229–70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, indicating that the contractor is fully exempt from the tax.

■ 4. Amend section 229.402–70 by adding paragraph (k) to read as follows:

**229.402–70 Additional provisions and clauses.**

* * * * *

(k) Use the clause at 252.229–70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, in contracts that include the clause at FAR 52.229–12, Tax on Certain Foreign Procurements, when the contractor has—

(1) Represented that it is a foreign person in response to the provision at FAR 52.229–11, Tax on Certain Foreign Procurements—Notice and Representation; and

(2) Indicated that it is fully exempt from the tax for reasons cited on their IRS Form W–14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments.

## PART 232—CONTRACT FINANCING

■ 5. Add sections 232.1108 and 232.1108–70 to subpart 232.11 to read as follows:

**232.1108 Payment by Governmentwide commercial purchase card.**

**232.1108–70 Prohibition of Governmentwide commercial purchase card as a method of payment when the tax on certain foreign procurements applies.**

The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any contract period of performance if the contract includes the clause at FAR 52.229–12, Tax on Certain Foreign Procurements, unless the contract also includes the clause at 252.229–70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, indicating that the contractor is fully exempt from the tax.

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Add section 252.229–70XX to read as follows:

**252.229–70XX Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements.**

As prescribed in 229.402–70(k), use the following clause: FULL EXEMPTION FROM TWO–PERCENT EXCISE TAX ON CERTAIN FOREIGN PROCUREMENTS (DATE)

(a) As the Contractor represented in its offer, any item, including any item delivered under subcontract; any service; or any combination thereof delivered under this contract is fully exempt from the 2-percent excise tax withholding imposed by 26 U.S.C. 5000C and implemented by Federal Acquisition Regulation (FAR) 52.229–12, Tax on Certain Foreign Procurements.

(b) If the full exemption no longer applies due to a change in circumstances during the performance of the contract, causing the Contractor to become subject to the withholding for the 2-percent excise tax as imposed by 26 U.S.C. 5000C, then the Contractor shall immediately comply with the notification and billing requirements of FAR clause 52.229–12.

(End of clause)

[FR Doc. 2022–13370 Filed 6–22–22; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**[Docket No. FWS–R4–ES–2021–0058; FF09E22000 FXES1113090FEDR 223]**

**RIN 1018–BE53**

## Endangered and Threatened Wildlife and Plants; Reclassification of Mitracarpus polycladus From Endangered to Threatened With a Section 4(d) Rule

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to reclassify *Mitracarpus polycladus* (a plant, no common name) from endangered to threatened (downlist) under the Endangered Species Act of 1973, as amended (Act). The proposed downlisting is based on our evaluation of the best available scientific and commercial information, which indicates that the species' status has improved such that it is not currently in danger of extinction throughout all or a significant portion of its range, but that it is still likely to become so in the foreseeable future. We also propose a rule under section 4(d) of the Act that provides for the conservation of *M. polycladus.*

**DATES:** We will accept comments received or postmarked on or before August 22, 2022. 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 August 8, 2022.

**ADDRESSES:** You may submit comments on this proposed rule by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–R4–ES–2021–0058, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the 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–R4–ES–2021–0058; 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 Information Requested, below, for more information).

*Availability of supporting materials:* This proposed rule, list of literature cited, and supporting documents, including the 5-year reviews and the Recovery Plan, are available at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2021–0058.

**FOR FURTHER INFORMATION CONTACT:** Edwin Muñiz, Field Supervisor, U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office, P.O. Box 491, Boquerón, PR 00622; telephone: (787) 851–7297. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

**SUPPLEMENTARY INFORMATION:**

## Executive Summary

*Why we need to publish a rule.* Under the Act, a species may warrant reclassification from endangered to threatened if it no longer meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range). *Mitracarpus polycladus* is listed as endangered, and we are proposing to reclassify (downlist) *M. polycladus* as threatened. We have determined *M. polycladus* does not meet the Act's definition of an endangered species, but it does meet the definition of a threatened species (likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range). Reclassifying a species as a threatened species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process.

*What this document does.* This rule proposes to reclassify *Mitracarpus polycladus* as a threatened species on the Federal List of Endangered and Threatened Plants (List) and to establish provisions under section 4(d) of the Act that are necessary and advisable to provide for the conservation of this species.

*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 may reclassify a species if the best available commercial and scientific data indicate the species no longer meets the applicable definition in the Act. In our April 2011 and September 2018 5-year status reviews, we recommended reclassifying this plant from endangered to threatened based on our evaluation of these same five factors. Based on the status review, the current threats analysis, and evaluation of conservation measures discussed in this proposed rule, we conclude that the plant *M. polycladus* no longer meets the Act's definition of an endangered species and should be reclassified to a threatened species. The species is no longer in danger of extinction throughout all or a significant portion of its range, but is likely to become so within the foreseeable future. We determined that *M. polycladus* is affected by the following current and ongoing threats to the extent that the species meets the definition of a threatened species under the Act: habitat destruction and modification due to road and trail maintenance, trampling by humans; human-caused fires; nonnative, invasive species; urbanization and tourism development; and the effects of climate change.

The status of *Mitracarpus polycladus* has improved since the time of listing with an increased range, number of localities and individuals. At the time of listing, the known range of *M. polycladus* consisted of an undetermined number of individuals located in a single population in southern Puerto Rico and from one record on Saba Island. Currently, there are 3 populations of *M. polycladus* with more than 20,000 adult individuals in 11 localities in southern Puerto Rico and multiple localities on Saba Island and Anegada Island. In the largest population, 89 percent of individuals occur in areas managed for conservation. Despite ongoing threats from habitat destruction and modification, all three populations exhibit high or moderate resiliency and have demonstrated ability to maintain occurrences through changing environmental conditions. Furthermore, the current number of localities buffers the species from catastrophic events (drought and fire). For these reasons, we determined that the species is not in danger of extinction, and, thus, we conclude that *M. polycladus* no longer meets the Act's definition of an endangered species.

Although population numbers and abundance of *M. polycladus* have increased, our analysis indicates that magnitude of threats will remain into the foreseeable future. As the effects of habitat destruction and modification and climate change continue into the future, the abundance of each of the three populations may be reduced, thereby exacerbating the impacts from these stressors. Thus, we find that *M. polycladus* is likely to become in danger of extinction in the foreseeable future, and meets the Act's definition of a threatened species.

*We are proposing to promulgate a section 4(d) rule.* We propose to prohibit the activities under section 9(a)(2) of the Act for endangered plant species as a means to provide protections to *Mitracarpus polycladus.* We also propose specific exceptions from these prohibitions for our State or Territorial agency partners, so that they may continue with certain activities covered by an approved cooperative agreement to carry out conservation programs that will facilitate the conservation and recovery of the species.

## 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 governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) Reasons we should or should not downlist *Mitracarpus polycladus* as a threatened species.

(2) Information on the historical and current status, range, distribution, and population size of *Mitracarpus polycladus.*

(3) Information on the known and potential threats to *Mitracarpus polycladus* including habitat modification, habitat loss, or climate change.

(4) Information regarding the life history, ecology, and habitat use of *Mitracarpus polycladus.*

(5) Current or planned activities within the geographic range of *Mitracarpus polycladus* that may have adverse or beneficial impacts on the species.

(6) Information on regulations that are necessary and advisable to provide for the conservation of *Mitracarpus polycladus* and that the Service can consider in developing a 4(d) rule for the species.

(7) Information concerning the extent to which we should include any of the Act's section 9 prohibitions in the 4(d) rule or whether we should consider any additional exceptions from the prohibitions in the 4(d) rule (to the extent permitted by Commonwealth law).

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 (16 U.S.C. 1531 *et seq.*) directs that determinations as to whether any species is an endangered or 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 used in preparing this proposed rule will be available for public inspection at Docket No. FWS–R4–ES–2021–0058 on *https://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final determination 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 should remain listed as endangered instead of being reclassified as threatened, or we may conclude that the species no longer warrants listing as either an endangered species or a threatened species. In addition, we may change the parameters of the proposed prohibitions or the proposed exceptions to those prohibitions if we conclude it is appropriate in light of comments and new information we receive. For example, we may expand the proposed prohibitions to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the species. Conversely, we may establish additional exceptions to the prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the species.

*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).

*Peer Review*

In accordance with our policy, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' which was published on July 1, 1994 (59 FR 34270) and our August 22, 2016, Director's Memorandum ''Peer Review Process,'' we will seek the expert opinion of at least three appropriate and independent specialists regarding scientific data and interpretations contained in this proposed rule. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will ensure that the opinions of peer reviewers are objective and unbiased by following the guidelines set forth in the Director's Memo, which updates and clarifies Service policy on peer review. The purpose of such review is to ensure that our decisions are based on scientifically sound data, assumptions, and analysis. Accordingly, our final decision may differ from this proposal.

**Previous Federal Actions**

On September 9, 1994, we published in the **Federal Register** (59 FR 46715) a final rule listing listing *Mitracarpus polycladus* as an endangered species. On October 6, 1998, we completed the recovery plan (Service 1998, entire). An amendment to the *M. polycladus* recovery plan was signed on September 24, 2019.

On September 27, 2006, and August 22, 2016, we initiated 5-year reviews for the species (71 FR 56545 and 81 FR 56692, respectively) and completed them on April 27, 2011 (Service 2011, entire), and September 25, 2018 (Service 2018a, entire). In those two reviews, we determined the species no longer met the definition of an endangered species and should be reclassified to threatened. The 5-year reviews are available at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2021–0058.

For additional details on previous Federal actions, see Recovery, below. See *https://ecos.fws.gov/ecp/species/206* for the species profile for this plant.

## I. Proposed Reclassification Determination

### Background

*Species Information*

A thorough review of the taxonomy, life history, ecology, and overall viability of *Mitracarpus polycladus* is presented in the 5-year status reviews (Service 2011, entire; Service 2018a, entire). Below, we present a summary of the biological and distributional information described in the 5-year status reviews and new information published or obtained since.

*Taxonomy and Species Description*

*Mitracarpus polycladus* is a small shrub in the Rubiaceae family and the *Spermacoce* clade. This large family of flowering plants in the coffee family contains over 640 genera and 10,000 species with a mainly tropical distribution (Bremer 1996, p. 23). *Mitracarpus polycladus* was first collected in Puerto Rico in 1886 and described in 1903 as a new species (Urban 1903, p. 389; Lioger 1997, p. 124).

*Mitracarpus polycladus* is frequently confused with other genera of the *Spermacoce* clade, due to the similarity in morphological characters of herbarium specimens (Nuñez-Florentin *et al.* 2017, p. 96; Service 2018a, p. 22).

*Mitracarpus polycladus* may reach up to 45 centimeters (cm) (17.7 inches (in)) in height and its stems grow either erect

or along the ground (Proctor 1991, p. 127; Lioger 1997, p. 125). The leaves are smooth and narrow, approximately 2–4.5 cm (0.8–1.8 in) long and 0.3–0.5 cm (0.1–0.2 in) wide. The inflorescence is surrounded by three bract-like leaves on the ends of branches and is made up of smaller white flowers. The seed capsule is very small (1.5 millimeter (mm) (0.06 in) diameter) and contains black seeds (Proctor 1991, p. 127).

*Biology*

The reproductive biology of *Mitracarpus polycladus* had not been thoroughly studied at the time it was listed. Phenology of *M. polycladus* is closely related to the dry and rainy seasons. Flower production occurs just after the peak of rainfall, which may start as early as May and end as late as December, and seed availability occurs during the dry season, which is December to March (Service 2018a, p. 8). The species shows a large reproductive output after the rainy season (high number of seedlings) followed by a low number of mature adults counted during the next rainy season. Seed germination has been observed a few days after a rain event, producing numerous seedlings within 0.9 meter (m) (3 feet (ft)) surrounding mature plants, denoting a clumped spatial distribution (Service 2018b, p. 6). Seedlings and adults categories in our analysis are consistent with those used in recent survey reports (Service 2018b, p. 4).

The timing and spatial distribution of seedlings indicate the species produces viable seeds that stay in the soil seedbank until the next rain event (Service 2018b, p. 6). *Mitracarpus polycladus* colonizes on exposed limestone where aggregations of sediment and water provide necessary conditions for seed germination and seedling rooting (Medina *et al.* 2012, p. 203). Although a large number of seedlings (*e.g.,* 1,500 and 13,680 in 2011 and 2018, respectively) have been documented in Puerto Rico, seedling estimates are not included as part of the population abundance estimates because surveyors have been unable to determine seedling survival rates and effective recruitment (Service 2011, p. 24; Service 2018b, p. 8). Survival of seedlings to maturity is uncertain due to natural thinning of the seedlings and environmental variables (drought stress). High mortality of seedlings is observed during the driest period (Service 2018b, p. 8). Additionally, the clumping distribution of seedlings near the mature flowering plant is likely related to the lack of an animal dispersal agent (*e.g.,* bird, small mammal) to carry the seeds farther away. Experts conclude that seeds are dependent on water or wind as a dispersal mechanism, with seeds that are not dispersed by water or wind clumping near the mature plant (Buitrago-Soto 2002, p. 25; Service 2018a, p. 9).

We have little information about *Mitracarpus polycladus's* pollinators. However, two insect groups (Hymenopterous and Lepidopterous) have been identified as visiting *M. polycladus* flowers and may act as effective pollinators of the species (Monsegur 2017, unpublished data). During 2017, bee species *Apis mellifera, Megachile lanata,* and *M. rufipennis,* and the hanno blue butterfly (*Hemiargurs hanno watsoni*) visited *M. polycladus* plants (Monsegur 2017, unpublished data). Similar insects (*e.g.,* the Great Southern butterfly (*Ascia monuste*), honeybees, and the hanno blue butterfly) have been documented visiting *M. maxwelliae* and are understood to pollinate the species (Buitrago-Soto 2002, p. 34). Although further research on the *M. polycladus's* breeding system and reproductive biology is needed to confirm its pollinators, available information indicates the species is cross-pollinated by these insects. The observations of multiple insect groups visiting *M. polycladus* support our rationale for defining localities in the Guánica Commonwealth Forest (GCF) area as a single population as it is very likely that insect-facilitated cross-pollination is taking place.

*Distribution and Abundance*

*Mitracarpus polycladus* was known to occur only in Puerto Rico and on Saba Island in the Lesser Antilles at the time of listing (59 FR 46715; September 9, 1994). Although the species was discovered on Anegada Island in 1970, we were not aware of this occurrence at the time of listing (Service 2011, p. 9; Hamilton and Bárrios 2017, p. 1).

In Puerto Rico, *Mitracarpus polycladus* was first collected in 1886 on coastal rocks near Caña Gorda in the municipality of Guánica (Sintenis 1886, p. 1; Proctor 1991, p. 126). The species was first collected on Saba Island (approximate 289.6 kilometers (km) (180 miles (mi)) from the southeast coast of Puerto Rico) in 1906 (Bolding 1906, p. 1; Service 1998, p. 1). On Anegada Island, *M. polycladus* was first collected in 1970 on an area adjacent to Deep Bay (Woodbury 1970, p. 1). Anegada is approximately 144.8 km (90 mi) from the northeast coast of Puerto Rico (Hamilton 2016, p. 26).

When listed, *Mitracarpus polycladus* was known in Puerto Rico only from the Mesetas trail in the GCF (DNR 1976, pp. 56–58; 59 FR 46715, September 9, 1994). No abundance estimates were available for the species in Puerto Rico and no information was available on the status of the species on Saba Island. When the 1998 recovery plan was finalized, there was little information on *M. polycladus's* historical and current abundance, distribution, ecology, and reproductive biology. At that time, we described *M. polycladus* occurrences in Puerto Rico and Saba Island as two populations (Proctor 1991, p. 2; Service 1998, p. 2).

At the time of listing and in the subsequent 5-year status reviews, occurrences of *Mitracarpus polycladus* in Puerto Rico were referred to as localities, and the occurrences on Anegada and Saba Islands were referred to as populations due to their distant geographic location. This approach did not consider the species-specific characteristics of clumped spatial distribution, distance among localities, natural geographic barriers, or the species' need for cross-pollination. Additional information about *M. polycladus's* geographic and spatial distribution and biological and ecological aspects of the species' life history (*e.g.,* pollinators, seed dispersion, phenology) has since become available. We concluded that the following are natural physical barriers and preclude cross-pollination among populations and localities: coastal plains; dense, extensive forest patches; and bays. Connectivity among localities is important to maximize the likelihood of cross-pollination and gene flow, and to increase fruit production, viable seeds, and the chances of natural recruitment to support viable *M. polycladus* populations. Based on the factors described, we now identify three natural populations of *M. polycladus:* (1) Guánica forest in south Puerto Rico (composed of at least 10 localities within the GCF, which is managed for *M. polycladus* conservation, and adjacent lands that provide suitable habitat and connectivity); (2) Saba Island; and (3) Anegada Island. Additionally, a separate locality, Cerro Toro, resulted from a private translocation effort. This population is disjunct (no connectivity nor cross-pollination) from the GCF population; thus, we consider it a separate, introduced population.

Since the time of listing and the recovery plan development, new information on abundance and distribution has been gained through targeted surveys (Service 2007 and 2017, unpubl. data) and incidental observations. By 2011, seven *M.*

*polycladus* localities were documented within the GCF with an estimated abundance of 1,400 adult individuals in four localities with no occupied area estimated (Service 2011, pp. 8, 14). By 2018, 2 additional localities were documented within the GCF with an estimated 12,472 adult individuals in 9 localities in a 0.42-hectare (ha) (1.02 acres (ac)) area (Service 2018a, p. 22). The most recent abundance estimate is 17,637 adult individuals occupying 0.44 ha (1.1 ac) (Service 2018b, p. 9). These are underestimates of the population abundance and spatial extent as they did not include three natural localities due to time constraints. Because changes in the habitat have not been observed in the three localities, we expect the abundance (number) and spatial extent (ha) to be similar to the previous assessments. Therefore, the information from these three localities is unlikely to substantially change the estimates of abundance and extent of occupied area for the population; however, we recognize the potential for slight underestimation of the extent of areas with *M. polycladus* occurrences.

To date, 10 natural localities and 1 introduced locality comprise the Puerto Rico population; 8 of these are within the GCF and 3 are on private properties (Ballena beach, Cerro Toro, and Monte de la Ventana, which extends into the GCF). Based on the surrounding vegetation structure and the presence of exposed limestone observed in aerial images of the GCF, additional suitable habitat for the species has been identified and may contain unknown localities of *M. polycladus,* but it has not been quantified or surveyed. Therefore, we expect the species may extend beyond surveyed areas (Service 2018b, p. 8).

The increase in the number of localities recorded in Puerto Rico reflects additional survey efforts since the time of listing, while the increase in the number of individuals likely reflects the species' seasonal response to rain events (Service 2018b, p. 3). The species shows a large reproductive output after the rainy season (high number of seedlings) followed by a low number of mature adults counted during the next rainy season. Therefore, timing and seasonality of surveys affects abundance estimates.

On Saba Island, current information indicates the species occurs in several localities along the road between The Bottom and Windward Side towns in the southern section of the island (Rojer 1997, p. 19); however, no population estimate is available and the 1997 assessment does not include a population estimate. On Anegada Island, surveys for *M. polycladus* were conducted in 2015, 2016, and 2017 (Bárrios and Hamilton 2018, p. 3). Based on these data, the estimated population abundance is no more than 2,500 individuals in the north central region of the island between Windlass Point and Cooper Rock (Bárrios and Hamilton 2018, p. 4).

TABLE 1—CURRENT ABUNDANCE AND AREAL EXTENT OF *Mitracarpus Polycladus* PER LOCALITY IN PUERTO RICO

[Service 2018b, p. 9]

| Locality | Abundance (# of adult plants) | Area occupied ** in hectares/acres | Ownership |
|---|---|---|---|
| Caña Gorda | Undetermined | | Puerto Rico Department of Natural and Environmental Resources (Department). |
| Jaboncillo | Undetermined | | Department. |
| Mesetas Trail | 13,064 | 0.255/0.63 | Department. |
| Ballena Trail | 1,048 | 0.036/0.09 | |
| La Cueva | 310 | 0.016/0.04 | |
| Hoya Onda | 246 | 0.004/0.01 | |
| State road PR 333 | 653 | 0.028/0.07 | |
| Las Picuas | 336 | 0.024/0.06 | |
| Monte de la Ventana | 1,967 | 0.077/0.19 | Department and Private. |
| Ballena Beach | Undetermined | | Private. |
| Cerro Toro * | 13 | 0.004/0.01 | Private. |
| Total | 17,637 | 0.44/1.1 | |

* Introduced individuals.
** Area occupied reflects area surveyed by circular plots of 29.2 square meters (314 square feet) (Service 2018b, p. 3).

*Habitat*

Throughout its range in Puerto Rico, *Mitracarpus polycladus* occurs only on exposed limestone with sediment and water accumulation in holes and crevices. *M. polycladus* is restricted to geographical areas with unique substrate and climate features in dry forest habitat types that serve as corridors for pollinators and facilitate cross-pollination among *M. polycladus* localities within contiguous habitats. The species occurs among three major types of plant communities: coastal shrub forest, cactus scrub forest, and coastal scrub on sandy soil (DNR 1976, p. 53; Lugo *et al.* 1978, p. 282; Service 2018b, p. 11). Although these forest types cover about 582 ha (1,438 ac), or about 15 percent of the 3,882 ha (9,593 ac) GCF, (DNR 1976 p. 53; Lugo *et al.* 1978, p. 278), known occurrences of *M. polycladus* occupy only an area of 0.44 ha (1.1 ac), where the habitat and microhabitat features (*i.e.,* exposed limestone and aggregation of sediment and water) essential for the species are present (Service 2018b, p. 8). However, surveys have not been conducted throughout the suitable forest types; thus, the species may occur elsewhere within this area. All known *M. polycladus* localities in Puerto Rico fall in the subtropical dry forest life zone. This life zone occupies an area of 121,640 ha (300,576 ac) (Ewel and Whitmore 1973, p. 9) and is the driest life zone in Puerto Rico. It receives a mean annual rainfall of 60–100 cm (24–40 in), experiences high temperatures, and has high evapotranspiration when sufficient water is available (Murphy and Lugo 1986, p. 90; Cáceres-Charneco 2018, p. 27). The climate in this region is seasonal, with most precipitation occurring in September and October (Lugo *et al.* 1978, p. 278) and another small peak of rainfall in May and June (Sloan *et al.* 2006, p. 196; Cáceres-Charneco 2018, p. 28).

On Saba Island, the best available information indicates the species occurs on Gile's cherty sandy loam soil found between The Bottom and Windward Side towns. This arid section of the island is located in the south portion of

Saba Island (Rojer 1997, p. 19; Freitas *et al* 2016, p. 10). On Anegada Island, *Mitracarpus polycladus* currently grows on limestone plain and coastal sandy habitats located in the north-central area of this island where the species is restricted to two localities situated between Windlass Point and Cooper Rock (Bárrios and Hamilton 2018, p. 4). This area has similar environmental conditions and soil characteristics to *M. polycladus* localities in Puerto Rico.

*Recovery Criteria*

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Under section 4(f)(1)(B)(ii), recovery plans must, to the maximum extent practicable, include objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the Lists of Endangered and Threatened Wildlife and Plants.

Recovery plans provide a roadmap for us and our partners on methods of enhancing conservation and minimizing threats to listed species, as well as measurable criteria against which to evaluate progress towards recovery and assess the species' likely future condition. However, they are not regulatory documents and do not substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. A decision to revise the status of a species, or to delist a species, is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that information differs from the recovery plan.

There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria in a recovery plan being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and that the species is robust enough that it no longer meets the Act's definition of an endangered species or a threatened species. In other cases, we may discover new recovery opportunities after having finalized the recovery plan. Parties seeking to conserve the species may use these opportunities instead of methods identified in the recovery plan. Likewise, we may learn new information about the species after we finalize the recovery plan. The new information may change the extent to which existing criteria are appropriate for identifying recovery of the species. The recovery of a species is a dynamic process requiring adaptive management that may, or may not, follow all the guidance provided in a recovery plan.

The following discussion provides an analysis of the recovery criteria and goals as they relate to evaluating the status of the taxon. The recovery plan for *Mitracarpus polycladus* does not provide downlisting criteria (Service 1998, p. 8). In 2019, we published an amendment to the recovery plan that provides three revised criteria for delisting *M. polycladus* (Service 2019, p. 4). The three recovery criteria for delisting the species as outlined in the amendment are: (1) Threat reduction and management activities have been implemented to a degree that the species will remain viable into the foreseeable future; (2) existing natural populations of *M. polycladus* show a stable or increasing trend, as evidenced by natural recruitment and multiple age classes; and (3) within the historical range, at least three new populations of *M. polycladus* showing a stable or increasing trend have been established on lands protected by conservation measures, as evidenced by natural recruitment and multiple age classes (Service 2019, entire). Based on the information gathered and analyzed, two of these criteria have been partially met and the third has been initiated. The following discussion provides an assessment of the delisting criteria as they relate to evaluating the status of *M. polycladus.*

*Criterion 1 for Delisting*

Criterion 1 states that threat reduction and management activities have been implemented to a degree that the species will remain viable into the foreseeable future. This criterion has been partially met. Eighty-nine percent of the currently known *Mitracarpus polycladus* individuals in Puerto Rico occur within the GCF, which is managed for conservation by the Department as recommended by the Master Plan for the Commonwealth Forests of Puerto Rico (DNR 1976, p. 56). The management actions in the GCF protect *M. polycladus* from development activities and are compatible with the species' needs. In addition, *M. polycladus* is listed as critically endangered under Department regulations (DNRNA 2004, p. 52). Accordingly, the Department reviews all proposed actions in the GCF that may impact *M. polycladus* and its habitat within the forest. However the species is occasionally impacted by intense use of trails, human-caused fires, and nonnative invasive grasses encroaching on *M. polycladus* individuals and habitat. The species is also impacted by road maintenance activities (vegetation trimming) in 5 of the 11 localities where the species occurs (4 of these localities are within the GCF) (Service 2018b, p. 10). Each of the localities in the GCF has experienced some impact by one or more stressors including trail use, fires, nonnative invasive species, or road maintenance; these changes have resulted in loss of *M. polycladus* habitat available for the species. Although portions of the GCF localities have been impacted by these stressors, the threats do not have a substantive effect on the population and the protected and managed habitat in the GCF remains a stronghold for the species with the largest number of individuals and areal extent occurring along the Mesetas trail. Thus, although *M. polycladus* is legally protected in this forest, it is subject to actions that limit its abundance and distribution in impacted areas.

Two localities on private lands are subject to potential development pressure. The Ballena beach locality is subject to development pressure in the past with proposals for the development of a hotel in that area. Although this project has not been constructed to date, the threat remains. In Monte de la Ventana, development of a wind farm project is expected to affect the species. This project and the effects to *M. polycladus* are discussed under ''Urbanization and Development,'' below.

Evidence of fire has been recorded on or adjacent to *Mitracarpus polycladus* localities near State road PR 333 and GCF trails (Service 2018a, p. 27). Moreover, we have observed that *M. polycladus* does not colonize previously burned areas on the GCF (Service 2018b, p. 12). Therefore, fire can be a threat to species viability, as *M. polycladus* is endemic to dry limestone forest where vegetation did not evolve under a natural fire regime.

These threats of fire, development, nonnative and invasive species, and road and trail maintenance, coupled with competition with other plant species for specific habitat requirements such as holes and cracks for seed germination, and observed lack of dispersal mechanisms, reduce the species' ability to colonize other areas. Therefore, we determined that, while threat reduction and management activities at GCF have been implemented and have improved the species' viability, they have not been

implemented or improved viability to a degree that the species will maintain viability into the foreseeable future (criterion 1). Accordingly, this criterion has not been fully met.

*Criterion 2 for Delisting*

Criterion 2 states that existing natural populations of *Mitracarpus polycladus* show a stable or increasing trend, as evidenced by natural recruitment and multiple age classes. This criterion has been partially met. Since the time of listing, the number of individuals and localities reported for *M. polycladus* have increased. Now, approximately 17,624 adult *M. polycladus* individuals are distributed in 10 natural localities in Puerto Rico occupying 0.44 ha (1.1 ac), with documented recruitment as evidenced by numerous seedlings in close proximity to adult plants, particularly after rain events. However, existing data indicate that seedlings' survival is uncertain due to natural thinning and environmental stochasticity (drought stress). Despite this uncertainty, effective recruitment has occurred, and seedlings and saplings were noted in seven of eight localities in Puerto Rico during the 2018 assessment (Service 2018b, p. 9). Nonetheless, habitat modification caused by human-caused fires and subsequent encroachment of nonnative grasses has resulted in the loss of some clusters of individuals within a locality. Habitat modification and other threats, discussed below under Summary of Biological Status and Threats, may preclude the expansion of the species within known suitable habitats in Puerto Rico. The status and trend of *M. polycladus* populations on Anegada and Saba Islands, including recruitment, are currently unknown. Based on the uncertainty of population estimates and the lack of evidence of expansion into suitable habitat, we determined that a stable or increasing trend, as evidenced by natural recruitment and multiple age classes (criterion 2), has been met in Puerto Rico, but not on Saba or Anegada Islands. Accordingly, this criterion has been partially met.

*Criterion 3 for Delisting*

Criterion 3 states that at least three new populations of *Mitracarpus polycladus* showing a stable or increasing trend have been established within the historical range on lands protected by conservation, as evidenced by natural recruitment and multiple age classes. This criterion has been initiated. In Cerro Toro, an undetermined number of *M. polycladus* individuals were translocated from the Monte de la Ventana locality by the landowner to establish a new population of the species physically separated from the GCF population. As of 2018, 13 of the planted individuals were still alive (Service 2018b, p. 9; see table 1, above), but no recruitment (seedlings or saplings) was observed. However, this recovery effort has not been expanded. The Royal Botanic Gardens (Kew), in collaboration with the National Park Trust of the Virgin Islands, is propagating material from *M. polycladus* on Anegada Island, but no planting efforts have been implemented. No further efforts of translocations or propagation and reintroduction are currently known. Greater emphasis has been placed on the search for and protection of newly discovered localities in southern Puerto Rico. To increase *Mitracarpus polycladus's* redundancy and long-term viability, additional populations should be established through translocation and/or propagation throughout the species' range.

**Regulatory and Analytical 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 consider these same five factors in downlisting a species from endangered to threatened (50 CFR 424.11(c) and (d)).

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 species' expected response 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 we 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.

**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. In addition, the 5-year review (Service 2018a, entire) documents our comprehensive biological status review for the species, including an assessment of the potential threats to the species. The following is a summary of this status review and the best available information gathered since that time that have informed this decision.

*Habitat Alteration and Destruction*

Habitat destruction and modification (Factor A) were identified as factors affecting the continued existence of *Mitracarpus polycladus* at the time of listing. Road and trail maintenance, human-caused fire, nonnative and invasive species, urbanization and tourism development, and grazing continue to contribute to alteration of *M. polycladus* habitat and are described in detail below. Although changes to habitat conditions may affect pollinator abundance and distribution, we currently have no evidence that a loss of pollinators is occurring in *M. polycladus* habitat and expect that sufficient pollinators are present to cross-pollinate individuals if they occur within the flight distance of that pollinator species.

Road and Trail Maintenance

Currently, *Mitracarpus polycladus* grows adjacent to or along paved and unpaved roads, parking areas, and trails that provide access to recreational areas in seven localities in the dry southern section of the GCF (Service 2018b, p. 5). These roads and trails are managed by the Department as scenic trails and natural areas. However, management and maintenance activities, primarily vegetation trimming, have affected *M. polycladus* individuals in these areas (Service 2018b, p. 10). Similarly, the Puerto Rico Department of Transportation and Public Works right-of-way maintenance causes impacts to individuals and habitat in the State road PR 333 locality (Service 2018b, p. 10). Right-of-way maintenance activities have resulted in mortality of reproductive *M. polycladus* individuals in three localities and may reduce production of seeds and potential seedlings in these localities if the plants do not recover sufficiently to reproduce when conditions are suitable (Service 2018b, p. 10).

The largest cluster of *Mitracarpus polycladus* occurs adjacent to the Mesetas trail in GCF with 13,064 individuals occupying an area of 0.25 ha (0.63 ac). This trail is heavily used for recreation and is the only access to that section of the GCF. Therefore, roughly a quarter of the individuals along the trail in this locality are exposed to damage caused by trail maintenance and human trampling. Physical impacts to *M. polycladus* and its habitat are caused by the frequent use of the scenic trails and adjacent habitat in the GCF by residents and tourists for recreational activities (*i.e.,* hiking, running, and mountain biking) throughout the year (Service 2018a, p. 12). Such habitat impacts also promote the intrusion of nonnative grasses along the trail corridor. Nonnative grass encroachment along trails follows a similar pattern to encroachment following fire and is described below. The Anegada and Saba Island populations do not occur adjacent to trails or roads and effects of road and trail maintenance on the *M. polycladus* population in Puerto Rico are limited. Although over half of localities and several thousand individuals are exposed to the threat of road and trail maintenance, the number of individuals impacted by this threat does not have a substantive effect on the population.

Human-Caused Fire

Fires are not a natural event in the subtropical dry forests in Puerto Rico, and the native vegetation in the Caribbean is not adapted to this type of disturbance (Brandeis and Woodall 2008, p. 557; Santiago-García *et al.* 2008, p. 604). However, human-caused fires were identified as a threat to the species when listed (59 FR 46715; September 9, 1994) and continue to occur throughout *Mitracarpus polycladus* habitat in Puerto Rico (Service 2018a, p. 27). Currently, 6 of 10 natural localities of *M. polycladus* occur in areas vulnerable to or at high risk of human-caused fires, particularly during the dry season (Service 2018b, p. 10). Although the Department implements a fire prevention and management program in the GCF during the dry season, fires still occur and impact *M. polycladus* and its habitat (Service 2011, p. 13; Service 2018b, p. 11). Surveyors documented several fires along State road PR 333 that affected *M. polycladus* habitat and, consequently, could have affected an undetermined number of individuals (Service 2018b, p. 11).

Fire affects *Mitracarpus polycladus* survival through impacts of heat and promotion of intrusion of invasive plant species. Nonnative plant species outcompete *M. polycladus* and serve as fuel for fires (García-Cancel 2013, pp. 19, 33; Service 2018a, p. 27). The interaction of fire and nonnative species is described under ''Nonnative, Invasive Species,'' below. Moreover, *M. polycladus* has not been observed growing in areas with evidence of past fires (Service 2018b, p. 11). We expect this is due to the effects of fire on the seedbank, thus precluding the sprouting of the species and recolonization of an area from the seedbank after a fire.

Human-caused fires lead to the destruction of native vegetation by direct impacts to individuals and to the seedbank (which is not fire-adapted). Therefore, it is very likely that fires reduce or eliminate *Mitracarpus polycladus* seeds in the seedbank and promote favorable conditions for the establishment of nonnative plant species. These species, such as guinea grass, are adapted to a natural fire regime and serve as fuel for fires, thus promoting conditions for a more frequent fire regime that precludes the establishment of native vegetation (Thaxton *et al.* 2012, p. 9). The presence of guinea grass and other nonnative grass species (*e.g.,* pajón and buffel grass) increases the amount of fuel for the fire and the resultant intensity of the fire. This occurs in some areas of *M. polycladus* habitat in the GCF, where nonnative grasses are present and *M. polycladus* is not (García-Cancel 2013, entire; Service 2018b, p. 12). Therefore, in habitats subject to fire, lack of seed availability is the primary factor limiting the recolonization of the forest with native species and compromises the long-term viability of native species, including *M. polycladus* (Wolfe 2009, p. 28). Other factors such as seed predation, seed intrinsic viability, and seedling survival also affect forest recovery after fire. In this and other habitat types, fires promote habitat fragmentation, return habitat to an earlier successional state, and slow forest recovery processes (Brandeis and Woodall 2008, p. 557; Meddens *et al.* 2008, p. 569).

Fire negatively impacts *Mitracarpus polycladus* and its habitat, and the

capacity of the species to survive and recover from this type of catastrophic event over time is unknown. Moreover, *M. polycladus* occurs in areas with high vulnerability to fires, exacerbating the potential effects of fire on individuals and populations. The effects of climate change and nonnative invasive species may alter conditions in *M. polycladus* habitat to promote increased susceptibility to fire (as described under ''Nonnative, Invasive Species,'' below). Therefore, even with the Department's current fire prevention and management program efforts during the dry season, human-caused fires occur every year within the species' range. Fires in *M. polycladus* localities affect the survival and recruitment of individuals, population resiliency, and, potentially, the species' viability (Service 2018b, p. 11). Information regarding the threat of fire to the Anegada and Saba Island populations is less extensive than the information for Puerto Rico; however, we expect the threat of human-caused fire is similar since the Anegada and Saba Island populations also occur along roadsides.

Nonnative, Invasive Species

Caribbean dry forests generally have seedbanks with low numbers and variety of species, and forest regeneration in areas disturbed through mechanical vegetation removal or through burning is largely dependent on propagules or seeds from nearby habitats (Wolfe 2009, p. 28). Nonnative species typically become established more quickly and may have less specific habitat or life-history requirements than native species. When nonnative species become established in a disturbed habitat, they outcompete native species for resources including space, nutrients, water, and sunlight. The impacts of nonnative invasive species are second only to habitat loss and degradation as a threat to global biodiversity and are among the greatest threats to the persistence of native rare species and their habitats in Puerto Rico (Thomson 2005, p. 615, García-Cancel 2013, entire). Nonnative species like guinea grass, buffel grass, pajón, and African grass (*Heteropogon contortus*) aggressively colonize and compete with native species for sunlight, nutrients, water and ground cover (space), suppressing native vegetation (García-Cancel 2013, entire; Rojas-Sandoval and Meléndez-Ackerman 2016, p. 156; Service 2018b, p. 12). Research on other listed plant species such as *Harrisia portoricensis* indicates that seedlings and juveniles are particularly susceptible to changes in microclimate conditions, and establishment is precluded by the presence of nonnative grasses (Rojas-Sandoval and Meléndez-Ackerman 2012, pp. 35, 37; Rojas-Sandoval and Meléndez-Ackerman 2013, p. 489). This finding is consistent with observations indicating that *Mitracarpus polycladus* did not occur in areas occupied (or dominated) by these grasses at localities in the GCF (García-Cancel 2013, entire; Service 2018b, p. 12). Moreover, nonnative trees (*e.g.,* lead tree (*Leucaena leucocephala*)) also colonize *M. polycladus* habitat, particularly after fire events, and suppress the growth of native vegetation (Wolfe and Van Bloem 2012, entire). Lead trees can remain as a dominant canopy species for at least 80 years (Wolfe 2009, p. 2), thus precluding recolonization of *M. polycladus* for long periods. The wind-aided broad seed dispersal and rapid growth of nonnative grasses can also negatively affect the establishment and persistence of *M. polycladus.* In areas where *M. polycladus* is established, nonnative species do not appear to reduce habitat directly by displacing existing individuals, but primarily impact *M. polycladus* populations by preventing or reducing colonization by the species when the area is disturbed. In summary, nonnative invasive species outcompete *M. polycladus* for required resources, promote increased frequency and intensity of fire, and prevent establishment of seedlings, thus impacting *M. polycladus* at the individual, population, and, potentially, species level.

Urbanization and Development

As previously mentioned, 89 percent of the currently known *Mitracarpus polycladus* individuals in Puerto Rico occur within the GCF, which is managed for conservation by the Department (DNR 1976, p. 56). However, one *Mitracarpus polycladus* locality occurs within an area currently proposed for the construction of a wind generation project (San Francisco Wind Farm) in Monte de la Ventana. This project occupies 79 ha (195 ac) of dry forest habitat with 1,967 *M. polycladus* individuals in the project area (Service 2018b, pp. 1, 11). Ninety-six percent of *M. polycladus* individuals on the site occur on and adjacent to now-abandoned roads opened in 2013 to access the proposed wind project site. The remaining 4 percent of individuals occur in areas that would not be impacted by the project.

Since 2010, we have been working with the landowner on the development and implementation of conservation measures to avoid or minimize adverse effects on the species and its habitat caused by the proposed development of the wind farm project. This wind farm project is covered by an incidental take permit (ITP) under a habitat conservation plan (HCP) that includes conservation measures to minimize adverse effects to listed species in the project area (Service 2013, p. 3). Although a substantial portion of this property is identified as a conservation area under the HCP, the conservation areas do not include habitat for *Mitracarpus polycladus* (Service 2013, p. 3). *Mitracarpus polycladus* is vulnerable to effects from the wind farm project operations because the species usually grows in open areas (*e.g.,* dirt roads and wind turbine pads in the project area), exposing it to impacts from maintenance activities, vehicle traffic, and habitat encroachment by nonnative invasive plants. To date, this wind farm project has not been constructed, but we have no indication that it is not being actively considered.

The Ballena beach locality has been subject to development pressure in the past with proposals for the development of a hotel in that area. Although this hotel development project has not been constructed, we do not have evidence it will not be pursued in the future.

*Mitracarpus polycladus* occurrences on Anegada and Saba Islands are also threatened by development. On Anegada Island, the potential for island-wide development exists, with local community support and road improvement works now underway (Hamilton 2016, p. 185). Anegada Island has been recognized by its government as an undeveloped island with high potential for tourism development due to the beauty of its natural resources (sandy beaches and coral reefs). In 2007, the Government of Anegada, under the authority of the Physical Planning Act No.15 of 2004 (enacted in March 2005), developed a Land Use Plan (Plan) designating areas for commercial and residential purposes, as well for hotel development, agriculture, community parks and recreational areas, a business district, protection and conservation, and government offices and related facilities (IRF 2013, p. 24). The Plan proposes to set aside some areas for conservation (IRF 2013, p. 25); however, the proposed areas do not contain *M. polycladus* or the habitat it requires. If the Plan is enacted fully, we expect *M. polycladus* and its habitat to be reduced or eliminated by the proposed development of the island. Although urbanization and development plans for Saba Island are unknown, the potential for urbanization and tourism development is present.

Grazing

On Anegada and Saba Islands, *Mitracarpus polycladus* habitat has been degraded by the grazing of feral livestock, such as goats and donkeys (Freitas *et al* 2016, p. 21; Bárrios and Hamilton 2018, p. 5; Hamilton 2020, pers. comm.). Livestock presence and grazing leads to an increase in soil erosion by disturbing soil with their hooves while foraging on the slopes, as has been observed on Saba Island (Freitas *et al.* 2016, p. 21). These animals also trample *M. polycladus* individuals, reduce its abundance, and affect the population structure. The best available information indicates feral livestock grazing may impact the species, although the extent of these impacts in the future is unclear.

In summary, impacts associated with habitat destruction and modification due to vegetation clearance for maintenance and improvement activities of roads and trails, urbanization and tourism development, human-caused fires, and encroachment of nonnative plant species have been documented as current threats to *Mitracarpus polycladus* throughout its range. In Puerto Rico, although about 89 percent of *M. polycladus* individuals occur within the GCF, the species and its habitat are still threatened by impacts from vegetation maintenance (trimming) along roads and trails, frequent human-caused fires, and encroachment of nonnative and invasive species after such disturbances. Human-caused fires have been documented in *M. polycladus* habitat even when fire management practices are implemented during the dry season. The remaining 11 percent of the individuals occur on private lands, not managed for conservation, where habitat destruction and modification resulting from road clearing and wind farm development and operation pose a threat to the species. All *M. polycladus* individuals on Saba Island and Anegada Island occur on private lands and are not purposefully managed for conservation. Occurrences on Saba island are subject to threats of grazing and human-induced fire, and potentially to the threat of urbanization and development. Anegada Island's *M. polycladus* are at risk due to grazing, urbanization and development, and human-induced fire.

*Limited Distribution and Small Population Size*

At the time of listing, we identified the species' limited distribution (*i.e.,* two isolated populations known at that time) coupled with an undetermined but presumably low number of individuals (*i.e.,* no abundance information was available, combined with ongoing drought conditions at the time) as the primary threats to the species. Since listing, our knowledge concerning *Mitracarpus polycladus's* abundance and distribution has improved, and we are aware of increased numbers and occurrences throughout the southern section of the GCF (Service 2018a, p. 22). Currently, there are three known natural populations (Puerto Rico, Saba Island, Anegada Island) and one introduced population occurring on three Caribbean islands across the species' historical range. The species is restricted to small clusters on exposed limestone, occupying a total area of 0.44 ha (1.1 ac) in southern Puerto Rico (no areal extent is estimated for the populations on Anegada and Saba Islands). The limited distribution of the four populations makes *M. polycladus* vulnerable to catastrophic events (*e.g.,* widespread and severe drought and large-scale fires).

Small population size can exacerbate other threats acting on the species. Most species' populations fluctuate naturally, responding to various factors such as weather events, disease, and predation. These factors have a relatively minor impact on a species with large, stable local populations and a wide and continuous distribution. However, populations that are small, isolated by habitat loss or fragmentation, or impacted by other factors are more vulnerable to extirpation by natural, randomly occurring events (such as predation or stochastic weather events), and to genetic effects that plague small populations, collectively known as small population effects (Purvis *et al.* 2000, p. 1947). These effects can include genetic drift, founder effects (over time, an increasing percentage of the population inheriting a narrow range of traits), and genetic bottlenecks leading to increasingly lower genetic diversity, with consequent negative effects on adaptive capacity and reproductive success (Keller and Waller 2002, p. 235).

The Mesetas trail locality in GCF, the most abundant locality with 13,064 adults, is numerically strong; the remaining 9 natural localities on Puerto Rico are smaller localities with varying degrees of connectivity and cross-pollination between localities. The information regarding *M. polycladus* populations on Anegada and Saba Islands is more limited than that regarding the Puerto Rico population. Based on the best available information for Anegada and Saba Islands, these populations are currently small (2,500 on Anegada Island and unknown abundance on Saba Island) and in a few localities with limited distribution.

*Effects of Climate Change and Sea Level Rise*

The Intergovernmental Panel on Climate Change (IPCC) concluded that evidence of warming of the climate system is unequivocal (IPCC 2014, pp. 2, 40). Observed effects associated with climate change include widespread changes in precipitation amounts, increased extreme weather events including droughts, heavy precipitation, heat waves, more intense tropical cyclones, and an increase in sea level (IPCC 2014, pp. 40–44). Rather than assessing climate change as a single threat in and of itself, we examined the potential consequences to the species and its habitat that arise from changes in environmental conditions associated with various aspects of climate change (temperature, precipitation, and sea level rise). Climatic changes may affect the phenology, abundance, and distribution of many species (Walther *et al.* 2002, p. 394). Thus, vulnerability to climate change impacts can be defined as a function of sensitivity, exposure, and adaptive capacity of the species to those changes (IPCC 2007, pp. 6, 21; Glick and Stein 2010, p. 19).

The IPCC-modelled scenarios for the Caribbean islands predict precipitation declines, sea level rise, stronger and more frequent extreme weather events, and temperature increases by 2050 (Penn 2010, p. 45; Khalyani *et al.* 2016 p. 265; Gould *et al.* 2018, p. 813; Strauss and Kulp 2018, p. 3; USGCRP 2018, p.136). We examined a downscaled model for Puerto Rico and the British Virgin Islands based on global emissions scenarios from the Climate Model Intercomparison Project (CMIP3) dataset. The more current CMIP5 dataset was not available for the species' range at the time of analysis. The Special Report on Emissions (SRES) scenarios using the CMIP3 dataset are generally comparable to the more recent representative concentration pathways (RCP) scenarios from RCP4.5 (SRES B1) to RCP8.5 (SRES A2) (Lorde 2011, entire; IPCC 2014, p. 57; Khalyani *et al.* 2016, pp. 267, 279–280). Under both scenarios, emissions increase, precipitation declines, and temperature and total dry days increase, resulting in extreme drought conditions that convert subtropical dry forest into dry and very dry forest (Khalyani *et al.* 2016, p. 280).

Modeling shows dramatic changes to Puerto Rico through 2100; however, the divergence in these projections increases after mid-century (Khalyani *et al.* 2016, p. 275). By 2050, Puerto Rico is predicted to be subject to a decrease

in rainfall, along with increased drought intensity (Khalyani *et al.* 2016 p. 265; USGCRP 2018, p.136). As precipitation decreases, influenced by warming, it will tend to accelerate the hydrological cycles, resulting in wet and dry extremes (Cashman *et al.* 2010, pp. 1, 51, 53; Jennings *et al.* 2014, pp. 1, 5–6). A reduction in precipitation in the subtropical dry forests, where rain events are already limited, will affect *Mitracarpus polycladus* viability through reduced seed viability and result in increased seedling mortality. Droughts compromise seedling recruitment as evidenced following dry periods, when seedling and adult mortality is the highest and other individuals show partial die-off (Service 2018b, p. 8). In fact, under experimental conditions, the germination and survival of seedlings of the closely related *M. maxwelliae* were negatively affected by reduced soil moisture (Buitrago-Soto 2002, p. 25). There are indications that the southern region of Puerto Rico, where *M. polycladus* occurs, has experienced negative trends in annual rainfall. Between 2000 and 2016, Puerto Rico had seven drought episodes concentrated around the south, east, and southeastern regions of the island. The most severe drought occurred between 2014 and 2016 when Puerto Rico experienced 80 consecutive weeks of moderate drought, 48 weeks of severe drought, and 33 weeks of extreme drought conditions (Alvarez-Berríos *et al.* 2018, p. 1). Prolonged dry seasons may represent a bottleneck for seedlings and promote changes in the composition of recruits of plant species (Allen *et al.* 2017, p. 6). Additionally, prolonged droughts and associated changes in soil conditions (*i.e.,* temperature and soil humidity) would result in conditions promoting fire throughout *M. polycladus*'s range, impacting individuals and reducing seed viability, and therefore species' recruitment. Moreover, the absence of forest canopy on the exposed limestone substrate where *M. polycladus* occurs reduces suitable habitat conditions (*i.e.,* hydrology and moisture retention) that buffer the severity of stress resulting from environmental perturbations, such as droughts.

The IPCC global models and scenarios analyzed for the downscaled models apply to the Caribbean islands. Downscaled general circulation models predict dramatic shifts in the life zones of Puerto Rico with potential loss of subtropical rain, moist, and wet forest, and the appearance of tropical dry and very dry forests anticipated (Khalyani *et al.* 2016, p. 275). Some species may move to higher elevations in response to this shift in life zones; however, the extent of a species' ability to redistribute will depend on its dispersal capability and forest connectivity (Khalyani *et al.* 2019, p. 11). Due to the low dispersal capability of *Mitracarpus polycladus,* clumped spatial distribution, habitat requirements (exposed limestone), and the limited availability of the required habitat, a shift from dry to very dry forest is expected to affect species' viability because of a lack of suitable habitat and the species' inability to move to suitable habitat. Based on the similarity of habitat and geographic proximity, the effects of climate change on Anegada and Saba Islands are expected to be similar to Puerto Rico as emissions increase, precipitation declines, and temperature and total dry days increase, resulting in extreme drought conditions that convert subtropical dry forest into dry and very dry forest (Khalyani *et al.* 2016, entire). In the subtropical dry forest habitat where *M. polycladus* occurs, climate change may impact the species through declines in natural recruitment and population expansion.

Sea level rise is another expected effect of climate change that may affect coastal communities and habitat in the Caribbean islands (Penn 2010, entire; Lorde 2011, entire; Strauss and Kulp 2018, p. 1). Integrated sea level rise projection and flood risk analysis predict floods reaching 0.5 m (1.64 ft) above current high tide levels will become common events throughout most of the Caribbean by 2050 (Strauss and Kulp 2018, p. 2). Other scenarios using RCP4.5 and 8.5 forecast that by mid-century, sea level is expected to increase by 0.24 m (0.8 ft) to 0.85 m (2.8 ft) (Church *et al.* 2013, p. 1182; Sweet *et al.* 2017, p. 75; Strauss and Kulp 2018, p. 14). Based on these sea level rise projections, coastal floods will negatively affect *Mitracarpus polycladus* habitat at or below the 1.0 m (3.3 ft) sea level near the coast or in areas with high coastal erosion through the effects of saltwater inundation. In Puerto Rico, *M. polycladus* occurs at elevations ranging from 1.5 m (5 ft) to 52 m (172 ft) from current sea level (Service 2018b, p. 5). On Saba Island, *M. polycladus* occurs at an elevation ranging from 12 m (40 ft) to 335 m (1,100 ft) (Rojer 1997, p. 19; Freitas *et al* 2016, p. 10). On Anegada Island, *M. polycladus* occurs at elevations ranging from 1 m (3.2 ft) to 8 m (26 ft) from current sea level (Barrios 2021, pers. comm.; Hamilton 2021, pers. comm.). Across the range, the only known locality in an area with potential to be affected by flooding and sea level rise is the Windlass site on Anegada Island (approximately 200 *M. polycladus* individuals). The Windlass site is located in the sandy and rocky areas on the northern coast of the island where the habitat is subjected to high energy wave and coastal erosion (Bárrios and Hamilton 2018, p. 5). *Mitracarpus polycladus* individuals occur in elevations higher than those we expect to be impacted by sea level rise on Puerto Rico, Saba Island, and other localities on Anegada Island. Based on predicted sea level rise and the elevation where most individuals occur, we determined sea level rise does not pose a threat to the species in the foreseeable future. Nevertheless, sea level rise may indirectly impact the species, particularly on Anegada Island, through development associated with displacement of the human population from coastal areas to inland and urban areas where individuals of *M. polycladus* occur (Penn 2010, pp. 21, 249; Hamilton 2016, p. 101).

In summary, other natural and human-caused factors, such as the limited distribution of the three known natural populations and the effects of climate change (*i.e.,* decreased rainfall, severe droughts, and shift in life zones), are current threats to *Mitracarpus polycladus.* The threats to the species will be exacerbated by the expected changes in climatic conditions by 2050. We expect the projected changes in habitat and microhabitat conditions of temperature and rainfall will have negative effects on *M. polycladus.* The ecology of *M. polycladus* appears closely linked to specific current climatic conditions of rain seasonality and drought periods. By 2050, sea level rise is expected to affect the Caribbean islands, including Puerto Rico, Anegada Island, and Saba Island. We do not expect significant effects to *M. polycladus* from sea level rise, although one coastal locality on Anegada Island has the potential to be affected. Overall, the effects of a changing climate on *M. polycladus* will be exacerbated by the relatively low number of populations and habitat degradation and fragmentation, which can affect the future viability of the species.

*Conservation Efforts and Regulatory Mechanisms*

In the final listing rule (59 FR 46715; September 9, 1994), we identified the inadequacy of existing regulatory mechanisms as one of the factors affecting the continued existence of *Mitracarpus polycladus.* At that time, the species had no legal protection, because it had not been included in Puerto Rico's list of protected species.

After *M. polycladus* was listed under the Act, the Commonwealth designated the species as endangered in 2004 (DRNA 2004, p. 56).

Presently, *Mitracarpus polycladus* is legally protected under Commonwealth Law No. 241–1999 (title 12 of the Laws of Puerto Rico at sections 107–107u), known as *Nueva Ley de Vida Silvestre de Puerto Rico* (New Wildlife Law of Puerto Rico). The purpose of this law is multifaceted: to protect, conserve, and enhance both native and migratory wildlife species; to declare as property of Puerto Rico all wildlife species within its jurisdiction; to regulate permits and hunting activities; and to regulate exotic species, among other activities. This law also has provisions to protect habitat for all wildlife and plant species. In 2004, the Department approved Regulation 6766 or *Reglamento para Regir el Manejo de las Especies Vulnerables y en Peligro de Extinción en el Estado Libre Asociado de Puerto Rico* (Regulation 6766: To govern the management of threatened and endangered species in the Commonwealth of Puerto Rico). Article 2.06 of Regulation 6766 prohibits collecting, cutting, and removing, among other activities, listed plant individuals within the jurisdiction of Puerto Rico (DRNA 2004, p. 11). The provisions of Commonwealth Law No. 241–1999 and Regulation 6766 extend to private lands.

*Mitracarpus polycladus* that occur in the GCF are further protected under Commonwealth Law No. 133–1975 (title 12 of the Laws of Puerto Rico at sections 191–204), known as *Ley de Bosques de Puerto Rico* (Forest Act of Puerto Rico), as amended in 2000. Section 8(a) of this law prohibits cutting down, killing, causing the deterioration of, bud pruning, uprooting, or otherwise injuring or deteriorating any tree or vegetation within a Commonwealth forest without authorization of the Department Secretary (title 12 of the Laws of Puerto Rico at section 198). The Department also identified the GCF as a Critical Wildlife Area. The designation is intended to provide information to Commonwealth and Federal agencies about the conservation needs of these areas, and assist permitting agencies in precluding adverse impacts as a result of project endorsements or permit approvals (DNR 2005, pp. 211–216).

Although there are legal mechanisms in place (*e.g.,* laws or regulations) for the protection of *Mitracarpus polycladus,* the enforcement of such mechanisms on private and public land is sometimes challenging. For example, accidental damage by cutting, pruning, mowing, or trampling, or even loss of *M. polycladus* individuals, may occur when land managers or private landowners are not aware it is a protected species. Land managers, landowners, and law enforcement officers are not always aware of the localities occupied by the species throughout its range or may have difficulty correctly identifying the plant (Service 2018b, p. 10). Therefore, limited public awareness of the species and its status exacerbates the challenge of implementation of existing laws and regulations and affects conservation of *M. polycladus* and its habitat.

On Anegada Island, various conservation and education efforts are taking place for the protection of rare plant and animal species (Gardner *et al.* 2008, entire; IRF 2013, p. 29). However, we are unaware of any formal regulatory mechanism that protects *Mitracarpus polycladus* on Anegada Island. Similarly, no terrestrial areas on Saba Island are legally protected (Geelhoed *et al.* 2013, p. 12). A draft Island Nature Protection Ordinance must be approved by each island's government in the former Netherlands Antilles to facilitate the creation of island-specific conservation legislation (Collier and Brown 2008, p. 259). This process is ongoing within the Saba Island government, but to our knowledge, no current legislation is in place for the designation of terrestrial protected areas or conservation of species.

Outside of the protections provided by the Act, as previously indicated, the Commonwealth of Puerto Rico legally protects *Mitracarpus polycladus* as an endangered species, including protections to its habitat, through Commonwealth Law No. 241–1999 and Regulation 6766, which prohibit collecting, cutting, and removal, among other actions, of listed plants. If this species is reclassified as a threatened species under the Act, we do not expect this species to be removed from legal protection by the Commonwealth. Although these protections extend to both public and private lands, as discussed above, protection of this species is challenging. *Mitracarpus polycladus* habitat on private land is subject to pressures from urbanization and tourism development. Additionally, accidental damage or loss of individuals has occurred because public land managers, private landowners, or other parties may not be aware that it is a protected species. Nevertheless, this plant is now more abundant, is widely distributed, and largely occurs within conserved lands. Despite the existing regulatory mechanisms and conservation efforts, the threats discussed above are still affecting the species to the extent that it does not meet the criteria for delisting. However, additional opportunities exist to engage the public and provide information about *M. polycladus* and support the enforcement of existing protective mechanisms.

*Summary*

We have carefully assessed the best scientific and commercial information available regarding the threats faced by *Mitracarpus polycladus* in developing this proposed rule. Limited distribution and a low number of individuals were considered a threat to *M. polycladus* when we listed the species in 1994, but recent information indicates the species is more abundant and widely distributed than was known at the time of listing and most individuals occur in protected lands where threats, although they still occur, are reduced. We determined that habitat destruction and modification (*e.g.,* vegetation clearance with trail and road maintenance activities, human-caused fires, encroachment by nonnative and invasive species, urbanization and tourism development), as well as other natural or manmade factors such as limited distribution and the effects of climate change, will continue to pose threats to *M. polycladus* populations over the foreseeable future.

Species viability, or the species' ability to sustain populations over time, is related to the species' ability to withstand catastrophic events (redundancy), to adapt to changing environmental conditions (representation), and to withstand stochastic disturbance of varying magnitude and duration (resiliency). The viability of a species is also dependent on the likelihood of new stressors or continued threats, now and in the future, that act to reduce a species' redundancy, representation, and resiliency.

We evaluated the biological status of this species, both currently and into the future, considering the species' viability as characterized by its resiliency, redundancy, and representation. *Mitracarpus polycladus* has demonstrated some level of resiliency to natural and anthropogenic disturbances in the past. Adult individuals have overcome disturbances such as droughts and habitat modification, road and trail maintenance, and fires. However, seedlings are susceptible to the effects of drought and to the invasion of nonnative plant species after fire events. The lack of or reduced seedling recruitment can affect population demographics and long-term viability of the species.

For *Mitracarpus polycladus* to maintain viability, populations, or some portion thereof, must be sufficiently resilient. Resiliency describes the ability of population to withstand stochastic events (arising random factors). We can measure resiliency based on metrics of population health: for example, birth versus death rates and population size. For this proposed rule, our classification of resiliency relies heavily on the biology of the species and habitat characteristics in the absence of highly certain population size or trend estimates.

We broadly define categories of resiliency for *M. polycladus* populations by assessing demographic and habitat parameters and anchor these categories in the species' needs and life-history characteristics. Important species' characteristics center on the species' seasonality, seedling mortality after drought, dispersal capability, and competition with nonnative grasses for space and resources. The demographic metrics we evaluated include abundance at localities and evidence of reproduction or recruitment. We assessed habitat characteristics, including the degree of habitat protection (or, conversely, development risk), extent of suitable habitat, connectivity to other localities, and vulnerability to threats. A population may not exhibit each characteristic of the category as defined, but most parameters known for the population fall into the resilience category. For example, a population that is described as highly resilient may have high abundance, high number of localities, good distribution of localities, and recruitment at most localities, but suitable habitat and connectivity may be limited.

TABLE 2—DEFINITIONS FOR MITRACARPUS POLYCLADUS POPULATION RESILIENCY CATEGORIES

| High | Moderate | Low |
|---|---|---|
| • Abundance is high;<br>• Number of localities is high, and they occupy a greater spatial extent within suitable habitat;<br>• Reproduction and recruitment are such that the population remains stable or increases;<br>• Abundant suitable habitat occurs outside known localities; and<br>• Connectivity occurs among most localities. | • Abundance is moderate;<br>• Number of localities is moderate, and they occupy a limited spatial extent within suitable habitat;<br>• Reproduction and/or recruitment is occurring at some localities;<br>• Recruitment and mortality are equal such that the population does not grow or the population trend is unknown;<br>• Some suitable habitat occurs outside known localities; and<br>• Connectivity occurs between at least two localities. | • Abundance is low;<br>• Number of localities is limited to one, and it occupies a very restricted spatial extent;<br>• No reproduction or recruitment is occurring;<br>• Mortality exceeds recruitment such that the population is declining;<br>• Limited or no suitable habitat occurs outside known locality; and<br>• There is no connectivity between localities (single locality population). |

Currently, three *Mitracarpus polycladus* natural populations are known from three islands in the Caribbean (*i.e.,* Puerto Rico, Anegada Island, and Saba Island). In Puerto Rico, many *M. polycladus* adult individuals occur in small clusters, and seedlings have been documented, particularly after rain events. Information from Anegada Island and Saba Island is very limited, making it difficult to determine the level of population resiliency. However, both of those populations of *M. polycladus* demonstrate some level of resiliency as they are still present on both islands and have presumably overcome historical disturbances of varying magnitude and duration, including habitat modification.

The short time it takes *M. polycladus* to reach reproductive size and the extent of seed production facilitates population-level resiliency. However, resiliency is limited by the small size of clusters of individuals, species' seasonality, low dispersal capacity, and high seedling mortality. We have no evidence that known *M. polycladus* clusters are expanding or colonizing suitable habitat away from roads and trails. The lack of expansion and colonization results in isolated clusters with an increased chance of reduced genetic variation due to genetic drift, potentially resulting in inbreeding depression and lower resiliency. In addition, *M. polycladus* has been displaced by nonnative, invasive species after habitat disturbance by fire, which further precludes the effective recruitment of the species. The *M. polycladus* population in Puerto Rico occurs on 0.44 ha (1.1 ac) of habitat in 10 naturally occurring and 1 introduced locality. Suitable habitat connects some, but not all, localities. Habitat protection and enhancement to increase connectivity between scattered localities in Puerto Rico is important to maximize the resiliency of the *M. polycladus* population. The Saba and Anegada Islands populations occur in limited areas as well and although the species has persisted in these locations, the population trend and extent are not known. Overall, the limited areal extent of *M. polycladus* contributes to its susceptibility to stochastic and catastrophic events. Based on these factors, we determined the Puerto Rico population currently exhibits moderate resiliency and the Anegada and Saba Islands populations exhibit unknown or likely low resiliency.

The species' viability is also affected by its ability to adapt to changing environmental conditions. We have no information on the genetic variability of *Mitracarpus polycladus* nor information on variation in adaptive life-history traits, and, therefore, we evaluated the species' ability to adapt based on its likelihood of maintaining the breadth of genetic diversity and gene flow. This species occurs in small patches of suitable habitat within subtropical dry forest in three islands of the Caribbean with little variation in habitat conditions between populations. Historically, genetic diversity may have contributed to the species' ability to adapt to changing conditions (to adapt or shift in place). We expect that the species has maintained some underlying genetic diversity, but as threats affect the species' viability in the future, this genetic diversity may be reduced, and the species will be less able to adapt. Currently, *M. polycladus* representation relies on the genetic contribution of only three disconnected and distinctive populations: Puerto Rico, Saba Island, and Anegada Island. In Puerto Rico, the natural population occurs in scattered clusters along approximately 5 miles of southwestern Puerto Rico coastline. Although on protected land, some localities are subject to human-caused fires and habitat encroachment by invasive grasses, which increase the distance between clusters and further affect cross-pollination. On Anegada

and Saba Islands, *M. polycladus* individuals are also clustered in a small area vulnerable to the effects of urbanization and development, as well as human-caused fires and encroachment by invasive grasses. Rangewide, all populations are vulnerable to the effects of climate change (*i.e.,* decreased rainfall, severe droughts, and shift in life zones), which could result in the extirpation of clusters of individuals and the loss of genetic representation.

The ability of the species to adapt is also a function of the level of gene flow between populations. The three populations are disconnected; thus, gene flow is limited to individuals within populations. Small, isolated populations are susceptible to the loss of genetic diversity, genetic drift, and inbreeding, which will affect the ability of the species to adapt to changing environmental conditions over time. At this time, the most updated information shows that the species' occurrences remain stable; thus, the species does not appear to be affected by genetic drift at present. However, gene flow is limited to individuals within populations due to the lack of connectivity that would allow cross-pollination among populations. As fragmentation increases, gene flow will be reduced further, and the populations will become more vulnerable to genetic drift and inbreeding, thereby reducing the species' ability to adapt to changing conditions. We determined *M. polycladus* representation is likely somewhat reduced from historical representation due to reduced or fragmented habitat conditions, but maintains moderate adaptive capacity for the species.

Lastly, the species' viability depends on its ability to withstand catastrophic events, which is a function of the number and distribution of *M. polycladus* populations. The more sufficiently resilient populations, and the wider the distribution of those populations, the more redundancy the species will exhibit. The number and distribution of localities in each population continue to occur in the same geographic area and are exposed to naturally occurring levels of catastrophic events. The primary catastrophic risks include drought and fire. These factors are expected to increase with the subtropical dry forest shifting to very dry forest habitat within the foreseeable future. Hence, we expect the risk of catastrophic events to increase in the foreseeable future. The species' largest population (Puerto Rico) is moderately resilient and the species now occurs in a wider rangewide distribution than was known historically; therefore, we have determined *M. polycladus* has maintained moderate species redundancy.

In summary, the current abundance of *Mitracarpus polycladus* has increased and some of the identified threats have decreased since listing in 1994. However, our analysis indicates that threats and stressors continue to affect the species. We based our analyses on biological factors, expert judgments regarding the consequences of interacting stressors to the species' viability, and our assessment of likely future habitat conditions.

## Determination of *Mitracarpus polycladus*'s 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 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. For a more detailed discussion on the factors considered when determining whether a species meets the definition of an endangered species or a threatened species and our analysis on how we determine the foreseeable future in making these decisions, please see Regulatory and Analytical Framework.

### *Status Throughout All of Its Range*

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we have determined that *Mitracarpus polycladus'* current viability is higher than was known at the time of listing (current abundance estimate of more than 20,000 adult individuals in three populations) and most individuals occur on protected lands where threats are reduced. Accordingly, we find that the species is not in danger of extinction and no longer meets the Act's definition of an endangered species.

At the time of listing, the known range of *Mitracarpus polycladus* consisted of an undetermined number of individuals located in a single population in southern Puerto Rico and from one record on Saba Island. The primary threats were habitat destruction and modification, inadequacy of existing regulatory mechanisms, and limited distribution (59 FR 46715, September 9, 1994, pp. 46716–46717). Currently, *M. polycladus* is known to occur in 11 localities within an areal extent of 0.44 ha (1.1 ac) in southern Puerto Rico and several localities on Saba Island and Anegada Island. In Puerto Rico, about 89 percent of the known *M. polycladus* individuals occur within the GCF, a forest managed for conservation by the Department in a manner compatible with *M. polycladus'*s needs and protected by Commonwealth regulations.

However, although now known to be more widespread and abundant than previously thought, the remaining 11 percent of individuals on Puerto Rico and individuals on Saba and Anegada Islands occur on private lands and are at risk due to habitat destruction and modification from wind farm projects, urbanization, and tourism development. Accidental damage to *M. polycladus* also occurs because private landowners and road and trail maintenance crews may not be aware it is a protected species or may not be able to identify it. Information from Puerto Rico also indicates that threats from human-caused fires, human trampling, and nonnative and invasive species are acting on *M. polycladus* on both public and private lands. Some of these threats could be more severe for the populations on private lands, since there are no fire management prevention practices implemented, making the species more vulnerable to impacts. On both Saba and Anegada Islands, the species also faces threats due to residential and commercial development and degradation due to uncontrolled grazing of feral livestock. Information from Anegada Island and Saba Island is very limited, making it difficult to determine the level of population resiliency; however, both populations demonstrate some level of resiliency as they are still present on both islands and have presumably overcome historical disturbances of varying magnitude and duration, including habitat modification. Thus, we determined the Puerto Rico population currently exhibits moderate resiliency and the resiliency of the Anegada and Saba Islands populations is unknown or likely low.

Furthermore, the species' distribution is wider than known at the time of listing, and the species' listing by the Commonwealth of Puerto Rico provides some level of protection to *Mitracarpus polycladus.* However, there continues to be concern about present or threatened destruction, modification, or curtailment of its habitat or range (specifically, maintenance of existing roads and trails, human trampling, human-caused fires, encroachment of

nonnative and invasive species after fires and other habitat modification activities, and urbanization and tourism development) (Factor A); and other natural or manmade factors affecting the continued existence of *Mitracarpus polycladus* throughout its range (specifically, limited distribution and the effects of climate change) (Factor E). The species is not affected by stressors related to overutilization. The best available information does not indicate that diseases are affecting the species or feral livestock are specifically targeting this species and consuming it. Despite the identification of these threats that currently continue to act upon the species, the species overall—and the Puerto Rico population in particular—appears sufficiently resilient to the current magnitude and scope of threats acting upon it.

In summary, *Mitracarpus polycladus* is distributed across a narrow range, but the number of localities within populations and environmental conditions have improved since the time of listing. Given the species' current resiliency and ability to withstand catastrophic events and adapt to changing conditions, the species is not currently in danger of extinction throughout its range. Therefore, we proceed with determining whether *M. polycladus* is threatened (*i.e.,* is likely to become endangered within the foreseeable future) throughout all of its range.

Based on biological factors and stressors to the species' viability, we determined 25 years to be the foreseeable future within which we can reasonably project threats and the species' response to those threats. The foreseeable future for the individual factors and threats varies. We reviewed available information including forest management plans, proposed development projects, and fire history within the range of the species, to inform our assessment of likely future levels for each threat. Projections out to the year 2050 predict increases in temperature and decreases in precipitation (Khalyani *et al.* 2016, pp. 274–275). However, divergence in temperature and precipitation projections increases dramatically after mid-century among climate change scenarios (Khalyani *et al.* 2016, p. 275), making late-century projections more uncertain. Therefore, our ability to reliably predict stressors associated with climate change is reduced beyond mid-century. In addition, observation of threats and the effects of those threats on the species since listing more than 25 years ago has given us a baseline to understand how threats described above may impact the species. For example, we have observed the effects of habitat destruction and modification (such as vegetation clearance for maintaining or improving trails and access roads, human trampling, human-caused fires, invasive species, and urban and tourist development), and climate change (predicted changes in temperature, increased droughts, and life zones shifting) on the species since its listing and can reliably predict the species' response to these threats.

The 25-year period includes multiple generations of the species and allows adequate time for impacts from conservation efforts or changes in threats to be observed through population responses. For example, this timeframe accounts for the species' reproductive biology, and thus the time required by multiple generations of *Mitracarpus polycladus* to reach a reproductive size and effectively contribute to the viability of the species. It accounts for reaching maturity, flowering, setting viable fruits and seeds, seed germination, and seedling survival and establishment, and allows environmental stochastic events such as severe drought periods to affect the species. Furthermore, the established timeframe provides an opportunity to analyze the implications of the Department's forest management actions, and existing laws and regulations to protect currently known populations.

Although population numbers and abundance of *M. polycladus* have increased and the species' occurrences appear stable, threats remain in magnitude, scope, and impact over time. Habitat destruction and modification, such as vegetation clearance for maintaining or improving trails and access roads, human trampling, human-caused fires, invasive species, and urban and tourist development (Factor A), and other natural or manmade factors such as the effects of climate change (Factor E) may limit the species' abundance and distribution of occurrences. Gene flow will continue to be limited to individuals within populations due to the lack of connectivity that would allow cross-pollination among populations; populations may become more vulnerable to genetic drift and inbreeding thereby reducing the species' ability to adapt to changing conditions. Although much of the Puerto Rico population occurs in the GCF, which is managed for conservation, actions that benefit the species will not eliminate the threats of trail maintenance, trampling, nonnative and invasive species, and human-caused fires and these threats are expected to continue to affect the species in the foreseeable future. Proposed urbanization and tourism development projects may be completed in the foreseeable future. Furthermore, under climate change projections, the risk of catastrophic drought and fire is expected to increase with the subtropical dry forest shifting to very dry forest habitat within the foreseeable future. The magnitude of effects associated with habitat destruction and modification and with climate change are expected to continue and potentially increase in the foreseeable future. Despite the existing regulatory mechanisms and conservation efforts, the threats discussed above are still affecting the species to the extent that it does not meet the criteria for delisting. Thus, after assessing the best available information, we conclude that *M. polycladus* is not currently in danger of extinction, but is likely to become in danger of extinction within the foreseeable future 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. The court in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Center for Biological Diversity*), 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 that the Service does not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Center for Biological Diversity,* we now

consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for *Mitracarpus polycladus,* we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered. Types of threats and levels of threats are more likely to vary across a species' range if the species has a large range rather than a very small natural range, such as *M. polycladus.* Species with limited ranges are more likely to experience the same types and generally the same levels of threats in all parts of their range.

For *Mitracarpus polycladus,* we considered whether the threats are geographically concentrated in any portion of the species' range at a biologically meaningful scale in the context of its small natural range. We examined the following threats: habitat loss and modification due to vegetation maintenance or trimming along roads and trails, human trampling, and urbanization and tourism development; human-caused fires; nonnative invasive plant species; the effects of climate change (prolonged droughts, expected shifts of life zones, and sea level rise); and synergistic and cumulative effects. We also considered whether these threats may be exacerbated by small population size and limited connectivity between populations. For detailed description of each threat, see Summary of Biological Status and Threats, above.

Habitat modification poses a threat to most of the 11 *Mitracarpus polycladu*s localities in Puerto Rico, as well as the populations on Saba and Anegada Islands. The *M. polycladus* populations on Puerto Rico, Anegada Island, and Saba Island experience threats of habitat degradation and modification due to vegetation clearance for maintenance and improvement of roads and trails, urbanization and tourism development, human-caused fires, and the subsequent encroachment of nonnative and invasive species. In addition, approximately 11 percent of *M. polycladus* individuals in Puerto Rico occur on private lands that are exposed to the threat of development more so than plants on protected lands. Moreover, the species' localities in Puerto Rico are distributed across a limited geographic area. Although climate change is expected to affect *M. polycladus* populations in the foreseeable future, we determined that climate change does not represent a current threat to the species; therefore, our assessment of the threat of climate change as a future threat is consistent with our ''threatened'' determination.

Small population size can exacerbate other threats acting on the species. The information regarding *Mitracarpus polycladus* populations on Anegada and Saba Islands is more limited than that regarding the Puerto Rico population. Based on the best available information for Anegada and Saba Islands, these populations are currently small or assumed to be small (2,500 on Anegada Island and unknown abundance on Saba Island) and in a few localities with limited distribution. Ten of the 11 localities on Puerto Rico also occur in clusters with low numbers of individuals that are isolated from other clusters, but the species is represented by a wider distribution on Puerto Rico than on Anegada and Saba Islands. Despite the rarity of *M. polycladus* on Anegada and Saba Islands, the species has demonstrated continued presence for decades in some localities. Although species' persistence does not equate with high resiliency or viability of a population or species, we expect *M. polycladus* populations to maintain resiliency in the future, despite ongoing threats. Therefore, small population size and low abundance in these localities, even when considered in the context of other threats, do not represent a concentration of threats at a biologically meaningful scale such that the species may be in danger of extinction in this portion. Based on our review of information and the synergistic effects of threats on Anegada and Saba Islands, this portion of the species' range does not provide a basis for determining that the species is in danger of extinction in a significant portion of its range.

Overall, we found that threats are likely acting on individuals or populations similarly across the species' range. These threats are certain to occur, and populations are facing the same extent of threats, even though certain populations may have fewer occurrences. We found no concentration of threats in any portion of *Mitracarpus polycladus'*s range at a biologically meaningful scale. Thus, there are no portions of the species' range where the species has a different status from its rangewide status. Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This does not conflict with the courts' holdings in *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018) and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not need to consider whether any portions are significant and, therefore, did not apply the aspects of the Final Policy's definition of ''significant'' that those court decisions held were invalid.

*Determination of Status*

Our review of the best available scientific and commercial information indicates that *Mitracarpus polycladus* meets the Act's definition of a threatened species. Therefore, we propose to reclassify *M. polycladus* as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

## II. Proposed Rule Under Section 4(d) 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. Because we are proposing to reclassify this species as a threatened species, the prohibitions in section 9 would not apply directly. We are, therefore, proposing below a set of regulations to provide for the conservation of the species in accordance with section 4(d) of the Act, which also authorizes us to apply any of the prohibitions in section 9 of the Act to a threatened species. The proposal, which includes a description of the kinds of activities that would or would not constitute a violation, complies with this policy.

## Background

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary shall issue such regulations as she deems necessary and advisable to provide for the conservation of species listed as threatened. The U.S. Supreme Court has noted that statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally,

the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to us when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife or include a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to [her] with regard to the permitted activities for those species. [She] may, for example, permit taking, but not importation of such species, or [she] may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

The provisions of this proposed 4(d) rule would promote the conservation of *M. polycladus* by encouraging management of the landscape in ways that meet both land management considerations and the conservation needs of *M. polycladus.* The provisions of this proposed rule are one of many tools that we would use to promote the conservation of *M. polycladus.* This proposed 4(d) rule would apply only if and when we make final the reclassification of *M. polycladus* as a threatened species.

**Provisions of the Proposed 4(d) Rule**

Exercising this authority under section 4(d) of the Act, we have developed a proposed rule that is designed to address *Mitracarpus polycladus'* specific threats and conservation needs. As discussed above under Summary of Biological Status and Threats, we have concluded that *Mitracarpus polycladus* is likely to become in danger of extinction within the foreseeable future primarily due to the present or threatened destruction, modification, or curtailment of its habitat or range (specifically, human-caused fires, nonnative and invasive species, and urbanization and tourism development); and other natural or manmade factors (specifically, the effects of climate change). Section 4(d) requires the Secretary to issue such regulations as she deems necessary and advisable to provide for the conservation of each threatened species and authorizes the Secretary to include among those protective regulations any of the prohibitions that section 9(a)(2) of the Act prescribes for endangered species. We find that, if finalized, the protections, prohibitions, and exceptions in this proposed rule as a whole satisfy the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of *M. polycladus.*

The protective regulations we are proposing for *Mitracarpus polycladus* incorporate prohibitions from section 9(a)(2) to address the threats to the species. Section 9(a)(2) prohibits the following activities for endangered plants: importing or exporting; certain acts related to removing, damaging, and destroying; delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce. These proposed protective regulations include all of these prohibitions for *M. polycladus* because the species is at risk of extinction in the foreseeable future and putting these prohibitions in place will help to protect the species' remaining populations, slow its rate of decline, and decrease synergistic, negative effects from other threats. For example, modifying the habitat of the species on Federal lands without authorization (*e.g.,* unauthorized opening of trails, etc.) would be considered a violation of this rule. Also, removing, cutting, digging up, or damaging or destroying of the species on any non-Federal lands in knowing violation of any law or regulation of the Territory or in the course of any violation of the Territory's criminal trespass law would be considered a violation. As a whole, the proposed 4(d) rule for this species would help in the efforts to recover *M. polycladus.*

In particular, this proposed 4(d) rule would provide for the conservation of *Mitracarpus polycladus* by prohibiting the following activities, unless they fall within specific exceptions or are otherwise authorized or permitted: importing or exporting; certain acts related to removing, damaging, and destroying; delivering, receiving, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce. The exceptions to the prohibitions would include all of the general exceptions to the prohibition against removing and reducing to possession endangered plants, as set forth in 50 CFR 17.61.

Despite these prohibitions regarding threatened species, we may under certain circumstances issue permits to carry out one or more otherwise-prohibited activities, including those described above. The regulations that govern permits for threatened plants state that the Director may issue a permit authorizing any activity otherwise prohibited with regard to threatened species (50 CFR 17.72). Those regulations also state that the permit shall be governed by the provisions of § 17.72 unless a special rule applicable to the plant is provided in §§ 17.73 to 17.78. Therefore, permits for threatened species are governed by the provisions of § 17.72 unless a species-specific 4(d) rule provides otherwise. However, under our recent revisions to § 17.71, the prohibitions in § 17.71(a) will not apply to any plant listed as a threatened species after September 26, 2019. As a result, for threatened plant species listed after that date, any protections must be contained in a species-specific 4(d) rule. We did not intend for those revisions to limit or alter the applicability of the permitting provisions in § 17.72, or to require that every species-specific 4(d) rule spell out any permitting provisions that apply to that species and species-specific 4(d) rule. To the contrary, we anticipate that permitting provisions would generally be similar or identical for most species, so applying the provisions of § 17.72 unless a species-specific 4(d) rule provides otherwise would likely avoid substantial duplication. Moreover, this interpretation brings § 17.72 in line with the comparable provision for wildlife at 50 CFR 17.32, in which the second sentence states that the permit shall be governed by the provisions of § 17.32 unless a special rule applicable to the wildlife, appearing in 50 CFR 17.40 to 17.48, provides otherwise. Under 50

CFR 17.72 with regard to threatened plants, a permit may be issued for the following purposes: For scientific purposes, to enhance propagation or survival, for economic hardship, for botanical or horticultural exhibition, for educational purposes, or for other activities consistent with the purposes and policy of the Act. Additional statutory exemptions from the prohibitions are found in sections 9 and 10 of the Act.

We recognize the beneficial and educational aspects of activities with seeds of cultivated plants, which generally enhance the propagation of the species and, therefore, would satisfy permit requirements under the Act. We intend to monitor the interstate and foreign commerce and import and export of these specimens in a manner that will not inhibit such activities, providing the activities do not represent a threat to the species' survival in the wild. In this regard, seeds of cultivated specimens would not be subject to the prohibitions above, provided that a statement that the seeds are of ''cultivated origin'' accompanies the seeds or their container (50 CFR 17.71(a)).

We recognize the special and unique relationship with our State and Territorial natural resource agency partners in contributing to conservation of listed species. State and Territorial agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State and Territorial agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist us in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Service shall cooperate to the maximum extent practicable with the States and Territories in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a Territorial conservation agency that is a party to a cooperative agreement with us in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve *Mitracarpus polycladus* that may result in otherwise prohibited activities without additional authorization.

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or our ability to enter into partnerships for the management and protection of *Mitracarpus polycladus.* However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between us and other Federal agencies, where appropriate. We ask the public, particularly State and Territorial agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested, above).

## Required Determinations

### *Clarity of This Proposed Rule*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

### *National Environmental Policy Act*

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with determining a species' listing status under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). We also determine that 4(d) rules that accompany regulations adopted pursuant to section 4(a) of the Act are not subject to the National Environmental Policy Act.

### *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 Tribes will be affected by this proposed reclassification.

## References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

## Authors

The primary authors of this proposed rule are the staff members of the Caribbean Ecological Services Field Office.

## List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

## Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

**Authority:** 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.12 in paragraph (h) amend the table by revising the entry for ''*Mitracarpus polycladus*'' under FLOWERING PLANTS in the List of Endangered and Threatened Plants to read as follows:

**§ 17.12 Endangered and threatened plants.**

* * * * *

(h) * * *

| Scientific name | Common name | Where listed | Status | Listing citations and applicable rules |
|---|---|---|---|---|
| Flowering Plants | | | | |
| * | * | * | * | * |
| *Mitracarpus polycladus* | No common name ..... | Wherever found ..... | T | 59 FR 46715, 9/9/1994; [**Federal Register** citation of final rule]; 50 CFR 17.73(l).[4d] |
| * | * | * | * | * |

■ 3. As proposed to be amended at 85 FR 58224 (September 17, 2020), 85 FR 61684 (September 30, 2020), 86 FR 18014 (April 7, 2021), 85 FR 66906 (October 21, 2020), 86 FR 3976 (January 15, 2021), 86 FR 33159 (June 24, 2021), and 86 FR 37091 (July 14, 2021), § 17.73 is further amended by adding paragraph (l) to read as follows:

**§ 17.73 Special rules—flowering plants.**

* * * * *

(l) *Mitracarpus polycladus* (no common name)

(1) *Prohibitions.* The following prohibitions that apply to endangered plants also apply to *Mitracarpus polycladus.* Except as provided under paragraph (l)(2) 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 cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth at § 17.61(b) for endangered plants.

(ii) Remove and reduce to possession the species from areas under Federal jurisdiction; maliciously damage or destroy the species on any such area; or remove, cut, dig up, or damage or destroy the species on any other area in knowing violation of any law or regulation of the Territory or in the course of any violation of a Territorial criminal trespass law.

(iii) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.61(d) for endangered plants.

(iv) Sale or offer for sale, as set forth at § 17.61(e) for endangered plants.

(2) *Exceptions from prohibitions.* In regard to this species, you may:

(i) Conduct activities as authorized by permit under § 17.72.

(ii) Remove, cut, dig up, damage, or destroy on areas not under Federal jurisdiction if you are a qualified employee or agent of the Service or Territorial conservation agency which is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, and you have been designated by that agency for such purposes, when acting in the course of official duties.

(iii) Engage in any act prohibited under paragraph (l)(1) of this section with seeds of cultivated specimens, provided that a statement that the seeds are of ''cultivated origin'' accompanies the seeds or their container.

**Martha Williams,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2022–13229 Filed 6–22–22; 8:45 am]

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# Notices

Federal Register
Vol. 87, No. 120
Thursday, June 23, 2022

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

**[Doc. No. AMS–FGIS–22–0034]**

### Solicitation of Nominations for Members of the USDA Grain Inspection Advisory Committee

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice to solicit nominees.

**SUMMARY:** The Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) is seeking nominations for individuals to serve on the USDA Grain Inspection Advisory Committee (Advisory Committee). The Advisory Committee meets no less than once annually to advise AMS on the programs and services it delivers under the U.S. Grain Standards Act (USGSA). Recommendations by the Advisory Committee help AMS better meet the needs of its customers who operate in a dynamic and changing marketplace.

**DATES:** AMS will consider nominations received before or on August 8, 2022.

**ADDRESSES:** Submit nominations for the Advisory Committee by completing form AD–755 and send via email as an attachment to: *Kendra.C.Kline@usda.gov.* Form AD–755 may be obtained via USDA's website: *https://www.usda.gov/sites/default/files/documents/ad-755.pdf.* For more information about the committee visit the Grain Inspection Advisory Committee website: *https://www.ams.usda.gov/about-ams/facas-advisory-councils/giac.*

**FOR FURTHER INFORMATION CONTACT:** Kendra Kline, Telephone (202) 690–2410 or Email *Kendra.C.Kline@usda.gov.*

**SUPPLEMENTARY INFORMATION:** As required by section 21 of the USGSA (7 U.S.C. 87j), as amended, the Secretary of Agriculture (Secretary) established the Advisory Committee on September 29, 1981, to provide advice to the AMS Administrator on implementation of the USGSA. As specified in the USGSA, no member may serve successively for more than 2 terms.

The Advisory Committee consists of 15 members, appointed by the Secretary, who represent the interests of grain producers, processors, handlers, merchandisers, consumers, exporters, and scientists with expertise in research related to the policies in section 2 of the USGSA (7 U.S.C. 74). While members of the Advisory Committee serve without compensation, USDA reimburses them for travel expenses, including per diem in lieu of subsistence, for travel away from their homes or regular places of business in performance of Advisory Committee service (see 5 U.S.C. 5703).

A list of current Advisory Committee members and other relevant information are available on the USDA website at: *https://www.ams.usda.gov/about-ams/facas-advisory-councils/giac.*

The grain industry that utilizes Official Inspection and Weighing services for barley, canola, corn, flaxseed, oats, rye, soybeans, sorghum, sunflower seed, triticale, wheat, and mixed grain is diverse. AMS is seeking nominations for the Advisory Committee that will reflect the diversity of the grain industry, including, but not limited to, grain producers, processors, handlers, merchandisers, consumers, exporters, and scientists. Therefore, when making recommendations for appointments, the industry must consider the diversity of the population served and the knowledge, skills, and abilities of the members to serve a diverse population.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and person with disabilities. USDA is an equal opportunity provider, employer, and lender.

The final selection of Advisory Committee members is made by the Secretary.

Date: June 17, 2022.

**Cikena Reid,**

*USDA Committee Management Officer.*

[FR Doc. 2022–13441 Filed 6–22–22; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

**[Doc. No. AMS–NOP–22–0042]**

### National Organic Standards Board; Meeting

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, as amended, the Agricultural Marketing Service (AMS), U.S. Department of Agriculture (USDA), is announcing a meeting of the National Organic Standards Board (NOSB). The NOSB assists the USDA in the development of standards for substances to be used in organic production and advises the Secretary of Agriculture on any other aspects of the implementation of the Organic Foods Production Act (OFPA).

**DATES:** An in-person meeting will be held October 25–27, 2022, from 8:30 a.m. to approximately 5:00 p.m. Pacific Time (PT) each day and will include a virtual broadcast. The NOSB will hear oral public comments via webinars on Tuesday, October 18, 2022, and

Thursday, October 20, 2022, from 12:00 p.m. to approximately 5:00 p.m. Eastern Time (ET). The deadline to submit written comments and/or sign up for oral comment is 11:59 p.m. ET, September 29, 2022.

**ADDRESSES:** The webinars are virtual and will be accessed via the internet and/or phone. Access information will be available on the AMS website prior to the webinars. The in-person meeting will take place at the Holiday Inn Sacramento Downtown—Arena, 300 J Street, Sacramento, California 95814, United States and may be broadcast virtually. Detailed information pertaining to the webinars and in-person meeting, including virtual viewing options, can be found at *https://www.ams.usda.gov/event/national-organic-standards-board-nosb-meeting-sacramento-ca-2022.*

**FOR FURTHER INFORMATION CONTACT:** Michelle Arsenault, Advisory Committee Specialist, National Organic Standards Board, USDA–AMS–NOP, 1400 Independence Avenue SW, Room 2642–S, STOP 0268, Washington, DC 20250–0268; Phone: (202) 997–0115; Email: *nosb@usda.gov.*

**SUPPLEMENTARY INFORMATION:** In accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 2 and 7 U.S.C. 6518(e), as amended, AMS is announcing a meeting of the NOSB. The NOSB makes recommendations to USDA about whether substances should be allowed or prohibited in organic production and/or handling, assists in the development of standards for organic production, and advises the Secretary on other aspects of the implementation of the Organic Foods Production Act, 7 U.S.C. 6501 *et seq.* NOSB is holding a public meeting to discuss and vote on proposed recommendations to USDA, to obtain updates from the USDA National Organic Program (NOP) on issues pertaining to organic agriculture, and to receive comments from the organic community. The meeting is open to the public. Registration is only required to sign up for oral comments. All meeting documents and instructions for participating will be available on the AMS website at *https://www.ams.usda.gov/event/national-organic-standards-board-nosb-meeting-sacramento-ca-2022.* Please check the website periodically for updates. Meeting topics will encompass a wide range of issues, including substances petitioned for addition to or removal from the National List of Allowed and Prohibited Substances (National List), substances on the National List that are under sunset review, and guidance on organic policies.

*Public Comments:* Comments should address specific topics noted on the meeting agenda.

*Written Comments:* Written public comments will be accepted on or before 11:59 p.m. ET on September 29, 2022, via *https://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments submitted after this date will be added to the public comment docket, but Board members may not have adequate time to consider those comments prior to making recommendations. NOP strongly prefers comments be submitted electronically. However, written comments may also be submitted (*i.e.,* postmarked) via mail to the person listed under **FOR FURTHER INFORMATION CONTACT** by or before the deadline.

*Oral Comments:* NOSB will hear oral public comments via webinars on Tuesday, October 18, 2022, and Thursday, October 20, 2022, from 12:00 p.m. to approximately 5:00 p.m. ET. Each commenter wishing to address the Board must pre-register by 11:59 p.m. ET on September 29, 2022, and can register for only one speaking slot. Instructions for registering and participating in the webinars can be found at *https://www.ams.usda.gov/event/national-organic-standards-board-nosb-meeting-sacramento-ca-2022.*

*Meeting Accommodations:* The meeting hotel is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under **FOR FURTHER INFORMATION CONTACT**. Determinations for reasonable accommodation will be made on a case-by-case basis.

Dated: June 17, 2022.

**Cikena Reid,**

*USDA Committee Management Officer.*

[FR Doc. 2022–13427 Filed 6–22–22; 8:45 am]

**BILLING CODE P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Tennessee Advisory Committee

**AGENCY:** Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that the Tennessee Advisory Committee to the Commission will hold a virtual (online) meeting on Wednesday, August 3, 2022, at 12:00 p.m.–1:30 p.m. (CT). The purpose of the meetings is for the Committee to discuss their project on Voting Rights in the state of Tennessee.

**DATES:** The meetings will be held on: Wednesday, August 3, 2022; 12:00 p.m. CT.

**ADDRESSES:** *https://civilrights.webex.com/civilrights/j.php?MTID=m4b847f2d0cba9881fc2d029418f86b0d.*

Join via phone 800–360–9505 USA Toll Free; Access Code: 2762 551 1582#.

**FOR FURTHER INFORMATION CONTACT:** Victoria Moreno at *vmoreno@usccr.gov* or by phone at 434–515–0204.

**SUPPLEMENTARY INFORMATION:** This meeting is available to the public through the WebEx link above. If joining only via phone, callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the call-in number found through registering at the web link provided above for the meeting.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the respective meeting. Written comments may be emailed to Victoria Moreno at *vmoreno@usccr.gov.* All written comments received will be available to the public.

Persons who desire additional information may contact the Regional Programs Unit at (202) 809–9618. Records and documents discussed during the meeting will be available for public viewing as they become available at the *www.facadatabase.gov.* Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Regional Programs Unit at the above phone number or email address.

**Agenda: Wednesday, August 3, 2022 (CT)**

1. Welcome & Roll Call
2. Committee Discussion
3. Public Comment
4. Adjourn

Dated: June 16, 2022.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2022–13390 Filed 6–22–22; 8:45 am]

BILLING CODE P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[S–99–2022]**

### Foreign-Trade Zone 21—Dorchester County, South Carolina; Application for Subzone; DMA Sales, LLC, Marion and Nichols, South Carolina

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the South Carolina State Ports Authority, grantee of FTZ 21, requesting subzone status for the facilities of DMA Sales, LLC, located in Marion and Nichols, South Carolina. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on June 16, 2022.

The proposed subzone would consist of the following sites: *Site 1* (25.81 acres) 202 Averette Street, Nichols; and, *Site 2* (14.63 acres) 1720 Wellman Road, Marion. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 21.

In accordance with the FTZ Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is August 2, 2022. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 17, 2022.

A copy of the application will be available for public inspection in the ''Online FTZ Information Section'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov.*

Dated: June 16, 2022.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2022–13392 Filed 6–22–22; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Sanctuary System Business Advisory Council; Public Meeting

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Notice of open public meeting.

**SUMMARY:** Notice is hereby given of a meeting of the Office of National Marine Sanctuaries' (ONMS) Sanctuary System Business Advisory Council. The meeting is open to the public. ONMS will provide an opportunity for oral and written comments.

**DATES:** The meeting will be held on Thursday, July 28, 2022, from 1 p.m. to 2 p.m. ET. The public will be provided with an opportunity to comment around 1:40 p.m. ET. The meeting times and agenda topics are subject to change. Up-to-date information about the meeting time and agenda topics can be found at *http://sanctuaries.noaa.gov/management/bac/meetings.html.*

**ADDRESSES:** The meeting will be held virtually using Google Meet. To participate, please use the weblink provided below. If you are unable to participate online, you can also connect to the public meeting using the phone number provided below.

*Weblink: meet.google.com/ysy-oxpf-grw.*

*Phone:* +1 575–448–410 PIN: 164 756 136 #.

Additional information, including instructions on how to join the meeting, can be found at *http://sanctuaries.noaa.gov/management/bac/meetings.html.* To provide an oral comment during the virtual public meeting, please sign up prior to or during the meeting by contacting Katie Denman by phone (240–533–0702) or email (*katie.denman@noaa.gov*). To provide a written comment, please send the comment to Katie Denman prior to or during the virtual meeting on July 28, 2022, via email (*katie.denman@noaa.gov*). Please note, the meeting will not be recorded. However, public comments, including any associated names, will be captured in the minutes of the meeting and will be maintained by ONMS as part of its administrative record, and may be subject to release pursuant to the Freedom of Information Act. By signing up to provide a public comment, you agree that these communications, including your name and comment, will be maintained as described here.

**FOR FURTHER INFORMATION CONTACT:** Katie Denman, Office of National Marine Sanctuaries, 1305 East West Highway, Silver Spring, Maryland 20910 (Phone: 240–533–0702; Email: *katie.denman@noaa.gov*).

**SUPPLEMENTARY INFORMATION:** ONMS serves as the trustee for a network of underwater parks encompassing more than 620,000 square miles (16,000 square kilometers) of marine and Great Lakes waters from Washington State to the Florida Keys, and from Lake Huron to American Samoa. The network includes a system of 15 national marine sanctuaries and Papahānaumokuākea and Rose Atoll marine national monuments. National marine sanctuaries protect our Nation's most vital coastal and marine natural and cultural resources, and through active research, management, and public engagement, sustain healthy environments that are the foundation for thriving communities and stable economies.

One of the many ways ONMS ensures public participation in the designation and management of national marine sanctuaries is through the formation of advisory councils. The Sanctuary System Business Advisory Council (council) has been formed to provide advice and recommendations to the Director of ONMS regarding the relationship between ONMS and the business community. Additional information on the council can be found at *https://sanctuaries.noaa.gov/management/bac/.*

*Agenda topics:* The meeting will include a discussion and vote on a proposed amendment to the current council charter and member updates. For a complete agenda, including times and topics, please visit *http://sanctuaries.noaa.gov/management/bac/meetings.html.*

*Authority:* 16 U.S.C. 1431, *et seq.*

**John Armor,**

*Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.*

[FR Doc. 2022–13375 Filed 6–22–22; 8:45 am]

BILLING CODE 3510–NK–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XC078]**

### Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

**ACTION:** Notice of issuance of Letter of Authorization.

**SUMMARY:** In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, notification is hereby given that a Letter of Authorization (LOA) has been issued to BHP Billiton Petroleum (GOM) Inc. for the take of marine mammals incidental to geophysical survey activity in the Gulf of Mexico.

**DATES:** The LOA is effective from the date of issuance through January 31, 2023.

**ADDRESSES:** The LOA, LOA request, and supporting documentation are available online at: *www.fisheries.noaa.gov/action/incidental-take-authorization-oil-and-gas-industry-geophysical-survey-activity-gulf-mexico.* In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

**FOR FURTHER INFORMATION CONTACT:** Kim Corcoran, Office of Protected Resources, NMFS, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:**

### Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively ''industry operators''), in Federal waters of the U.S. Gulf of Mexico (GOM) over the course of 5 years (86 FR 5322; January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and reporting of such taking. Under 50 CFR 217.186(e), issuance of an LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take authorized under the LOA is of no more than small numbers.

### Summary of Request and Analysis

BHP plans to conduct zero offset vertical seismic profile (VSP) survey within Green Canyon Block 564. See Attachment 5 of BHP's application for a map. BHP plans to use a 6-element, 1,500 cubic inch ($in^3$) airgun array. Please see BHP's application for additional detail.

Consistent with the preamble to the final rule, the survey effort proposed by BHP in its LOA request was used to develop LOA-specific take estimates based on the acoustic exposure modeling results described in the preamble (86 FR 5322, 5398; January 19, 2021). In order to generate the appropriate take number for authorization, the following information was considered: (1) survey type; (2) location (by modeling zone [1]); (3) number of days; and (4) season.[2] The acoustic exposure modeling performed in support of the rule provides 24-hour exposure estimates for each species, specific to each modeled survey type in each zone and season.

No VSP surveys were included in the modeled survey types, and use of existing proxies (*i.e.,* 2D, 3D NAZ, 3D WAZ, Coil) is generally conservative for use in evaluation of these survey types. Summary descriptions of these modeled survey geometries are available in the preamble to the proposed rule (83 FR 29212, 29220; June 22, 2018). Coil was selected as the best available proxy survey type for BHP's survey because the spatial coverage of the planned surveys is most similar to the coil survey pattern. For the planned survey, the source will be hung off of the drilling rig above the well. Approximately 26 shot stations are expected beneath salt, and up to 28 additional stations from base of salt, resulting in 270 maximum shots fired. The source will be stationary and thus cover no area. The coil survey pattern in the model was assumed to cover approximately 144 kilometers squared ($km^2$) per day (compared with approximately 795 $km^2$, 199 $km^2$, and 845 $km^2$ per day for the 2D, 3D NAZ, and 3D WAZ survey patterns, respectively). Among the different parameters of the modeled survey patterns (*e.g.,* area covered, line spacing, number of sources, shot interval, total simulated pulses), NMFS considers area

[1] For purposes of acoustic exposure modeling, the GOM was divided into seven zones. Zone 1 is not included in the geographic scope of the rule.

[2] For purposes of acoustic exposure modeling, seasons include Winter (December–March) and Summer (April–November).

covered per day to be most influential on daily modeled exposures exceeding Level B harassment criteria. Because BHP's planned survey is expected to cover no additional area as a stationary source the coil proxy is most representative of the effort planned by BHP in terms of predicted Level B harassment.

In addition, all available acoustic exposure modeling results assume use of a 72-element, 8,000 in$^3$ array. Thus, estimated take numbers for this LOA are considered conservative due to the differences in both the airgun array (6 elements, 1,500 in$^3$), and in daily survey area planned by BHP (as mentioned above), as compared to those modeled for the rule.

The survey is planned to occur for a maximum of 2 days in Zone 5. The survey may occur in either season. Therefore, the take estimates for each species are based on the season that has the greater value for the species (*i.e.,* winter or summer).

In this case, use of the exposure modeling produces results that are smaller than average GOM group sizes for multiple species (Maze-Foley and Mullin, 2006). NMFS' typical practice in such a situation is to increase exposure estimates to the assumed average group size for a species in order to ensure that, if the species is encountered, exposures will not exceed the authorized take number. However, other relevant considerations here lead to a determination that increasing the estimated exposures to average group sizes would likely lead to an overestimate of actual potential take. In this circumstance, the very short survey duration (two days) and relatively small Level B harassment isopleths produced through use of the 6-element, 1,500 in$^3$ airgun array (compared with the modeled 72-element, 8,000 in$^3$ array) mean that it is unlikely that certain species would be encountered at all, much less that the encounter would result in exposure of a greater number of individuals than is estimated through use of the exposure modeling results. As a result, in this case NMFS has not increased the estimated exposure values to assumed average group sizes in authorizing take.

Additionally, for some species, take estimates based solely on the modeling yielded results that are not realistically likely to occur when considered in light of other relevant information available during the rulemaking process regarding marine mammal occurrence in the GOM. Thus, although the modeling conducted for the rule is a natural starting point for estimating take, our rule acknowledged that other information could be considered (see, *e.g.,* 86 FR 5322, 5442 (January 19, 2021), discussing the need to provide flexibility and make efficient use of previous public and agency review of other information and identifying that additional public review is not necessary unless the model or inputs used differ substantively from those that were previously reviewed by NMFS and the public). For this survey, NMFS has other relevant information reviewed during the rulemaking that indicates use of the acoustic exposure modeling to generate a take estimate for certain marine mammal species produces results inconsistent with what is known regarding their occurrence in the GOM. Accordingly, we have adjusted the calculated take estimates for those species as described below.

Rice's whales (formerly known as GOM Bryde's whales) [3] are generally found within a small area in the northeastern GOM in waters between 100–400 m depth along the continental shelf break (Rosel *et al.,* 2016). Whaling records suggest that Rice's whales historically had a broader distribution within similar habitat parameters throughout the GOM (Reeves *et al.,* 2011; Rosel and Wilcox, 2014), and a NOAA survey reported observation of a Rice's whale in the western GOM in 2017 (NMFS, 2018). Habitat-based density modeling identified similar habitat (*i.e.,* approximately 100–400 m water depths along the continental shelf break) as being potential Rice's whale habitat (Roberts *et al.,* 2016), although a ''core habitat area'' defined in the northeastern GOM (outside the scope of the rule) contained approximately 92 percent of the predicted abundance of Rice's whales. See discussion provided at, *e.g.,* 83 FR 29212, 29228, 29280 (June 22, 2018); 86 FR 5322, 5418 (January 19, 2021).

Although it is possible that Rice's whales may occur outside of their core habitat, NMFS expects that any such occurrence would be limited to the narrow band of suitable habitat described above (*i.e.,* 100–400 m). BHP's planned activities will occur in water depths of approximately 4,187 ft in the central GOM. Thus, NMFS does not expect there to be the reasonable potential for take of Rice's whale in association with this survey and, accordingly, does not authorize take of Rice's whale through this LOA.

Killer whales are the most rarely encountered species in the GOM, typically in deep waters of the central GOM (Roberts *et al.,* 2015; Maze-Foley and Mullin, 2006). The approach used in the acoustic exposure modeling, in which seven modeling zones were defined over the U.S. GOM, necessarily averages fine-scale information about marine mammal distribution over the large area of each modeling zone. NMFS has determined that the approach can result in unrealistic projections regarding the likelihood of encountering killer whales.

As discussed in the final rule, the density models produced by Roberts *et al.* (2016) provide the best available scientific information regarding predicted density patterns of cetaceans in the U.S. GOM. The predictions represent the output of models derived from multi-year observations and associated environmental parameters that incorporate corrections for detection bias. However, in the case of killer whales, the model is informed by few data, as indicated by the coefficient of variation associated with the abundance predicted by the model (0.41, the second-highest of any GOM species model; Roberts *et al.,* 2016). The model's authors noted the expected non-uniform distribution of this rarely-encountered species (as discussed above) and expressed that, due to the limited data available to inform the model, it ''should be viewed cautiously'' (Roberts *et al.,* 2015).

NOAA surveys in the GOM from 1992–2009 reported only 16 sightings of killer whales, with an additional three encounters during more recent survey effort from 2017–18 (Waring *et al.,* 2013; *www.boem.gov/gommapps*). Two other species were also observed on less than 20 occasions during the 1992–2009 NOAA surveys (Fraser's dolphin and false killer whale [4]). However, observational data collected by protected species observers (PSOs) on industry geophysical survey vessels from 2002–2015 distinguish the killer whale in terms of rarity. During this period, killer whales were encountered on only 10 occasions, whereas the next most rarely encountered species (Fraser's dolphin) was recorded on 69 occasions (Barkaszi and Kelly, 2019). The false killer whale and pygmy killer whale were the next most rarely encountered species, with 110 records each. The killer whale was the species with the lowest detection frequency during each period over which PSO data were synthesized (2002–2008 and 2009–2015). This information qualitatively

[3] The final rule refers to the GOM Bryde's whale (*Balaenoptera edeni*). These whales were subsequently described as a new species, Rice's whale (*Balaenoptera ricei*) (Rosel *et al.,* 2021).

[4] However, note that these species have been observed over a greater range of water depths in the GOM than have killer whales.

informed our rulemaking process, as discussed at 86 FR 5322, 5334 (January 19, 2021), and similarly informs our analysis here.

The rarity of encounter during seismic surveys is not likely to be the product of high bias on the probability of detection. Unlike certain cryptic species with high detection bias, such as *Kogia* spp. or beaked whales, or deep-diving species with high availability bias, such as beaked whales or sperm whales, killer whales are typically available for detection when present and are easily observed. Roberts *et al.,* (2015) stated that availability is not a major factor affecting detectability of killer whales from shipboard surveys, as they are not a particularly long-diving species. Baird *et al.,* (2005) reported that mean dive durations for 41 fish-eating killer whales for dives greater than or equal to 1 minute in duration was 2.3–2.4 minutes, and Hooker *et al.,* (2012) reported that killer whales spent 78 percent of their time at depths between 0–10 m. Similarly, Kvadsheim *et al.,* (2012) reported data from a study of four killer whales, noting that the whales performed 20 times as many dives to 1–30 m depth than to deeper waters, with an average depth during those most common dives of approximately 3 m.

In summary, killer whales are the most rarely encountered species in the GOM and typically occur only in particularly deep water. While this information is reflected through the density model informing the acoustic exposure modeling results, there is relatively high uncertainty associated with the model for this species, and the acoustic exposure modeling applies mean distribution data over areas where the species is in fact less likely to occur. NMFS' determination in reflection of the data discussed above, which informed the final rule, is that use of the generic acoustic exposure modeling results for killer whales would result in high estimated take numbers that are inconsistent with the assumptions made in the rule regarding expected killer whale take (86 FR 5322, 5403; January 19, 2021).

In past authorizations, NMFS has often addressed situations involving the low likelihood of encountering a rare species such as killer whales in the GOM through authorization of take of a single group of average size (*i.e.,* representing a single potential encounter). See 83 FR 63268, December 7, 2018. See also 86 FR 29090, May 28, 2021; 85 FR 55645, September 9, 2020. For BHP's survey, use of the exposure modeling produces an estimate of one killer whale exposure. Given the foregoing discussion, it is unlikely that even one killer whale would be encountered during this 2-day survey, and accordingly, no take of killer whales is authorized through the BHP LOA.

Based on the results of our analysis, NMFS has determined that the level of taking authorized through the LOA is consistent with the findings made for the total taking allowable under the regulations. See Table 1 in this notice and Table 9 of the rule (86 FR 5322; January 19, 2021).

**Small Numbers Determination**

Under the GOM rule, NMFS may not authorize incidental take of marine mammals in an LOA if it will exceed ''small numbers.'' In short, when an acceptable estimate of the individual marine mammals taken is available, if the estimated number of individual animals taken is up to, but not greater than, one-third of the best available abundance estimate, NMFS will determine that the numbers of marine mammals taken of a species or stock are small. For more information please see NMFS' discussion of the MMPA's small numbers requirement provided in the final rule (86 FR 5322, 5438; January 19, 2021).

The take numbers for authorization, which are determined as described above, are used by NMFS in making the necessary small numbers determinations, through comparison with the best available abundance estimates (see discussion at 86 FR 5322, 5391; January 19, 2021). For this comparison, NMFS' approach is to use the maximum theoretical population, determined through review of current stock assessment reports (SAR; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and model-predicted abundance information (*https://seamap.env.duke.edu/models/Duke/GOM/*). For the latter, for taxa where a density surface model could be produced, we use the maximum mean seasonal (*i.e.,* 3-month) abundance prediction for purposes of comparison as a precautionary smoothing of month-to-month fluctuations and in consideration of a corresponding lack of data in the literature regarding seasonal distribution of marine mammals in the GOM. Information supporting the small numbers determinations is provided in Table 1.

TABLE 1—TAKE ANALYSIS

| Species | Authorized take [1] | Abundance [2] | Percent abundance |
|---|---|---|---|
| Rice's whale | 0 | 51 | n/a |
| Sperm whale | 53 | 2,207 | 2.4 |
| *Kogia* spp | [3] 20 | 4,373 | 0.5 |
| Beaked whales | 232 | 3,768 | 6.2 |
| Rough-toothed dolphin | 40 | 4,853 | 0.8 |
| Bottlenose dolphin | 189 | 176,108 | 0.1 |
| Clymene dolphin | 112 | 11,895 | 0.9 |
| Atlantic spotted dolphin | 76 | 74,785 | 0.1 |
| Pantropical spotted dolphin | 510 | 102,361 | 0.5 |
| Spinner dolphin | 137 | 25,114 | 0.5 |
| Striped dolphin | 44 | 5,229 | 0.8 |
| Fraser's dolphin | 13 | 1,665 | 3.9 |
| Risso's dolphin | 33 | 3,764 | 0.9 |
| Melon-headed whale | 74 | 7,003 | 1.1 |
| Pygmy killer whale | 17 | 2,126 | 0.8 |
| False killer whale | 28 | 3,204 | 0.9 |
| Killer whale | 0 | 267 | n/a |
| Short-finned pilot whale | 21 | 1,981 | 1.1 |

[1] Scalar ratios were not applied in this case due to brief survey duration.

[2] Best abundance estimate. For most taxa, the best abundance estimate for purposes of comparison with take estimates is considered here to be the model-predicted abundance (Roberts *et al.,* 2016). For those taxa where a density surface model predicting abundance by month was produced, the maximum mean seasonal abundance was used. For those taxa where abundance is not predicted by month, only mean annual abundance is available. For the killer whale, the larger estimated SAR abundance estimate is used.

[3] Includes 1 takes by Level A harassment and 19 takes by Level B harassment.

Based on the analysis contained herein of BHP's proposed survey activity described in its LOA application and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the affected species or stock sizes and therefore is of no more than small numbers.

## Authorization

NMFS has determined that the level of taking for this LOA request is consistent with the findings made for the total taking allowable under the incidental take regulations and that the amount of take authorized under the LOA is of no more than small numbers. Accordingly, we have issued an LOA to BHP authorizing the take of marine mammals incidental to its geophysical survey activity, as described above.

Dated: June 16, 2022.

**Catherine Marzin,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2022–13371 Filed 6–22–22; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[RTID 0648–XC088]**

## Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Exempted Fishing Permit

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

**ACTION:** Notice of receipt of an application for exempted fishing permit; request for comments.

**SUMMARY:** NMFS announces the receipt of an application for an exempted fishing permit (EFP) from the Sustainable Seas Technology, LLC. If granted, the EFP would authorize the applicant to deploy modified black sea bass pots with Subsea Buoy Retrieval Systems (SBRS) in South Atlantic Federal waters off North Carolina, South Carolina, Georgia, and Florida. The project would continue to examine the potential usefulness of SBRSs for use in the black sea bass pot component for the commercial sector of the snapper-grouper fishery in minimizing impacts to protected species.

**DATES:** Written comments must be received on or before July 8, 2022.

**ADDRESSES:** You may submit comments on the application, identified by ''NOAA–NMFS–2022–0059'' by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter ''NOAA–NMFS–2022–0059'' in the Search box. Click the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Frank Helies, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of the application and may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/black-sea-bass-pot-experimental-retrieval-project-exempted-fishing-permit-application-revision/.*

**FOR FURTHER INFORMATION CONTACT:** Frank Helies, 727–824–5305; email: *frank.helies@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** The EFP is requested under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C 1801 *et seq.*), and regulations at 50 CFR 600.745(b) concerning exempted fishing.

Currently, vertical end lines and buoys, such as those utilized with black sea bass pots in the South Atlantic, present an entanglement risk to the North Atlantic right whale, a species that is listed as endangered under the Endangered Species Act (ESA). Each fall, some right whales travel from their feeding areas in the waters off New England and Canada to the shallow, coastal waters of North Carolina, South Carolina, Georgia, and northeastern Florida. SBRSs are a type of fishing gear that allows fish traps, including black sea bass pots, buoys, and their retrieval devices to be stored at depth until triggered for retrieval at the surface. These gear systems allow for trap and pot buoys and vertical lines to exist in the water column for minutes instead of hours or days, as they are activated via acoustic or timed release only when fishers are present. As described in the application, the applicant believes that adaptation of SBRSs or ''ropeless'' systems for black sea bass pot fishing in the South Atlantic could reduce the risk to these whales and other marine animals that are subject to entanglements from vertical lines and buoys.

The project seeks to build upon previous research and continue to examine the potential usefulness of the modified black sea bass pot gear in minimizing impacts to protected species. This would be the third EFP authorizing this applicant to conduct this type of proposed research. NMFS approved the applicant's first EFP (August 24, 2020, through October 20, 2020) for the pilot research that allowed gear testing outside the black sea bass pot closed season (85 FR 42831; July 15, 2020). NMFS approved a second EFP on February 2, 2022, to be effective through August 31, 2024, that was similar to the first EFP but it allowed testing during the black sea bass pot closed season (87 FR 2595; January 22, 2022). Those EFPs allowed gear testing in offshore Federal waters of North Carolina, South Carolina, Georgia, and Florida.

If granted, this EFP would allow similar gear testing throughout the year, as discussed below. The EFP would exempt limited fishing gear testing activities from certain regulations for the black sea bass pot component for the commercial sector of the South Atlantic snapper-grouper fishery, specifically gear identification at 50 CFR 622.177(a)(4), area and seasonal closures at 50 CFR 622.183 (622.183(a)(1)(ii)(E), 622.183(a)(2)(vii)(E), and 622.183(b)(6)), black sea bass pot configuration restrictions and requirements at 50 CFR 622.189 (622.189(b), 622.189(e)(1), and 622.189(g)) and Atlantic large whale gear marking requirements at 50 CFR

229.32 (229.32(c)(1), 229.32(c)(2)(ii), and 229(c)(2)(iv)).

The applicant seeks an EFP to determine the following: if the SBRS gear would continue to show a greater than 99 percent successful deployment and retrieval rate; if SBRS gear significantly increases the time and/or expense for gear retrieval and recovery versus the current fishing method such that it might affect profitability; if SBRS gear significantly increases time and/or expense for the repacking of gear for redeployment versus the current fishing method such that it might affect profitability; if bycatch rates for the modified black sea bass pot fishing configuration are greater than those for the traditional single pots; and if the harvest of black sea bass in the preferred inshore areas that are currently closed, would still yield enough catch to offset the cost of SBRS fishing gear and modifications. If granted, the project would allow for expansion of gear testing conducted under the currently issued EFP to allow gear testing year round, including during the seasonal closure of the commercial black sea bass pot component of the snapper-grouper fishery. This proposed EFP would provide additional time to the applicant to train new participants and conduct tests with the gear, to perform gear configuration adjustments, and to liaise with SBRS manufacturers on modifications that might best suit the particular needs of the black sea bass pot component of the snapper-grouper fishery.

Under the EFP, the applicant would collect data through an ongoing collaborative effort among different SBRS manufacturers and fishery industry partners. If granted, the EFP would be effective from the date of issuance through April 30, 2025. If granted, the EFP issued to the applicant on February 2, 2022, for this type of gear research would be ended and replaced by the new EFP as described here and in the application. In addition to this EFP request for exemption from Magnuson-Stevens Act regulations, the applicant would consult with NMFS to ensure the EFP would be consistent with North Atlantic right whale conservation measures currently in place through the ESA and Marine Mammal Protection Act. Fishers participating in this project are assumed to be receiving grant funding and/or self-funding the work. These fishers would be allowed to keep and sell all catch lawfully harvested by black sea bass pots. The proposed EFP testing area would occur in offshore Federal waters of North Carolina, South Carolina, Georgia, and Florida out to a depth of 65 meters. The inshore water depth for testing in Federal waters would not be less than 20 meters. Sampling would occur year round, including the November 1 through April 30 closed season, of each year. The testing would not occur in any special management zones listed in 50 CFR 622.182 or in the North Atlantic Right Whale Critical Habitat Area.

Up to 11 different SRBS designs would be fished as singles, two pot trawls, and four pot trawls in inshore areas. This would be done year round, including during the black sea bass pot closure period each year (November 1 through April 30), to compare against control pots fished under previous EFPs to yield data relative to the time expended to retrieve and rebait traditional traps pursuant to the current regulations. Using the SBRS, the applicant would utilize virtual gear marking of the pots (marking of gear deployment location with chart plotters, GPS, and manufacturer-provided software). The applicant would also evaluate the feasibility of use of various virtual gear marking systems and share the results with fishery management partners.

Participating permitted commercial fishers would deploy experimental gear for up to 10 days each year in supervised field trials and additional unsupervised fishing trials, not to exceed 2,500 gear hauls per vessel over the length of the EFP, to evaluate the performance of SBRS with both the experimental and standard black sea bass pot configurations. Each deployment under the EFP would be limited to 35 total pots per vessel, with an average soak time of 90 minutes per configuration. Some overnight sampling would occur for acoustic releases.

**EFP Black Sea Bass Pot Configurations**

Under the EFP, four regulation-sized pots would be connected together with wire connecting clips or zip ties so that only one SBRS gear device is needed to retrieve four connected pots. Each pot would have the standard black sea bass pot single entrance and would possess one back panel of 2-inch (5.1-cm) uniform mesh. The connected four traps would test both one and two single entrances (on adjacent sides of single traps to replace the allowable two opposite entrances) to four regulation-sized trap interiors, and would otherwise comply with the requirements for black sea bass pot dimensions and construction in the South Atlantic. This experimental gear design of the four connected pots is not a chevron-style fish trap, it is a design of standard black sea bass pots connected to adjacent standard black sea bass pots. The goal of this modification is to examine ways to reduce procurement and implementation costs associated with the number of required SBRSs to fish 35 pots.

In addition to this configuration, the applicant would also test a new adaptation to their gear research, which is a simplified version of the four pot trawl design in which only two traps are connected, allowing for both a normal number of trap entrances as well as half the number of trap entrances, as described above. This configuration was developed to assist vessel captains that fish without crew, who found the four pot trawl configuration difficult to service singlehanded.

**EFP Gear Markings**

Two of the technologies that would be used in the EFP utilize lift bags and buoys and are therefore unable to be line-marked as they do not incorporate line into their design. For the other technologies being tested under the EFP, all buoy lines on SBRS gear types that use stored line would be marked in accordance with the most recent requirements pursuant to the Atlantic Large Whale Take Reduction Plan and other Federal regulations, and would have weak links with a maximum breaking strength of 600 lb (272 kg), 1,700 lb (771 kg) maximum breaking strength sleeves, and line with a breaking strength of less than 2,200 lb (998 kg).

**EFP Buoy Line**

Six of the eight currently available SBRS devices require the use of a line for retrieval that is contained and stored at depth by a line management system. The other two release devices do not use line, but instead, utilize the inflation of either a lift bag or inflatable buoy to pull a lead trap to the surface. The styles of line storage vary with device design and includes square, rectangular, domed, circular, and conical cages, oyster mesh bags, canisters, and spools. These have been successfully used in trials and testing in a variety of active fishing operations in the United States and worldwide.

Four of the SBRS devices in the EFP require floating line to return the buoy or buoys to the surface for retrieval. Currently, the average time for appearance of buoys at depths greater than 100 ft (30.5 m) is approximately 3 minutes. Retrieval generally takes less than 2 minutes, which means that any floating line would be at the surface for less than 5 minutes, and during which time the fishing vessel would be within 20–30 ft (6.1–9.1 m) of the line. Two of

the release devices do not incorporate line longer than 10 ft (3.1 m) in their design, and two devices use a harness that clips to the pot. The remaining devices use less than 150 ft (45.7 m) of line which would be stowed inside either a bag or on a spool. Sinking line cannot be used for any SBRS as it would create a negatively buoyant strain on the buoys and not effectively allow for their return to the surface. All of the SBRSs with a line storage system would need to be attached between the trap and the buoy. If necessary, several of the SBRSs may also require a small anchor or weight to be attached between the pot and line-storage device or buoy in areas with higher current to keep them from fouling in the pot, as well as to ensure they are not dragged from their intended deployment area. For lift bag and buoy systems, the actual systems would be secured between the pot and the buoy/bag.

NMFS finds the application warrants further consideration based on a preliminary review. Possible conditions the agency may impose on the permit, if granted, include but are not limited to, a prohibition on conducting fishing gear testing within marine protected areas, marine sanctuaries, special management zones, or areas where they might interfere with managed fisheries without additional authorization. Additionally, NMFS may require special protections for ESA-listed species and designated critical habitat, and may require particular gear markings. A final decision on issuance of the EFP will depend on NMFS' review of public comments received on the application, consultations with the appropriate fishery management agencies of the affected states, the South Atlantic Fishery Management Council, and the U.S. Coast Guard, and a determination that the activities to be taken under the EFP are consistent with all applicable laws.

(Authority: 16 U.S.C 1801 *et seq.*)

Dated: June 16, 2022.

**Kelly Denit,**

*Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2022–13407 Filed 6–22–22; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Invention Promoters/Promotion Firms Complaints

The United States Patent and Trademark Office (USPTO) 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. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on March 31, 2022 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

*Agency:* United States Patent and Trademark Office, Department of Commerce.

*Title:* Invention Promoters/Promotion Firms Complaints.

*OMB Control Number:* 0651–0044.

*Needs and Uses:* Pursuant to the Inventors' Rights Act of 1999, 35 U.S.C. 297, and implementing regulations at 37 CFR part 4, the United States Patent and Trademark Office (USPTO) is required to provide a forum for the publication of complaints concerning invention promoters and responses from the invention promoters. Upon receipt of a complaint, the USPTO will forward it to the inventor promoter for a response. The USPTO does not investigate these complaints or participate in any legal proceedings against invention promoters or promotion firms. Under the Act, USPTO is responsible for making complaints and responses available to the public on the USPTO's website.

A complaint submitted to the USPTO must be clearly marked, or otherwise identified, as a complaint. The complaint must include: (1) The name and address of the complaint; (2) the name and address of the invention promoter; (3) the name of the customer; (4) the invention promotion services offered or performed by the invention promoter; (5) the name of the mass media in which the invention promoter advertised providing such services; (6) and example of the relationship between the customer and the invention promoter; and (7) a signature of the complainant. Identifying information is necessary so that the USPTO can both forward the complaint to the invention promoter or promotion firm as well as notify the complainant that the complaint has been forwarded. Complainants should understand that the complaints will be forwarded to the invention promoter for response and that the complaint and response will be made available to the public as required by the Inventors' Rights Act. If the USPTO does not receive a response from the invention promoter, the complaint will be published without a response. The USPTO does not accept under this program complaints that request confidentiality.

This information collection contains one form, Complaint Regarding Invention Promoter (PTO/2048A), which is used by the public to submit a complaint under this program. This form is available for download from the USPTO website. Use of this form is voluntary, and the complainant may submit his or her complaint without the form via any of the approved methods of collection as long as the complainant includes the necessary information and the submission is clearly marked as a complaint filed under the Inventors' Rights Act. There is no associated form for submitting responses to a complaint.

*Form:*

- PTO/2048A (Complaint Regarding Invention Promoter).

*Type of Review:* Extension and revision of a currently approved information collection.

*Affected Public:* Private sector; individuals or households.

*Respondent's Obligation:* Voluntary.

*Frequency:* On occasion.

*Estimated Number of Annual Respondents:* 22 respondents.

*Estimated Number of Annual Responses:* 22 responses.

*Estimated Time per Response:* The USPTO estimates that the responses in this information collection will take the public approximately 15 minutes (0.25 hours) to 30 minutes (0.5 hours) to complete. This includes the time to gather the necessary information, create the document, and submit the completed request to the USPTO.

*Estimated Total Annual Respondent Burden Hours:* 8 hours.

*Estimated Total Annual Respondent Non-Hourly Cost Burden:* $51.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 0651–0044.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0044 information request'' in the subject line of the message.
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

**Kimberly Hardy,**

*Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.*

[FR Doc. 2022–13284 Filed 6–22–22; 8:45 am]

**BILLING CODE 3510–16–P**

## BUREAU OF CONSUMER FINANCIAL PROTECTION

**[Docket No. CFPB–2022–0041]**

## Agency Information Collection Activities: Comment Request

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau or CFPB) is publishing this notice seeking comment on a Generic Information Collection titled, ''Sample Form Usability Research and Communication Testing,'' prior to requesting the Office of Management and Budget's (OMB's) approval of this collection under the Generic Information Collection ''Generic Information Collection Plan for the Development and Testing of Disclosures and Related Materials'' under OMB Control number 3170–0022.

**DATES:** Written comments are encouraged and must be received on or before July 25, 2022 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: PRA_Comments@cfpb.gov.* Include Docket No. CFPB–2022–0041 in the subject line of the email.
- *Mail/Hand Delivery/Courier:* Comment intake, Bureau of Consumer Financial Protection (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552.

Please note that due to circumstances associated with the COVID–19 pandemic, the Bureau discourages the submission of comments by mail, hand delivery, or courier. Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

**FOR FURTHER INFORMATION CONTACT:** Documentation prepared in support of this information collection request is available at *www.regulations.gov.* Requests for additional information should be directed to Anthony May, Paperwork Reduction Act Officer, at (202) 841–0544, or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Sample Form Usability Research and Communication Testing.

*OMB Control Number:* 3170–0022.

*Type of Review:* Request for approval of a generic information collection under an existing Generic Information Collection Plan.

*Affected Public:* Individuals.

*Estimated Number of Respondents:* 268.

*Estimated Total Annual Burden Hours:* 153.

*Abstract:* In connection with the rulemaking required to implement section 1071 of the Dodd-Frank Act, the CFPB will be developing a sample form for collecting the demographic data required for collection by the statute. This form is intended to show one example of a form that lenders, to facilitate their compliance with the statute, might provide to their small business customers. As contemplated by the statute, those small business customers will be able to choose the extent to which they complete the sample form or any other form presented to those customers by the lenders. The CFPB believes that the purposes of the statute will be furthered to the extent small business owners understand the purpose and nature of the statutorily-required demographic data collection.

We intend to conduct qualitative research to learn more about potential concerns that small business owners may have about providing demographic data to lenders while applying for business credit, including audience research with small business owners to assess their knowledge and understanding of the upcoming 1071 rule, as well as concerns that may impact their willingness to complete a form of this type. There are two purposes for this research:

- The Sample Form Usability Research is intended to identify possible concerns or issues small business owners may have with submitting demographic data via sample forms and explore possible approaches to form design and language that might bear on willingness to provide the data.
- The Communication Testing Research is intended to identify small business owners' knowledge and understanding of the upcoming 1071 rule as well as concerns that may impact their willingness to complete a form of this type. It will help develop implementation materials to facilitate lenders' compliance with the statutory requirements.

*Request for Comments:* The Bureau is soliciting comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be submitted to OMB as part of its review of this request. All comments will become a matter of public record.

**Anthony May,**

*Paperwork Reduction Act Officer, Consumer Financial Protection Bureau.*

[FR Doc. 2022–13424 Filed 6–22–22; 8:45 am]

**BILLING CODE 4810–AM–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Renewal of Department of Defense Federal Advisory Committees—Defense Business Board

**AGENCY:** Department of Defense (DoD).

**ACTION:** Renewal of Federal Advisory Committee.

**SUMMARY:** The DoD is publishing this notice to announce that it is renewing the Defense Business Board (DBB).

**FOR FURTHER INFORMATION CONTACT:** Jim Freeman, DoD Advisory Committee Management Officer, 703–692–5952.

**SUPPLEMENTARY INFORMATION:** The DoD is renewing the DBB in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C., Appendix) and 41 CFR 102–3.50(d). The charter and contact information for the DBB's Designated Federal Officer (DFO) are found at *https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation.*

The DBB provides the Secretary of Defense and Deputy Secretary of Defense with independent advice and actionable recommendations to address critical matters and challenges to accelerate adoption of effective and efficient business processes and functions, organizational management constructs, and business and organizational cultural changes within the DoD in response to specific tasking from the Secretary of Defense or the Deputy Secretary of Defense (''the DoD Appointing Authority''). The DBB examines and advises on DoD executive management, innovative business processes, and governance from private, public, and academic sector perspectives. The DBB is composed of no more than 20 members who meet one of more of the following criteria: (a) proven track record of sound judgement in leading or governing large, complex public or private-sector organizations, including academia; (b) significant management-level (executive level managers that are titled ''chief'' followed by their function) global business or academic experience including, but not limited to the areas of executive management, corporate strategy, governance, business process improvement and innovation, global business services/shared services, audit and finance, supply chain and logistics, human resources/talent management, data/analytics management and use, real property management, organizational design and optimization, energy and climate, or technology; (c) demonstrated performance in developing new business theories, innovation, and concepts; (d) career as a distinguished academic or researcher in business at an accredited college or institute of higher education; or (e) a proven track record as an innovative leader in small and minority owned businesses.

Individual members are appointed according to DoD policy and procedures, and serve a term of service of one-to-four years with annual renewals. One member will be appointed as Chair of the DBB. No member, unless approved according to DoD policy and procedures, may serve more than two consecutive terms of service on the DBB, or serve on more than two DoD Federal advisory committees at one time.

DBB members who are not full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, are appointed as experts or consultants, pursuant to 5 U.S.C. 3109, to serve as special government employee members. DBB members who are full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services are appointed pursuant to 41 CFR 102–3.130(a), to serve as regular government employee members.

All DBB members are appointed to provide advice based on their best judgment without representing any particular point of view and in a manner that is free from conflict of interest. Except for reimbursement of official DBB-related travel and per diem, members serve without compensation.

The public or interested organizations may submit written statements about the DBB's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the DBB. All written statements shall be submitted to the DFO for the DBB, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: June 17, 2022.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2022–13451 Filed 6–22–22; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF EDUCATION

### List of Correspondence From April 1, 2020, Through March 31, 2022

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Secretary is publishing the following list of correspondence from the U.S. Department of Education (Department) received by individuals during quarters two, three, and four of calendar year 2020, all four quarters of calendar year 2021, and the first quarter of calendar year 2022. The correspondence describes the Department's interpretations of the Individuals with Disabilities Education Act (IDEA) or the regulations that implement IDEA. These letters or other documents described in this list, with personally identifiable information redacted, as appropriate, can be found at *https://sites.ed.gov/idea/policy-guidance/.*

**FOR FURTHER INFORMATION CONTACT:** Rebecca Walawender, U.S. Department of Education, 400 Maryland Avenue SW, Room 5103, Potomac Center Plaza, Washington, DC 20202–2500. Telephone: (202) 245–7399. Email: *Rebecca.Walawender@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

On request to the person listed under **FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain a copy of this notice and the letters or other documents described in this notice in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

**SUPPLEMENTARY INFORMATION:** The following list identifies correspondence for eight quarters, April 1, 2020, through March 31, 2022. Under section 607(f) of IDEA, the Secretary is required to publish this list in the **Federal Register**. The list includes those letters that contain interpretations of the requirements of IDEA and its implementing regulations, as well as letters and other documents that the Department believes will assist the public in understanding the requirements of the law. The list identifies the date and topic of each letter and provides summary information, as appropriate. To protect the privacy interests of the individual or individuals involved, personally identifiable information has been redacted, as appropriate.

**2020—Second Quarter**

**Part B—Assistance for Education of All Children With Disabilities**

*Section 612—State Eligibility*

Topic Addressed: Procedural Safeguards

○ Letter dated June 8, 2020, to anonymous, regarding the use of IDEA Part B funds to pay hearing officers to conduct due process hearings under IDEA.

**2020—Third Quarter**

**Part B—Assistance For Education of All Children With Disabilities**

*Section 615—Procedural Safeguards*

Topic Addressed: Mediation

○ Letter dated July 31, 2020, to anonymous, addressing whether a parent may be required to sign a confidentiality agreement in order to participate in mediation under Part B of the IDEA.

**2020—Fourth Quarter**

No letters.

**2021—First Quarter**

No letters.

**2021—Second Quarter**

**Part B—Assistance for Education of All Children With Disabilities**

*Section 602—Definitions*

Topic Addressed: Special Education

○ Letter dated May 12, 2021, to Garth Tymeson, Center on Disability Health and Adapted Physical Activity, University of Wisconsin-La Crosse, regarding the provision of special education, including physical education and adapted physical education, for children with disabilities.

**2021—Third Quarter**

**Part B—Assistance for Education of All Children With Disabilities**

*Section 614—Evaluations, Eligibility Determinations, Individualized Education Programs (IEPs), and Educational Placements*

Topic Addressed: IEPs

○ Letter dated September 24, 2021, to Daniel Frumkin, addressing a petition for rulemaking to modify the IDEA regulations in order to establish a timeline to provide access to a child's IEP to teachers and service providers.

**2021—Fourth Quarter**

**Part B—Assistance for Education of All Children With Disabilities**

*Section 614—Evaluations, Eligibility Determinations, IEPs, and Educational Placements*

Topic Addressed: IEPs

○ Letter dated November 15, 2021, to WIDA Founder and Director, Timothy Boals, addressing whether IDEA requires the inclusion of language development goals in an IEP if the child is an English learner with a disability.

*Section 615—Procedural Safeguards*

Topic Addressed: Impartial Due Process Hearings

○ Letter dated November 17, 2021, to anonymous, regarding whether a local educational agency may file a due process complaint against a parent when a parent refuses to consent to a change in the child's IEP and whether a party has met the IDEA exhaustion requirements if a hearing officer determines that a State educational agency is not a proper party to a due process hearing.

**2022—First Quarter**

No letters.

*Electronic Access to This Document:* The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Katherine Neas,**

*Deputy Assistant Secretary. Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.*

[FR Doc. 2022–13357 Filed 6–22–22; 8:45 am]

BILLING CODE 4000–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–SFUND–2012–0104; FRL–9958–01–OMS]**

## Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Brownfields Program—Accomplishment Reporting (Renewal)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency has submitted an information collection request (ICR), Brownfields Program—Accomplishment Reporting (Renewal) (EPA ICR Number 2104.09, OMB Control Number 2050–0192) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2024. Public comments were previously requested via the **Federal Register** on March 23, 2022 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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:** Additional comments may be submitted on or before July 25, 2022.

**ADDRESSES:** Submit your comments, referencing Docket ID Number EPA–HQ–SFUND–2012–0104, to EPA online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection 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:** Kelly Gorini, Office of Brownfields and Land Revitalization, (5105T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 566–1702; fax number: (202) 566–1476; email address: *gorini.kelly@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

*Abstract:* This ICR covers the collection of information from those organizations that receive cooperative agreements, contracts, and Targeted Brownfields Assessment (TBA) funds from EPA under the authority of the section 104(k) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended by the Brownfields Utilization, Investment, and Local Development (BUILD) Act (Pub. L. 115–141). CERCLA 104(k), as amended, authorizes EPA to award grants or cooperative agreements and contract funding to states, tribes, local governments, other eligible entities, and nonprofit organizations to support the assessment and cleanup of brownfields sites. Under section 101(39) of CERCLA, a brownfields site means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. Cooperative agreement recipients (''recipients'') have general reporting and record keeping requirements as a condition of their cooperative agreement that result in burden. A portion of this reporting and record keeping burden is authorized under 2 CFR part 1500 and identified in the EPA's general grants ICR (OMB Control Number 2030–0020). EPA requires Brownfields program recipients to maintain and report additional information to EPA on the uses and accomplishments associated with funded brownfields activities. EPA intends to expand programmatic reporting requirements to include TBA contractors and technical assistance contractors. EPA will use several forms to assist recipients and contractors in reporting the information and to ensure consistency of the information collected. EPA uses this information to meet Federal stewardship responsibilities to manage and track how program funds are being spent, to evaluate the performance of the Brownfields Cleanup and Land Revitalization Program, to meet the Agency's reporting requirements under the Government Performance Results Act, and to report to Congress and other program stakeholders on the status and accomplishments of the program.

*Respondents/affected entities:* State/local/tribal governments; Non-Profits; Contractors.

*Respondent's obligation to respond:* Required to obtain or Retain Benefits (2 CFR part 1500).

*Estimated number of respondents:* 6,562 (total).

*Frequency of response:* Bi-annual for subtitle CERCLA 128 recipients; quarterly for CERCLA 104(k) recipients.

*Total estimated burden:* 3,808 hours (per year). Burden is defined at 5 CFR 1320.03(b).

*Total estimated cost:* $480,509 (per year), includes $0 annualized capital or operation & maintenance costs.

*Changes in the Estimates:* There is decrease of 2,335 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease can be attributed to tremendous improvements in the ACRES database to streamline reporting requirements. Additional ACRES training and outreach efforts have also greatly increased grantees familiarity with the database. Grantees have reported that ACRES is now more intuitive, and the layout is significantly easier to follow. Grantees interviewed for this burden estimate self-reported data entry times at half the burden hours compared to estimates gathered 2 years ago. These combined factors result in the significant burden reduction.

**Courtney Kerwin,**

*Director, Regulatory Support Division.*

[FR Doc. 2022–13379 Filed 6–22–22; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2011–0374; FRL–9933–01–OMS]**

## Notice of Objections to Notice of Intent To Suspend Dimethyl Tetrachloroterephthalate (DCPA) Technical Registration; Notice of Public Hearing

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of objections and public hearing.

**SUMMARY:** The Environmental Protection Agency (EPA) has received objections and hearing requests in response to its issuance of a Notice of Intent to Suspend registration of a pesticide containing dimethyl tetrachloroterephthalate (DCPA). EPA will hold a public hearing to receive evidence related to the proposed suspension of DCPA.

**DATES:** A public hearing will be held beginning at 9 a.m. July 6, 2022 and continue as necessary through July 8, 2022.

**ADDRESSES:** The public hearing will take place in the EPA Administrative Courtroom, EPA East Building, Room 1152, 1201 Constitution Ave. NW, Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** Mary Angeles, Headquarters Hearing Clerk, Office of Administrative Law Judges, 1200 Pennsylvania Ave. NW, Mail Code 1900R, Washington, DC 20460; telephone number: (202) 564–6281; email address: *angeles.mary@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, farm worker and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

*B. How can I get copies of this document and other related information?*

The regulatory docket for this action, identified by docket identification number EPA–HQ–OPP–2011–0374, is available electronically at *https://www.regulations.gov* or in hard copy at

the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center 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.

The adjudication docket for the proceeding in which petitioners have requested a public hearing, captioned in re FIFRA Section 3(c)(2)(B) Notice of Intent to Suspend Dimethyl Tetrachloroterephthalate (DCPA) Technical Registration and identified by docket number FIFRA–HQ–2022–0002, is available electronically on the website of EPA's Office of Administrative Law Judges at *https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/Active+Dockets?OpenView*.

## II. Public Hearing To Be Held on Objections to EPA's Notice of Intent To Suspend DCPA

EPA previously published (87 FR 25262, April 28, 2022) a Notice of Intent to Suspend (NOITS) the registration of DCPA pursuant to its authority under Section 3(c)(2)(B)(iv) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 136a(c)(2)(B)(iv). Section 3(c)(2)(B)(iv) of FIFRA provides that any person adversely affected by the NOITS may request a hearing on the proposed suspension within thirty days of the registrant receiving the notice. On May 24, 2022, the Western Plant Health Association filed an objection to the NOITS. On May 27, 2022, AMVAC Chemical Corporation, the DCPA registrant, filed an objection to the NOITS and requested a hearing. Also on May 27, 2022, the Grower-Shipper Association of Central California, Sunheaven Farms, LLC, J&D Produce, Ratto Bros., Inc., and Huntington Farms jointly filed an objection to the NOITS and requested a hearing.

The hearing requests commenced a proceeding under Section 6(d) of FIFRA, 7 U.S.C. 136d(d), and EPA's procedural rules, 40 CFR 164, before EPA's Office of Administrative Law Judges. The proceeding includes a public hearing that will be held to receive evidence from the parties relevant and material to issues raised by petitioners objecting to the proposed suspension of DCPA. FIFRA section 3(c)(2)(B)(iv) specifically limits the scope of the hearing to two questions: (1) whether the registrant has failed to take the action that served as the basis for the notice of intent to suspend the registration of the pesticide for which additional data is required; and (2) whether the Administrator's determination with respect to the disposition of existing stocks is consistent with FIFRA.

As set forth in **DATES** and **ADDRESSES**, the hearing will begin at 9 a.m. July 6, 2022, and continue as necessary through July 8, 2022, in the EPA Administrative Courtroom, EPA East Building, Room 1152, 1201 Constitution Ave. NW, Washington, DC 20460. Anyone wishing to attend the hearing must notify Mary Angeles, Headquarters Hearing Clerk, Office of Administrative Law Judges, by email no later than July 1, 2022, at the email address listed under **FOR FURTHER INFORMATION CONTACT**. A notice of intent to attend the hearing shall include the individual's name, email address, telephone number, and any organization they represent. On the day of the hearing, attendees must present government-issued identification to enter EPA facilities, and they will be required to wear a mask and physically distance from others in the hearing room. Attendees may face further restrictions on entry based on the community level of COVID–19 at the time of the hearing.

*Authority:* 7 U.S.C. 136 *et seq.;* 40 CFR 164.

Dated: June 14, 2022.

**Susan Biro,**

*Chief Administrative Law Judge, Office of Administrative Law Judges.*

[FR Doc. 2022–13445 Filed 6–22–22; 8:45 am]

**BILLING CODE 6560–50–P**

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OLEM–2018–0198, FRL–9960–01–OMS]**

## Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Land Disposal Restrictions (Renewal)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Land Disposal Restrictions (EPA ICR Number 1442.24, OMB Control Number 2050–0085) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through June 30, 2022. Public comments were previously requested via the **Federal Register** on November 10, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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:** Additional comments may be submitted on or before July 25, 2022.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OLEM–2018–0198, to EPA online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection 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:** Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–566–0453; 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* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *https://www.epa.gov/dockets.*

*Abstract:* Section 3004 of the Resource Conservation and Recovery Act (RCRA), as amended, requires that EPA develop standards for hazardous waste treatment, storage, and disposal as may be necessary to protect human health and the environment. Subsections 3004(d), (e), and (g) require EPA to promulgate regulations that

prohibit the land disposal of hazardous waste unless it meets specified treatment standards described in subsection 3004(m).

The regulations implementing these requirements are codified in the Code of Federal Regulations (CFR) Title 40, Part 268. EPA requires that facilities maintain the data outlined in this ICR so that the Agency can ensure that land disposed waste meets the treatment standards. EPA strongly believes that the recordkeeping requirements are necessary for the agency to fulfill its congressional mandate to protect human health and the environment.

*Form Numbers:* None.

*Respondents/affected entities:* Private sector and State, Local, or Tribal governments.

*Respondent's obligation to respond:* Mandatory (40 CFR part 268).

*Estimated number of respondents:* 77,612.

*Frequency of response:* On occasion.

*Total estimated burden:* 517,369 hours per year. Burden is defined at 5 CFR 1320.03(b).

*Total estimated cost:* $87,510,974 (per year), which includes $45,898,132 in annualized capital and operation & maintenance costs.

*Changes in the estimates:* The total annual hour burden in this ICR decreased by 82,701 hours from the currently approved ICR. This decrease is due to a decrease in the number of respondents.

**Courtney Kerwin,**

*Director, Regulatory Support Division.*

[FR Doc. 2022–13444 Filed 6–22–22; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA R9–2022–01; FRL–9853–01–R9]**

### Notice of Proposed Administrative Settlement Agreement for Recovery of Past Response Costs at the Omega Chemical Corporation Superfund Site in Los Angeles County, California

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of proposed settlement; request for public comment.

**SUMMARY:** In accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (''CERCLA''), notice is hereby given that the Environmental Protection Agency (EPA), has entered into a proposed settlement, embodied in an Administrative Settlement Agreement for Recovery of Past Response Costs (''Settlement Agreement''), with Powerine Oil Company and Lakeland Development Company. Under the Settlement Agreement, Powerine and Lakeland agree to pay a total of $150,000 to reimburse EPA for costs EPA has incurred at the Omega Chemical Corporation Superfund Site (''Omega'').

**DATES:** Comments must be received on or before July 25, 2022.

**ADDRESSES:** Please contact Michael Massey at *massey.michael@epa.gov* or (415) 972–3034 to request a copy of the Settlement Agreement. Comments on the Settlement Agreement should be submitted in writing to Mr. Massey at *massey.michael@epa.gov.* Comments should reference the Omega Site and the EPA Docket Number for the Settlement Agreement, EPA R9–2022–01. If for any reason you are not able to submit a comment by email, please contact Mr. Massey at (415) 972–3043 to make alternative arrangements for submitting your comment. EPA will post its response to comments at *https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0903349,* EPA's web page for the Omega Site.

**FOR FURTHER INFORMATION CONTACT:** Michael Massey, Assistant Regional Counsel (ORC–3), Office of Regional Counsel, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105; Email: *massey.michael@epa.gov;* Phone (415) 972–3034.

**SUPPLEMENTARY INFORMATION:** Notice of this proposed Settlement Agreement is made in accordance with Section 122(i) of CERCLA, 42 U.S.C. 9622(i). The Settlement Agreement concerns costs incurred by EPA in connection with Omega, a CERCLA response action in Los Angeles County, California, where groundwater contamination has come to be located. Powerine and Lakeland, which agree to pay EPA a total of $150,000, are the only parties to the Settlement Agreement. EPA has collected costs from other responsible parties at Omega and intends further cost recovery from additional parties in the future; however, because EPA is not recovering one hundred percent of its past costs at this time, this Settlement Agreement represents a compromise of EPA's costs. The settlement includes a covenant not to sue pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C 9606 and 9607(a).

EPA will consider all comments received on the Settlement Agreement in accordance with the **DATES** and **ADDRESSES** sections of this Notice and may modify or withdraw its consent to the Settlement Agreement if comments received disclose facts or considerations that indicate that the settlement is inappropriate, improper, or inadequate.

Dated: June 15, 2022.

**Michael Montgomery,**

*Director, Superfund and Emergency Management Division, Region 9.*

[FR Doc. 2022–13380 Filed 6–22–22; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[FR ID 92241]**

### Radio Broadcasting Services; AM or FM Proposals to Change the Community of License

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**DATES:** The agency must receive comments on or before August 22, 2022.

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

**FOR FURTHER INFORMATION CONTACT:** Rolanda F. Smith, 202–418–2054.

**SUPPLEMENTARY INFORMATION:** The following applicants filed AM or FM proposals to change the community of license: TOP O' TEXAS EDUCATIONAL BROADCASTING FOUNDATION, INC., KIJN–FM, Fac. ID No. 65458, FROM FARWELL, TX, TO UMBARGER, TX, File No. 0000190783; DIMES MEDIA CORPORATION, KSGG(FM), Fac. ID No. 762378, FROM KING CITY, CA, TO SOLEDAD, CA, File No. 0000189549; MIDWAY BROADCASTING COMPANY, WFLM(FM), Fac. ID No. 42065, FROM WHITE CITY, FL, TO PALM BEACH SHORES, FL; File No. 0000193154; ONDAS DE VIDA, INC., NEW(FM), Fac. ID No. 768304, FROM COALINGA, CA, TO STRATFORD, CA, File No. 0000192882; and CLARITY COMMUNICATIONS, INC., Fac. ID No. 59387, FROM STAMPING GROUND, KY, TO PARIS, KY, File No. 0000189436. The full text of these applications is available electronically via the Licensing and Management System (LMS), *https://apps2int.fcc.gov/dataentry/public/tv/publicAppSearch.html.*

Federal Communications Commission.

**Nazifa Sawez,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 2022–13363 Filed 6–22–22; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–1079; FR ID 92442]**

### Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

**DATES:** Written PRA comments should be submitted on or before August 22, 2022. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–1079.

*Title:* Section 15.240, Radio Frequency Identification Equipment.

*Type of Review:* Extension of a currently approved collection.

*Form No.:* N/A.

*Respondents:* Business or other for-profit and not-for-profit institutions.

*Number of Respondents and Responses:* 10 respondents; 20 responses.

*Estimated Time per Response:* 2 hours.

*Frequency of Response:* On occasion reporting requirement and third party disclosure requirements.

*Obligation to Respond:* Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. 154(i), 301, 302, 303(e), 303(f) and 303(r).

*Total Annual Burden:* 200 hours.

*Total Annual Cost:* No cost.

*Privacy Act Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* There is no need for confidentiality.

*Needs and Uses:* The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the three year clearance. Section 15.240 requires each grantee of certification for Radio Frequency Identification (RFID) Equipment to register the location of the equipment/devices its markets with the Commission. The information that the grantee must supply to the Commission when registering the device(s) shall include the name, address and other pertinent contact information of users, the geographic coordinates of the operating location, and the FCC identification number(s) of the equipment.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2022–13442 Filed 6–22–22; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[GN Docket No. 19–329; FR ID 92458]**

### Federal Advisory Committee Act; Task Force for Reviewing the Connectivity and Technology Needs of Precision Agriculture in the United States

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC or Commission) Task Force for Reviewing the Connectivity and Technology Needs of Precision Agriculture in the United States (Task Force) will hold its next meeting via live internet link.

**DATES:** July 21, 2022. The meeting will come to order at 12:00 p.m. EDT.

**ADDRESSES:** The meeting will be held via conference call and be available to the public via live feed from the FCC's web page at *www.fcc.gov/live.*

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Cuttner, Designated Federal Officer, at (202) 418–2145, or *Elizabeth.Cuttner@fcc.gov;* Stacy Ferraro, Deputy Designated Federal Officer, at (202) 418–0795, or *Stacy.Ferraro@fcc.gov;* or Lauren Garry, Deputy Designated Federal Officer, at (202) 418–0942, or *Lauren.Garry@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** The meeting will be held on July 21, 2022 at 12:00 p.m. EDT and may be viewed live, by the public, at *http://www.fcc.gov/live.* Any questions that arise during the meeting should be sent to *PrecisionAgTF@fcc.gov* and will be answered at a later date. Members of the public may submit comments to the Task Force in the FCC's Electronic Comment Filing System, ECFS, at *www.fcc.gov/ecfs.* Comments to the Task Force should be filed in GN Docket No. 19–329.

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice). Such requests should include a detailed description of the accommodation needed. In addition, please include a way the FCC can contact you if it needs more information. Please allow at least five days' advance notice; last-minute requests will be accepted but may not be possible to fill.

*Proposed Agenda:* At this meeting, the Task Force will hear presentations on cybersecurity, the future of agriculture production in the United States, and updates from the Working Group leadership on their progress. This agenda may be modified at the discretion of the Task Force Chair and the Designated Federal Officer.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary.*

[FR Doc. 2022–13448 Filed 6–22–22; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–0936; FR ID 92354]**

### Information Collection Being Reviewed by the Federal Communications Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before August 22, 2022. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov*.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

*OMB Control No.:* 3060–0936.

*Title:* Sections 95.2593, 95.2595 and 95.2509, Medical Device Radiocommunications Service (MedRadio).

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit and not-for-profit institutions.

*Number of Respondents:* 3,120 respondents; 3,120 responses.

*Estimated Time per Response:* 1–3 hours.

*Frequency of Response:* On occasion reporting requirement, third party disclosure requirement and recordkeeping requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151 and 303 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 9,120 hours.

*Total Annual Cost:* No cost.

*Needs and Uses:* The Federal Communications Commission is requesting that the Office of Management and Budget (OMB) approve for a period of three years an extension for the information collection requirements contained in this collection.

The information collection requirements that are approved under this information collection are contained in 95.2593, 95.2595 and 95.2509 which relate to the Medical Device Radiocommunication Service (MedRadio). The former rule sections for this collection were 95.1215, 95.1217, 95.1223 and 95.1225.

The information is necessary to allow the coordinator and parties using the database to contact other users to verify information and resolve potential conflicts. Each user is responsible for determining in advance whether new devices are likely to cause or be susceptible to interference from devices already registered in the coordination database.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2022–13447 Filed 6–22–22; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Notice to All Interested Parties of Intent To Terminate Receiverships

*Notice is hereby given* that the Federal Deposit Insurance Corporation (FDIC or Receiver), as Receiver for the institutions listed below, intends to terminate its receivership for said institutions.

NOTICE OF INTENT TO TERMINATE RECEIVERSHIPS

| Fund | Receivership name | City | State | Date of appointment of receiver |
|---|---|---|---|---|
| 10021 | Franklin Bank, SSB | Houston | TX | 11/07/2008 |
| 10043 | Security Savings Bank | Henderson | NV | 02/27/2009 |
| 10061 | BankUnited, FSB | Coral Gables | FL | 05/21/2009 |
| 10062 | Strategic Capital Bank | Champaign | IL | 05/22/2009 |
| 10063 | Citizens National Bank | Macomb | IL | 05/22/2009 |
| 10185 | La Jolla Bank, FSB | La Jolla | CA | 02/19/2010 |
| 10343 | Charter Oak Bank | Napa | CA | 02/18/2011 |

The liquidation of the assets for each receivership has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receiverships will serve no useful purpose. Consequently, notice is given that the receiverships shall be terminated, to be effective no sooner than thirty days after the date of this notice. If any person

wishes to comment concerning the termination of any of the receiverships, such comment must be made in writing, identify the receivership to which the comment pertains, and be sent within thirty days of the date of this notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Section, 600 North Pearl, Suite 700, Dallas, TX 75201.

No comments concerning the termination of the above-mentioned receiverships will be considered which are not sent within this timeframe.

(Authority: 12 U.S.C. 1819)

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on June 17, 2022.

**James P. Sheesley,**

*Assistant Executive Secretary.*

[FR Doc. 2022–13433 Filed 6–22–22; 8:45 am]

**BILLING CODE 6714–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Sunshine Act Meeting

**TIME AND DATE:** 10:28 a.m. on Tuesday, June 21, 2022.

**PLACE:** The meeting was held in the Board Room located on the sixth floor of the FDIC Building located at 550 17th Street NW, Washington, DC.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:** In calling the meeting, the Board determined, on motion of Director Michael J. Hsu (Acting Comptroller of the Currency), seconded by Director Rohit Chopra (Director, Consumer Financial Protection Bureau), and concurred in by Acting Chairman Martin J. Gruenberg, that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B).

**CONTACT PERSON FOR MORE INFORMATION:** Requests for further information concerning the meeting may be directed to Debra A. Decker, Executive Secretary of the Corporation, at 202–898–8748.

Dated this the 21st day of June, 2022.

Federal Deposit Insurance Corporation.

**James P. Sheesley,**

*Assistant Executive Secretary.*

[FR Doc. 2022–13595 Filed 6–21–22; 4:15 pm]

**BILLING CODE 6714–01–P**

## FEDERAL MARITIME COMMISSION

**[DOCKET NO. 22–15]**

### Pro Transport Charleston, Inc., Complainant v. Allround Midwest Forwarding, Inc., Respondent; Notice of Filing of Complaint and Assignment

Served: June 13, 2022.

Notice is given that a complaint has been filed with the Federal Maritime Commission (Commission) by Pro Transport Charleston, Inc. (Pro Transport), hereinafter ''Complainant'', against Allround Midwest Forwarding, Inc. (Allround), hereinafter ''Respondent''. Complainant alleges that Respondent is an ocean transportation intermediary (OTI) organized as a corporation under the laws of Delaware with Cleveland, OH as its principal place of business.

Complainant alleges that Respondent violated 46 U.S.C. 40902 for its failure to maintain a surety bond. The full text of the complaint can be found in the Commission's Electronic Reading Room at *https://www2.fmc.gov/readingroom/proceeding/22-15/.*

This proceeding has been assigned to Office of Administrative Law Judges. The initial decision of the presiding officer in this proceeding shall be issued by June 13, 2023, and the final decision of the Commission shall be issued by January 9, 2024.

**William Cody,**

*Secretary.*

[FR Doc. 2022–13372 Filed 6–22–22; 8:45 am]

**BILLING CODE 6730–02–P**

## FEDERAL MARITIME COMMISSION

### Notice of Agreements Filed

The Commission hereby gives notice of filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, 800 North Capitol Street, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**, and the Commission requests that comments be submitted within 7 days on agreements that request expedited review. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

*Agreement No.:* 201288–005.

*Agreement Name:* Digital Container Shipping Association Agreement.

*Parties:* CMA CGM S.A.; Evergreen Marine Corporation; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Maersk A/S; Mediterranean Shipping Company S.A.; Ocean Network Express Pte. Ltd.; Yang Ming Marine Transport Corporation; and Zim Integrated Shipping Services Ltd.

*Filing Party:* Wayne Rohde; Cozen O'Connor.

*Synopsis:* The amendment authorizes the parties to develop and offer products and services in addition to standards. It also revises some of the governance procedures for the association and restates the Agreement.

*Proposed Effective Date:* 7/31/2022.

*Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/21328.*

Dated: June 16, 2022.

**William Cody,**

*Secretary.*

[FR Doc. 2022–13367 Filed 6–22–22; 8:45 am]

**BILLING CODE 6703–02–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

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 paragraph 7 of the Act.

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 July 8, 2022.

*A. Federal Reserve Bank of Kansas City* (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Gregory Corbin Massey and the Massey Family Foundation, Inc., each of Durant, Oklahoma;* to become members of the Massey Family Group, a group acting in concert, to acquire voting shares of Spend Life Wisely Company, Inc., and thereby indirectly acquire voting shares of First United Bank and Trust Company, both of Durant, Oklahoma.

2. *The First National Bank and Trust Co. Chickasha, Oklahoma, Savings Incentive and Employee Stock Ownership Plan (FNBT ESOP), Patrick A. Brooks, as co-trustee, the Paula K. Brooks Revocable Trust, Paula K. Brooks, as trustee, and Mark Smith, all of Chickasha, Oklahoma; certain minor grandchildren of Mr. and Mrs. Brooks, all of Dallas, Texas; the Murray Living Trust, Bruce Murray, as co-trustee, both of Wauna, Washington; Kyle Abrahams, individually, and as co-trustee of FNBT ESOP, Elijah Young, and certain minor children of Mr. Abrahams, all of Norman, Oklahoma; and the Tanner Shelton Connel Irrevocable Trust, the Jacob Curtis Connel Irrevocable Trust, the Michael Porter Connel Irrevocable Trust, and the Kennamer Hope Connel Irrevocable Trust, Daren Connel, individually, and as co-trustee of all aforementioned trusts, all of North Richland Hills, Texas;* to join the Brooks Family Group, a group acting in concert, to retain voting shares of First Independent Bancorp, Inc., and thereby indirectly retain voting shares of The First National Bank and Trust Company, both of Chickasha, Oklahoma.

*B. Federal Reserve Bank of Dallas* (Karen Smith, Director, Applications) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Michael H. Fiuzat, Houston, Texas;* to acquire voting shares of Central Bancshares, Inc., and thereby indirectly acquire voting shares of Central Bank, both of Houston, Texas, by becoming a trustee of both the Carolyn J. Young 2012 Trust and the John H. Young 2020 Trust, both of Houston, Texas, and a member of the Young Family Control Group.

Board of Governors of the Federal Reserve System.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2022–13435 Filed 6–22–22; 8:45 am]

**BILLING CODE P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

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 paragraph 7 of the Act.

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 July 8, 2022.

*A. Federal Reserve Bank of New York* (Ivan Hurwitz, Senior Vice President) 33 Liberty Street, New York, New York 10045–0001. Comments can also be sent electronically to *Comments.applications@ny.frb.org*:

1. *Mr. Felix Scherzer, Scherzer Capital, LLC, and the Scherzer Family Trust, Tanya Scherzer, as trustee, all of Purchase, New York;* a group acting in concert to acquire voting shares of Patriot National Bancorp, Inc., and thereby indirectly acquire voting shares of Patriot National Bank, both of Stamford, Connecticut.

*B. Federal Reserve Bank of Minneapolis* (Chris P. Wangen, Assistant Vice President), 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291; or electronically to *MA@mpls.frb.org*:

1. *The Willard and Geraldine Ogren Revocable Trust and the Greg Ogren Descendants Separate Trust, Greg Ogren, individually, and as trustee, the Scott Ogren Descendants Separate Trust, Scott Ogren, individually, and as trustee, and Lori Ogren, all of Iron River, Wisconsin; and the Mark Ogren Descendants Separate Trust, Mark Ogren, individually, and as trustee, both of Minnetrista, Minnesota;* a group acting in concert to retain voting shares of Security Bank Shares, Inc., and thereby indirectly retain voting shares of Security State Bank, both of Iron River, Wisconsin, and Security Bank, New Auburn, Wisconsin.

*C. Federal Reserve Bank of Dallas* (Karen Smith, Director, Applications) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *The Terry L. Chandler Trust, Doug Chandler, as trustee, both of Carlsbad, New Mexico;* to retain voting shares of First Artesia Bancshares, Inc., and thereby indirectly retain voting shares of First American Bank, both of Artesia, New Mexico.

Board of Governors of the Federal Reserve System.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2022–13358 Filed 6–22–22; 8:45 am]

**BILLING CODE P**

## FEDERAL RESERVE SYSTEM

### Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

**AGENCY:** Board of Governors of the Federal Reserve System.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Senior Credit Officer Opinion Survey on Dealer Financing Terms (FR 2034; OMB No. 7100–0325).

**FOR FURTHER INFORMATION CONTACT:** Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

**SUPPLEMENTARY INFORMATION:** On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB

inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

**Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Information Collection**

*Collection title:* Senior Credit Officer Opinion Survey on Dealer Financing Terms.

*Collection identifier:* FR 2034.

*OMB control number:* 7100–0325.

*Frequency:* Quarterly.

*Respondents:* The current reporting panel consists of U.S. banking institutions and U.S. branches and agencies of foreign banks, the majority of which are affiliated with a Primary Government Securities Dealer.[1] Other types of respondents, such as other depository institutions, bank holding companies, or other financial entities, may be surveyed when appropriate. Respondents may also include institutions that, while not primary dealers, play a significant role in over-the-counter derivatives or securities financing activities.

*Estimated number of respondents:* 25.

*Estimated average hours per response:* 5.

*Estimated annual burden hours:* 500.

*General description of report:* This survey collects qualitative and limited quantitative information from senior credit officers at responding financial institutions on (1) stringency of credit terms, (2) credit availability and demand across the entire range of securities financing and over-the-counter derivatives transactions, and (3) the evolution of market conditions and conventions applicable to such activities. The FR 2034 survey is conducted quarterly, along with the Senior Loan Officer Opinion Survey on Bank Lending Practices (FR 2018; OMB No. 7100–0058). The survey contains 79 core questions divided into three broad sections, as well as additional questions on topics of timely interest.

*Legal authorization and confidentiality:* The FR 2034 is authorized by sections 2A and 12A of the Federal Reserve Act (FRA).[2] Section 2A of the FRA requires that the Board and the Federal Open Market Committee (FOMC) ''maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.''[3] Section 12A of the FRA further requires the FOMC to implement ''regulations relating to the open-market transactions'' conducted by Federal Reserve Banks ''with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country.''[4] The Board and FOMC use the information obtained through the FR 2034 to discharge these responsibilities.

Responding to the FR 2034 is voluntary. To the extent the information contained in responses to the core questions of the FR 2034 is nonpublic commercial or financial information, which is both customarily and actually treated as private by the respondent, the Board may keep such information confidential pursuant to exemption 4 of the Freedom of Information Act (FOIA).[5] Supplemental questions asked on each survey may vary, and the Board's ability to keep confidential responses to such questions must therefore be determined on a case-by-case basis. Responses to supplemental questions may contain nonpublic commercial information that may be kept confidential by the Board pursuant to exemption 4 of the FOIA. Some such responses may also contain information contained in or related to an examination of a financial institution, which may be kept confidential under exemption 8 of the FOIA.[6]

*Current actions:* On December 3, 2021, the Board published a notice in the **Federal Register** (86 FR 68666) requesting public comment for 60 days on the extension, without revision, of the Senior Credit Officer Opinion Survey on Dealer Financing. The comment period for this notice expired on February 1, 2022. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, June 16, 2022.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2022–13388 Filed 6–22–22; 8:45 am]

**BILLING CODE 6210–01–P**

[1] A list of the current Primary Dealers in Government Securities is available at *https://www.newyorkfed.org/markets/primarydealers.html.*

[2] 12 U.S.C. 1828(c). The Board also has the authority to require reports from state member banks (12 U.S.C. 248(a) and 324).

[3] 12 U.S.C. 225a.

[4] 12 U.S.C. 263.

[5] 5 U.S.C. 552(b)(4).

[6] 5 U.S.C. 552(b)(8).

## FEDERAL TRADE COMMISSION

**[File No. 211 0087]**

## ARKO/GPM Investments; Analysis of Agreement Containing Consent Orders To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement; request for comment.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before July 25, 2022.

**ADDRESSES:** Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: ''ARKO/GPM Investments; File No. 211 0087'' on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Kurt Herrera-Heintz (202–326–3542), Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the terms of the consent agreement and the allegations in the

complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before July 25, 2022. Write ''ARKO/GPM Investments; File No. 211 0087'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to protective actions in response to the COVID–19 pandemic and the agency's heightened security screening, postal mail addressed to the Commission will be delayed. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''ARKO/GPM Investments; File No. 211 0087'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *https://www.regulations.gov*—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *https://www.ftc.gov* to read this document and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before July 25, 2022. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

## Analysis of Agreement Containing Consent Orders To Aid Public Comment

### I. Introduction

The Federal Trade Commission (''Commission'') has accepted an Agreement Containing Consent Order (''Consent Agreement'') from ARKO Corp., GPM Investments, LLC, GPM Southeast, LLC, and GPM Petroleum, LLC (collectively ''Respondents''). The Consent Agreement is designed to remedy the anticompetitive effects that resulted from GPM's acquisition of retail fuel assets from Corrigan Oil Company (''Corrigan'').

Pursuant to an Asset Purchase Agreement dated March 8, 2021, GPM Petroleum, LLC, and GPM Southeast, LLC, which are directly controlled by GPM Investments, LLC (collectively ''GPM'') and indirectly controlled by ARKO Corp., acquired 60 branded Express Stop retail fuel locations in Michigan and Ohio from Corrigan (the ''Acquisition''). GPM consummated the Acquisition in May 2021 for total consideration of approximately $94 million. As part of the Asset Purchase Agreement, Corrigan agreed not to compete for a period of time and within a specified radius around approximately 190 GPM owned, operated, and leased locations, in addition to the Express Stop locations purchased by GPM.

The Commission's Complaint alleges that the Acquisition violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition for the retail sale of gasoline in five local markets in Michigan, and for the retail sale of diesel fuel in one of those same local markets. The Commission's Complaint also alleges that the noncompete agreements violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by unreasonably lessening potential competition for the retail sale of gasoline and diesel fuel within the noncompete territories.

Under the terms of the Decision and Order (''Order'') contained in the Consent Agreement, Respondents are required to rescind parts of an Asset Purchase Agreement with Corrigan and release back to Corrigan retail fuel assets in the five local markets in Michigan. Respondents must transfer these assets back to Corrigan no later than the Closing Date listed in the Reacquisition Agreement of June 28, 2022. In addition, the Order resolves concerns raised by the noncompete agreements in the parties' Asset Purchase Agreement.

The Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. The Commission issued the accompanying Order as final prior to seeking public comment, as provided in Section 2.34(c) of the Commission's Rules. This will allow the Commission to enforce the Order if there are any violations of its provisions during the public comment period. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Consent Agreement and comments received and decide whether it should withdraw from the Consent Agreement or modify the accompanying Order as provided in Section 2.34(e) of the Commission's Rules.

### II. The Respondents

Respondent ARKO Corp., through its wholly owned subsidiary GPM, operates or supplies stores in thirty-three states and Washington, D.C. GPM is the sixth largest convenience store chain in the country, with approximately 3,000 locations comprising approximately 1,400 company-operated stores and 1,625 independent dealer locations.

GPM sells fuel to retail and wholesale customers. GPM earned 2021 revenue over $4.7 billion, with fuel sales accounting for $3 billion.

GPM derives most of its revenue from the retail sale of fuel and products sold in its convenience stores. GPM retains control over the fuel operation at its company-operated stores and sets wholesale fuel prices on a delivered basis to its dealer-operated network.

**III. Retail Sale of Gasoline and Diesel Fuel**

Relevant product markets in which to analyze the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel fuel for their diesel-powered vehicles and can purchase diesel fuel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel fuel constitute separate relevant markets because the two are not interchangeable. Vehicles that run on gasoline cannot run on diesel fuel, and vehicles that run on diesel fuel cannot run on gasoline.

The Commission alleges that the relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of gasoline are five local markets in and around the following cities: Saginaw, Chesaning, Mt. Morris, and Mason, Michigan. The relevant geographic market in which to analyze the effects of the Acquisition on the retail sale of diesel fuel include one local market in and around one of the Saginaw, Michigan retail gasoline markets.

The geographic markets for retail gasoline and retail diesel fuel are highly localized, depending on the unique circumstances of each area. Each relevant market is distinct and fact-dependent, reflecting many considerations, including commuting patterns, traffic flows, and outlet characteristics. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes. The geographic markets for the retail sale of diesel fuel are similar to the corresponding geographic markets for retail gasoline, as many diesel fuel consumers exhibit preferences and behaviors similar to those of gasoline consumers.

The Acquisition substantially lessened competition in each of these local markets, resulting in five highly concentrated markets for the retail sale of gasoline and one highly concentrated market for the retail sale of diesel fuel. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics.

In each of the local gasoline and diesel fuel retail markets where the Commission alleges harm, the Acquisition reduced the number of competitively constraining independent market participants around the locations GPM is returning to Corrigan to two or fewer. Absent the Acquisition, Respondents and Corrigan would have continued to compete directly in these local markets. Because of the Acquisition, GPM is likely able to raise prices unilaterally in markets where GPM and Corrigan were close competitors.

Moreover, the Acquisition would enhance the incentives for interdependent behavior in local markets where only two competitively constraining, independent market participants would remain. Two aspects of the retail fuel industry make it vulnerable to such coordination. First, retail fuel outlets post their fuel prices on price signs that are visible from the street, allowing competitors to easily observe each other's fuel prices. Second, retail fuel outlets regularly track their competitors' fuel prices and change their own prices in response. These repeated interactions give retail fuel outlets familiarity with how their competitors price and how changing prices affect fuel sales.

The Commission's Complaint also alleges that, absent the Consent Agreement, the agreement not to compete harms customers in local retail gasoline and retail diesel fuel markets throughout Michigan and Ohio. By prohibiting Corrigan from competing with (1) each acquired retail fuel outlet and (2) a list of specified GPM locations, whether those GPM locations are anywhere near an acquired Corrigan location, the noncompete provision unreasonably restricts potential competition between Corrigan and GPM that would otherwise benefit consumers.

A general desire to be free from competition following a transaction is not a legitimate business interest. First, Corrigan's agreement not to compete with the 190 GPM-identified retail fuel outlets goes well beyond what is reasonably necessary to protect GPM's investment in the 60 acquired retail Express Stop locations. Second, the Corrigan noncompete agreements around the 60 acquired Express Stop stations, based on the unique facts and conditions present in those markets, is unreasonably overbroad in geographic scope and longer than reasonably necessary to protect a legitimate business interest.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time and uncertainty associated with obtaining necessary permits and approvals.

**IV. The Consent Agreement**

The Order remedies the Acquisition's likely anticompetitive effects by requiring Respondents to return to Corrigan the retail fuel outlets included in the Acquisition in each of the five local markets. Corrigan is an experienced operator of retail fuel sites and remains an active market participant by continuing to operate a retail fuel business and a wholesale fuel supply business in Michigan.

The transfer of assets must be completed no later than the Closing Date listed in the Reacquisition Agreement of June 28, 2022. The Order further requires Respondents to maintain the economic viability, marketability, and competitiveness of each retail fuel business until Corrigan reacquires the five retail fuel locations.

The Order also requires Respondents to obtain prior approval from the Commission before acquiring retail fuel assets within a 3-mile driving distance of any of the returned locations for 10 years. The prior approval provision is necessary because the purchase of a retail fuel business near any of the five retail fuel locations would likely raise the same competitive concerns as the Acquisition and may not be reportable under the Hart-Scott-Rodino Act.

The Order also resolves the competitive concerns raised by the agreements not to compete. The Order requires that Respondents amend the noncompete obligation in the Asset Purchase Agreement to (i) only apply to retail fuel businesses acquired by GPM in this Acquisition, excluding the five locations to be returned to Corrigan, and (ii) limit the noncompete terms relating to each acquired retail fuel business to no broader than 3 years in duration and no more than 3 miles from each Express Stop location. The Order further (1) requires Respondents not enter into or enforce any noncompete agreement related to acquisitions of a retail fuel business that restrict competition around a retail fuel business that GPM already owns or operates, as opposed to the acquired retail fuel business, and (2)

to notify third parties subject to similar noncompete agreements of GPM's obligations under the Order.

Retail fuel competition varies based on many factors, including driving patterns, population density, and consumer demand. The reasonableness of agreements not to compete will necessarily differ with local retail fuel competition. A 3-year and 3-mile radius around each acquired location in this transaction resembles a reasonable duration and geographic scope given the local competitive conditions around each Express Stop location. Noncompete agreements affecting areas geographically distinct from acquired retail fuel outlets, and noncompete agreements untethered to protecting goodwill acquired in the acquisition, are highly suspect and warrant Commission scrutiny.

The purpose of this analysis is to facilitate public comment on the Consent Agreement. The Commission does not intend this analysis to constitute an official interpretation of the Consent Agreement or to modify its terms in any way.

By direction of the Commission.

**April J. Tabor,**

*Secretary.*

**Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya**

Last year, in an unreportable transaction valued at approximately $94 million, GPM Petroleum, LLC, GPM Southeast, LLC, GPM Investments, LLC, and ARKO Corp. (collectively ''GPM'') acquired 60 retail gasoline, diesel, and convenience stores from Corrigan Oil Company (''Corrigan''). Today, after a thorough investigation of this deal, the Commission announced an enforcement action alleging that GPM illegally acquired five of those retail fuel stations from Corrigan, and imposed illegitimate, overbroad agreements not to compete in connection with that acquisition. This action marks an important step forward in protecting the public from harm when rivals agree not to compete. Firms proposing mergers should take note that the Commission will scrutinize contract terms in merger agreements that impede fair competition.

Noncompete agreements affect millions of Americans every day, but they come in a variety of forms. Much of the discussion surrounding noncompete clauses in recent years has focused on their inclusion in employment contracts and the resulting harm to workers. Noncompete covenants, however, can also govern businesses that are direct or potential competitors, and sometimes are included in merger agreements. Today's Commission action highlights that noncompete clauses in a merger agreement may unduly and illegitimately restrain competition when both of the parties remain competitors in other markets.

By its very nature, an agreement not to compete between two businesses reduces competition if it restrains the activities of actual and potential rivals during the term of the agreement. Indeed, noncompete agreements between competing businesses are suspect: for instance, an agreement not to compete may constitute a thinly veiled market allocation scheme, a per se violation of the antitrust laws.

In the context of mergers, parties sometimes assert that noncompete clauses are necessary to protect a legitimate business interest in connection with the sale of a business, such as the goodwill acquired in a transaction. When the seller is exiting the business or selling off assets needed to compete with the buyer, a noncompete that limits prospects for reentry may in certain instances reflect that goodwill, if appropriately limited in geographic scope and duration.

In this matter, as alleged in the Commission's complaint, GPM's agreement to purchase Corrigan's retail fuel stations contained noncompete terms that were overbroad and facially unrelated to protecting any goodwill GPM might hope to acquire with the Corrigan stations. According to the complaint, these noncompete provisions are illegal because they were designed to ensure that GPM would not face direct or indirect competition from Corrigan—not only in the competitively overlapping areas, but even in geographic areas far from the acquired stations.

As today's consent agreement makes clear, firms may not use a merger as an excuse to impose overbroad restrictions on competition or competitors. The Commission will evaluate agreements not to compete in merger agreements with a critical eye.

We look forward to reviewing input and comments from the public about the approach this settlement has taken with respect to the noncompetes at issue here. The Commission is committed to acting in the public interest, and comments from the public are vital to ensuring that we are successful in doing so.

[FR Doc. 2022–13415 Filed 6–22–22; 8:45 am]

BILLING CODE 6750–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention (CDC)

### Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE22–007: Reduce Health Disparities and Improve Traumatic Brain Injury (TBI) Related Outcomes Through the Implementation of CDC's Pediatric Mild TBI Guideline; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE22–007: Reduce Health Disparities and Improve Traumatic Brain Injury (TBI) Related Outcomes Through the Implementation of CDC's Pediatric Mild TBI Guideline, June 7–8, 2022, 8:30 a.m.–5:30 p.m., EDT, Videoconference.

The meeting was published in the **Federal Register** on February 1, 2022, Volume 87, Number 21, page 5483.

The meeting notice is being amended in the first column (FR Doc 2022–01950) to change the meeting date and should read as follows:

CE22–007: Reduce Health Disparities and Improve Traumatic Brain Injury (TBI) Related Outcomes Through the Implementation of CDC's Pediatric Mild TBI Guideline, June 7, 2022.

The meeting is closed to the public.

**FOR FURTHER INFORMATION CONTACT:** Mikel Walters, Ph.D., Scientific Review Officer, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop F–63, Atlanta, Georgia 30341; Telephone: (404) 639–0913; Email: *MWalters@cdc.gov*.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

**Kalwant Smagh,**

*Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2022–13450 Filed 6–22–22; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Request for Information: Forced Labor in Healthcare Supply Chains

**AGENCY:** Office on Trafficking in Persons (OTIP), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

**ACTION:** Notice of Request for Information.

**SUMMARY:** The Office on Trafficking in Persons (OTIP) requests information on forced labor, a form of human trafficking, in healthcare supply chains including monitoring, training, and research efforts. This request for information (RFI) is part of OTIP's ongoing efforts to seek public comments to inform implementation of Executive Order 14001 (*A Sustainable Public Health Supply Chain*), the *National Strategy for a Resilient Public Health Supply Chain,* and other related efforts on forced labor.

**DATES:** Comments on this notice must be received by midnight Eastern Daylight Time (EDT) 30 days after posting. OTIP will not respond individually to responders but will consider all comments submitted by the deadline.

**ADDRESSES:** Please submit all responses via email to *EndTrafficking@acf.hhs.gov* with ''RFI: Forced Labor in Healthcare Supply Chains'' in the subject. Submissions can include attachments of or links to any supporting documentation (*e.g.,* research, training materials, policies, data). Please provide your contact information, including the organization name, for possible follow-up from OTIP.

**FOR FURTHER INFORMATION CONTACT:** Alyssa Wheeler, Policy Analyst, Office on Trafficking in Persons, Email: *Alyssa.Wheeler@acf.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

OTIP is responsible for the development of anti-trafficking strategies, policies, and programs to prevent human trafficking, build health and human service capacity to respond to human trafficking, increase victim identification and access to services, and strengthen health and well-being outcomes of trafficking survivors. OTIP funds the National Human Trafficking Hotline, where an analysis of 32,000 cases reported into the hotline identified healthcare services as one of 25 industries impacted by human trafficking.[1] OTIP programs also include grants to community-based organizations to fund comprehensive case management services for survivors of human trafficking, training and technical assistance for health and human service organizations to build capacity to respond to human trafficking, and research and policy guidance. OTIP serves as the secretariat for the HHS Task Force to Prevent Human Trafficking.[2]

In July 2021, HHS published the *National Strategy for a Resilient Public Health Supply Chain* in response to Executive Order 14001 on a sustainable public health supply chain.[3] [4] [5] The strategy incorporates learnings from experiences of significant disruptions to public health supply chains during the COVID–19 pandemic. It reinforces a commitment to an ethical, equitable, and environmentally sustainable public health supply chain. This includes a call to ''having processes in place to identify and mitigate sourcing risks such as child labor, forced labor, and human trafficking.'' The strategy recognizes the impact of production scarcity, decrease in qualified labor, insufficient technical skills, and other domestic and international factors as increasing risk of forced labor. For example, Objective 1.4 incorporates efforts on forced labor while combatting unfair trade.

As part of this response, the Procurement and Supply Chains Committee of the Senior Policy Operating Group under the President's Interagency Taskforce to Monitor and Combat Trafficking in Persons established a subgroup on Forced Labor in Global Supply Chains. This subgroup is coordinating relevant federal efforts on corporate accountability and compliance, including with the healthcare industry.

Public comments responding to this RFI may inform OTIP, HHS, and federal interagency efforts on trainings, policy guidance, resources, and coordination on data and due diligence tailored to healthcare organizations, procurement professionals, and suppliers.

## II. Definitions

The term ''forced labor'' is defined for U.S. enforcement purposes in two separate sections of the United States Code. First, the criminal statutes of Title 18 encompass the range of activities involved in obtaining the labor or services of a person including (1) force, threats of force, physical restraint, or threats of physical restraint; (2) serious harm, threats of serious harm; (3) abuse or threatened abuse of the legal process; (4) or by a ''scheme, plan or pattern'' designed to cause fear of serious harm or physical restraint (18 U.S.C. 1589). Once a person's labor is obtained by such means, the person's previous consent or effort to obtain employment with the trafficker does not preclude the person from being considered a victim, or the government from prosecuting the offender. Title 18 also defines forced labor as occurring when an individual or entity ''knowingly benefits, financially or by receiving anything of value, from participating in a venture which has engaged in providing or obtaining labor or services by prohibited means, knowing or in reckless disregard of the fact that the venture has engaged in providing or obtaining labor or services by such prohibited means.''[6]

Second, the customs-related statute of Title 19 defines forced labor in connection with the prohibition on the importation of goods mined, produced, or manufactured wholly or in part by convict labor, forced labor, and/or indentured labor (19 U.S.C. 1307). In this context, forced and/or indentured labor includes children and is defined as ''all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.''[7]

Forced labor is also referenced in connection to human trafficking protections codified in Title 22, specifically in forms of labor trafficking (22 U.S.C. 7102). Labor trafficking, one type of ''severe forms of trafficking in persons,'' means ''the recruitment, harboring, transportation, provision, or

[1] The Typology of Modern Slavery report analyzing data from the National Human Trafficking Hotline is available at *https://polarisproject.org/wp-content/uploads/2019/09/Polaris-Typology-of-Modern-Slavery-1.pdf.*

[2] Press release for the HHS Task Force to Prevent Human Trafficking is available at *https://www.hhs.gov/about/news/2022/01/31/secretary-becerra-announces-new-hhs-task-force-to-prevent-human-trafficking.html.*

[3] The National Strategy for a Resilient Public Health Supply Chain is available at *https://www.phe.gov/Preparedness/legal/Documents/National-Strategy-for-Resilient-Public-Health-Supply-Chain.pdf.*

[4] Executive Order 14001 is available at *https://www.federalregister.gov/documents/2021/01/26/2021-01865/a-sustainable-public-health-supply-chain.*

[5] More information on mitigating labor trafficking in public health supply chains is available at *https://www.acf.hhs.gov/blog/2021/10/mitigating-labor-trafficking-public-health-supply-chains.*

[6] Additional text on 18 U.S.C. 1589 is available at *https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-2000-title18-section1589&num=0.*

[7] Additional text on 19 U.S.C. 1307 is available at *https://uscode.house.gov/view.xhtml?req=(title:19%20section:1307%20edition:prelim).*

obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.'' [8]

Pursuant to concepts set out in the *National Strategy for a Resilient Public Health Supply Chain,* healthcare supply chains include the ''finished product . . . raw materials, equipment, and ancillary supplies needed to make and use that product'' (*e.g.,* drugs, biological products, medical devices, personal protective equipment). For the purposes of the RFI, healthcare supply chains also include nutrition-related procurement and the acquisition of services, including delivery of clinical services (*e.g.,* nursing) and ancillary services (*e.g.,* food, custodial, and laundry services).

For purposes of this RFI, ''healthcare product'' will mean any item sourced or produced in the healthcare supply chain, and ''healthcare services'' will refer to any services procured by an organization in the healthcare sector, including clinical and support services.

## III. Request for Comments

OTIP is interested in all the questions listed below, but respondents are welcome to address as many or as few as they choose and to address additional areas of interest not listed.

### *A. Information on Monitoring Forced Labor in the Procurement of Healthcare Services*

- Does your organization or another organization have established standard operating procedures for preventing, identifying, reporting, and addressing suspected forced labor or unfair labor practices by staffing agencies or other subcontractors providing workforce personnel?
- What are your current reporting mechanisms in procuring clinical services and services in general? Would it be feasible to incorporate measures on forced labor in those mechanisms?
- How can service contracting practices be strengthened in the healthcare sector?
- Are there mechanisms in place for individuals delivering clinical or supporting services in the healthcare sector to report abuse, fraud, or forced labor? If so, what are those practices and mechanisms? What protections from retaliation are in place for individuals reporting? Are these mechanisms being successfully utilized?
- What steps does your organization take to investigate and, if needed, remediate forced labor violations?
- Are there any barriers in federal policies, programs, and systems that make it challenging to monitor and address forced labor risks in healthcare services procurement? If so, what are those barriers?

### *B. Information on Monitoring Forced Labor in the Procurement of Healthcare Products*

- Does your organization or another organization have established standard operating procedures for preventing, identifying, reporting, and addressing suspected forced labor or unfair labor practices by potential suppliers or contractors for healthcare products?
- What are your current due diligence and reporting mechanisms in procuring healthcare products in general? Would it be feasible to incorporate measures on forced labor in those mechanisms?
- How can supply chain transparency practices be strengthened to combat forced labor in the healthcare products?
- Are there practices and mechanisms in place for procurement professionals, administrators, contractors, and/or anyone else who might become aware of forced labor risks in procurement of goods to report abuse, fraud, or forced labor? If so, what are those practices and mechanisms? What protections from retaliation are in place for individuals reporting? Are these mechanisms being successfully utilized?
- What steps does your organization take to investigate and, if needed, remediate forced labor violations?
- Are there any barriers in federal policies, programs, and systems that make it challenging to monitor and address forced labor risks in healthcare product procurement? If so, what are those barriers?

### *C. Information on Training and Public Awareness on Forced Labor in Healthcare Supply Chains*

- Do you think healthcare procurement professionals and suppliers are aware of forced labor in supply chains (*e.g.,* production of personal protective equipment, medical equipment) or in the workforce (*e.g.,* patient care services, ancillary support services)?
- What resources currently exist to help healthcare procurement professionals and suppliers prevent, identify, report, and address forced labor in supply chains? Please provide links to resources or information on organizations developing resources.
- What trainings, information sharing, or information collection efforts have successfully integrated content on forced labor in the acquisition of healthcare products and services?
- What are the gaps in training, technical assistance, and awareness on identifying, monitoring, and addressing forced labor in healthcare supply chains?

### *D. Information on Research and Data on Forced Labor in Healthcare Supply Chains*

- Who do you consider a subject matter expert on forced labor in healthcare supply chains and/or in supply chains more broadly? Please provide the name, affiliation, and email for any individuals you list.
- Do you currently rely on research, data, or information on forced labor in healthcare supply chains to inform your organization's practices to prevent, monitor, and respond to concerns? If so, what type of information and where do you access that information?
- What research, data, or information would be helpful to inform and/or strengthen due diligence processes for healthcare procurement professionals and suppliers?
- What diversity, equity, and inclusion considerations should inform understanding of how forced labor occurs in healthcare supply chains from both the administrative and workforce perspectives?

This RFI is for planning purposes only and should not be construed as a policy, solicitation for applications, or as an obligation on the part of the Government to provide support for any ideas identified in response to it. OTIP will use the information submitted in response to this RFI at its discretion and will not provide comments to any responder's submission. However, responses to the RFI may be reflected in future solicitation(s), policies, or publications. Respondents will not be identified in any published reports. Respondents are advised that the Government is under no obligation to acknowledge receipt of the information received or provide feedback to respondents with respect to any information submitted. No proprietary, classified, confidential, or sensitive information should be included in your response, unless marked as Business Confidential Information (BCI). Materials submitted may be made public.

Material submitted by members of the public that is properly marked as BCI with a valid statutory basis will not be disclosed publicly. For any comments that contain BCI, the file name of the business confidential version should begin with the characters 'BCI'. Any

[8] Additional text on 22 U.S.C. 7102 is available at *https://www.govinfo.gov/content/pkg/USCODE-2011-title22/html/USCODE-2011-title22-chap78.htm.*

page containing BCI must be clearly marked 'BUSINESS CONFIDENTIAL' on the top of that page, and the submission should clearly indicate, via brackets, highlighting, or other means, the specific information that is business confidential. A filer requesting business confidential treatment must certify that the information is business confidential and that they would not customarily release it to the public. Filers of comments containing BCI also must submit a public version of their comments. The file name of the public version should begin with the character 'P'.

Dated: June 16, 2022.

**Roshelle M. Brooks,**

*Office of the Executive Secretariat, Administration for Children and Families.*

[FR Doc. 2022–13374 Filed 6–22–22; 8:45 am]

**BILLING CODE 4184–47–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Heart, Lung, and Blood Institute; 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 Heart, Lung, and Blood Advisory Council.

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 Heart, Lung, and Blood Advisory Council.

*Date:* August 23, 2022.

*Time:* 1:00 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Laura K. Moen, Ph.D., Director, Division of Extramural Research Activities, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–Q, Bethesda, MD 20892, 301–827–5517, *moenl@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *www.nhlbi.nih.gov/meetings/nhlbac/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders 1Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: June 17, 2022.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–13420 Filed 6–22–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; 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 General Medical Sciences Special Emphasis Panel; Support for Research Excellence—First Independent Research (SuRE–First) Award (R16).

*Date:* July 21, 2022.

*Time:* 3:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Lisa A. Dunbar, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–2849, *dunbarl@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–13421 Filed 6–22–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Office of the Director, National Institutes of Health; 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 Novel and Exceptional Technology and Research Advisory Committee.

The meeting will be held as a virtual meeting 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:* Novel and Exceptional Technology and Research Advisory Committee.

*Date:* July 14, 2022.

*Time:* 1:00 p.m. to 2:30 p.m.

*Agenda:* The Novel and Exceptional Technology and Research Advisory Committee meeting will include an update from the Working Group on Data Science and Emerging Technology and discussion of next steps regarding the current charge to the committee, delivered in June 2021.

*Place:* National Institutes of Health, 6705 Rockledge Drive, Suite 630, Bethesda, MD 20892 (Virtual Meeting Link will be available at *https://osp.od.nih.gov/biotechnology/main-nextrac/#meetings*).

*Contact Person:* Jessica Tucker, Office of Science Policy, National Institutes of Health, 6705 Rockledge Drive, Suite 630, Bethesda, MD 20892, 301–496–9838, *SciencePolicy@od.nih.gov.*

Any interested person may file written comments by forwarding the statement to the Contact Person listed on this notice at least two business days prior to the meeting date. The statement should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person. Other than name and contact information, please do not include any personally identifiable information or any information that you do not wish to make public. Proprietary, classified, confidential, or sensitive information should not be included in your comments. Please note that any written comments NIH receives may be posted

unredacted to the Office of Science Policy website.

Information is also available on the NIH Office of Science Policy website: *https://osp.od.nih.gov/biotechnology/main-nextrac/#meetings,* where an agenda, link to the webcast meeting, and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: June 17, 2022.

**Victoria Townsend,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–13419 Filed 6–22–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; National Centers for Metabolic Phenotyping in Live Models of Obesity and Diabetes (MPMOD) Consortium Review.

*Date:* July 19–20, 2022.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate cooperative agreement applications.

*Place:* NIDDK, NIH, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ann A. Jerkins, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7119, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, 301–594–2242, *jerkinsa@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–13417 Filed 6–22–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK Clinical Centers.

*Date:* July 15, 2022.

*Time:* 9:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health/NIDDK, 2 Democracy, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Elena Sanovich, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7351, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, 301–594–8886, *sanoviche@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–13422 Filed 6–22–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Cancer Institute; Notice of Charter Renewal

In accordance with Title 41 of the U.S. Code of Federal Regulations, Section 102–3.65(a), notice is hereby given that the Charter for the National Cancer Institute Clinical Trials and Translational Research Advisory Committee, was renewed for an additional two-year period on April 14, 2022.

It is determined that the National Cancer Institute Clinical Trials and Translational Research Advisory Committee, is in the public interest in connection with the performance of duties imposed on the National Cancer Institute by law, and that these duties can best be performed through the advice and counsel of this group.

Inquiries may be directed to Claire Harris, Director, Office of Federal Advisory Committee Policy, Office of the Director, National Institutes of Health, 6701 Democracy Boulevard, Suite 1000, Bethesda, Maryland 20892 (Mail code 4875), Telephone (301) 496–2123, or *harriscl@mail.nih.gov.*

Dated: June 17, 2022.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–13418 Filed 6–22–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases

Special Emphasis Panel; Understanding and Targeting the Pathophysiology of Youth-onset Type 2 Diabetes.

*Date:* July 25, 2022.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* NIH/NIDDK, 6707 Democracy Blvd., Bethesda, MD 20892 (Teleconference Meeting).

*Contact Person:* Paul A. Rushing, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7345, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8895, *rushingp@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2022–13416 Filed 6–22–22; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF STATE

### Office of the Secretary

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act

**AGENCY:** Office of the Secretary, DOS; Office of the Secretary, DHS.

**ACTION:** Notice of determination.

Following consultations with the Attorney General, the Secretary of State and Secretary of Homeland Security have determined that the grounds of inadmissibility at section 212(a)(3)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a)(3)(B), bar certain individuals who do not pose a national security or public safety risk from admission to the United States and from obtaining immigration benefits or other status. Of particular concern, these grounds of inadmissibility bar some individuals who actively assisted U.S. efforts in Afghanistan and now seek and deserve the protection of our Government.

Accordingly, consistent with prior exercises of the exemption authority, the Secretary of State and the Secretary of Homeland Security hereby conclude, as a matter of discretion in accordance with the authority granted by section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), as amended, after considering the foreign policy and national security interests deemed relevant in these consultations, that section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), excluding subclause (i)(II), shall not apply with respect to an individual for any activity or association relating to actions:

(1) Directed against the Afghan Taliban or Afghan Taliban-affiliated militia groups;

(2) Directed against any other organization that was engaged in violent activities that targeted the United States or allied entities, including (a) any entity or contractor of the United States government or any individual employed by or on behalf of the United States government, (b) the International Security Assistance Force (ISAF) or any successor name of such Force, (c) the United Nations, or (d) the government of the Islamic Republic of Afghanistan or the Afghan Transitional Authority during the time period from December 22, 2001 to August 15, 2021; or

(3) Directed against the army of the Union of Soviet Socialist Republics (USSR) or the government of the Democratic Republic of Afghanistan between April 27, 1978 and April 28, 1992,

provided that the individual satisfies the relevant agency authority that the individual:

(a) Is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;

(b) Has undergone and passed all relevant background and security checks;

(c) Has fully disclosed, to the best of their knowledge to relevant U.S. government entities, the nature and circumstances of all activities or associations falling within the scope of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B);

(d) Has not participated in, or provided material support for the commission of, a terrorist activity that they knew or reasonably should have known targeted noncombatant persons or U.S. interests;

(e) Is not otherwise inadmissible under section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), for which no exemption applies;

(f) Has not been indicted by any international tribunal or the International Criminal Court;

(g) Has not voluntarily and knowingly engaged in any terrorist activities on behalf of, or provided any material support to any organization which has ever been designated a terrorist organization as described in section 212(a)(3)(B)(vi)(I) or (II) of the INA, at any time, including prior to that organization's designation, unless the activities are otherwise exempted;

(h) Has not committed, ordered, incited, assisted, or otherwise participated in acts of torture, as defined in 18 U.S.C. 2441(d)(1)(A), or genocide, as defined in 18 U.S.C. 1091(a); or recruited or used child soldiers, as described in 18 U.S.C. 2442;

(i) Has not been identified in either Executive Order 13224, as amended, or otherwise designated by the Secretary of State or the Secretary of the Treasury pursuant to the Specially Designated Nationals List (SDNL), or in lists established by United Nations Security Council Committee pursuant to Resolutions 1267 (1999) or 1988 (2011) concerning Al-Qaida and the Taliban and associated individuals and entities;

(j) Poses no danger to the safety and security of the United States; and

(k) Warrants an exemption from the relevant inadmissibility provision(s) in the totality of the circumstances.

Implementation of this determination will be made by U.S. Citizenship and Immigration Services (USCIS) or by U.S. consular officers, as applicable, and in consultation with relevant U.S. government entities, who shall ascertain, to their satisfaction, and in their discretion, that the particular applicant meets each of the criteria set forth above.

This exercise of authority may be revoked as a matter of discretion and without notice at any time, with respect to any and all persons subject to it. Any determination made under this exercise of authority as set out above can inform but shall not control a decision regarding any subsequent benefit or protection application, unless such exercise of authority has been revoked.

This exercise of authority shall not be construed to prejudice, in any way, the ability of the U.S. government to commence subsequent criminal or civil proceedings in accordance with U.S. law involving any beneficiary of this exercise of authority (or any other person). This exercise of authority creates no substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

In accordance with section 212(d)(3)(B)(ii) of the INA, 8 U.S.C. 1182(d)(3)(B)(ii), a report on the individuals to whom this exercise of authority is applied, on the basis of case-by-case decisions by the U.S. Department of Homeland Security or by

the U.S. Department of State, shall be provided to the specified congressional committees not later than 90 days after the end of the fiscal year.

This determination is based on an assessment related to the national security and foreign policy interests of the United States as they apply to the particular persons described herein and shall not have any application with respect to other persons or to other provisions of U.S. law.

*Authority:* 8 U.S.C. 1182(d)(3)(B)(i).

Dated: June 8, 2022.

**Alejandro N. Mayorkas,**

*Secretary, U.S. Department of Homeland Security.*

Dated: June 8, 2022.

**Antony J. Blinken,**

*Secretary, U.S. Department of State.*

[FR Doc. 2022–13473 Filed 6–21–22; 11:15 am]

BILLING CODE 9111–97–P

## DEPARTMENT OF STATE

### Office of the Secretary

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act

**AGENCY:** Office of the Secretary, DOS; Office of the Secretary, DHS

**ACTION:** Notice of determination.

Following consultations with the Attorney General, the Secretary of Homeland Security and the Secretary of State have determined that grounds of inadmissibility at section 212(a)(3)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a)(3)(B), bar certain individuals who do not pose a national security or public safety risk from admission to the United States and from obtaining immigration benefits or other status. Accordingly, consistent with prior exercises of the exemption authority, the Secretary of Homeland Security and the Secretary of State, in consultation with the Attorney General, hereby conclude, as a matter of discretion in accordance with the authority granted by section 212(d)(3)(B)(i) of the INA, 8 U.S.C. 1182(d)(3)(B)(i), as amended, after considering the foreign policy and national security interests deemed relevant in these consultations, that section 212(a)(3)(B)(iv)(VI)(cc) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(cc), shall not apply with respect to an individual who provided: (1) insignificant material support (*i.e.,* support that was minimal in amount and inconsequential in effect); or (2) limited material support under circumstances involving certain routine commercial transactions, certain routine social transactions (*i.e.,* in the satisfaction of certain well-established or verifiable family, social, or cultural obligations), certain humanitarian assistance, or substantial pressure that does not rise to the level of duress, to a designated terrorist organization as described in subsection 212(a)(3)(B)(vi)(I) or subsection 212(a)(3)(B)(vi)(II) of the INA, 8 U.S.C. 1182(a)(3)(B)(vi)(I) or 8 U.S.C. 1182(a)(3)(B)(vi)(II), or to any member of such organization, and provided that the individual satisfies the relevant agency authority that the individual:

(a) Did not voluntarily and knowingly engage in terrorist activity on behalf of a designated terrorist organization as described in section 212(a)(3)(B)(vi)(I) or (II) of the INA, 8 U.S.C. 1182(a)(3)(B)(vi)(I) or (II);

(b) Is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;

(c) Has undergone and passed all relevant background and security checks;

(d) Has fully disclosed, to the best of their knowledge, in all relevant applications and interviews with government representatives and agents, the nature and circumstances of any material support provided and any other activity or association falling within the scope of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), as well as all contact with a terrorist organization and its members;

(e) Has not provided the material support with any intent or desire to assist any terrorist organization or terrorist activity;

(f) Has not provided material support that the individual knew or reasonably should have known could directly be used to engage in terrorist or violent activity;

(g) Has not provided material support to terrorist activities that they knew or reasonably should have known targeted noncombatant persons, U.S. citizens, or U.S. interests;

(h) Has not provided material support that the individual knew or reasonably should have known involved providing weapons, ammunition, explosives, or components thereof, or the transportation or concealment of such items;

(i) Is not otherwise inadmissible under section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), for which no exemption applies;

(j) Poses no danger to the safety and security of the United States; and

(k) Warrants an exemption from the relevant inadmissibility provision(s) in the totality of the circumstances.

Implementation of this determination will be made by U.S. Citizenship and Immigration Services (USCIS), in consultation with U.S. Immigration and Customs Enforcement (ICE), or by U.S. consular officers, as applicable, who shall ascertain, to their satisfaction, and in their discretion, that the particular applicant meets each of the criteria set forth above.

This exercise of authority may be revoked as a matter of discretion and without notice at any time, with respect to any and all persons subject to it. Any determination made under this exercise of authority as set out above can inform but shall not control a decision regarding any subsequent benefit or protection application, unless such exercise of authority has been revoked.

This exercise of authority shall not be construed to prejudice, in any way, the ability of the U.S. government to commence subsequent criminal or civil proceedings in accordance with U.S. law involving any beneficiary of this exercise of authority (or any other person). This exercise of authority creates no substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

In accordance with section 212(d)(3)(B)(ii) of the INA, 8 U.S.C. 1182(d)(3)(B)(ii), a report on the applicant or beneficiaries to whom this exercise of authority is applied, on the basis of case-by-case decisions by the U.S. Department of Homeland Security or by the U.S. Department of State, shall be provided to the specified congressional committees not later than 90 days after the end of the fiscal year.

This determination is based on an assessment related to the national security and foreign policy interests of the United States as they apply to the particular persons described herein and shall not have any application with respect to other persons or to other provisions of U.S. law.

*Authority:* 8 U.S.C. 1182(d)(3)(B)(i).

Dated: June 8, 2022.

**Alejandro N. Mayorkas,**

*Secretary, U.S. Department of Homeland Security.*

Dated: June 8, 2022.

**Antony J. Blinken,**

*Secretary, U.S. Department of State.*

[FR Doc. 2022–13472 Filed 6–21–22; 11:15 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF STATE

### Office of the Secretary

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act

**AGENCY:** Office of the Secretary, DOS; Office of the Secretary, DHS.

**ACTION:** Notice of determination.

Following consultations with the Attorney General, the Secretary of State and the Secretary of Homeland Security have determined that the grounds of inadmissibility at section 212(a)(3)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a)(3)(B), bar certain individuals who do not pose a national security or public safety risk from admission to the United States and from obtaining immigration benefits or other status. Accordingly, consistent with prior exercises of the exemption authority, the Secretary of State and the Secretary of Homeland Security hereby conclude, as a matter of discretion in accordance with the authority granted by section 212(d)(3)(B)(i) of the INA, 8 U.S.C. 1182(d)(3)(B)(i), as amended, after considering the foreign policy and national security interests deemed relevant in these consultations, that section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), excluding subclause (i)(II), shall not apply with respect to an individual who was employed as a civil servant in Afghanistan at any time from September 27, 1996 to December 22, 2001, or from August 15, 2021, or thereafter, if the individual establishes that they did not voluntarily and knowingly engage in terrorist activity on behalf of the Taliban or another designated terrorist organization, and provided that the individual satisfies the relevant agency authority that the individual:

(a) Is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;

(b) Has undergone and passed all relevant background and security checks;

(c) Has fully disclosed, to the best of their knowledge, in all relevant applications and interviews with U.S. government representatives and agents, the nature and circumstances of any activities or associations falling within the scope of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B);

(d) Has not participated in, or provided material support for the commission of, a terrorist activity that they knew or reasonably should have known targeted noncombatant persons or U.S. interests;

(e) Is not otherwise inadmissible under section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), for which no exemption applies;

(f) Poses no danger to the safety and security of the United States; and

(g) Warrants an exemption from the relevant inadmissibility provision(s) in the totality of the circumstances.

Implementation of this determination will be made by U.S. Citizenship and Immigration Services (USCIS), in consultation with U.S. Immigration and Customs Enforcement (ICE), or by U.S. consular officers, as applicable, who shall ascertain, to their satisfaction, and in their discretion, that the particular applicant meets each of the criteria set forth above.

This exercise of authority supersedes a similar exercise of authority by then Secretary of Homeland Security Jeh Johnson and then Secretary of State John Kerry signed on January 18, 2017, expanding the covered time period of employment as a civil servant in Afghanistan to include the period from ''August 15, 2021, or thereafter,'' in addition to the period from September 27, 1996 to December 22, 2001. This exercise of authority may be revoked as a matter of discretion and without notice at any time with respect to any and all persons subject to it. Any determination made under this exercise of authority as set out above can inform but shall not control a decision regarding any subsequent benefit or protection application, unless such exercise of authority has been revoked.

This exercise of authority shall not be construed to prejudice, in any way, the ability of the U.S. government to commence subsequent criminal or civil proceedings in accordance with U.S. law involving any beneficiary of this exercise of authority (or any other person). This exercise of authority creates no substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

In accordance with section 212(d)(3)(B)(ii) of the INA, 8 U.S.C. 1182(d)(3)(B)(ii), a report on the individuals to whom this exercise of authority is applied, on the basis of case-by-case decisions by the U.S. Department of State or by the U.S. Department of Homeland Security, shall be provided to the specified congressional committees not later than 90 days after the end of the fiscal year.

This determination is based on an assessment related to the national security and foreign policy interests of the United States as they apply to the particular persons described herein and shall not have any application with respect to other persons or to other provisions of U.S. law.

*Authority:* 8 U.S.C. 1182(d)(3)(B)(i).

Dated: June 8, 2022.

**Alejandro N. Mayorkas,**

*Secretary, U.S. Department of Homeland Security.*

Dated: June 8, 2022.

**Antony J. Blinken,**

*Secretary, U.S. Department of State.*

[FR Doc. 2022–13474 Filed 6–21–22; 11:15 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCO933000.L16100000. LXSILITI0000.DO0000.22X]**

### Notice of Intent To Prepare a Supplemental Environmental Impact Statement for the Colorado River Valley Field Office and Grand Junction Field Office Resource Management Plans, Colorado

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of intent.

**SUMMARY:** In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) Colorado River Valley Field Office (CRVFO), Silt, Colorado, and Grand Junction Field Office (GJFO), Grand Junction, Colorado, intend to prepare a supplemental environmental impact statement (EIS) for the CRVFO and GJFO Resource Management Plans (RMPs). This notice announces the beginning of the scoping process to solicit public involvement and identify issues.

**DATES:** This notice initiates the public scoping process for the supplemental

EIS. Comments concerning the scope of analysis, potential alternatives, and identification of relevant issues may be submitted in writing until July 25, 2022. All comments must be received by July 25, 2022. Scoping meetings will be held virtually and will be announced at least 15 days in advance through local media, newspapers and the BLM website at: *https://go.usa.gov/xtrgf.*

**ADDRESSES:** You may submit comments related to this planning effort electronically via the ePlanning website at *https://go.usa.gov/xtrgf.* Comments may also be sent to BLM Upper Colorado River District, Attn: Supplemental EIS, 2518 H Road, Grand Junction, CO 81506. Documents pertinent to this proposal may be examined online at *https://go.usa.gov/xtrgf.*

**FOR FURTHER INFORMATION CONTACT:** Bruce Krickbaum, Project Manager, email *ucrd-seis@blm.gov,* telephone 970–240–5399; or at the mailing address shown earlier (see **ADDRESSES**). Persons in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

**SUPPLEMENTARY INFORMATION:** This document provides notice that the BLM CRVFO and GJFO intend to prepare a joint supplemental EIS for their respective RMPs. The planning area is in Garfield, Mesa, Eagle, Pitkin, Routt, Rio Blanco and Montrose counties, Colorado, and encompasses approximately 1.56 million acres of public land and 1.95 million acres of Federal mineral estate.

## Purpose and Need

The purpose of the supplemental EIS is to supplement the EISs completed in 2014 for the CRVFO RMP and 2015 for the GJFO RMP by considering one or more additional alternatives with respect to the lands that are allocated as open or closed to oil and gas leasing in the planning decision areas, and to provide additional analysis of greenhouse gas emissions associated with the fluid mineral management alternatives considered in the final EISs and the supplemental EIS.

The need for this supplemental EIS is to address the issues identified by the court in litigation involving the Colorado River Valley RMP (*Wilderness Workshop* v. *BLM,* 16–cv–01822), as described in settlement agreements in that case and a related oil and gas leasing case (*Wilderness Workshop* v. *BLM,* 18–cv–00987), and to revisit the Grand Junction RMP, as described in BLM's motion for voluntary remand in litigation involving that RMP (*Center for Biological Diversity* v. *BLM,* 19–cv–02869).

## Preliminary Alternatives

The BLM has identified the following preliminary issues that may arise in the consideration of alternatives with different acreages potentially eligible for oil and gas leasing and is accepting public input during the scoping period consistent with 43 CFR 1610.4–1: environmental consequences of downstream combustion of the oil and gas resources; economic impacts; impacts to affected biological, physical, and heritage resources, resource uses, and special designations; and impacts to recreation. A potential new alternative for each RMP would have no future oil and gas leasing in areas with no-known, low, and moderate fluid mineral potential. Under the potential new alternative, high and very high fluid mineral potential areas would remain open for oil and gas leasing, except for areas that were considered for closure in the conservation alternative (alternative C) from the proposed RMP/final EISs. Apart from oil and gas management planning, this potential alternative would retain existing management as described in the 2015 CRVFO and GJFO RMP Records of Decision and applicable amendments. The supplemental EIS will include an updated analysis of greenhouse gas emissions associated with fluid mineral management planning decisions. The BLM welcomes comments on the potential new alternative as well as suggestions for additional alternatives.

## Planning Criteria

The BLM has identified the following preliminary planning criteria and is accepting public input during the scoping period consistent with 43 CFR 1610.4–2(c):

- The supplemental EIS will comply with NEPA, FLPMA, and other applicable laws, executive orders, regulations, and policy;
- Lands covered in the supplemental EIS will be Federal lands where BLM makes mineral leasing eligibility decisions and split-estate lands with Federal minerals;
- The supplemental EIS will address the issues identified by the court in *Wilderness Workshop* v. *BLM,* 16–cv–01822, by considering whether lands will be open or closed to Federal fluid mineral leasing (''reasonable alternatives to oil and gas leasing'') and analyzing the effects that combustion of oil and gas produced in the planning decision area may have on greenhouse gas emissions, as well as related mitigation;
- The scope of analysis will be appropriate to the planning scale and in accordance with Bureau-wide standards and program guidance; and
- The BLM will consider Tribal, State, and local plans that are germane in the development of land use plans for public lands, and specifically, the planning decisions considered in the supplemental EIS, to the extent the plans are consistent with the purposes, policies, and programs of Federal laws and regulations applicable to public lands.

## Summary of Expected Impacts

The supplemental EIS will evaluate impacts from potential oil and gas leasing and future development to the extent they are reasonably foreseeable at the planning stage. Impacts are not known at this time except as described in the 2014 and 2015 final EISs. The analysis in the supplemental EIS may consider potential effects on wildlife, threatened and endangered species habitat, recreation, visual resources, water resources, air quality, cultural resources, special designations, social and economic conditions, fluid minerals, and other resources and uses. The BLM will use an interdisciplinary approach that incorporates the expertise of specialists in the relevant resource fields.

## Schedule for the Decision-Making Process

The BLM will provide additional opportunities for public participation consistent with the NEPA and land use planning processes, including a 90-day comment period on the draft supplemental EIS and a 30-day public protest period and a 60-day Governor's consistency review on the final supplemental EIS. The draft supplemental EIS is anticipated to be available for public review in Spring 2023 and the final supplemental EIS is anticipated to be available for public protest in Winter 2023/2024 with a Record of Decision in Spring 2024.

## Public Scoping Process

The BLM encourages comments concerning the scope of the analysis in the supplemental EIS, the potential new alternative, other potential alternatives, identification of issues for analysis, and any other information relevant to this project. You may submit comments by using one of the methods listed in the

**ADDRESSES** section of this Notice. Public scoping meetings will be conducted virtually to explain project details. Representatives from BLM will be available to answer questions. All comments must be received by the date shown in the **DATES** section.

### Lead and Cooperating Agencies

The BLM is the lead Federal agency for the supplemental EIS. The BLM has invited the following to participate as cooperating agencies: the seven counties that are entirely or partially in the planning area, municipalities that participated as cooperating agencies during the RMPs/EISs, Colorado Department of Natural Resources, Colorado Parks and Wildlife, Colorado River Water Conservation District, U.S. Fish and Wildlife Service, and U.S. Bureau of Reclamation.

### Responsible Official

The Colorado State Director is the deciding official for this planning effort.

### Nature of Decision To Be Made

The nature of the decision to be made will be the State Director's selection of land use planning decisions for managing BLM-administered lands under the principles of multiple use and sustained yield in a manner that best addresses the purpose and need. The decision resulting from this supplemental EIS will specify which areas are allocated as open or closed to oil and gas leasing in the decision area.

### Additional Information

The BLM will identify, analyze, and consider mitigation to address the reasonably foreseeable impacts to resources from all reasonable alternatives and, in accordance with 40 CFR 1502.14(f), include appropriate mitigation measures not already included in the alternatives. Mitigation may include avoidance, minimization, rectification, reduction, or elimination over time, and compensation; and may be considered at multiple scales, including the landscape scale.

The BLM will utilize and coordinate the NEPA and land use planning processes for this planning effort to help support procedural requirements under the Endangered Species Act (16 U.S.C. 1536) and Section 106 of the National Historic Preservation Act (54 U.S.C. 306108) as provided in 36 CFR 800.2(d)(3), including public involvement requirements of Section 106. The information about historic and cultural resources and threatened and endangered species within the area potentially affected by the proposed plan will assist the BLM in identifying and evaluating impacts to such resources.

The BLM will consult with Indian Tribes on a government-to-government basis in accordance with Executive Order 13175, BLM Manual section 1780, and other Departmental policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with Tribes and stakeholders that may be interested in or affected by the supplemental EIS that the BLM is evaluating, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate in the development of the environmental analysis as a cooperating agency.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 40 CFR 1501.7 and 43 CFR 1610.2)

**Stephanie Connolly,**

*Acting BLM Colorado State Director.*

[FR Doc. 2022–13394 Filed 6–22–22; 8:45 am]

**BILLING CODE 4310–JB–P**

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## DEPARTMENT OF THE INTERIOR

## Bureau of Land Management

**[223 LLUTP00000 L17110000.AQ0000 BOC:253Y00]**

## Notice of Public Meeting, Grand Staircase-Escalante National Monument Advisory Committee, Utah

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act, as amended, the Federal Advisory Committee Act, and the Federal Lands Recreation Enhancement Act, the U.S. Department of the Interior, Bureau of Land Management's (BLM) Grand Staircase-Escalante National Monument Advisory Committee will meet as indicated below.

**DATES:** The Grand Staircase-Escalante National Monument Advisory Committee will hold virtual meetings on July 12, 2022; October 18, 2022; and December 13, 2022. All meetings will occur from 9 a.m. to 4:30 p.m. Public comments will be received on July 12, 2022 at 3:30 p.m., October 18, 2022 at 2:45 p.m., and on December 13, 2022 at 1:45 p.m. The meetings are open to the public.

**ADDRESSES:** The agenda and meeting access information (including how to log in and participate in virtual meetings) will be announced on the Grand Staircase-Escalante National Monument Advisory Committee web page 15 days before the meeting at *https://go.usa.gov/xuq2U.*

**FOR FURTHER INFORMATION CONTACT:** David Hercher, Paria River District Public Affairs Specialist, 669 S Highway 89A, Kanab, UT 84741, via email with the subject line ''GSENM MAC'' to *escalante_interagency@blm.gov,* or by calling the Grand Staircase-Escalante National Monument Office at (435) 644–1200.

**SUPPLEMENTARY INFORMATION:** Presidential Proclamation 6920, as modified by Presidential Proclamations 9682 and 10286, established the Grand Staircase-Escalante National Monument Advisory Committee to provide advice and information to the Secretary of the Interior through the Director of the BLM to consider for managing the Grand Staircase-Escalante National Monument. The 15-member committee represents a wide range of interests including local and state government, paleontological and archaeological expertise, the conservation community, livestock grazing permittees, Tribal members, developed and dispersed recreation interests, private landowners, local business owners, and the public at large.

Planned agenda items for the July meeting include: administrative business; introduction of the Oct. 8, 2021, Proclamation 10286, as the foundational legal instrument for the management of the Monument; presentation of the interim guidance issued by the BLM Dec. 16, 2021, as providing interim management direction for land managers, while a new Monument management plan is being developed; and the role of the guidance in ongoing management. Additional agenda items include introduction of the National Landscape Conservation System 15-Year Strategy (2010–2025) and how this strategy will apply to Monument management, review of the status of BLM efforts toward preparing and adopting a science plan for the Monument, and a brief update on other ongoing National Environmental Policy Act (NEPA) planning within the Monument. Planned agenda items for the October

meeting include identification and discussion of potential issues to consider in resource management planning, presentation and discussion of the current resource management planning status and future milestones, and updates on other ongoing NEPA planning priorities within the Monument. Planned agenda items for the December meeting include presentation and discussion of the current resource management planning status and future milestones, discussion of the alternatives development process and the draft environmental impact statement, and updates on other ongoing NEPA planning priorities within the Monument.

A public comment period will be offered during these meetings. Depending on the number of people wishing to comment and the time available, the time for individual comments may be limited. Written comments may also be sent to the Grand Staircase-Escalante National Monument at the address listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. All comments received prior to the meeting will be provided to the Grand Staircase-Escalante National Monument Advisory Committee.

Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Detailed meeting minutes for the Grand Staircase-Escalante National Monument Advisory Committee meeting will be maintained in the Paria River District Office and will be available for public inspection and reproduction during regular business hours within 90 days following the meeting. Minutes will also be posted to the Grand Staircase-Escalante National Monument Advisory Committee web page.

*Authority:* 43 CFR 1784.4–2.

**Harry Barber,**

*District Manager.*

[FR Doc. 2022–13453 Filed 6–22–22; 8:45 am]

**BILLING CODE 4310–DQ–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[223.LLAK941200.L1440000.ET0000; AA–82862]**

### Public Land Order No. 7908; Extension of Public Land Order No. 7531; King Salmon Environmental Remediation Project, Alaska

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This Public Land Order (PLO) extends the duration of the withdrawal created by PLO No. 7531, which would otherwise expire on August 5, 2022, for an additional 20-year term. PLO No. 7531 withdrew 1.25 acres of public land from settlement, sale, location, or entry under the public land laws, including the United States mining laws, but not from leasing under the mineral leasing laws, subject to valid existing rights, for the United States Air Force (USAF) to protect the King Salmon Remediation Project.

**DATES:** This PLO takes effect on August 6, 2022.

**FOR FURTHER INFORMATION CONTACT:** Chelsea Kreiner, BLM Alaska State Office, 222 West Seventh Avenue, Mailstop 13, Anchorage, AK 99513–7504, (907) 271–4205, or *ckreiner@blm.gov*. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

**SUPPLEMENTARY INFORMATION:** The purpose for which the withdrawal was first made requires this extension to continue the protection of the King Salmon Environmental Remediation Project in King Salmon, Alaska.

**Order**

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

1. Subject to valid existing rights, PLO No. 7531, (67 FR 50894 (2002)), which withdrew 1.25 acres of public land from settlement, sale, location, or entry under the public land laws, including the United States mining laws, but not from leasing under the mineral leasing laws, subject to valid existing rights, and reserved it for environmental remediation and protection by the United States Air Force, is hereby extended for an additional 20-year period.

2. The withdrawal extended by this Order will expire on August 5, 2042, unless, as a result of a review conducted prior to the expiration date, pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be further extended.

**Tanya Trujillo,**

*Assistant Secretary for Water and Science.*

[FR Doc. 2022–13443 Filed 6–22–22; 8:45 am]

**BILLING CODE 4310–JA–P**

## INTERNATIONAL TRADE COMMISSION

### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Rotating 3–D LiDAR Devices, Components Thereof, and Sensing Systems Containing the Same, DN 3624;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov* . The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Velodyne Lidar USA, Inc. on June 16, 2022. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain rotating 3–d lidar devices, components thereof, and sensing systems containing the same. The complainant names as respondent: Ouster, Inc. of San Francisco, CA; and Benchmark Electronics, Inc. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondent, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments. Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3624'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: June 16, 2022.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2022–13387 Filed 6–22–22; 8:45 am]

**BILLING CODE 7020–02–P**

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

On June 14, 2022, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of New Jersey in the lawsuit entitled *United States* v. *Kaydon Acquisition XI, Inc., et al.,* Civil Action No. 2:22–cv–03759–CCC–JRA. The three defendants are Kaydon Acquisition XI, Inc., K. Hovnanian Port Imperial Urban Renewal, Inc., and Hovnanian Enterprises, Inc. In the filed complaint, the United States, on behalf of the U.S. Environmental Protection Agency (''EPA''), alleges that the defendants are liable under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a), for past response costs EPA incurred to respond to releases and threatened releases of

hazardous substances into the environment at the M.C. Canfield Sons Co. Site located in Newark, New Jersey. The proposed consent decree requires the defendants to pay $1.5 million, plus interest from April 1, 2022, to EPA, in settlement of the United States' claim for past response costs against the defendants.

The publication of this notice opens a period for public comment on the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Kaydon Acquisition XI, Inc., et al.,* D.J. Ref. No. 90–11–3–11062/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

| *To submit comments:* | *Send them to:* |
|---|---|
| By email ..... | *pubcomment-ees.enrd@usdoj.gov.* |
| By mail ..... | Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611. |

During the public comment period, the proposed consent decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611

Please enclose a check or money order for $4.75 (25 cents per page reproduction cost), payable to the United States Treasury.

**Henry S. Friedman,**

*Assistant Section Chief, Environmental Enforcement Section, Environment & Natural Resources Division.*

[FR Doc. 2022–13400 Filed 6–22–22; 8:45 am]

**BILLING CODE 4410–15–P**

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting

**TIME AND DATE:** The Finance Committee of the Legal Services Corporation Board of Directors will meet virtually on June 30, 2022. The meeting will commence at 2:30 p.m. EDT, and will continue until the conclusion of the Committee's agenda.

**PLACE:** *Public Notice of Virtual Meetings:*

LSC will conduct the June 30, 2022 meetings via Zoom.

*Public Observation:* Unless otherwise noted herein, the Finance Committee meeting will be open to public observation via Zoom. Members of the public who wish to participate remotely in the public proceedings may do so by following the directions provided below.

**Directions for Open Session**

*June 30, 2022*

- To join the Zoom meeting by computer, please use this link.
- *https://lsc-gov.zoom.us/j/89857351710?pwd=dGc4K3hwVVVPZFNlZW16OFhrQzJTdz09&from=addon*
  - *Meeting ID:* 898 5735 1710
  - *Passcode:* 63022
- To join the Zoom meeting with one tap from your mobile phone, please click dial:
  - +13017158592,,89857351710# US (Washington DC)
  - +13126266799,,89857351710# US (Chicago)
- To join the Zoom meeting by telephone, please dial one of the following numbers:
  - +1 301 715 8592 US (Washington DC)
  - +1 312 626 6799 US (Chicago)
  - +1 646 876 9923 US (New York)
  - +1 408 638 0968 US (San Jose)
  - +1 669 900 6833 US (San Jose)
  - +1 253 215 8782 US (Tacoma)
  - +1 346 248 7799 US (Houston)
  - *Meeting ID:* 898 5735 1710
  - *Passcode:* 63022

Once connected to Zoom, please immediately mute your computer or telephone. Members of the public are asked to keep their computers or telephones muted to eliminate background noise. To avoid disrupting the meetings, please refrain from placing the call on hold if doing so will trigger recorded music or other sound.

From time to time, the Finance Committee Chair may solicit comments from the public. To participate in the meeting during public comment, use the 'raise your hand' or 'chat' functions in Zoom and wait to be recognized by the Chair before stating your questions and/or comments.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

1. Approval of Meeting Agenda
2. Discussion with LSC Leadership Regarding Recommendations for LSC's Fiscal Year 2024 Budget Request
   - *Ronald S. Flagg, President*
   - *Carol A. Bergman, Vice President for Government Relations & Public Affairs*
3. Discussion with Leadership from the Office of Inspector General (OIG) for the Legal Services Corporation Regarding OIG's Fiscal Year 2024 Budget Request
   - *Roxanne Caruso, Acting Inspector General*
   - *David Maddox, Assistant Inspector General for Management and Evaluation*
4. Public Comment
5. Consider and Act on Other Business
6. Consider and Act on Adjournment of Meeting

**CONTACT PERSON FOR MORE INFORMATION:** Kaitlin Brown, Executive and Board Project Coordinator, at (202) 295–1555. Questions may also be sent by electronic mail to *brownk@lsc.gov.*

*Non-Confidential Meeting Materials:* Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC website, at *https://www.lsc.gov/about-lsc/board-meeting-materials.*

Dated: June 21, 2022.

**Kaitlin D. Brown,**

*Executive and Board Project Coordinator, Legal Services Corporation.*

[FR Doc. 2022–13586 Filed 6–21–22; 4:15 pm]

**BILLING CODE 7050–01–P**

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting

**TIME AND DATE:** The Operations and Regulations Committee of the Legal Services Corporation Board of Directors will meet virtually on June 30, 2022. The meeting will commence at 12:00 p.m. EDT, and will continue until the conclusion of the Committee's agenda.

**PLACE:** *Public Notice of Virtual Meetings:*

LSC will conduct the June 30, 2022 meeting via Zoom.

*Public Observation:* Unless otherwise noted herein, the Operations and Regulations Committee meeting will be open to public observation via Zoom. Members of the public who wish to participate remotely in the public proceedings may do so by following the directions provided below.

**Directions for Open Session**

*June 30, 2022*

To join the Zoom meeting by computer, please use this link.

- *https://lsc-gov.zoom.us/j/82982585279?pwd=aFhQV1VBd2x2Y2ZVUmh0cGF6c0x6UT09&from=addon*

○ *Meeting ID:* 829 8258 5279
○ *Passcode:* 63022

• To join the Zoom meeting with one tap from your mobile phone, please click dial:
○ +13017158592,,82982585279# US (Washington DC)
○ +16468769923,,82982585279# US (New York)

• To join the Zoom meeting by telephone, please dial one of the following numbers:
○ +1 301 715 8592 US (Washington DC)
○ +1 646 876 9923 US (New York)
○ +1 312 626 6799 US (Chicago)
○ +1 346 248 7799 US (Houston)
○ +1 408 638 0968 US (San Jose)
○ +1 669 900 6833 US (San Jose)
○ +1 253 215 8782 US (Tacoma)
○ *Meeting ID:* 829 8258 5279
○ *Passcode:* 63022

Once connected to Zoom, please immediately mute your computer or telephone. Members of the public are asked to keep their computers or telephones muted to eliminate background noise. To avoid disrupting the meetings, please refrain from placing the call on hold if doing so will trigger recorded music or other sound.

From time to time, the Operations and Regulations Committee Chair may solicit comments from the public. To participate in the meeting during public comment, use the 'raise your hand' or 'chat' functions in Zoom and wait to be recognized by the Chair before stating your questions and/or comments.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

1. Approval of Agenda
2. Approval of Minutes of the Committee's Open Session Meeting on April 4, 2022
3. Update on Financial Guide
   - *Corrine Campbell, Fiscal Compliance Analyst, Office of Compliance and Enforcement*
   - *April Jung, Fiscal Compliance Analyst, Office of Compliance and Enforcement*
4. Consider and Act on 2022–2023 Regulatory Agenda
   - *Stefanie Davis, Senior Associate General Counsel for Regulations and Ethics Officer, Office of Legal Affairs*
5. Public Comment
6. Consider and Act on Other Business
7. Consider and Act on Adjournment of Meeting

**CONTACT PERSON FOR MORE INFORMATION:** Kaitlin Brown, Executive and Board Project Coordinator, at (202) 295–1555. Questions may also be sent by electronic mail to *brownk@lsc.gov.*

*Non-Confidential Meeting Materials:* Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC website, at *https://www.lsc.gov/about-lsc/board-meeting-materials.*

Dated: June 21, 2022,

**Kaitlin D. Brown,**

*Executive and Board Project Coordinator, Legal Services Corporation.*

[FR Doc. 2022–13585 Filed 6–21–22; 4:15 pm]

**BILLING CODE 7050–01–P**

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## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting

**TIME AND DATE:** The Governance and Performance Review Committee of the Legal Services Corporation Board of Directors will meet virtually on July 1, 2022. The meeting will commence at 2:30 p.m. EDT, and will continue until the conclusion of the Committee's agenda.

**PLACE:** *Public Notice of Virtual Meetings:*

LSC will conduct the July 1, 2022 meeting via Zoom.

*Public Observation:* Unless otherwise noted herein, the Governance and Performance Review Committee meeting will be open to public observation via Zoom. Members of the public who wish to participate remotely in the public proceedings may do so by following the directions provided below.

**Directions for Open Session**

*July 1, 2022*

• To join the Zoom meeting by computer, please use this link.
• *https://lsc-gov.zoom.us/j/86874310695?pwd=K3B3REJoNTQ4aHVmWTArc2c2b1Vldz09&from=addon*
○ *Meeting ID:* 868 7431 0695
○ *Passcode:* 7122

• To join the Zoom meeting with one tap from your mobile phone, please click dial:
○ +13017158592,,86874310695# US (Washington DC)
○ +16468769923,,86874310695# US (New York)

• To join the Zoom meeting by telephone, please dial one of the following numbers:
○ +1 301 715 8592 US (Washington DC)
○ +1 646 876 9923 US (New York)
○ +1 312 626 6799 US (Chicago)
○ +1 346 248 7799 US (Houston)
○ +1 408 638 0968 US (San Jose)
○ +1 669 900 6833 US (San Jose)
○ +1 253 215 8782 US (Tacoma)
○ *Meeting ID:* 868 7431 0695
○ *Passcode:* 7122

Once connected to Zoom, please immediately mute your computer or telephone. Members of the public are asked to keep their computers or telephones muted to eliminate background noise. To avoid disrupting the meetings, please refrain from placing the call on hold if doing so will trigger recorded music or other sound.

From time to time, the Governance and Performance Review Committee Chair may solicit comments from the public. To participate in the meeting during public comment, use the 'raise your hand' or 'chat' functions in Zoom and wait to be recognized by the Chair before stating your questions and/or comments.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

1. Approval of Agenda
2. Approval of Minutes of the Committee's Open Session and Closed Session Meetings on April 3, 2022
3. Report on U.S. Department of Justice's Access to Justice Office and White House Legal Aid Interagency Roundtable (LAIR)
   - *Ron Flagg, President*
   - *Carol Bergman, Vice President for Government Relations & Public Affairs*
4. Consider and Act on Other Business
5. Public Comment
6. Consider and Act on Motion to Adjourn the Meeting

**CONTACT PERSON FOR MORE INFORMATION:** Kaitlin Brown, Executive and Board Project Coordinator, at (202) 295–1555. Questions may also be sent by electronic mail to *brownk@lsc.gov.*

*Non-Confidential Meeting Materials:* Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC website, at *https://www.lsc.gov/about-lsc/board-meeting-materials.*

Dated: June 21, 2022.

**Kaitlin D. Brown,**

*Executive and Board Project Coordinator, Legal Services Corporation.*

[FR Doc. 2022–13587 Filed 6–21–22; 4:15 pm]

**BILLING CODE 7050–01–P**

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## EXECUTIVE OFFICE OF THE PRESIDENT

### Office of National Drug Control Policy

### Paperwork Reduction Act; Proposed Collection; Comment Request

**AGENCY:** Office of National Drug Control Policy.

**ACTION:** 60-Day notice and request for comments. Revisions of currently approved collection: Drug-Free

Communities (DFC) Support Program and CARA Local Drug Crisis Program National Evaluation.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Office of National Drug Control Policy (ONDCP) announces it will submit to the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA) an information collection request.

**DATES:** ONDCP encourages and will accept public comments on or before 60 days after the date of this publication.

**ADDRESSES:** Address all comments in writing within 60 days to Helen Hernandez. Email is the most reliable means of communication. Ms. Hernandez's email address is *HHernandez@ondcp.eop.gov.* Mailing address is: Executive Office of the President, Office of National Drug Control Policy, Drug-Free Communities (DFC) Support Program, 1800 G Street NW, Suite 9110 Washington, DC 20006.

**SUPPLEMENTARY INFORMATION:**

*Abstract:* ONDCP administers the Drug-Free Communities (DFC) Support Program and Community-Based Coalition Enhancement Grants to Address Local Drug Crisis (CARA) Local Drug Crisis Programs. The DFC Program has two primary goals: To reduce youth substance abuse, and to support community anti-drug coalitions by establishing, strengthening, and fostering collaboration among public and private agencies. The CARA Local Drug Crisis grant program funds current or former DFC grant award recipients to focus on preventing and reducing the misuse of opioids, prescription medication, and the use of methamphetamines among youth ages 12–18 in communities throughout the United States.

Under reauthorization legislation (21 U.S.C. 1521), Congress mandated an evaluation of the DFC program to determine its effectiveness in meeting objectives. Under the CARA Local Drug Crisis program statute, CARA Local Drug Crisis data collection is authorized and required by Public Law 114–198 Sec 103, ''a grant under this section shall be subject to the same evaluation requirements and procedures as the evaluation requirements and procedures imposed on the recipients of a grant under the Drug-Free Communities Act of 1997, and may also include an evaluation of the effectiveness at reducing abuse of opioids or methamphetamines''. ONDCP awarded a contract for a DFC grant oversight system at the end of 2014, following a competitive request for proposals process. The DFC Management and Evaluation (DFC Me) system was launched in 2016. An additional award was made in 2019, with the requirement to include CARA Local Drug Crisis recipients in the system and DFC & CARA Me continues to be used and updated (*https://dfcme.ondcp.eop.gov*) regularly to support grant recipients. The development and implementation of the DFC & CARA Me system provided an improved platform for DFC & CARA recipients to meet data reporting requirements of the grant, introduced a DFC Learning Center where resources and success stories can be shared, and strengthened ONDCP's continued oversight of the programs. The data collected through this system is more user friendly and validates data during entry, therefore reducing the burden on grant award recipients.

ONDCP's Drug-Free Communities office will continue to utilize the case study protocols previously approved by OMB to document coalition practices, successes and challenges. Approximately nine DFC grant award recipients are selected each year to highlight in the case studies. The information from the case studies will be used to illustrate not only what works to reduce drug use in a community setting, but also how and why it works.

The CARA Local Drug Crisis program evaluation makes use of a shortened version of the DFC progress report to support evaluation, monitoring and tracking of progress annually for grant award recipients and will provide information to ONDCP and the Administration's effort to address the opioid crisis.

*Title of Information Collection:* Web-based data collection, surveys and interviews of DFC and CARA Local Drug Crisis grant award recipients.

*Title:* Drug-Free Communities (DFC) Support Program and CARA Local Drug Crisis Program National Cross Site Evaluation.

*Frequency:* Previously, DFC required semi-annual progress reports, this package recommends a shift to annual progress reports by DFC and CARA Local Drug Crisis Program Directors via DFC & CARA Me. DFC Program Directors also submit annual Coalition Classification Tool (CCT) data in DFC & CARA Me. Core measures are collected and submitted every two years in progress reports for both grant programs. Case study interviews and electronic surveys of Program Directors and electronic surveys of selected coalition members will be accomplished once a year.

*Affected Public:* DFC current grant award recipients and CARA Local Drug Crisis grant award recipients (includes both current and former DFC grant award recipients).

*Estimated Burden:* ONDCP expects that the time required to complete each DFC annual report via DFC & CARA *Me* will be approximately 24 hours, and each CCT report will take approximately two hours to complete. Face to face interviews will take 1–2 hours. The estimated total amount of time required by all DFC respondents over one year, including Program Directors and recipients to complete DFC & CARA Me, CCT, surveys, and interviews, is 19,622 hours. ONDCP expects that the time required to complete each CARA Local Drug Crisis annual report via DFC & CARA Me will be approximately 10 hours, with an estimated total time for all respondents to complete of 650 hours. The combined hour burden is 20,272 hours.

*Goals:* ONDCP intends to use the data of the DFC & CARA National Evaluations to assess each Program's effectiveness in preventing and reducing youth substance use. Two primary objectives of the evaluation are to: (1) Regularly monitor, measure and analyze data in order to report on the progress of each program and its recipients on program goals, and (2) providing technical assistance support to grant award recipients in effectively collecting and submitting data and in understanding the role of data in driving local coalition efforts. In addition, ONDCP intends to use the data from the CARA Local Drug Crisis grant award recipients to inform ONDCP and the Administration's efforts to address the opioid crisis.

*Comment Request:* ONDCP especially invites comments on: Whether the proposed data are proper for the functions of the agency; whether the information will have practical utility; the accuracy of ONDCP's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions; ways to enhance the quality, utility, and clarity of the information to be collected; and, ways to ease the burden on proposed respondents, including the use of automated collection techniques or other forms of information technology. Comments will be accepted for sixty days.

Dated: June 17, 2022.

**Robert Kent,**

*General Counsel.*

[FR Doc. 2022–13397 Filed 6–22–22; 8:45 am]

BILLING CODE 3280–F5–P

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts

### Arts Advisory Panel Meetings

**AGENCY:** National Endowment for the Arts, National Foundation on the Arts and the Humanities.

**ACTION:** Notice of meetings.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, as amended, notice is hereby given that 16 meetings of the Arts Advisory Panel to the National Council on the Arts will be held by teleconference or videoconference.

**DATES:** See the **SUPPLEMENTARY INFORMATION** section for individual meeting times and dates. All meetings are Eastern time and ending times are approximate:

**ADDRESSES:** National Endowment for the Arts, Constitution Center, 400 7th St. SW, Washington, DC, 20506.

**FOR FURTHER INFORMATION CONTACT:** Further information with reference to these meetings can be obtained from Daniel Beattie, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506; *beattied@arts.gov,* or call 202/682–5688.

**SUPPLEMENTARY INFORMATION:** The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the NEA Chair of March 11, 2022, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of title 5, United States Code.

The upcoming meetings are:

*Musical Theater Panel* (review of applications): This meeting will be closed.

*Date and time:* July 12, 2022; 1:00 p.m. to 3:00 p.m.

*Theater Panel* (review of applications): This meeting will be closed.

*Date and time:* July 12, 2022; 4:00 p.m. to 6:00 p.m.

*Museums Panel* (review of applications): This meeting will be closed.

*Date and time:* July 13, 2022; 11:30 a.m. to 1:30 p.m.

*Museums Panel* (review of applications): This meeting will be closed.

*Date and time:* July 13, 2022; 2:30 p.m. to 4:30 p.m.

*Theater Panel* (review of applications): This meeting will be closed.

*Date and time:* July 14, 2022; 1:00 p.m. to 3:00 p.m.

*Theater Panel* (review of applications): This meeting will be closed.

*Date and time:* July 14, 2022; 4:00 p.m. to 6:00 p.m.

*Museums Panel* (review of applications): This meeting will be closed.

*Date and time:* July 14, 2022; 11:30 a.m. to 1:30 p.m.

*Literature Fellowships: Translation Projects Panel* (review of applications): This meeting will be closed.

*Date and time:* July 19, 2022; 2:00 p.m. to 4:00 p.m.

*Theater Panel* (review of applications): This meeting will be closed.

*Date and time:* July 19, 2022; 1:00 p.m. to 3:00 p.m.

*Theater Panel* (review of applications): This meeting will be closed.

*Date and time:* July 19, 2022; 4:00 p.m. to 6:00 p.m.

*Research Labs Panel* (review of applications): This meeting will be closed.

*Date and time:* July 19, 2022; 11:00 a.m. to 1:00 p.m.

*Research Labs Panel* (review of applications): This meeting will be closed.

*Date and time:* July 19, 2022; 3 p.m. to 5:00 p.m.

*Literature Fellowships: Translation Projects Panel* (review of applications): This meeting will be closed.

*Date and time:* July 20, 2022; 2:00 p.m. to 4:00 p.m.

*Theater Panel* (review of applications): This meeting will be closed.

*Date and time:* July 21, 2022; 1:00 p.m. to 3:00 p.m.

*Arts Education Panel* (review of applications): This meeting will be closed.

*Date and time:* July 22, 2022; 11:30 a.m. to 1:30 p.m.

*Arts Education Panel* (review of applications): This meeting will be closed.

*Date and time:* July 22, 2022; 2:30 p.m. to 4:30 p.m.

Dated: June 17, 2022.

**Daniel Beattie,**

*Director, National Endowment for the Arts.*

[FR Doc. 2022–13402 Filed 6–22–22; 8:45 am]

BILLING CODE 7537–01–P

## NATIONAL SCIENCE FOUNDATION

### Agency Information Collection Activities: Comment Request

**AGENCY:** National Science Foundation.

**ACTION:** Submission for OMB review; comment request.

**SUMMARY:** The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register** and one request for a copy of the information collection was received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

**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.

**FOR FURTHER INFORMATION CONTACT:** Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314, or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays). Comments regarding this information collection are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

*Comments:* Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of

appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

As required by 5 CFR 1320.8(d), comments on the information collection activities as part of this study were solicited through publication of a 60-Day Notice in the **Federal Register** on March 30, 2022, at 87 FR 18399. One comment was received, to which we here respond. The comment came from the Bureau of Economic Analysis (BEA). They expressed general support for the HERD and FFRDC surveys and requested that they be informed of any future questionnaire modifications. NCSES is in regular contact with BEA about their data needs and sends annual data files to support their national income and product accounts (NIPAs), industry economic accounts (IEAs), and gross domestic product (GDP) by state estimates. BEA noted the specific items used from each survey.

NSF 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.

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Higher Education Research and Development Survey.

*OMB Number:* 3145–0100.

*Type of Request:* Renewal with change of an information collection.

*Proposed Project:* The Higher Education Research and Development (R&D) Survey (formerly known as the Survey of R&D Expenditures at Universities and Colleges) originated in fiscal year (FY) 1954 and has been conducted annually since FY 1972. The survey represents one facet of the higher education component of the NSF's National Center for Science and Engineering Statistics (NCSES) statistical program authorized by the America COMPETES Reauthorization Act of 2010 § 505, codified in the National Science Foundation Act of 1950 (NSF Act), as amended, at 42 U.S.C. 1862. The collection also includes the Federally Funded Research and Development (FFRDC) R&D survey, which has been conducted annually for all FFRDCs since 2001. Between 1953 and 2001, only FFRDCs administered by academic institutions were surveyed.

*Use of the Information:* The proposed project will continue the annual survey cycle for three years. The Higher Education R&D Survey will provide continuity of statistics on R&D expenditures by source of funding, type of R&D (basic research, applied research, or development), and field of research, with separate data requested on research equipment by field.

Data are published in NSF's annual publication series Higher Education Research and Development, available on the web at *http://www.nsf.gov/statistics/srvyherd/*.

The Federally Funded Research and Development Centers R&D survey will also provide continuity of statistics on R&D expenditures by source of funding (federal, state and local, business, nonprofit, or other, and federal agency source), and type of R&D (basic research, applied research, or development). Beginning with FY 2022, the FFRDC R&D survey will collect headcounts and full-time equivalents of R&D personnel (researchers, R&D technicians, and R&D support staff).

Data are published in NSF's annual publication series FFRDC Research and Development Survey, available on the web at *https://www.nsf.gov/statistics/srvyffrdc/*.

*Expected respondents:* The FY 2022 Higher Education R&D Survey will be administered to approximately 650 institutions. In addition, a shorter version of the survey asking for R&D expenditures by source of funding and broad field will be sent to approximately 275 institutions spending at least $150 thousand but less than $1 million on R&D in their previous fiscal year. A short population review screener is also sent to approximately 125 institutions before the survey cycle to identify potential eligible institutions not already in the survey frame. Finally, a survey requesting R&D expenditures by source of funds, cost categories, and type of R&D will be administered to the 42 Federally Funded Research and Development Centers.

*Estimate of burden:* The survey is a fully automated web data collection effort and is handled primarily by administrators in university sponsored programs and accounting offices. Response to this voluntary survey has exceeded 95 percent each year.

The total annual calculated burden across all forms is 44,613 hours. Additional details on the burden calculation can be found in the first **Federal Register** Notice. This estimated burden includes 100 average annual burden hours requested for research on the development of national totals for R&D capital expenditures and depreciation of R&D assets. This research will be conducted in 2022 and 2023.

Dated: June 16, 2022.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2022–13399 Filed 6–22–22; 8:45 am]

BILLING CODE 7555–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–275 and 50–323; NRC–2022–0132]**

## Pacific Gas and Electric Company; Diablo Canyon Nuclear Power Plant, Units 1 and 2; Post-Shutdown Decommissioning Activities Report

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Public meeting and request for comment.

**SUMMARY:** On December 4, 2019, Pacific Gas and Electric Company (PG&E, the licensee) submitted to the U.S. Nuclear Regulatory Commission (NRC) letters enclosing the post-shutdown decommissioning activities report (PSDAR), the site-specific decommissioning cost estimate (SSDCE), and the irradiated fuel management plan (IFMP), for the Diablo Canyon Nuclear Power Plant, Units 1 and 2 (Diablo Canyon, Units 1 and 2). The PSDAR, including the SSDCE and IFMP, provide an overview of PG&E's planned activities, schedule, projected costs, and environmental impacts for the decommissioning of Diablo Canyon, Units 1 and 2. On February 21, 2020, the NRC solicited comments on these documents. Subsequently, PG&E submitted a notification of changes on October 19, 2021. The NRC planned to hold a public meeting in the vicinity of Diablo Canyon, Units 1 and 2, to discuss the PSDAR's content, including the SSDCE and IFMP, and receive comments but decided to reschedule the public meeting due to concerns with the coronavirus disease 2019 (COVID–19) public health emergency. The NRC has rescheduled the public meeting to discuss the PSDAR, including the SSDCE and IFMP, and receive comments.

**DATES:** The public meeting will be held on Thursday, July 21, 2022, from 6:00 p.m. until 9:00 p.m. Pacific Time (PT), at the San Luis Obispo County Government Building, located at 1055 Monterey Street, in San Luis Obispo, California. The public meeting is also accessible through an online webinar. Submit comments by October 19, 2022. Comments received after this date will be considered, if it is practical to do so,

but the NRC is able to ensure consideration only for comments received on or before this date. See section III, ''Request for Comment and Public Meeting,'' of this document for additional information.

**ADDRESSES:** You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

• *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0132. Address questions about Docket IDs in *Regulations.gov* 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.

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:** Samson S. Lee, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–3168, email: *Samson.Lee@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Obtaining Information and Submitting Comments

### *A. Obtaining Information*

Please refer to Docket ID NRC–2022–0132 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0132.

• *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.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.

• *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

### *B. Submitting Comments*

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2022–0132 in 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, then 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

PG&E is the holder of Facility Operating License Nos. DPR–80 and DPR–82 for Diablo Canyon, Units 1 and 2, respectively. The license provides, among other things, that the facility is subject to all relevant rules, regulations, and orders of the NRC now or hereafter in effect. The facility consists of a pair of Westinghouse four loop pressurized water reactors located in San Luis Obispo County, California. By letter dated November 27, 2018, PG&E informed the NRC that it will permanently cease power operations at Diablo Canyon, Units 1 and 2, on November 2, 2024, and August 26, 2025, respectively.

Paragraph 50.82(a)(4)(i) of title 10 of the *Code of Federal Regulations* (10 CFR) states that a PSDAR must contain a description of the planned decommissioning activities along with a schedule for their accomplishment, a discussion that provides the reasons for concluding that the environmental impacts associated with site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements, and an SSDCE, including the projected cost of managing irradiated fuel.

Accordingly, pursuant to 10 CFR 50.82(a)(4)(ii), the NRC noticed receipt of the Diablo Canyon, Units 1 and 2 PSDAR, including the SSDCE and IFMP, and made them available for public comment on February 21, 2020 (85 FR 10200). The public comment period closed on June 22, 2020. The purpose of the **Federal Register** notice (85 FR 10200; February 21, 2020) was to inform the public of a meeting on March 19, 2020, to discuss and accept comments on the PSDAR, including the SSDCE and IFMP. Due to the concerns of COVID–19, the NRC canceled the March 19, 2020, public meeting (85 FR 15505; March 18, 2020). On October 19, 2021, PG&E submitted a notification of changes to the PSDAR, including the SSDCE and IFMP.

## III. Request for Comment and Public Meeting

The NRC is requesting public comments on the PSDAR, including the SSDCE and IFMP, for Diablo Canyon, Units 1 and 2. The NRC is planning to hold the PSDAR meeting and receive comments on Thursday, July 21, 2022, from 6:00 p.m. until 9:00 p.m. (PT), at the San Luis Obispo County Government Building, located at 1055 Monterey Street, in San Luis Obispo, California. Please contact Samson Lee no later than July 8, 2022, if accommodations or special equipment is needed to attend or to provide comments. Information regarding the public meeting, including webinar information, will be posted on the NRC's public meeting website at least 10 calendar days before the meeting. The NRC's public meeting website is located at *https://www.nrc.gov/public-involve.html.* The NRC requests that comments provided outside the Thursday, July 21, 2022, meeting be submitted as noted in section I, ''Obtaining Information and Submitting Comments,'' of this document in writing by October 19, 2022.

## IV. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

| Document description | ADAMS accession No. |
|---|---|
| Letter from PG&E to the NRC, ''Certification of Permanent Cessation of Power Operations,'' dated November 27, 2018. | ML18331A553. |
| Letter from PG&E to the NRC, ''Diablo Canyon Power Plant, Units 1 and 2—Post-Shutdown Decommissioning Activities Report,'' dated December 4, 2019. | ML19338F173. |
| Letter from PG&E to the NRC, ''Diablo Canyon Power Plant, Units 1 and 2 Irradiated Fuel Management Plan,'' dated December 4, 2019. | ML19338F260. |
| Letter from PG&E to the NRC, ''Diablo Canyon Power Plant, Units 1 and 2—Site-Specific Decommissioning Cost Estimate,'' dated December 4, 2019 (publicly available version). | ML19345D344 and ML19345D345. |
| Letter from PG&E to the NRC, ''Notification of Changes to Post-Shutdown Decommissioning Activities Report, Site-Specific Decommissioning Cost Estimate, and Irradiated Fuel Management Plan for Diablo Canyon Power Plant, Units 1 and 2,'' dated October 19, 2021. | ML21293A120. |

Dated: June 17, 2022.

For the Nuclear Regulatory Commission.

**Jennifer L. Dixon-Herrity,**

*Chief, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2022–13406 Filed 6–22–22; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–305 and 72–64; License No. DPR–43; EA–22–030; NRC–2021–0185]**

## In the Matter of Dominion Energy Kewaunee, Inc.; Kewaunee Power Station and the Kewaunee Independent Spent Fuel Storage Installation

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Indirect transfer of license; order.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC, the Commission) is issuing an order approving the indirect transfer of Renewed Facility Operating License No. DPR–43 for the Kewaunee Power Station (KPS) and the general license for the KPS independent spent fuel storage installation, held by Dominion Energy Kewaunee, Inc. (DEK), to Kewaunee Solutions, Inc. (Kewaunee Solutions). The transfer assigns control of the licenses from DEK's parent entity, Dominion Nuclear Projects, Inc. (Dominion), to Energy*Solutions,* LLC and reflects, concurrent with the transfer, the planned name change from DEK to Kewaunee Solutions. The NRC is also issuing a draft conforming amendment to the renewed facility operating license for administrative purposes to reflect the license transfer from DEK to Kewaunee Solutions. The NRC determined that Kewaunee Solutions, as a direct and wholly owned subsidiary of Energy*Solutions,* is qualified to be the holder of the licenses and that transfer of the licenses is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto, subject to the conditions set forth in the order. The order approving the indirect transfer of the licenses was effective on March 31, 2022.

**DATES:** The order was issued on March 31, 2022 and is effective for 1 year.

**ADDRESSES:** Please refer to Docket ID NRC–2021–0185 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0185. Address questions about Docket IDs in *Regulations.gov* 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.
- *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 license transfer order, the NRC safety evaluation supporting the staff's findings, and the draft conforming license amendment are available in ADAMS under Package Accession No. ML22014A387.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. Eastern Time (ET), Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Karl J. Sturzebecher, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–8534; email: *Karl.Sturzebecher@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** The text of the order is attached.

Dated: June 17, 2022.

For the Nuclear Regulatory Commission.

**Shaun M. Anderson,**

*Chief, Reactor Decommissioning Branch, Division of Decommissioning, Uranium Recovery, and Waste Programs, Office of Nuclear Material Safety and Safeguards.*

### Attachment—Order Approving Indirect Transfer of License and Draft Conforming License Amendment

### United States of America

### Nuclear Regulatory Commission

In the Matter of: Dominion Energy Kewaunee, Inc.; Kewaunee Power Station and the Kewaunee Independent Spent Fuel Storage Installation; EA–22–030; Docket Nos. 50–305 and 72–64; License No. DPR–43.

### Order Approving Indirect Transfer of License and Draft Conforming License Amendment

### I

Dominion Energy Kewaunee, Inc. (DEK) is the holder of Renewed Facility Operating License No. DPR–43 for Kewaunee Power Station (KPS) and the general license for the KPS independent spent fuel storage installation (ISFSI), and Dominion Nuclear Projects, Inc. (Dominion) is the parent entity of DEK. KPS permanently ceased power operations on May 7, 2013, and DEK certified to the U.S. Nuclear Regulatory Commission (NRC) by letter dated May 14, 2013 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13135A209) that as of May 14, 2013

all the fuel was permanently removed from the KPS reactor vessel and placed into the KPS spent fuel pool. Accordingly, pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) Section 50.82(a)(2), the KPS license no longer authorizes operation of the KPS reactor or emplacement or retention of fuel into the KPS reactor vessel. KPS was a two-loop pressurized-water reactor designed by Westinghouse Electric Corporation and licensed by the NRC to generate an approximate maximum power output of 1772 megawatts-thermal in the Town of Carlton along the coast of Lake Michigan in Kewaunee County, Wisconsin.

**II**

By letter dated May 10, 2021 (ADAMS Accession No. ML21131A141), as supplemented by letters dated May 13, 2021 (ADAMS Accession No. ML21145A118), October 28, 2021 (ADAMS Accession No. ML21301A177), February 16, 2022 (ADAMS Accession No. ML22047A057), and March 15, 2022 (ADAMS Accession No. ML22076A065), DEK and Energy*Solutions,* LLC (Energy*Solutions*) (together, the Applicants) requested that the NRC consent to the indirect transfer of control of Renewed Facility Operating License No. DPR–43 for KPS and the general license for the KPS ISFSI. Pursuant to Section 184, ''Inalienability of Licenses,'' of the Atomic Energy Act of 1954, as amended (AEA), and 10 CFR 50.80, ''Transfer of licenses,'' and 10 CFR 72.50, ''Transfer of license,'' the Applicants requested indirect transfer of control of the licenses from DEK's parent entity, Dominion, to Energy*Solutions.* In addition, pursuant to 10 CFR 50.90, ''Application for amendment of license, construction permit, or early site permit,'' the Applicants requested that the NRC approve a conforming administrative amendment to Renewed Facility Operating License No. DPR–43 to reflect, concurrent with the transfer, the proposed transfer and the planned name change from DEK to Kewaunee Solutions, Inc. (Kewaunee Solutions). By letter dated March 15, 2022, the Applicants requested that the NRC approve the withdrawal of the previous commitment made by letter dated February 16, 2022 and replace it with a new commitment that Kewaunee Solutions will retain in place, and assume responsibility for, the implementation of the current NRC-approved quality assurance program for KPS. This commitment shall remain in effect until the Kewaunee Solutions Decommissioning Quality Assurance Program for KPS is approved by the NRC and implemented at the site.

Upon an NRC approval of the license transfer application and the consummation of the proposed transfer transaction, the same legal entity would remain the KPS licensee, and its name would change from DEK to Kewaunee Solutions. Kewaunee Solutions would continue to hold title to and ownership of any real estate encompassing the KPS site, any improvements to the site, and title to and ownership of spent nuclear fuel. Kewaunee Solutions would have responsibility for all licensed activities at the KPS site, including responsibility under the license to complete decommissioning pursuant to NRC regulations. However, Kewaunee Solutions would operate under new management and would be a direct and wholly owned subsidiary of Energy*Solutions.*

On October 12, 2021, the NRC published in the **Federal Register** (FR) (86 FR 56731) a notice of consideration of approval of the license transfer application and of a conforming amendment to the license to reflect the proposed transfer. This notice provided an opportunity to request a hearing within 20 days and an opportunity to comment within 30 days. No hearing requests or comments were received.

In accordance with 10 CFR 50.80, no license for a production or utilization facility, or any right thereunder, shall be transferred, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission gives its consent in writing. In accordance with 10 CFR 72.50, no license or any part included in a license for an ISFSI shall be transferred, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the NRC gives its consent in writing. Upon review of the information in the license transfer application, as supplemented, and other information before the Commission, and relying upon the representations and agreements contained in the application, the NRC staff has determined that Kewaunee Solutions, as a direct and wholly owned subsidiary of Energy*Solutions,* is qualified to be the holder of Renewed Facility Operating License No. DPR–43 for KPS and the general license for the KPS ISFSI and that transfer of the licenses is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto, subject to the conditions set forth below.

Upon review of the application, as supplemented, for a conforming administrative license amendment to reflect the transfer, the NRC staff has determined that:

(1) The application for amendment complies with the standards and requirements of the AEA and the Commission's regulations set forth in 10 CFR Chapter I.

(2) The facility will operate in conformity with the application, the provisions of the AEA, and the Commission's regulations.

(3) There is reasonable assurance that the activities authorized by the amendment can be conducted without endangering the health and safety of the public and that such activities will be conducted in compliance with the Commission's regulations.

(4) The issuance of the amendment will not be inimical to the common defense and security or to the health and safety of the public.

(5) The issuance of the amendment is in accordance with 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' of the Commission's regulations and all applicable requirements have been satisfied.

The findings set forth above are supported by an NRC staff safety evaluation dated March 31, 2022, which is publicly available at ML22014A394.

**III**

Accordingly, pursuant to Sections 161b, 161i, and 184 of the AEA; 42 United States Code §§ 2201(b), 2201(i), and 2234; and 10 CFR 50.80, 10 CFR 72.50, and 10 CFR 50.90, *it is hereby ordered* that the license transfer application, as described herein, is approved, subject to the following conditions:

(1) At least two business days before the planned closing date of the purchase transaction, Energy*Solutions* shall provide the Director of the NRC's Office of Nuclear Material Safety and Safeguards (NMSS) satisfactory documentary evidence of the establishment of, as of closing, a dedicated subaccount within the KPS decommissioning trust fund or a Back-Up Nuclear Decommissioning Trust containing $7 million (approximately one year's worth of estimated ISFSI operation and maintenance (O&M) costs). Energy*Solutions* shall also provide the Director of NMSS satisfactory documentary evidence of the establishment of, as of closing, a parent support agreement providing that Energy*Solutions* shall obtain a performance bond if a settlement agreement with the U.S. Department of Energy (DOE) on DOE reimbursements

for spent fuel management expenses is not entered into by January 1, 2024. The performance bond will be effective January 1, 2024 in the amount of, at least, $8 million, and it will be renewed annually. This amount covers the annual amount of ISFSI O&M costs projected for 2024–2030. The parent support agreement will provide that the performance bond value, combined with the aggregate trust fund values, will be sufficient for radiological decommissioning and ISFSI O&M costs at KPS at all times.

(2) At least two business days before the planned closing date of the purchase transaction, Energy*Solutions* shall provide the Director of NMSS satisfactory documentary evidence that the appropriate amount of insurance required of a licensee under 10 CFR 140.11(a)(4) and 10 CFR 50.54(w) has been obtained.

*It is further ordered* that after receipt of all required regulatory approvals of the indirect license transfer, the Applicants shall inform the Director of NMSS in writing of such receipt and of the date of the closing of the transfer no later than five business days prior to the date of the closing of the transfer. Should the indirect license transfer not be completed within one year of the date of this order, this order shall become null and void, provided, however, that upon written application and for good cause shown, such date may be extended by order. The conditions of this order may be amended upon application by the Applicants and approval by the NRC.

*It is further ordered* that consistent with 10 CFR 2.1315(b), the license amendment that makes changes, as indicated in Enclosure 2, ''DRAFT CONFORMING LICENSE AMENDMENT TO RENEWED FACILITY OPERATING LICENSE NO. DPR–43 DOCKET NO. 50–305,'' to the letter transmitting this order, to reflect the subject license transfer, is approved. The amendment shall be issued and made effective at the time the proposed transfer actions are completed.

This order is effective upon issuance.

For further details with respect to this order, see the application dated May 10, 2021, as supplemented by letters dated May 13, 2021, October 28, 2021, February 16, 2022, and March 15, 2022, and the associated NRC staff safety evaluation dated March 31, 2022, which are available for public inspection electronically through ADAMS in the NRC Library at *https://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff by telephone at 1–800–397–4209 or 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Dated: March 31, 2022.

For the Nuclear Regulatory Commission.

/RA/

John W. Lubinski,

*Director, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2022–13428 Filed 6–22–22; 8:45 am]

BILLING CODE 7590–01–P

## POSTAL REGULATORY COMMISSION

**[Docket Nos. MC2022–68 and CP2022–74; MC2022–69 and CP2022–75; MC2022–70 and CP2022–76; MC2022–71 and CP2022–77; MC2022–72 and CP2022–78]**

## New Postal Products

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* June 24, 2022.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

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### I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

### II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2022–68 and CP2022–74; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 11 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 14, 2022; *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:* June 24, 2022.

2. *Docket No(s).:* MC2022–69 and CP2022–75; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 12 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 14, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* June 24, 2022.

3. *Docket No(s).:* MC2022–70 and CP2022–76; *Filing Title:* USPS Request

[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).

to Add Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 13 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 15, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* June 24, 2022.

4. *Docket No(s).:* MC2022–71 and CP2022–77; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 14 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 15, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* June 24, 2022.

5. *Docket No(s).:* MC2022–72 and CP2022–78; *Filing Title:* USPS Request to Add Priority Mail Express & Priority Mail Contract 133 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 15, 2022; *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:* June 24, 2022.

This Notice will be published in the **Federal Register**.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2022–13366 Filed 6–22–22; 8:45 am]

**BILLING CODE 7710–FW–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–95119; File No. SR–NYSECHX–2022–06]**

## Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify Rule 7.31 To Add Subparagraph (f)(4) Regarding Directed Orders

June 16, 2022.

On April 20, 2022, NYSE Chicago, Inc. (''NYSE Chicago'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify Rule 7.31 (Orders and Modifiers) to allow a participant to submit Directed Orders to be routed directly to an alternative trading system (''ATS'') specified by the participant. The proposed rule change was published for comment in the **Federal Register** on May 9, 2022.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission will either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is June 23, 2022. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change, so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates August 7, 2022, as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–NYSECHX–2022–06).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–13385 Filed 6–22–22; 8:45 am]

**BILLING CODE 8011–01–P**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 94837 (May 3, 2022), 87 FR 27681 (May 9, 2022) (SR–NYSECHX–2022–06).

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(57).

## SECURITIES AND EXCHANGE COMMISSION

**[No. 34–95114; File No. SR–NYSENAT–2022–06]**

## Self-Regulatory Organizations; NYSE National, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify Rule 7.31 To Add Subparagraph (f)(4) Regarding Directed Orders

June 16, 2022.

On April 20, 2022, NYSE National, Inc. (''NYSE National'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify Rule 7.31 (Orders and Modifiers) to allow an ETP Holder to submit Directed Orders to be routed directly to an alternative trading system (''ATS'') specified by the ETP Holder. The proposed rule change was published for comment in the **Federal Register** on May 10, 2022.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission will either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is June 24, 2022. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change, so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates August 8, 2022, as the date by which the Commission shall either approve or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 94842 (May 4, 2022), 87 FR 28041 (May 10, 2022) (SR–NYSENAT–2022–06) (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

disapprove the proposed rule change (File No. SR–NYSENAT–2022–06).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–13381 Filed 6–22–22; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–95118; File No. SR–NYSE–2022–20]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify Rule 7.31 To Add Subparagraph (f)(1) Regarding Directed Orders

June 16, 2022.

On April 20, 2022, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify Rule 7.31 (Orders and Modifiers) to allow member organizations to submit Directed Orders to be routed directly to an alternative trading system (''ATS'') specified by the member organization. The proposed rule change was published for comment in the **Federal Register** on May 9, 2022.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission will either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is June 23, 2022. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change, so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates August 7, 2022, as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–NYSE–2022–20).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–13384 Filed 6–22–22; 8:45 am]

**BILLING CODE 8011–01–P**

[6] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 94839 (May 3, 2022), 87 FR 27679 (May 9, 2022) (SR–NYSE–2022–20).

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(57).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–95120; File No. SR–ICEEU–2022–011]**

## Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amendments to the ICE Clear Europe Rules

June 16, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 10, 2022, ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I, II, and III below, which Items have been prepared primarily by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(4)(ii) thereunder,[4] such that the proposed rule change was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') proposes to modify its Clearing Rules (''Clearing Rules'' or ''Rules'') to provide greater certainty and additional detail with respect to: (i) the correction of settlement prices in the case of certain external events and (ii) the cash settlement of transactions in lieu of delivery where a Clearing Member is in default or there are grounds for declaring a default in respect of a Clearing Member, each of the foregoing in respect of F&O Contracts. A copy of the proposed amendments is set forth in Exhibit 5.

### II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

*(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

(a) Purpose

ICE Clear Europe is proposing to amend its Clearing Rules to provide greater certainty and additional detail in relation to (i) the scenarios where there is an external or other change in a relevant price or event which results in a need for the Clearing House to correct settlement prices; and (ii) the cash settlement of transactions in lieu of delivery where a Clearing Member is in default or there are grounds for declaring a default in respect of a Clearing Member.

Determination of Settlement Price

Futures Contracts

Although the Exchange Delivery Settlement Price (''EDSP'') for a futures contract is generally determined based on data provided by the relevant Market, Rule 701(c) provides that in a number of scenarios the Clearing House may itself determine the Exchange Delivery Settlement Price. The amendments would add the cases of Force Majeure Event, Illegality or Impossibility as circumstances in which the Clearing House could take such

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4)(ii).

action. Although the existing general language of Rule 701(c) would generally permit the determination by the Clearing House of the EDSP in those cases, ICE Clear Europe believes it is appropriate, as a matter of clarity and transparency, to provide so explicitly. The amendments would also remove a redundant reference to the Clearing House acting in its discretion. Rule 701(c) would also be updated to provide that any EDSP determined under such Rule would be communicated only to affected Clearing Members (as communication to unaffected Clearing Members should be unnecessary).

A new subsection (d) would be added to Rule 701 and would provide that the Clearing House would be entitled to amend any previously communicated EDSP, including in respect of futures contracts already settled or delivered, in the following two scenarios: (i) a Market or other external pricing source has made an error in or amends the EDSP or the basis for, or any element or input data in respect of the EDSP, or (ii) there has been an error by the Clearing House. In such scenarios, the Clearing House would be able to order revised payments to reflect the amended EDSP, including in respect of settled or delivered Contracts. Any amended EDSP determined by the Clearing House under each new such subsection would be communicated to affected Clearing Members, and any revised payments ordered by the Clearing House in connection therewith would be promptly processed by the Clearing House as part of its usual operational processes. The amendments are intended to provide greater certainty under the Rules as to the situations in which a change of price might take place and the consequences of such change, including the rights and obligations of the Clearing House in the event of a change in a settlement price, or an input in the settlement price, and the rights and obligations of the Clearing House and F&O Clearing Members to make appropriate payments in the event of a resulting change in an EDSP, including following settlement of a Contract. Such a change could occur, for example, where an input for the EDSP is based by the relevant Market on a price reporting service or prices in a spot or cash market for an underlying commodity, or where an input price is subject to or affected by action of relevant governmental or other authorities with jurisdiction over those markets. Although the Clearing House has other existing general authority, including under Rule 701(c) and Rule 109, that it might potentially use to address such situations, the Clearing House believes it is appropriate for the Clearing House to have explicit, specific rules addressing the possibility of such a change in a relevant price, in light of experiences with errors involving underlying prices and other cases in which underlying or related markets have considered such changes that could potentially have affected the EDSP. The amendments would also provide increased certainty for Clearing Members and other market participants as to the likely consequences of such changes occurring. ICE Clear Europe does not expect that Rule 701(d) would be commonly used in the ordinary course of business.

The amendments would also redesignate the ultimate paragraph in Rule 705 as subsection (b). This non-substantive update is intended to improve the organization and readability of the Rules, and to align with the parallel provision in Rule 805. A further conforming change would be made to the same paragraph provide that the discharge of the rights and obligations of Clearing Members upon settlement would be made expressly subject to Rule 701(d) (as discussed above), a change which reflects the Clearing House's present interpretation of how these two provisions interrelate.

Parallel changes would be made for Options Contracts in Rules 802(c) and (d). Rule 802(c) would be amended to add Force Majeure Event, Illegality or Impossibility to the list of scenarios that entitle the Clearing House to determine the EDSP at its discretion. The amendments would also remove a redundant reference to the Clearing House acting in its discretion. Rule 802(c) would be updated to provide that any EDSP determined under such Rule would be communicated to affected Clearing Members, for the reasons discussed for Rule 701(c) above.

A new subsection (d) would also be added to Rule 802 and would provide that the Clearing House would be entitled at its discretion to amend any previously communicated EDSP for option contracts, including in respect of contracts already settled or delivered, in the following two scenarios: (i) a Market or other external pricing source has made an error in or amends the EDSP or the basis for, or any element or input data in respect of the EDSP, or (ii) there has been an error by the Clearing House. In such scenarios, the Clearing House would be able to order revised payments, including in respect of settled or delivered Contracts. Any amended EDSP determined by the Clearing House under each new such subsection would be communicated to affected Clearing Members, and any revised payments ordered by the Clearing House in connection therewith would be promptly processed by the Clearing House as part of its usual operational processes. The purpose and rationale for these amendments is substantially the same as for the amendments to Rule 701(d), as discussed above.

Similar to the changes to Rule 705 discussed above, a conforming change would be made to Rule 807 to provide that the discharge of Clearing Members on settlement would be subject to Rule 802(d) (as discussed above). Likewise, a change would be made to Rule 808(b) to provide that the termination of rights and obligations upon abandonment of an option would be subject to Rule 802(d), for similar reasons.

Cash Settlement on Default

The Clearing House proposes to amend Rule 703(h) to provide greater certainty as to the treatment of delivery obligations under F&O Contracts in the event of a default by a Clearing Member or when there are grounds for declaring a default in respect of a Clearing Member. Depending upon the kind of F&O Contract, pursuant to existing Rule 703(f) and the Delivery Procedures, selling Clearing Members may be matched with buying Clearing Members to effect delivery between them, in satisfaction of the selling Clearing Member's delivery obligation to the Clearing House and the Clearing House's delivery obligation to the buying Clearing Member. In the case of other F&O Contracts, there is no such matching and delivery is made by Sellers to the Clearing House and then by the Clearing House to Buyers, pursuant to Rules 703(b) to (e) and the Delivery Procedures.

The proposed amendments to Rule 703(h) would provide further detail, consistent with existing Clearing House practices and interpretations, as to what happens when a Clearing Member which has been matched for purposes of delivery fails to perform its delivery obligations. Rule 703(h) applies to a Clearing Member that has been declared a Defaulter or is subject to grounds for declaring an Event of Default or Force Majeure Event. In such a case, the Clearing House already has under Rule 703(h) the ability to direct that delivery obligations be substituted for cash, including as against non-defaulting Clearing Members. This enables it to ensure that the number of Contracts under delivery remain matched and that the Clearing House does not need to source deliverable commodities in the physical marketplace. Amended Rule

703(h) would provide explicitly that a relevant Contract of the defaulter may be substituted for cash settlement obligations at a price determined by ICE Clear Europe at its discretion. The rights, liabilities, and obligations of any Clearing Member with an Account having an opposite delivery position in Contracts in the same Set could then, at the discretion of the Clearing House, also be substituted for cash settlement obligations at the same price. These amendments are intended to build on the Clearing House's existing authority to substitute cash settlement for delivery obligations in the case of default, in furtherance of its default management, and more clearly reflect how the existing authority would operate in practice.

(b) Statutory Basis

ICE Clear Europe believes that the proposed amendments to the Clearing Membership Procedures are consistent with the requirements of Section 17A of the Act [5] and the regulations thereunder applicable to it. In particular, Section 17A(b)(3)(F) of the Act [6] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest.

The proposed changes to the Rules are intended to provide greater certainty and additional detail as to (i) the rights and obligations of the Clearing House and F&O Clearing Members in scenarios where there is an external or other change of price which results in a need to change or correct the EDSP, including after settlement occurs; and (ii) the way in which the Clearing House could effect cash settlement in lieu of delivery in the case of an F&O Clearing Member default or where a Clearing Member is subject to ground for declaring a default. The amendments relating to changes in EDSP are intended to provide greater certainty as to the actions the Clearing House may take in circumstances where there is a potential change in a settlement price, including where settlement has already occurred and additional payments would be required. The Clearing House believes it is important to have clear provisions in the Rules for this scenario given the potential impact on market participants. The amendments with respect to cash settlement of delivery obligations in case of default are not intended to materially change the substance of the rights or obligations of the Clearing House and Clearing Members but would provide greater clarity as to the applicable process. The amendments also remove certain overlapping or duplicative information in order to improve organization and readability. In ICE Clear Europe's view the amendments would thus facilitate the clearing and settlement process, as well as default management, by the Clearing House. The proposed amendments would therefore facilitate the prompt and accurate clearing of cleared Contracts, the safeguarding of securities and funds in the custody or control of the Clearing House or for which it is responsible, and the protection of investors and the public interest in the sound operations of the Clearing House, consistent with the requirements of Section 17A(b)(3)(F).[7]

For similar reasons, the amendments to the Rules are also consistent with relevant provisions of Rule 17Ad–22.[8] Rule 17Ad–22(e)(1) provides that ''[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonable designed to, as applicable [. . .] provide for a well-founded, clear, transparent and enforceable legal basis for each aspect of its activities in all relevant jurisdictions''.[9] As discussed above, the amendments will provide greater certainty for market participants as to the rights and obligations of the Clearing House and F&O Clearing Members in cases where there is a subsequent change in a settlement price or inputs in the settlement price. The amendments also elucidate the rights and obligations relating to delivery in a default scenario. As such, the amendments are consistent with establishing a well-founded, clear and transparent basis for the activities of the Clearing House, within the meaning of Rule 17Ad–22(e)(1).[10]

Rule 17Ad–22(e)(8) provides that ''[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonable designed to, as applicable [. . .] define the point at which settlement is final to be no later than the end of the day on which the payment or obligation is due. . . .''.[11] As described above, the amendments address a change in EDSP in limited circumstances where there has been an error or other change in a relevant underlying price. Where necessary, the amendments would also provide for additional payments to or from Clearing Members to reflect the amended price. ICE Clear Europe does not believe that correction of an error or similar circumstance, even though it may require additional payments, would be inconsistent with finality of settlement within the meaning of Rule 17Ad–22(e)(8). Specifically, in ICE Clear Europe's view, the proposed amendments should not be viewed as affecting the finality of settlement payments previously made (which were final and irrevocable when made in accordance with the settlement finality provisions of the ICE Clear Europe Rules and applicable settlement finality regulations) but rather as establishing an independent new payment obligation, with a new payment date, to reflect the change in EDSP. Such new payment obligation would itself give rise to or be subsumed in a new payment transfer order which would be subject to the settlement finality provisions of Part 12 of the ICE Clear Rules. As such, the amendments are not inconsistent with the finality requirements of Rule 17Ad–22(e)(8).[12]

Rule 17Ad–22(e)(10) provides that ''[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonable designed to, as applicable [. . .] establish and maintain transparent written standards that state its obligations with respect to the delivery of physical instruments, and establish and maintain operational practices that identify, monitor and manage the risks associated with such physical deliveries.'' [13] As set forth above, the amendments would clarify the rights and obligations of the Clearing House and Clearing Members with respect to physical delivery in the case of a failure to perform by a Clearing Member, by setting forth the ability of the Clearing House to provide for cash settlement in lieu of physical delivery in that scenario. In addition, this authority will facilitate the Clearing House's ability to manage its risk associated with a failed physical delivery in the context of a Clearing Member default. The amendments are therefore consistent with the requirements of Rule 17Ad–22(e)(10).[14]

[5] 15 U.S.C. 78q–1.

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 17 CFR 240.17Ad–22.

[9] 17 CFR 240.17Ad–22(e)(1).

[10] 17 CFR 240.17Ad–22(e)(1).

[11] 17 CFR 240.17Ad–22(e)(8).

[12] 17 CFR 240.17Ad–22(e)(8).

[13] 17 CFR 240.17Ad–22(e)(10).

[14] 17 CFR 240.17Ad–22(e)(10).

*(B) Clearing Agency's Statement on Burden on Competition*

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The amendments are being adopted to update and provide greater legal certainty under the Rules to address scenarios in which the Clearing House may need to amend an EDSP, including as a result of a change in a relevant input. Other amendments would elucidate the rights and obligations of Clearing Members with respect to physical delivery in the case of a Clearing Member default. The amendments would apply to all F&O Clearing Members. Although the amendments address scenarios where a market participant may be obligated to make a payment as a result of a change in an EDSP, which could impose costs on such market participant, that result would depend on the market participant's own positions and reflect a change in the underlying relevant price or input to correctly reflect the value of the relevant Contract. Similarly, the amendments address the ability of the Clearing House to impose cash settlement in lieu of physical settlement, including on non-defaulters, which could impose a cost on such market participant. However, that result would depend on the Clearing Member's own positions and reflects a cost and risk to which the Clearing Members are already exposed and which arise commonly in clearing systems. ICE Clear Europe does not believe the amendments would otherwise affect the costs of clearing, the ability of market participants to access clearing, or the market for clearing services generally. Therefore, ICE Clear Europe does not believe the proposed rule change imposes any burden on competition that is inappropriate in furtherance of the purposes of the Act.

*(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

ICE Clear Europe consulted with a number of market participants, including a relevant futures industry group, in connection with the development of the proposed rule changes, and considered feedback from such participants in preparing the specific rule changes that are now proposed to be adopted. In particular, market participants raised questions concerning (i) the circumstances in which settlement prices might be changed, and (ii) the appropriate timeframe in which a change to EDSP may be made. In developing the current proposal, ICE Clear Europe notes that the amendments are generally intended to deal with changes from external pricing sources, which may be permitted to make such changes in a variety of circumstances, and with a variety of characterizations, that are outside the control of ICE Clear Europe and may be difficult to define more specifically in advance. ICE Clear Europe also notes that it has not defined a specific timeframe in which a change to EDSP may be made, in light of the fact that different Markets cleared by ICE Clear Europe and different external pricing sources may have their own time period in which changes to relevant prices may be made. ICE Clear Europe has thus sought to maintain appropriate flexibility to deal with the range of potential changes to relevant prices as they may arise.

ICE Clear Europe has also conducted a formal public consultation with respect to the proposed rule changes.[15] No written comments were received as a result of the public consultation. ICE Clear Europe will notify the Commission of any written comments received with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and paragraph (f) of Rule 19b–4 [17] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICEEU–2022–011 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–ICEEU–2022–011. 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 filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/notices/Notices.shtml?regulatoryFilings.*

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–ICEEU–2022–011 and should be submitted on or before July 14, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–13386 Filed 6–22–22; 8:45 am]

**BILLING CODE 8011–01–P**

[15] ICE Clear Europe Circular C22/056 (25 April 2022), available at *https://www.theice.com/publicdocs/clear_europe/circulars/C22056.pdf.*

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f).

[18] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–95116; File No. SR–NYSEArca–2022–25]**

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify Rule 7.31–E To Add Subparagraph (f)(4) Regarding Directed Orders

June 16, 2022.

On April 20, 2022, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify Rule 7.31–E (Orders and Modifiers) to allow an ETP Holder to submit Directed Orders to be routed directly to an alternative trading system (''ATS'') specified by the ETP Holder. The proposed rule change was published for comment in the **Federal Register** on May 10, 2022.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission will either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is June 24, 2022. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change, so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates August 8, 2022, as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–NYSEArca–2022–25).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–13382 Filed 6–22–22; 8:45 am]

**BILLING CODE 8011–01–P**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 94834 (May 4, 2022), 87 FR 28081 (May 10, 2022) (SR–NYSEArca–2022–25) (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(57).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–95117; File No. SR–NYSEAMER–2022–19]**

### Self-Regulatory Organizations; NYSE American LLC; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify Rule 7.31E To Add Subparagraph (f)(4) Regarding Directed Orders

June 16, 2022.

On April 20, 2022, NYSE American LLC (''NYSE American'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify Rule 7.31E (Orders and Modifiers) to allow an ATP Holder to submit Directed Orders to be routed directly to an alternative trading system (''ATS'') specified by the ATP Holder. The proposed rule change was published for comment in the **Federal Register** on May 9, 2022.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission will either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is June 23, 2022. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change, so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates August 7, 2022, as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–NYSEAMER–2022–19).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022–13383 Filed 6–22–22; 8:45 am]

**BILLING CODE 8011–01–P**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 94840 (May 3, 2022), 87 FR 27677 (May 9, 2022) (SR–NYSEAMER–2022–19).

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(57).

## SURFACE TRANSPORTATION BOARD

**[Docket No. EP 290 (Sub-No. 5) (2022–3)]**

### Quarterly Rail Cost Adjustment Factor

**AGENCY:** Surface Transportation Board.

**ACTION:** Approval of rail cost adjustment factor.

**SUMMARY:** The Board has approved the third quarter 2022 Rail Cost Adjustment Factor (RCAF) and cost index filed by the Association of American Railroads. The third quarter 2022 RCAF (Unadjusted) is 1.250. The third quarter 2022 RCAF (Adjusted) is 0.512. The third quarter 2022 RCAF–5 is 0.487.

**DATES:** *Applicability Date:* July 1, 2022.

**FOR FURTHER INFORMATION CONTACT:** Pedro Ramirez at (202) 245–0333. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** Additional information is contained in the Board's decision, which is available at *www.stb.gov.*

Decided: June 16, 2022.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

**Regena Smith-Bernard,**

*Clearance Clerk.*

[FR Doc. 2022–13429 Filed 6–22–22; 8:45 am]

**BILLING CODE 4915–01–P**

## SUSQUEHANNA RIVER BASIN COMMISSION

### Actions Taken at June 16, 2022 Meeting

**AGENCY:** Susquehanna River Basin Commission.

**ACTION:** Notice.

**SUMMARY:** As part of its regular business meeting held on June 16, 2022, Baltimore, Maryland, the Commission approved the applications of certain water resources projects, and took additional actions, as set forth in the Supplementary Information below.

**DATES:** June 16, 2022.

**ADDRESSES:** Susquehanna River Basin Commission, 4423 N Front Street, Harrisburg, PA 17110–1788.

**FOR FURTHER INFORMATION CONTACT:** Jason E. Oyler, General Counsel and Secretary, telephone: (717) 238–0423, ext. 1312, fax: (717) 238–2436; email: *joyler@srbc.net*. Regular mail inquiries may be sent to the above address. See also Commission website at *www.srbc.net*.

**SUPPLEMENTARY INFORMATION:** In addition to the actions taken on projects identified in the summary above and the listings below, the following items were also acted upon at the business meeting: (1) election of Commission officers for FY2023; (2) reconciliation of FY2023 budget; (3) a motion related to the Conowingo Watershed Implementation Plan; (4) ratification of contracts/grants; (5) revision of Commission By-laws; (6) proposed Water Resources Program for 2022–2024; and (7) three regulatory program waiver requests.

### Project Applications Approved

1. *Project Sponsor and Facility:* Blackhill Energy LLC (Susquehanna River), Ulster Township, Bradford County, Pa. Application for surface water withdrawal of up to 3.024 mgd (peak day).

2. *Project Sponsor and Facility:* Chesapeake Appalachia, L.L.C. (Susquehanna River), Mehoopany Township, Wyoming County, Pa. Application for renewal of surface water withdrawal of up to 0.999 mgd (peak day) (Docket No. 20170603).

3. *Project Sponsor and Facility:* Chesapeake Appalachia, L.L.C. (Susquehanna River), Wysox Township, Bradford County, Pa. Application for renewal of surface water withdrawal of up to 0.999 mgd (peak day) (Docket No. 20170604).

4. *Project Sponsor and Facility:* Chesapeake Appalachia, L.L.C. (Wyalusing Creek), Rush Township, Susquehanna County, Pa. Application for renewal of surface water withdrawal of up to 0.715 mgd (peak day) (Docket No. 20170605).

5. *Project Sponsor*: Corning Incorporated. Project Facility: Houghton Park, City of Corning, Steuben County, N.Y. Application for renewal of groundwater withdrawal of up to 1.080 mgd (30-day average) from Well 5 (Docket No. 19970503).

6. *Project Sponsor and Facility*: East Cocalico Township Authority, East Cocalico, West Cocalico, and Brecknock Townships, Lancaster County, Pa. Applications for renewal of groundwater withdrawals (30-day averages) of up to 0.081 mgd from Well 11, 1.150 mgd from Well F, and 1.395 mgd from Well M (Docket Nos. 19920702 and 20070606).

7. *Project Sponsor:* Golf Acres, Inc. Project Facility: Chapel Hill Golf Course (Little Muddy Creek), Spring Township, Berks County, Pa. Applications for surface water withdrawal of up to 0.180 mgd (peak day) and consumptive use of up to 0.162 mgd (peak day).

8. *Project Sponsor and Facility:* Hydrage, LLC, East Union and Mahanoy Townships, Schuylkill County, Pa. Application for renewal of consumptive use of up to 0.200 mgd (peak day) (Docket No. 20070603).

9. *Project Sponsor and Facility:* Lykens Valley Golf Course & Resort Inc (unnamed tributary to Wiconisco Creek), Upper Paxton Township, Dauphin County, Pa. Applications for renewal of surface water withdrawal of up to 0.200 mgd (peak day) and consumptive use of up to 0.200 mgd (peak day) (Docket No. 20080614).

10. *Project Sponsor:* New Enterprise Stone & Lime Co., Inc. Project Facility: Tyrone Quarry, Warriors Mark Township, Huntingdon County, Pa. Application for groundwater withdrawal of up to 0.173 mgd (30-day average) from Well MW–36B and modification to increase consumptive use (peak day) by an additional 0.238 mgd, for a total consumptive use of up to 0.532 mgd (Docket No. 20031205).

11. *Project Sponsor and Facility:* Repsol Oil & Gas USA, LLC (Towanda Creek), Franklin Township, Bradford County, Pa. Application for renewal of surface water withdrawal of up to 1.000 mgd (peak day) (Docket No. 20170611).

12. *Project Sponsor and Facility:* SWN Production Company, LLC (Susquehanna River), Oakland Township, Susquehanna County, Pa. Application for surface water withdrawal of up to 3.000 mgd (peak day).

13. *Project Sponsor and Facility:* Town of Kirkwood, Broome County, N.Y. Application for renewal of groundwater withdrawal of up to 0.841 mgd (30-day average) from Well 3 (Docket No. 19920304).

14. *Project Sponsor and Facility:* Village of Canisteo, Steuben County, N.Y. Application for renewal of groundwater withdrawal of up to 0.499 mgd (30-day average) from Well 2 (Docket No. 19950902).

15. *Project Sponsor:* Vulcan Construction Materials, LLC. Project Facility: Havre de Grace Quarry (Susquehanna River), Havre de Grace District, Harford County, Md. Applications for renewal of surface water withdrawal of up to 0.234 mgd (peak day) and consumptive use of up to 0.823 mgd (peak day) (Docket No. 19920105).

### Project Scheduled for Action Involving a Diversion

16. *Project Sponsor and Facility:* Patrick Hoopes Trucking, Inc., Eulalia Township, Potter County, Pa. Application for an into-basin diversion from the Ohio River Basin of up to 1.000 mgd (peak day) from the Allegheny River.

### Commission Initiated Project Approval Modification

17. *Project Sponsor and Facility:* Lebanon Valley College, Annville and North Annville Townships, Lebanon County, Pa. Conforming the grandfathered amount with the forthcoming determination for groundwater withdrawals (30-day averages) of up to 0.019 mgd from the Football Well, 0.044 mgd from the Baseball Well, and 0.042 mgd from the West (Soccer) Well, as well as modify monitoring and reporting requirements for the project (Docket No. 20030409).

### Projects Tabled

18. *Project Sponsor and Facility:* Municipal Authority of the Township of East Hempfield dba Hempfield Water Authority, East Hempfield Township, Lancaster County, Pa. Applications for renewal of groundwater withdrawals (30-day averages) of up to 0.353 mgd from Well 6, 0.145 mgd from Well 7, 1.447 mgd from Well 8, and 1.800 mgd from Well 11, and Commission-initiated modification to Docket No. 20120906, which approves withdrawals from Wells 1, 2, 3, 4, and 5 and Spring S–1 (Docket Nos. 19870306, 19890503, 19930101, and 20120906).

19. *Project Sponsor and Facility:* Shrewsbury Borough, Shrewsbury Township and Shrewsbury Borough, York County, Pa. Applications for renewal of groundwater withdrawals (30-day averages) of up to 0.099 mgd

from the Meadow Well and 0.180 mgd from the Village Well (Docket Nos. 19890501 and 19900105).

20. *Project Sponsor*: SUEZ Water Pennsylvania Inc. Project Facility: Grantham Operation, Upper Allen Township, Cumberland County, Pa. Application for renewal of groundwater withdrawal of up to 0.395 mgd (30-day average) from Well 2 (Docket No. 19901104).

(Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.)

Dated: June 17, 2022.

**Jason E. Oyler,**

*General Counsel and Secretary to the Commission.*

[FR Doc. 2022–13434 Filed 6–22–22; 8:45 am]

**BILLING CODE 7040–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Request To Release Property at John C. Tune Airport, Nashville, TN (JWN)

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice.

**SUMMARY:** The Federal Aviation Administration is requesting public comment on a request by Metropolitan Nashville Airport Authority (MNAA), to release five access easements (8.1 acres) at John C. Tune Airport from federal obligations.

**DATES:** Comments must be received on or before July 25, 2022.

**ADDRESSES:** Comments on this notice may be emailed to the FAA at the following email address:

FAA/Memphis Airports District Office, Attn: L. Bernard Green, Community Planner, *Leonard.Green@faa.gov*

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Keith Wilschetz, Director, Strategic Planning, Metropolitan Nashville Airport Authority at the following address:

One Terminal Drive, Suite 501, Nashville, TN 37214

**FOR FURTHER INFORMATION CONTACT:** L. Bernard Green, Community Planner, Federal Aviation Administration, Memphis Airports District Office, 2600, Thousand Oaks Boulevard, Suite 2250, Memphis, TN 38118–2482, *Leonard.Green@faa.gov.* The application may be reviewed in person at this same location, by appointment.

**SUPPLEMENTARY INFORMATION:** The FAA proposes to rule and invites public comment on the request to release five access easements at John C. Tune Airport, 110 Tune Airport Drive, Nashville, TN 37209, under the provisions of 49 U.S.C. 47107(h)(2). The FAA determined that the request to release the five access easements at John C. Tune Airport (JWN) submitted by the Sponsor meets the procedural requirements of the Federal Aviation Administration and the release of these properties does not and will not impact future aviation needs at the airport. The FAA may approve the request, in whole or in part, no sooner than thirty days after the publication of this notice.

The request consists of the following:

The Metropolitan Nashville Airport Authority is proposing the release of five access easements totaling 8.1 acres, more or less. All five locations are located on the west side of the Cumberland River from the Airport, within two miles of the airport and include a radio tower easement, an access easement, and three tower easements. The five access easements are no longer required.

This request will release this property from federal obligations. This action is taken under the provisions of 49 U.S.C. 47107(h)(2).

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the request, notice and other documents germane to the request in person at John C. Tune Airport (JWN).

Issued in Memphis, Tennessee, on June 17, 2022.

**Duane Leland Johnson,**

*Assistant Manager, Memphis Airports District Office, Southern Region.*

[FR Doc. 2022–13398 Filed 6–22–22; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Docket No. FAA–2022–0701]**

### Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Operations Specifications, Part 129 Application.

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. The FAA assesses the information collected and issues operations specifications to foreign air carriers. These operations specifications assure the foreign air carrier's ability to navigate and communicate safely within the U.S. National Airspace System.

**DATES:** Written comments should be submitted by August 22, 2022.

**ADDRESSES:** Please send written comments:

By Electronic Docket: *www.regulations.gov* (Enter docket number into search field)

By email at: *danuta.pronczuk@faa.gov* and *paul.thoren@faa.gov.* In the email subject enter: comments on Docket No. FAA–2022–0701

**FOR FURTHER INFORMATION CONTACT:** Danuta Pronczuk or Paul Thoren by email at: *danuta.pronczuk@faa.gov*; phone: 202–267–0923; *paul.thoren@faa.gov*; phone: 424–405–7819.

**SUPPLEMENTARY INFORMATION:**

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

*OMB Control Number:* 2120–0749.

*Title:* Operations Specifications, Part 129 Application.

*Form Numbers:* There are no FAA forms associated with this collection.

*Type of Review:* Renewal of an information collection.

*Background:* The final rule published in 2011, clarified and standardized the rules for applications by foreign air carriers and foreign persons for operations specifications issued under 14 CFR part 129 and established standards for amendment, suspension and termination of those operations specifications. The final rule also applied to foreign air carriers and foreign persons operating U.S.-registered aircraft in common carriage solely outside the United States. This action was necessary to update the process for issuing operations specifications, and it established a regulatory basis for current practices,

such as amending, terminating, and suspending operations specifications.

*Respondents:* Approximately 29 new applicants annually and 480 existing foreign air carriers and foreign persons annually.

*Frequency:* Information is collected on occasion.

*Estimated Average Burden per Response:* 27 Hours for new applicants. 47 hours for existing applicants.

*Estimated Total Annual Burden:* 783 hours for new applicants and 22, 560 hours for existing applicants.

Issued in Washington, DC.

**Robert C. Carty,**

*Deputy Executive Director, Flight Standards Service.*

[FR Doc. 2022–13395 Filed 6–22–22; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Availability of the Final Environmental Assessment and Finding of No Significant Impact/Record of Decision for the Huntsville International Airport Reentry Site Operator License and Sierra Space Corporation Vehicle Operator License

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

**ACTION:** Notice of availability.

**SUMMARY:** In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), Council on Environmental Quality NEPA implementing regulations, and FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures,* the FAA is announcing the availability of the Final Environmental Assessment and Finding of No Significant Impact/Record of Decision for the Huntsville International Airport Reentry Site Operator License and Sierra Space Corporation Vehicle Operator License (Final EA and FONSI/ROD).

**FOR FURTHER INFORMATION CONTACT:** Amy Hanson, Environmental Protection Specialist, Federal Aviation Administration, 800 Independence Avenue SW, Suite 325, Washington, DC 20591; email *HuntsvilleReentry@icf.com.*

**SUPPLEMENTARY INFORMATION:** The FAA is the lead agency responsible for completing the EA. The National Aeronautics and Space Administration (NASA) and U.S. Coast Guard (USCG) are cooperating agencies for the EA for the Huntsville International Airport Reentry Site Operator License and Sierra Space Corporation Vehicle Operator License due to their special expertise and jurisdictions. The FAA evaluated (1) the Huntsville-Madison County Airport Authority's (Authority) proposal to operate a commercial reentry site at Huntsville International Airport, which would require the FAA to issue a Reentry Site Operator License, and (2) Sierra Space Corporation's (Sierra Space) proposal to land the Dream Chaser at Huntsville International Airport, which would require the FAA to issue a Vehicle Operator License. Issuing a Reentry Site Operator License and Vehicle Operator License are considered Federal actions subject to environmental review under NEPA. Under the Proposed Action, the FAA would issue a Reentry Site Operator License to the Authority and a Vehicle Operator License to Sierra Space to land the Dream Chaser at Huntsville International Airport.

The Final EA evaluated the potential environmental impacts of the Proposed Action and the No Action Alternative. Under the No Action Alternative, the FAA would not issue a Reentry Site Operator License to the Authority, nor would the FAA issue a Vehicle Operator License to Sierra Space for landing the Dream Chaser at Huntsville International Airport. Sierra Space's Dream Chaser reentry operations would not occur at Huntsville International Airport and Huntsville International Airport would not offer its site for commercial space reentries.

The FAA published a Draft EA for public review and comment on November 12, 2021 through December 22, 2021. The FAA received 40 public comments on the Draft EA. The FAA posted the Final EA and FONSI/ROD on the FAA Office of Commercial Space Transportation website on May 12, 2022, linked here: *https://www.faa.gov/space/stakeholder_engagement/huntsville_reentry/.*

The FAA's ROD contains the agency's decision to approve the Proposed Action, and includes numerous finding and determinations pursuant to Executive Orders and special purpose laws, including the Department of Transportation Act, the National Historic Preservation Act, the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

Issued in Washington, DC, on: June 15, 2022.

**Stacey Molinich Zee,**

*Manager, Operations Support Branch, Office of Commercial Space Transportation.*

[FR Doc. 2022–13396 Filed 6–22–22; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

**[Docket No. FHWA–2022–0020]**

### Agency Information Collection Activities: Notice of Request for Extension of Currently Approved Information Collection

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of request for extension of currently approved information collection.

**SUMMARY:** The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for renewal of an existing information collection that is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

**DATES:** Please submit comments by August 22, 2022.

**ADDRESSES:** You may submit comments identified by DOT Docket ID Number 2022–0020 by any of the following methods:

*Website:* For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

*Fax:* 1–202–493–2251.

*Mail:* Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

*Hand Delivery or Courier:* U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5p.m. ET, Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kenneth Petty, (202) 366–6654, Office of Planning, Environment, and Realty, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5p.m. ET, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

*Title:* Planning and Research Program Administration.

*OMB Control #:* 2125–0039.

*Background:* Under the provisions of Title 23, United States Code, Section 505, 2 percent of Federal-aid highway funds in certain categories that are

apportioned to the States are set aside to be used only for State Planning and Research (SPR). At least 25 percent of the SPR funds apportioned annually must be used for research, development, and technology transfer activities. In accordance with government-wide grant management procedures, a grant application must be submitted for these funds. In addition, recipients must submit periodic progress and financial reports. In lieu of Standard Form 424, Application for Federal Assistance, the FHWA uses a work program as the grant application. The information contained in the work program includes task descriptions, assignments of responsibility for conducting the work effort, and estimated costs for the tasks. This information is necessary to determine how FHWA planning and research funds will be utilized by the State Transportation Departments and if the proposed work is eligible for Federal participation. The content and frequency of submission of progress and financial reports specified in 23 CFR part 420 are specified in OMB Circular A–102 and the companion common grant management regulations.

*Respondents:* 52 State Transportation Departments, including the District of Columbia and Puerto Rico.

*Frequency:* Annual.

*Estimated Average Annual Burden per Response:* 560 hours per respondent.

*Estimated Total Annual Burden Hours:* 29,120 hours.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection of information is necessary for the U.S. DOT's performance, including whether the information will have practical utility; (2) the accuracy of the U.S. DOT's estimate of the burden of the proposed information collection; (3) ways to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

*Authority:* The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: June 17, 2022.

**Michael Howell,**

*Information Collection Officer.*

[FR Doc. 2022–13404 Filed 6–22–22; 8:45 am]

BILLING CODE 4910–22–P

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

**[FHWA Docket No. FHWA–2021–0010]**

### Surface Transportation Project Delivery Program; Utah Department of Transportation Audit Report

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice; Request for comment.

**SUMMARY:** The Moving Ahead for Progress in the 21st Century Act (MAP–21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) and other Federal environmental laws for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This notice announces and solicits comments on the fourth and final audit report for the Utah Department of Transportation (UDOT).

**DATES:** Comments must be received on or before July 25, 2022.

**ADDRESSES:** Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590. You may also submit comments electronically at *www.regulations.gov.* All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone can search the electronic form of all comments in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

**FOR FURTHER INFORMATION CONTACT:** Ms. Lana Lau, Office of Project Development and Environmental Review, (202) 366–2052, *Lana.Lau@dot.gov,* or Mr. Patrick Smith, Office of the Chief Counsel, (202) 366–1345, *Patrick.c.Smith@dot.gov,* Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

#### Electronic Access

An electronic copy of this notice may be viewed online at *www.regulations.gov* using the docket number listed above. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.FederalRegister.gov* and the U.S. Government Publishing Office's website at *www.GovInfo.gov.*

#### Background

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed in lieu of FHWA. The UDOT published its application for NEPA assumption on October 9, 2015, and made it available for public comment for 30 days. After considering public comments, UDOT submitted its application to FHWA on December 1, 2015. The application served as the basis for developing a memorandum of understanding (MOU) that identified the responsibilities and obligations that UDOT would assume. The FHWA published a notice of the draft MOU in the **Federal Register** on November 16, 2016 (81 FR 80710), with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period, FHWA and UDOT considered comments and proceeded to execute the MOU. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA, and the responsibilities for other

Federal environmental laws described in the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first 4 years of State participation and, after the fourth year, monitor compliance. The FHWA must make the results of each audit available for public comment. The FHWA published the first audit report of UDOT compliance on September 17, 2018 (83 FR 46992), the second report on November 13, 2019 (84 FR 61680), and the third report on September 17, 2020 (85 FR 58102). This notice announces the availability of the fourth and final audit report for UDOT and solicits public comments.

*Authority:* Section 1313 of Public Law 112–141; Section 6005 of Public Law 109–59; 23 U.S.C. 327; 23 CFR part 773.

**Stephanie Pollack,**

*Deputy Administrator, Federal Highway Administration.*

## Surface Transportation Project Delivery Program; Draft FHWA Audit of the Utah Department of Transportation; July 1, 2018–June 30, 2019

### Executive Summary

This report summarizes the results of the Federal Highway Administration's (FHWA) fourth audit of the Utah Department of Transportation's (UDOT) National Environmental Policy Act (NEPA) review responsibilities and liabilities that FHWA has assigned and UDOT has assumed pursuant to 23 U.S.C. 327. Throughout this report, FHWA uses the term ''NEPA Assignment Program'' to refer to the program codified at 23 U.S.C. 327. Pursuant to 23 U.S.C. 327, UDOT and FHWA executed a memorandum of understanding (MOU) on January 17, 2017, to memorialize UDOT's NEPA responsibilities and liabilities for Federal-aid highway projects and certain other FHWA approvals in Utah. The section 327 MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and non-designated documented categorical exclusions (DCE). A separate MOU, pursuant to 23 U.S.C. 326, authorizes UDOT's environmental review responsibilities for other categorical exclusions (CE), commonly known as CE Program Assignment. The scope of this audit does not cover the CE Program Assignment responsibilities.

As part of FHWA's review responsibilities under 23 U.S.C. 327, FHWA formed a team (the ''Audit Team'') in August 2020 to plan and conduct an audit of NEPA responsibilities UDOT assumed. The Audit Team conducted its review during the period from November 9 to December 2, 2020. As part of this audit, the Audit Team reviewed UDOT's NEPA project files, UDOT's response to FHWA's pre-audit information request (PAIR), UDOT's NEPA Assignment Self-Assessment Report, UDOT's NEPA Quality Assurance/Quality Control (QA/QC) Guidance, and UDOT's NEPA Assignment Training Plan. The Audit Team conducted videoconference interviews with four members of UDOT central office staff, six of UDOT's legal counsel (one current Assistant Attorney General assigned to UDOT, one former Assistant Attorney General assigned to UDOT, and four outside counsel), three staff members from the U.S Environmental Protection Agency, and two staff members from the U.S. Fish and Wildlife Service (FWS) as part of the audit.

Overall, the Audit Team found that UDOT continues to successfully carry out its DCE, EA, and EIS project review responsibilities. The UDOT has also made efforts to respond to the FHWA findings from the third audit, including improving document management and QA/QC procedures. In the third audit, the Audit Team had found that UDOT issued an environmental document without a final legal sufficiency finding, and observed that there were ways UDOT could improve their training.

In this fourth and final audit, the Audit Team identified four observations and two successful practices. The Audit Team finds UDOT is carrying out the responsibilities it has assumed and is in substantial compliance with the provisions of the MOU. This report also concludes with the status of FHWA's non-compliance observation from the third audit review, including any UDOT self-imposed corrective actions. After the fourth year of UDOT's participation in the program, FHWA will continue to monitor UDOT's compliance with the terms of this MOU, in accordance with 23 U.S.C. 327(h).

### Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects and certain FHWA approvals. Under 23 U.S.C. 327, a State that assumes these Federal responsibilities becomes solely responsible and solely liable for carrying them out. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA and other related environmental laws. Examples of responsibilities UDOT has assumed in addition to NEPA include section 7 consultation under the Endangered Species Act and consultation under section 106 of the National Historic Preservation Act.

Audits are the primary mechanism through which FHWA oversees UDOT's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal laws and policies, evaluating UDOT's progress toward achieving the performance measures identified in MOU Section 10.2, and collecting information needed for the Secretary's annual report to Congress. The FHWA must present the results of each audit in a report and make it available for public comment in the **Federal Register**.

Through this fourth and final audit, FHWA will satisfy provisions of 23 U.S.C. 327(g) and Part 11 of the MOU. This report summarizes the results of the fourth audit in Utah and includes a summary discussion that describes progress since the last audit. This audit is the last of the required audits.

### Scope and Methodology

The MOU (Part 3.1.1) states that ''[p]ursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and UDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the U.S. Department of Transportation Secretary's responsibilities for compliance with the NEPA, 42 U.S.C. 4321 *et seq.* with respect to the highway projects specified under subpart 3.3. This assignment includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for highway projects such as 23 U.S.C. 139, 40 CFR parts 1500–1508, DOT Order 5610.1C, and 23 CFR 771 as applicable.'' Also, the performance measure in MOU Part 10.2.1(A) for compliance with NEPA and other Federal environmental statutes and regulations commits UDOT to maintaining documented compliance with requirements of all applicable statutes and regulations, as well as provisions in the MOU.

The Audit Team consisted of NEPA subject matter experts from the FHWA Utah Division, FHWA Resource Center, the Volpe Center, FHWA Headquarters, and FHWA Office of the Chief Counsel. These experts received training on how to evaluate implementation of the NEPA Assignment Program.

The Audit Team conducted an examination of UDOT's NEPA project files, UDOT's responses to the PAIR, and UDOT's self-assessment. The audit

also included interviews with staff and reviews of UDOT policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: program management; documentation and records management; QA/QC; legal sufficiency; training; and performance measurement. In particular, the Audit Team reviewed UDOT's process and procedures for conducting environmental re-evaluations.

The focus of the audit was on UDOT's process and program implementation. Therefore, while the Audit Team reviewed project files to evaluate UDOT's NEPA process and procedures, the Audit Team did not evaluate UDOT's project-specific decisions to determine if they were, in FHWA's opinion, appropriate or not. The Audit Team reviewed 20 NEPA Project files with DCEs, EAs, EISs, and re-evaluations, representing all projects with decision points or other actionable items between July 1, 2019, and June 30, 2020. The Audit Team also interviewed environmental staff in UDOT's headquarters office.

The PAIR consisted of 25 questions about specific elements in the MOU. The Audit Team used UDOT's response to the PAIR to develop specific follow-up questions for the UDOT staff.

The Audit Team conducted four interviews with UDOT environmental staff, one virtual interview with staff from the U.S. Environmental Protection Agency (EPA), one interview with staff from the FWS, two interviews with UDOT's outside legal counsel, and one interview with legal counsel from the Utah Attorney General's office. All interviews were conducted as videoconference interviews.

Throughout the document reviews and interviews, the Audit Team verified information regarding the UDOT NEPA Assignment Program including UDOT policies, guidance, manuals, and reports. This included the NEPA QA/QC Guidance, the NEPA Assignment Training Plan, and the NEPA Assignment Self-Assessment Report.

The Audit Team compared the procedures outlined in UDOT environmental manuals and policies to the information obtained during interviews and project file reviews to determine if there were discrepancies between UDOT's performance and documented procedures. The Audit Team documented observations under the six NEPA Assignment Program topic areas. Below are the audit results.

Overall, UDOT has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program, and as such the Audit Team finds UDOT is substantially compliant with the provisions of the MOU.

**Observations and Successful Practices**

This section summarizes the Audit Team's observations of UDOT's NEPA Assignment Program implementation, including successful practices UDOT may want to continue or expand. Successful practices are positive results FHWA would like to commend UDOT for developing. These may include ideas or concepts that UDOT has planned but not yet implemented. Observations are items the Audit Team would like to draw UDOT's attention to, which may benefit from revisions to improve processes, procedures, or outcomes. The UDOT may have already taken steps to address or improve upon the Audit Team's observations, but at the time of the audit they appeared to be areas where UDOT could make improvements. This report addresses all six MOU topic areas as separate discussions. Within each area, this report discusses successful practices followed by observations.

This audit report provides an opportunity for UDOT to implement actions to improve their NEPA Assignment Program. The FHWA and UDOT will continue to work together to monitor UDOT's compliance with the terms of this MOU, as required by 23 U.S.C. 327(h).

*Program Management*

Successful Practice #1

The Audit Team identified one of UDOT's project websites which included detailed information about the proposed noise impact analyses, traffic noise abatement measures, and the proposed relocation of the existing noise barriers as a successful practice. The noise impact and abatement information presented to the public was comprehensive and easy to understand.

Observation #1

Section 5.1.4 of UDOT's NEPA Assignment MOU outlines an interagency planning and coordination protocol to make sure that all programmatic agreements reflect UDOT's new roles and responsibilities under NEPA Assignment. The Audit Team observed that UDOT's Section 106 programmatic agreements with four Tribal governments predate NEPA Assignment, and they do not reflect UDOT's assigned roles and responsibilities. We recommend that UDOT reach out to these Tribal governments and implement the interagency planning and coordination provisions of Section 5.1.4, which may include amending the programmatic agreements or obtaining a ''written consent''. The recommended path forward would enable UDOT to clarify its assigned roles and responsibilities during Section 106 consultations.

The overall consistency across all five of the Section 106 programmatic agreements is important to clarify the organizational roles and responsibilities between UDOT and FHWA for both Section 106 and Government-to-Government consultations, resulting in more predictable lines of communication, more productive and meaningful interagency dialogue with the Tribes, and a positive reinforcement of FHWA's retained Tribal trust responsibilities.

Observation #2

In the course of reviewing the most recent Manual of Instruction (MOI), the Audit Team identified several areas that do not address the most recent requirements and guidelines associated with the Fixing America's Surface Transportation Act; FHWA's 2019 Re-evaluation Q&A Guidance; Moving Ahead for Progress in the 21st Century Act (MAP–21) Section 1319 interim guidance relating to the appropriate use of the combined Final Environment Impact Statement/Record of Decision (FEIS/ROD) documents; FHWA's 2011 Environmental Justice and NEPA guidance for identifying, disclosing and mitigating impacts to environmental justice communities; or FHWA's October 2018 memorandum addressing activities that may be completed prior to issuance of a Notice of Intent to prepare an EIS. During interviews, UDOT informed us that they make regular updates to the MOI, as needed. However, these examples illustrate that the MOI would benefit from a regularly scheduled, comprehensive review to ensure that it reflects current national policy and guidance.

*Documentation and Records Management*

Successful Practice #1

During this audit period, the Audit Team reviewed re-evaluations for two EIS projects that appeared to use the same format. While it is not explicitly required by the MOI, UDOT did appear to use a standard procedure for these re-evaluations. For example, both included a Summary of Re-evaluation Analysis Table that functions like an environmental checklist. This table creates a standard process for looking at changes in both the magnitude of

project impacts, as well as project scope modifications.

Observation #1

The team reviewed multiple re-evaluations for the West Davis Corridor Project. Each individual re-evaluation addressed the changes on that portion of the larger project. The FHWA suggests UDOT also add language that summarizes the changes across all the re-evaluations, such as providing a listing of all the related re-evaluations and a statement correlating them, to clearly demonstrate and document that UDOT has considered impacts across the entirety of the project.

*Quality Assurance/Quality Control*

The UDOT has made improvements to its QA/QC procedures. These improvements are discussed in the Legal Sufficiency section of this report.

*Legal Sufficiency*

During the audit period outside counsel issued three findings of legal sufficiency per the requirements of 23 CFR 771.125(b) and 23 CFR 774.7(d), copies of which were provided to the Audit Team. These include legal sufficiency reviews of one EIS and two Section 4(f) evaluations. The UDOT has continued using the legal sufficiency process it put in place for both Section 326 CE and Section 327 NEPA Assignment; that is, contracting with outside counsel who have extensive experience in NEPA, other environmental laws, and Federal environmental litigation.

Since the signing of the initial FHWA–UDOT MOU for the NEPA Assignment Program in January 2017, no lawsuits have been filed against NEPA-assigned projects in the State of Utah.

*Training*

The UDOT has continued to develop an annual training plan, in compliance with Section 12.2 of the MOU.

*Performance Measures*

The UDOT has continued to assess its performance as required under the terms of the MOU. The UDOT's annual self-assessment report indicates that they are meeting their performance targets. The process of, and results from, the State's self-assessment have been an important factor in the improvement of UDOT's NEPA Program.

Observation #1

Section 10.2.1.C.i of the MOU requires UDOT to assess change in and ensure effective communication among UDOT, Federal and State resource agencies resulting from assumption of responsibilities under the MOU.

In interviews, resource agency staff at the EPA and the FWS stated that overall they have a good working relationship with UDOT staff. Some FWS staff indicated that they could utilize additional information on the differences between the 23 U.S.C. 326 (CE Assignment) program and the 23 U.S.C. 327 (NEPA Assignment) program. The audit team also learned that neither FWS nor EPA had responded to UDOT's annual resource agency survey. These are examples of where UDOT's program may benefit from more consistent, program-level discussions with resource agencies to ensure that all parties understand their respective roles and responsibilities, as well as the provisions of the 326 and 327 programs. Stronger managerial-level communications with the resource agencies may increase their understanding of the importance of the survey and improve the response rate.

**Non-Compliance Observation**

Non-compliance observations are instances where the team found UDOT was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or UDOT's own procedures for compliance with the NEPA process. Such observations may also include instances where UDOT has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other non-compliance observations could suggest a persistent failure to adequately consult, coordinate, or consider the concerns of other Federal, State, Tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects UDOT to develop and implement corrective actions to address all non-compliance observations.

The Audit Team did not identify any non-compliance observations during this audit.

**Follow-up to Previous Audit Findings**

The FHWA reported a non-compliance observation relating to UDOT not complying with the State's environmental review procedures as a part of Audit #3.

*2019 Audit #3—Issuing a Document Without Final Legal Sufficiency Finding*

As noted earlier, in response to the 2019 audit finding that legal sufficiency review documentation was not provided prior to approval of a project FEIS, UDOT and outside counsel implemented a more formalized system by instituting a Legal Sufficiency Review Form to be completed by outside counsel. The form ensures a record that the review occurred. This form has already been used for legal sufficiency reviews during this audit period.

**Next Steps**

The FHWA provided this draft audit report to UDOT for a 30-day review and comment period. The Audit Team considered UDOT comments in developing this draft audit report. The FHWA will publish this notice in the **Federal Register** for a 30-day comment period in accordance with 23 U.S.C. 327(g)(2)(A). No later than 60 days after the close of the comment period, FHWA will respond to all comments submitted to finalize this draft audit report pursuant to 23 U.S.C. 327(g)(2)(B). Once finalized, FHWA will publish the final audit report in the **Federal Register**.

[FR Doc. 2022–13401 Filed 6–22–22; 8:45 am]

**BILLING CODE 4910–22–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

**[FTA Docket No. FTA 2022–0017]**

### Agency Information Collection Activity Under OMB Review: Public Transportation Safety Agency Plan

**AGENCY:** Federal Transit Administration, Department of Transportation (DOT).

**ACTION:** Notice of request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describe the nature of the information collection and their expected burdens.

**DATES:** Comments must be submitted on or before July 25, 2022.

**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:* 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; the accuracy of

the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Tia Swain, Office of Administration, Management Planning Division, 1200 New Jersey Avenue SE, Mail Stop TAD–10, Washington, DC 20590, (202) 366–0354 or *tia.swain@dot.gov.*

**SUPPLEMENTARY INFORMATION:** The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, Section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On March 22, 2022 FTA published a 60-day notice (87 FR 16306) in the **Federal Register** soliciting comments on the ICR that the agency was seeking OMB approval. FTA received no comments after issuing this 60-day notice. Accordingly, DOT announces that these information collection activities have been re-evaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507 (b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The requirements are being submitted for clearance by OMB as required by the PRA.

*Title:* Public Transportation Agency Safety Plan.

*OMB Control Number:* 2132–0580.

*Background:* The Public Transportation Agency Safety Plan regulation (49 CFR part 673) establishes requirements for Agency Safety Plans as authorized under 49 U.S.C. 5329(d). The regulation requires States and certain operators of public transportation systems that receive Federal financial assistance under 49 U.S.C. Chapter 53 to develop Agency Safety Plans based on the Safety Management Systems (SMS) approach. The development and implementation of these plans will help ensure that public transportation systems are safe nationwide.

Each Public Transportation Agency Safety Plan must include, at minimum:

- An approval from the recipient's Board of Directors, or an Equivalent Authority;
- Methods for identifying and evaluating safety risks throughout all elements of the recipient's public transportation system;
- Strategies to minimize the exposure of the public, personnel, and property to hazards and unsafe conditions;
- A process and timeline for conducting an annual review and update of the plan;
- Performance targets based on the safety performance measures established in FTA's National Public Transportation Safety Plan;
- Assignment of an adequately trained safety officer who reports directly to the general manager, president, or equivalent officer; and
- A comprehensive safety training program for operations personnel and personnel directly responsible for safety that includes the completion of a safety training program and continuing safety education and training.
- A rail transit agency must include or incorporate by reference in its Agency Safety Plan an emergency preparedness and response plan or procedures.

Information collection requirements associated with this regulation include information collected by the agency to support its internal SMS processes and information collected by recipients to distribute to FTA.

The information collection conducted at the agency level to support internal SMS processes includes the regulatory requirement to maintain:

- Documents that set forth the Agency Safety Plan, including those related to implementing the SMS;
- Results from SMS processes and activities; and
- Documents included in whole, or by reference, that describe the programs, policies, and procedures used to carry out the Agency Safety Plan.

Transit agencies must maintain this documentation for a minimum of three years and must make this documentation available upon request to FTA, other Federal entities having jurisdiction, and the relevant State Safety Oversight Agency, if applicable.

The information collection exchange between FTA and its recipients consists of:

- Annual Certifications and Assurances. FTA requires operators of public transportation systems and States to certify compliance with 49 CFR part 673 through its annual submittal of Certifications and Assurances to FTA.
- Triennial Review Process. FTA incorporated questions specific to the Public Transportation Agency Safety Plan Rule into FTA's existing oversight questionnaire for transit agencies to evaluate areas of compliance.
- State Management Review Process. FTA also ensures compliance with this rule through its existing triennial State Management Review oversight process.

The information collection will continue to help guide transit agency and FTA's safety program priorities.

*Respondents:* State and local government agencies, including transit agencies.

*Estimated Annual Number of Respondents:* 755 respondents.

*Estimated Annual Burden Hours per Respondent:* 335 hours.

*Estimated Total Annual Burden:* 252,855 hours.

*Frequency:* Annually.

**Nadine Pembleton,**

*Deputy Associate Administrator, Office of Administration.*

[FR Doc. 2022–13413 Filed 6–22–22; 8:45 am]

BILLING CODE 4910–57–P

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

**[FTA Docket No. FTA 2022–0016]**

### Agency Information Collection Activity Under OMB Review: Public Transportation Safety Certification Training Program (PTSCP)

**AGENCY:** Federal Transit Administration, Department of Transportation (DOT).

**ACTION:** Notice of request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requirements (ICRs)

abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICRs describe the nature of the information collection and their expected burdens.

**DATES:** Comments must be submitted on or before July 25, 2022.

**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:* 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; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Tia Swain, Office of Administration, Management Planning Division, 1200 New Jersey Avenue SE, Mail Stop TAD–10, Washington, DC 20590, (202) 366–0354 or *tia.swain@dot.gov.*

**SUPPLEMENTARY INFORMATION:** The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, Section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On March 1, 2022 FTA published a 60-day notice (87 FR 11507) in the **Federal Register** soliciting comments on the ICR that the agency was seeking OMB approval. FTA received no comments after issuing this 60-day notice. Accordingly, DOT announces that these information collection activities have been re-evaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507 (b)-(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The requirements are being submitted for clearance by OMB as required by the PRA.

*Title:* Public Transportation Safety Certification Training Program (PTSCTP).

*OMB Control Number:* 2132–0578.

*Type of Request:* FTA's Public Transportation Safety Certification Training Program (PTSCTP) is authorized pursuant to 49 U.S.C. 5329(c)(1), which requires the Secretary of Transportation to establish a public transportation safety certification training program for Federal and State employees, or other designated personnel, who conduct safety audits and examinations of public transportation systems, and employees of public transportation agencies directly responsible for safety oversight. The program implements a uniform safety certification training curriculum and requirements to enhance the technical proficiency of individuals who conduct safety audits and examinations of public transportation systems operated by public transportation agencies and those who are directly responsible for safety oversight of public transportation agencies. To comply with 49 U.S.C. 5329(c)(1), these designated personnel are required to register for the PTSCTP and request an Individual Training Plan (ITP). The PTSCTP has three different ITP tracks. The different ITP tracks: (1) State Safety Oversight (SSO)—State Safety Oversight Agency (SSOA) personnel and contractors who conduct safety audits and examinations of rail transit systems; (2) Rail Transit Agency (RTA)—Rail transit agency personnel and contractors who are directly responsible for safety oversight; and (3) Bus—Bus transit agency personnel and contractors who are directly responsible for safety oversight. FTA then issues an ITP which specifies a curriculum the registrant must complete. PTSCTP participants enroll in courses specific to their curriculum. The information collected as part of this program is to ensure that SSOA and RTA recipients are complying with the prescribed training requirements by ensuring their designated personnel are receiving training that assists with enhancing technical and professional proficiency in performing safety oversight functions. FTA will use the information collected to monitor implementation and effectiveness of the PTSCTP. Certain information collected may be disseminated to recipients or FTA program managers to encourage and ensure participation by designated personnel is achieved within the prescribed 3-year certification period and maintained through refresher training. Recipients are required to self-certify compliance with 49 CFR part 672 annually. This request for renewal of an existing information collection does not reflect any changes as a result of the Bipartisan Infrastructure Law. In the event that FTA updates PTSCTP requirements, FTA will seek comment from stakeholders through the publication of a separate **Federal Register** Notice outside of the Paperwork Reduction Act process.

*Respondents:* State Safety Oversight Agencies and Rail Transit Agencies.

*Estimated Annual Number of Respondents:* 91 respondents (31 SSOAs that conduct audits and examinations of public transportation systems and 60 public RTAs with designated personnel who are directly responsible for safety oversight of their systems).

*Estimated Annual Number of Responses:* 1,020 responses.

*Estimated Total Annual Burden:* 5,118 hours.

*Frequency:* Annually.

**Nadine Pembleton,**

*Deputy Associate Administrator, Office of Administration.*

[FR Doc. 2022–13414 Filed 6–22–22; 8:45 am]

BILLING CODE 4910–57–P

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

**[FTA Docket No. FTA 2022–0016]**

### Agency Information Collection Activity Under OMB Review: Fixed Guideway Capital Investment Grants (CIG) Program Section 5309

**AGENCY:** Federal Transit Administration, Department of Transportation (DOT).

**ACTION:** Notice of request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describe the nature of the information collection and their expected burdens.

**DATES:** Comments must be submitted on or before July 25, 2022.

**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:* 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; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Tia Swain, Office of Administration, Management Planning Division, 1200 New Jersey Avenue SE, Mail Stop TAD–10, Washington, DC 20590 (202) 366–0354 or *tia.swain@dot.gov*.

**SUPPLEMENTARY INFORMATION:** The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, Section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On March 1, 2022 FTA published a 60-day notice (87 FR 11508) in the **Federal Register** soliciting comments on the ICR that the agency was seeking OMB approval. FTA received no comments after issuing this 60-day notice. Accordingly, DOT announces that these information collection activities have been re-evaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507 (b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The requirements are being submitted for clearance by OMB as required by the PRA.

*Title:* Fixed Guideway Capital Investment Grants (CIG) Program Section 5309.

*OMB Control Number:* 2132–0561.

*Background:* The Federal Transit Administration (FTA) administers the discretionary Capital Investment Grants (CIG) grant program under 49 U.S.C. Section 5309 that provides funding for major transit capital investments including rapid rail, light rail, commuter rail, bus rapid transit, and ferries. Three types of eligible projects are outlined in law: smaller scaled corridor-based transit capital projects known as ''Small Starts''; new fixed guideway transit systems and extensions to existing fixed guideway systems known as ''New Starts''; and projects to improve capacity in existing fixed guideway corridors, known as ''Core Capacity''. The CIG program has a longstanding requirement that FTA evaluate proposed projects against a prescribed set of statutory criteria at specific points during the projects' development including when they seek to enter a subsequent phase of the process or a construction grant agreement. In addition, FTA must report on its evaluations and ratings annually to Congress.

The current Federal Public Transportation Law, 49 U.S.C. 5309, has not changed the statutorily defined project justification and local financial commitment criteria that are the subject of this information collection. In addition, the statutorily required approval steps for projects seeking CIG funds have not changed. The current request for renewal of this information collection does not reflect any changes as a result of the Bipartisan Infrastructure Law (BIL). FTA will seek comment from stakeholders through the publication of a separate **Federal Register** Notice outside of the PRA process. In general, the information used by FTA for CIG project evaluation and rating should arise as a part of the normal project planning process.

*Respondents:* State and local government agencies, including transit agencies.

*Estimated Annual Number of Respondents:* 155 respondents.

*Estimated Total Annual Burden:* 68,840 hours.

*Frequency:* Annually.

**Nadine Pembleton,**

*Deputy Associate Administrator, Office of Administration.*

[FR Doc. 2022–13412 Filed 6–22–22; 8:45 am]

**BILLING CODE 4910–57–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2021–0077; Notice 1]**

### Michelin North America, LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Receipt of petition.

**SUMMARY:** Michelin North America, LLC (MNA), has determined that certain Michelin Pilot Sport All Season 4 replacement passenger car tires do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 139, *New Pneumatic Radial Tires for Light Vehicles.* MNA filed a noncompliance report dated September 14, 2021, and subsequently petitioned

NHTSA on September 30, 2021, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces receipt of MNA's petition.

**DATES:** Send comments on or before July 25, 2022.

**ADDRESSES:** Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the docket. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

**FOR FURTHER INFORMATION CONTACT:** Jayton Lindley, General Engineer, NHTSA, Office of Vehicle Safety Compliance, (325) 655–0547.

**SUPPLEMENTARY INFORMATION:**

## I. Overview

MNA has determined that certain Michelin Pilot Sport All Season 4 replacement passenger car tires do not fully comply with the requirements of paragraph S5.5.4(b) of FMVSS No. 139, *New Pneumatic Radial Tires for Light Vehicles* (49 CFR 571.139). MNA filed a noncompliance report dated September 14, 2021, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* MNA subsequently petitioned NHTSA on September 30, 2021, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of MNA's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercise of judgment concerning the merits of the petition.

## II. Tires Involved

According to MNA approximately 3,589 Michelin Pilot Sport All Season 4, size 295/40ZR21 111Y XL, replacement passenger car tires, manufactured between October 7, 2020, and August 20, 2021, and sold in the United States and Canada were affected by the subject noncompliance. MNA says that of the 3,589 tires, 1,729 tires entered the U.S. market, 110 entered the Canadian market, and the remaining 1,750 were blocked in Michelin's inventory control system to be repaired or scrapped. For the 110 tires that entered the Canadian market, the agency cannot exempt MNA from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance for those tires. Therefore, the agency's decision will only apply to the 1,729 tires that entered U.S. market.

## III. Noncompliance

MNA explains that the noncompliance was due to a mold error in which one sidewall, the serial sidewall, of the subject tires incorrectly state the maximum load range as required by paragraph S5.5.4(b) of FMVSS No. 139. Specifically, the subject tires were marked with a maximum load of 1090 kg (1433 lbs.) when they should have been marked with a maximum load of 1090 kg (2403 lbs.).

## IV. Rule Requirements

Paragraph S5.5.4(b) of FMVSS No. 139 includes the requirements relevant to this petition. For passenger car tires, if the maximum inflation pressure of a tire is 240, 280, 300, 340, or 350 kPa, then each marking of the tire's maximum load rating in kilograms must be followed in parenthesis by the equivalent load rating in pounds, rounded to the nearest whole number.

## V. Summary of MNA's Petition

The following views and arguments presented in this section, ''V. Summary of MNA's Petition,'' are the views and arguments provided by MNA. They have not been evaluated by the Agency and do not reflect the views of the Agency. MNA describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety for the following reasons:

MNA asserts that although erroneously marked, the subject tires were ''designed as a load index 111 tire, with a maximum load rating of 1090 kilograms, or 2403 pounds.'' MNA says that the subject tires ''fully comply with Michelin performance requirements'' and with all applicable FMVSSs. According to MNA, other than the tire maximum load rating in pounds, the tires are correctly marked and ''provide both dealers and consumers with the necessary information to enable proper selection and application of the tires.'' MNA says that if a consumer were to go by the erroneous maximum load, in pounds, based on the markings on the tire, the tire would be put ''into service respecting a maximum load of 1433 lbs., which is less than the actual designed maximum load of 2403 lbs.''

MNA cites the following past inconsequentiality petitions NHTSA has granted that MNA claims are similar to the subject petition:

• Bridgestone Americas Tire Operations, LLC, Grant of Petition for Decision of Inconsequential Noncompliance. *See* 78 FR 35357, June 12, 2013;

• The Goodyear Tire & Rubber Company, Grant of Petition for Decision of Inconsequential Noncompliance. *See* FR 41254, July 18, 2005;

• Continental Tire North America Inc., Grant of Application for Decision of Inconsequential Noncompliance. *See* 70 FR 14748, March 23, 2005;

• Michelin North America, Inc., Grant of Petition for Decision of Inconsequential Noncompliance. *See* 69 FR 62511, October 26, 2004; and

• Bridgestone/Firestone, Inc., Grant of Application for Decision That Noncompliance Is Inconsequential to Motor Vehicle Safety. *See* 66 FR 57772, November 16, 2001.

MNA states that they have ''captured and retained'' a total of 1,750 tires with the intent to either repair or scrap them. MNA also states that they have corrected the tire specification drawing and updated the mold to reflect the correct maximum load in pounds.

MNA concludes that the subject noncompliance is inconsequential as it relates to motor vehicle safety and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject tires that MNA no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve equipment distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant tires under their control after MNA notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

**Otto G. Matheke III,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. 2022–13365 Filed 6–22–22; 8:45 am]

BILLING CODE 4910–59–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2019–0130; Notice 2]**

### Goodyear Tire & Rubber Company, Denial of Petition for Decision of Inconsequential Noncompliance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice of petition denial.

**SUMMARY:** Goodyear Tire & Rubber Company (Goodyear), has determined that certain Kelly Armorsteel KDM 1 commercial truck tires do not comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 119, *New Pneumatic Tires for Motor Vehicles with a GVWR of more than 4,536 kilograms (10,000 pounds) and Motorcycles.* Goodyear petitioned NHTSA on November 25, 2019, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and filed a noncompliance report dated November 26, 2019. This document announces and explains the denial of Goodyear's petition.

**FOR FURTHER INFORMATION CONTACT:** Jayton Lindley, Office of Vehicle Safety Compliance, NHTSA, telephone (325) 655–0547.

**SUPPLEMENTARY INFORMATION:**

*I. Overview:* Goodyear has determined that certain Kelly Armorsteel KDM 1 commercial truck tires do not fully comply with paragraph S6.5 of FMVSS No. 119, *New Pneumatic Tires for Motor Vehicles with a GVWR of More than 4,536 kilograms (10,000 pounds) and Motorcycles* (49 CFR 571.119). Goodyear petitioned NHTSA on November 25, 2019, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.* Goodyear filed a noncompliance report dated November 26, 2019, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.*

Notice of receipt of Goodyear's petition was published with a 30-day public comment period in the **Federal Register** (85 FR 35994, June 12, 2020). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2019–0130.''

*II. Tires Involved:* Approximately 76 Kelly Armorsteel KDM 1 commercial truck tires, size 11/R22.5 LRH, manufactured between August 25, 2019, and August 31, 2019, are potentially involved.

*III. Noncompliance:* Goodyear explained that the noncompliance is that the Tire Identification Number (TIN) on the subject tires contains a date code that was engraved less than the required depth of 0.51 mm (0.02 inch) and, therefore, does not meet the requirements of paragraph S6.5 of FMVSS No. 119.

*IV. Rule Requirements:* Paragraph S6.5 of FMVSS No. 119 includes the requirements relevant to this petition. Each tire shall be marked on each sidewall with the information specified in paragraphs (a) through (j) of this section. The markings shall comply with part 574.5 Tire Identification Markings which requires, among other things, that the markings be permanently molded 0.51 mm (0.02 inch) to 1.02 mm (0.04 inch) deep.

*V. Summary of Goodyear's Petition:* The following views and arguments presented in this section are the views and arguments provided by Goodyear. They do not reflect the views of the Agency.

Accordingly, Goodyear described the subject noncompliance and stated that the noncompliance is inconsequential as it relates to motor vehicle safety.

1. Goodyear believes this noncompliance is inconsequential to motor vehicle safety because these tires were manufactured as designed and meet or exceed all applicable FMVSS. All of the sidewall markings related to tire service (load capacity, corresponding inflation pressure, etc.) are correct. The mislabeling and irregular date code is not a safety concern and has no impact on the retreading, repairing, and recycling industries. The affected date code stencil has been corrected, and all future production will not contain the irregularity in the date code.

2. Goodyear states that the date code portion of the TIN becomes important in

the event of a safety campaign, so that the consumer may properly identify the recalled tire(s). Goodyear states that in the unlikely event that a safety campaign would ever become necessary for this Kelly Armorsteel KDM 1 11/R22.5 LRH commercial truck tire made in the 34th week of 2019, it would include in the listing of recalled TINs the TIN for these tires with the date code portion as shown: MJ3TK2BW3419, as well as the TIN for these tires with the date code portion omitted as shown: MJ3TK2BW, so that the consumer would know that tires with this TIN are included in the recall even if they have difficulty reading the date code portion because it is not raised to the 0.51 mm level.

Goodyear concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

*VI. NHTSA's Analysis:* NHTSA does not agree with Goodyear's assessment that the noncompliance with FMVSS No. 119 is inconsequential to motor vehicle safety. As discussed below, the tire markings required by paragraph S6.5 (b) of FMVSS No. 119 provide valuable information about the tire. Goodyear does not provide information on the actual engraved depth of the date code, other than stating it is less than the required depth of 0.51 mm (0.02 inch). However, an exemplar photo provided by Goodyear in its petition shows that it is more than a de minimus deviation from the required depth and illustrates that the date code is very difficult or impossible to read.

NHTSA recognizes that Goodyear has addressed one safety related concern by ensuring that the subject tires with the insufficient date code depth will be included in any relevant future recall. However, the Agency finds that this measure does not address all safety concerns associated with a missing or illegible date code.

A significant source of tire related accidents is tire age. This is especially a concern in recreational vehicles (RVs) on which the subject tires could be installed because of the tire's size. RVs often sit in storage, unused, for extensive periods of time. NHTSA's website provides guidance for replacing a tire due to age and states the following: ''As tires age, they are more prone to failure. Some vehicle and tire manufacturers recommend replacing tires that are six to 10 years old regardless of treadwear.'' [1] In the case of the subject tires, the insufficient date code depth makes the date code challenging to read, and the date code may become completely illegible with wear. This will prevent consumers from making informed decisions related to the age of the tire, which may lead to prolonged usage and increased risk of accidents.

Finally, Goodyear stated and believes this noncompliance is inconsequential to motor vehicle safety because these tires were manufactured as designed and meet or exceed all applicable Federal Motor Vehicle Safety Standards. Further, Goodyear stated all the sidewall markings related to tire service (load capacity, corresponding inflation pressure, etc.) are correct. NHTSA does not find these arguments to be relevant to the safety concerns presented by the noncompliance because they do not relate to the information provided by the date code.

*VII. NHTSA's Decision:* In consideration of the foregoing, NHTSA has decided that Goodyear has not met its burden of persuasion that the subject FMVSS No. 119 noncompliance is inconsequential to motor vehicle safety. Accordingly, Goodyear's petition is hereby denied and Goodyear is consequently obligated to provide notification of and free remedy for that noncompliance under 49 U.S.C. 30118 and 30120.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

**Anne L. Collins,**

*Associate Administrator for Enforcement.*

[FR Doc. 2022–13364 Filed 6–22–22; 8:45 am]

**BILLING CODE 4910–59–P**

[1] *https://www.nhtsa.gov/equipment/tires* (''Should I replace my tires?'')

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Notice of OFAC Sanctions Actions

**AGENCY:** Office of Foreign Assets Control (OFAC), Treasury.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of the Treasury's Office of Foreign Assets Control is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

**DATES:** See Supplementary Information section for effective date(s).

**FOR FURTHER INFORMATION CONTACT:** OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

**SUPPLEMENTARY INFORMATION:**

### Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

### Notice of OFAC Actions

On June 17, 2022, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

### Individual

1. LOPEZ DELGADO, Ruy, Carretera Masaya, Km 6.5, Plaza 800 Mts Sur Lomas Santo Domingo, Casa #6, Managua, Nicaragua; DOB 30 Jun 1949; POB Managua, Nicaragua; nationality Nicaragua; Gender Male; Passport C01850896 (Nicaragua) issued 11 May 2015 expires 11 May 2025; National ID No. 0013006490003J (Nicaragua) (individual) [NICARAGUA].

Designated pursuant to section 1(a)(iii) of Executive Order 13851 of November 27, 2018, ''Blocking Property of Certain Persons Contributing to the Situation in Nicaragua (''E.O. 13851''), for being an official of the Government of Nicaragua or having served as an official of the Government of Nicaragua at any time on or after January 10, 2007.

### Entity

1. EMPRESA NICARAGUENSE DE MINAS (a.k.a. ENIMINAS), Residencial Bolonia, de la Embajada Alemania, 2 cuadras Oeste, 1 cuadra Norte, Managua, Nicaragua; Organization Established Date 2017; Organization Type: Mining of other non-ferrous metal ores; Target Type State-Owned Enterprise [NICARAGUA] (Linked To: LOPEZ DELGADO, Ruy).

Designated pursuant to section 1(a)(v) of E.O. 13851, for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Ruy DELGADO LOPEZ, a person whose property and interests in property are blocked pursuant to E.O. 13851.

Dated: June 17, 2022.

**Bradley T. Smith,**

*Deputy Director, Office of Foreign Assets Control, U.S. Department of the Treasury.*

[FR Doc. 2022–13432 Filed 6–22–22; 8:45 am]

**BILLING CODE 4810–AL–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Notice of Medical Necessity Criteria Under the Mental Health Parity and Addiction Equity Act of 2008

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, 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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning Notice of Medical Necessity Criteria under the Mental Health Parity and Addiction Equity Act of 2008.

**DATES:** Written comments should be received on or before August 22, 2022 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov*. Please include OMB Number 1545–2165 in the subject line of the message.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this collection should be directed to Sara Covington, at (202) 317–5744, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet *sara.l.covington@irs.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* Notice of Medical Necessity Criteria under the Mental Health Parity and Addiction Equity Act of 2008.

*OMB Number:* 1545–2165.

*Abstract:* This document contains previously approved final rules implementing the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA) of 2008, which requires parity between mental health or substance use disorder benefits and medical/surgical benefits with respect to financial requirements and treatment limitations under group health plans and group and individual health insurance coverage.

*Current Actions:* The Consolidated Appropriation Act (the Act) amended MHPAEA, in part, by expressly requiring group health plans to perform and document a comparative analysis of the design and application of any non-quantitative treatment limitations (NQTLs) that apply to medical/surgical and mental health and substance use disorder benefits. The increase in hour burden is associated with the ICRs related to the comparative analysis that is required to meet the MHPAEA related requirements.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Business or other for-profit organizations, individuals or households, and not for profit institutions.

*Estimated Number of Respondents:* 1,413,420.

*Estimated Time per Response:* 2.1557.

*Estimated Total Annual Burden Hours:* 3,046,961.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 17, 2022.

**Andres Garcia Leon,**

*Supervisory Tax Analyst.*

[FR Doc. 2022–13431 Filed 6–22–22; 8:45 am]

**BILLING CODE 4830–01–P**

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Part II

## Department of Commerce

National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Geophysical Surveys at the Cascadia Subduction Zone and Juan de Fuca Plate in the Northeast Pacific Ocean; Notice

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XC041]**

# Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Geophysical Surveys at the Cascadia Subduction Zone and Juan de Fuca Plate in the Northeast Pacific Ocean

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

**ACTION:** Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

**SUMMARY:** NMFS has received a request from Lamont-Doherty Earth Observatory (L–DEO) for authorization to take marine mammals incidental to geophysical surveys at the Cascadia Subduction Zone and Juan de Fuca Plate in the Northeast Pacific Ocean. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-time, one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

**DATES:** Comments and information must be received no later than July 25, 2022.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to *ITP.Corcoran@noaa.gov*.

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Kim Corcoran, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities.* In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:**

## Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed incidental harassment authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

## National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

## Summary of Request

On December 14, 2021, NMFS received a request from L–DEO for an IHA to take marine mammals incidental to a marine geophysical survey off the coasts of Oregon and Washington in the northeast Pacific Ocean. The application was deemed adequate and complete on April 4, 2022. L–DEO request is for take of small numbers of 23 species of marine mammals by Level B harassment only. Neither L–DEO nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued an IHA to L–DEO for larger surveys in a similar location in the Northeast Pacific (*e.g.,* 86 FR 29090; May 28, 2021; 84 FR 35073; July 22, 2019). These surveys, however, included survey areas much closer to the coast. L–DEO complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs and information regarding their monitoring results may be found in the Description of Marine Mammals in the Area of Specified Activities section.

## Description of Proposed Activity

### *Overview*

Researchers from New Mexico Institute of Mining and Technology (NMT) and Oregon State University (OSU), with funding from the U.S. National Science Foundation (NSF) propose to conduct low-energy seismic surveys from the Research Vessel (R/V) *Marcus G. Langseth* (*Langseth*), which is owned and operated by Lamont-Doherty Earth Observatory (L–DEO) of Columbia University, at the Cascadia subduction Zone and Juan de Fuca Plate in the

Northeast Pacific Ocean during Summer 2022. The proposed two-dimensional (2–D) seismic surveys would occur within the Exclusive Economic Zone (EEZ) of the United States, in waters deeper than 1600 meters (m). To complete this survey, the R/V *Langseth* would tow a Generator-Injector (GI)-airgun cluster consisting of two 45 cubic inch ($in^3$) GI guns spaced 2.46 m apart, with a total discharge volume of 90 $in^3$. The acoustic source would be towed at 2 to 4 m deep along the survey lines, while the receiving system is towed in an 800–1400 m long hydrophone streamer.

The proposed study would acquire high-resolution 2–D seismic reflection data in conjunction with densely-spaced heat flow measurements to better understand the thermal structure of the Juan de Fuca plate as it enters the Cascadia subduction zone. The seismic and heat flow data would be acquired across several distinct structures that have not been previously studied, including a pseudofault, complex buried seamounts, and small outcrops that represent the summit of much larger buried seamounts.

*Dates and Duration*

The proposed survey is expect to last for 23 days, with approximately six days of seismic operations, three days of transit and 14 days of heat flow measurements. R/V *Langseth* would likely leave out of and return to port in Newport, OR, during summer 2022.

*Specific Geographic Region*

The proposed survey would occur within ~42–47°N, ~125–127°W off the coast of Washington and Oregon in the Northeast Pacific ocean. Four regions where the surveys are proposed to occur are depicted in Figure 1; the tracklines could occur anywhere within the boxes shown in Figure 1. No representative survey tracklines are shown, as actual track lines and order of survey operations are dependent on science objectives and weather. The surveys are proposed to occur within the EEZ of the U.S., in waters >1600 m deep.

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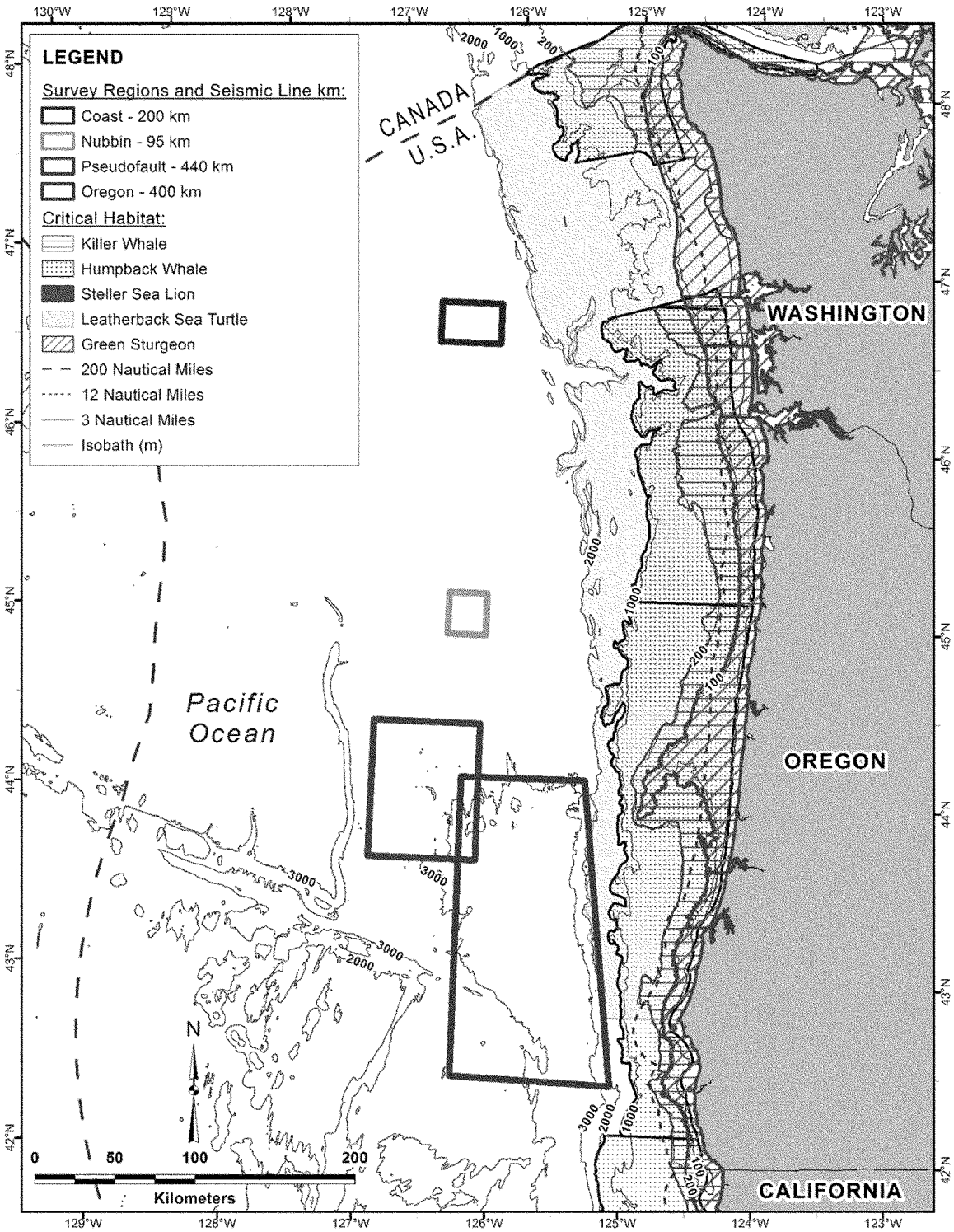


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*Detailed Description of Specific Activity*

The procedures to be used for the proposed surveys would be similar to those used during previous seismic surveys by L–DEO and would use conventional seismic methodology. The surveys would involve one source vessel, R/V *Langseth,* which is owned and operated by L–DEO. R/V *Langseth* would deploy two 45/105 in$^3$ GI airguns as an energy source with a total volume of ~90 in$^3$. The receiving system would consist of one 800–1400 m long hydrophone streamer. As the airguns are towed along the survey lines, the hydrophone streamer would transfer data to the on-board processing system. Approximately 1135 kilometers (km) of transect lines would be surveyed in four survey regions in the Northeast Pacific Ocean; 200 km, 95 km, 440 km, and 400 km in the Coast, Nubbin, Pseudofault, and Oregon survey regions, respectively. All survey effort would occur in deep water >1600 m. In addition to the operations of the airgun array, the ocean floor would be mapped with the Kongsberg EM 122 multibeam echosounder (MBES), a Knudsen CHIRP

3260 (SBP) and an Acoustic Doppler Current Profiler (ADCP) would be operated from the vessel continuously. All planned geophysical data acquisition activities would be conducted by L–DEO with on-board assistance by the scientists who have proposed the studies. The vessel would be self-contained, and the crew would live aboard the vessel. Take of marine mammals is not expected to occur incidental to use of the MBES, SBP and ADCP, whether or not the airguns are operating simultaneously with the other sources. Given their characteristics (*e.g.,* narrow downward-directed beam), marine mammals would experience no more than one or two brief ping exposures, if any exposure were to occur. NMFS does not expect that the use of these sources presents any reasonable potential to cause take of marine mammals.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

## Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, incorporated here by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Table 1 lists all species or stocks for which take is expected and proposed to be authorized for this action, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprise that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Pacific SARs (Carretta et al., 2021). All values presented in Table 1 are the most recent available at the time of publication and are available in the 2020 SARs (Carretta et al., 2021) and draft 2021 SARs (available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports*).

TABLE 1—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

| Common name | Scientific name | Stock | ESA/MMPA status; strategic (Y/N) [1] | Stock abundance (CV, Nmin, most recent abundance survey) [2] | PBR | Annual M/SI [3] |
|---|---|---|---|---|---|---|
| **Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)** | | | | | | |
| Family Balaenopteridae (rorquals): | | | | | | |
| Humpback whale | *Megaptera novaeangliae.* | California/Oregon/Washington. | –,–,Y | 4,973 (0.05, 4,776, 2018) | 28.7 | >48.6 |
| Minke whale | *Balaenoptera acutorostrata.* | California/Oregon/Washington. | –,–,N | 915 (0.792, 509, 2018) | 4.1 | >0.59 |
| Sei whale | *Balaenoptera borealis* | Eastern North Pacific | E, D, Y | 519 (0.4, 374, 2014) | 0.75 | >0.2 |
| Fin whale | *Balaenoptera physalus* | California/Oregon/Washington. | E, D, Y | 11,065 (0.405, 7,970, 2018) | 80 | >2.2 |
| Blue whale | *Balaenoptera musculus* | Eastern North Pacific | E, D, Y | 1,898 (0.085, 1,767, 2018) | 4.1 | >19.4 |
| **Superfamily Odontoceti (toothed whales, dolphins, and porpoises)** | | | | | | |
| Family Physeteridae: | | | | | | |
| Sperm whale | *Physeter macrocephalus.* | California/Oregon/Washington. | E, D, Y | 1,997 (0.57, 1270, 2014) | 2.5 | 0.6 |
| Family Kogiidae: | | | | | | |
| Pygmy sperm whale. | *Kogia breviceps* | California/Oregon/Washington. | –,–,N | 4,111 (1.12, 1924, 2014) | 19 | 0 |
| Dwarf sperm whale | *Kogia sima* | California/Oregon/Washington. | –,–,N | UNK (UNK, UNK, 2014) | UND | 0 |
| Family Ziphiidae (beaked whales): | | | | | | |
| Baird's beaked whale. | *Berardius Bairdii* | California/Oregon/Washington. | –,–,N | 1,363 (0.53, 894, 2018) | 8.9 | >0.2 |
| Cuvier's beaked whale. | *Ziphius cavirostris* | California/Oregon/Washington. | –,–,N | 3,274 (0.67, 2,059, 2014) | 21 | <0.1 |
| Mesoplodont Beaked Whales. | *Mesoplodon* spp. | California/Oregon/Washington. | –,–,N | 3,044 (0.54, 1,967, 2005) | 20 | 0.1 |
| Family Delphinidae: | | | | | | |
| Striped dolphin | *Stenella coeruleoalba* | California/Oregon/Washington. | –,–,N | 29,988 (0.3, 23,448, 2018) | 225 | >4 |
| Short-beaked common dolphin. | *Delphinus delphis* | California/Oregon/Washington. | –,–,N | 1,056,308 (0.21, 888,971, 2018) | 8,889 | >30.5 |

TABLE 1—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES—Continued

| Common name | Scientific name | Stock | ESA/ MMPA status; strategic (Y/N) [1] | Stock abundance (CV, Nmin, most recent abundance survey) [2] | PBR | Annual M/SI [3] |
|---|---|---|---|---|---|---|
| Pacific white-sided dolphin. | *Lagenorhynchus obliquidens.* | California/Oregon/ Washington. | -,-,C | 34,998 (0.222, 29,090, 2018) | 279 | 7 |
| Northern right whale dolphin. | *Lissodelphis borealis* .... | California/Oregon/ Washington. | –,–,N | 29,285 (0.72, 17024, 2018) | 163 | >6.6 |
| Risso's dolphin ..... | *Grampus griseus* ..... | California/Oregon/ Washington. | –,–,N | 6,336 (0.32, 4,817, 2014) | 46 | >3.7 |
| Killer whale ..... | *Orcinus orca* ..... | West Coast Transient .. | –,–,N | 349 (N/A, 349, 2018) | 3.5 | 0.4 |
| | | North Pacific Offshore .. | –,–,N | 300 (0.1, 276, 2012) | 2.8 | 0 |
| Family Phocoenidae (porpoises): | | | | | | |
| Dall's porpoise ..... | *Phocoenoides dalli* ..... | California/Oregon/ Washington. | –,–,N | 16,498 (0.61, 10,286, 2019) | 99 | >0.66 |
| **Order Carnivora—Superfamily Pinnipedia** | | | | | | |
| Family Otariidae (eared seals and sea lions): | | | | | | |
| Northern fur seal ... | *Callorhinus ursinus* ..... | Eastern Pacific ..... | -,D,Y | 626,618 (0.2, 530,376, 2020) | 11,403 | 373 |
| | | California ..... | -,D,Y | 14,050 (N/A, 7,524, 2013) | 451 | 1.8 |
| Guadalupe fur seal | *Arctocephalus townsendi.* | Mexico ..... | T, D, Y | 34,187 (N/A, 31,019, 2013) | 1,062 | >3.8 |
| Steller sea lion ..... | *Eumetopias jubatus* ..... | Eastern ..... | –,–,N | 43,201 (N/A, 43,201,2017) | 2,592 | 112 |
| California sea lion .. | *Zalophus californianus* | United States ..... | –,–,N | 257,606 (N/A, 233,525, 2014) | 14,011 | >320 |
| Family Phocidae (earless seals): | | | | | | |
| Northern elephant seal. | *Mirounga angustirostris* | California Breeding ..... | –,–,N | 187,386 (N/A, 85,369, 2013) | 5,122 | 5.3 |

[1]—Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2]—NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3]—These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

As indicated above, all 23 species (with 25 managed stocks) in Table 1 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. While North Pacific right whales (*Eubalaena japonica*), bottlenose dolphins (*Tursiops truncatus),* short-finned pilot whales (*Globicephala macrorhynchus*), gray whales (*Eschrichtius robustus*), and false killer whales (*Pseudorca crassidens*) have been documented near the area, the temporal and/or spatial occurrence of these species is such that take is not expected to occur. Therefore, they are not discussed further beyond the explanation provided below.

The North Pacific right whale is one of the rarest marine mammals in the world (Muto *et al.,* 2021). The species comprises of an eastern and western population that are largely or wholly discrete. The summer range of the eastern stock includes the Gulf of Alaska and the Bergin Sea, while the western stock is believed to feed in the Okhotsk Sea and in pelagic waters of the northwestern North Pacific (Muto *et al.,* 2021). Whaling records from the 19th century and recent Soviet catch data have shown that right whales were broadly distributed across the eastern North Pacific (Scarff 1986, Brownell *et al.,* 2001, Ivashchenko and Clapham 2012). There are sporadic records from below 20 degrees north, but the bulk of the data show right whales concentrated north of 35 degrees north, including coastal and offshore waters ranging from Washington state and British Columbia through the Gulf of Alaska, Alaska Peninsula, Aleutian Islands, and the Bering Sea (Muto *et al.,* 2021).

The eastern North Pacific stock that occurs in the United States is estimated to contain 31 whales for the Bering sea and Aleutian Islands. A Biologically Important Area (BIA) for feeding for North Pacific right whales was designated east of the Kodiak Archipelago, which includes the Gulf of Alaska critical habitat and extends south of 56 degrees north and north of 58 degrees north and beyond the shelf edge. South of 50 degrees north, only 29 reliable sightings were recorded from 1900–1994 (Scarff 1986, 1991; Carretta *et al.,*1994). Off the coast of California/ Oregon/Washington, only seven documented sightings of right whales were made from 1990 through 2000. Two North Pacific right whale calls were detected on a bottom-mounted hydrophone (located in water 1390 m deep) off the Washington coast on June 29, 2013 (Sirovic *et al.,* 2014). During L–DEO's summer 2021 seismic survey in the Northeast Pacific, a sighting of two individuals was made northwest of the survey area in British Columbia, west of Haida Gwaii on July 27, 2021. Because of the small population size, and the fact that North Pacific right whales spend the summer feeding in high latitudes, the likelihood that the proposed survey would encounter a North Pacific right whale is discountable, and NMFS is not proposing to authorize take of this species.

Bottlenose dolphins are distributed worldwide in tropical and warm-temperate waters. Bottlenose dolphins occur frequently off the coast of California, and sightings have been made as far north as 41 degrees north, but few records exist for Oregon and Washington (Carretta *et al.,* 2021). In California, separate coastal and offshore populations are known (Walker 1981; Ross and Cockcroft 1999; Van Waerebeek *et al.,* 1990; Lowther 2006). Three sightings and one stranding of bottlenose dolphins have been documented in Puget Sound since 2004 (Cascadia Research 2011 *in* U.S.C.

2015). L–DEO requested authorization for the incidental take of bottlenose dolphins (the request was for a total of 13 individuals). Although sightings of bottlenose dolphins in Puget Sound have increased considerably since 2016 (Cascadia Research Collective, 2020), given the far north and offshore placement of the proposed survey and the species' tendency to stay in coastal waters and in lower latitudes, we believe it is highly unlikely that bottlenose dolphins would be encountered in the proposed survey area, and NMFS is not proposing to authorize take of this species.

Short-finned pilot whales are found in tropical and warm temperate waters (Olson 2018) and seen as far south as 40 degrees south and as far north as 50 degrees north (Jefferson *et al.,* 2015). Pilot whales are generally nomadic, but may reside in certain locations, including California and Hawaii (Olson 2018). The species were common off southern California (Dohl *et al.,* 1980) until an El Nino event occurred in 1982–1983 (Green *et al.,* 1992; Carretta and Forney 1993; Barlow 1997). Few sightings were made off California/Oregon/Washington in 1983–1984, but sightings remain rare (Barlow 1997; Buchanan *et al.,* 2001; Barlow 2010). No short-finned pilot whales were seen during surveys off Oregon and Washington in 1989–1990, 1992, 1996, and 2001 (Barolow 2003). Only one sighting has occurred off Oregon from 1991–2014 (Carretta *et al.,* 2021). Although zero Level B harassment exposure estimates were calculated, L–DEO requested authorization for the incidental take of 29 short-finned pilot whales based on the average group size produced by Barlow (2016). However, considering the species' historical occurrence in the proposed survey area, their preference for warmer tropical waters, and the best available information, the likelihood that L–DEO will encounter short-finned pilot whales in the proposed survey area is discountable, and NMFS is not proposing to authorize take of this species.

Two separate populations of gray whales have been recognized in the North Pacific: the eastern North Pacific and western North Pacific stocks (LeDuc *et al.,* 2002; Weller *et al.,* 2013). However, the distinction between these two populations has been recently debated owing to evidence that whales from the western feeding area also travel to breeding areas in the eastern North Pacific (Weller *et al.,* 2012, 2013; Mate *et al.,* 2015). BIAs for feeding gray whales along the coasts of Washington, Oregon, and California have been identified, including northern Puget sound, Northwestern Washington, and Grays Harbor (WA); Depoe Bay and Cape Blanco and Orford Reef (OR), and Point St. George (CA); most of these areas are of importance from late spring through early fall (Calambokidis *et al.,* 2015); none occur within the proposed survey region. Resident gray whales have been observed foraging off the coast of Oregon from May through October and off Washington June through November (Newell and Cowles 2006; Scordino *et al.,* 2014). BIAs have also been identified for migrating gray whales along the entire coasts of Washington, Oregon, and California; although most whales travel within 10 km from shore, the BIAs were extended out to 47 km from the coastline (Calambokidis *et al.,* 2015); the proposed Oregon survey region is located adjacent to this BIA (see Figure 1). Gray whales from the far north begin to migrate south to breeding grounds on the west coast of Baja California and the southeastern Gulf of California in October and November (Braham 1984; Rugh *et al.,* 2001). Gray whales migrate closest to the Washington/Oregon coastline during spring (April–June), when most strandings are observed (Norman *et al.,* 2004). The species' stock range extends from as far south as Mexico all the way north to the Gulf of Alaska, primarily hugging the coastline (NMFS 2022).

NOAA (2021b) declared an unusual mortality event (UME) for gray whales in 2019, as an elevated number of strandings have occurred along the coast of the Pacific Northwest since January 2019. As of 1 October 2021, a total of 212 dead gray whales have been reported, including 248 in the U.S. (55 in Washington; 12 in Oregon), 225 in Mexico, and 19 in B.C.; some of the whales were emaciated. A UME for gray whales was also declared for 1999–2000 (NOAA 2021c).

The proposed survey is planned during the summer feeding season, when most individuals from the eastern North Pacific stock occur farther north. Although individuals, particularly from the Pacific Coast Feeding Group (PCFG), could be encountered in nearshore waters less than 10 km from shore, the likelihood that any gray whales will be encountered as far offshore as the proposed survey area is discountable. Gray whales have been observed to have a distinct ecological niche in nearshore and shallow waters (Darling *et al.,* 1998) and L–DEO's proposed activities to not overlap with this niche. L–DEO requested the incidental take of a singular gray whale, however NMFS does not propose to authorize any take of gray whales as it is temporally and spatially unlikely that they will be encountered.

Lastly, the false killer whale is found worldwide in tropical and temperate waters, generally between 50 degrees north and 50 degrees south (Odell and McClune 1999). It is widely distributed, but not abundant anywhere (Carwardine 1995). The false killer whale generally inhabits deep, offshore waters, but sometimes is found over the continental shelf and occasionally moves into very shallow water (Jefferson *et al.,* 2015; Baird 2018b). In the eastern North Pacific, it has been reported only rarely north of Baja California (Leatherwood *et al.,* 1982, 1987; Mangels and Gerrodete 1994); however, the waters off the United States west coast all the way north to Alaska are considered part of its secondary range (Jefferson *et al.,* 2015).

Its occurrence in Washington/Oregon is associated with warm-water incursions (Buchanan *et al.,* 2001). However, no sightings of false killer whales were made along the U.S. west coast during surveys conducted from 1986–2001 (Ferguson and Barlow 2001, 2003; Barlow 2003) or in 2005 and 2008 (Forney 2007; Barlow 2010). One pod of false killer whales occurred in Puget Sound for several months during the 1990s (USN 2015). Two false killer whales were reported stranded along the Washington coast during 1930–2002, both in El Niño years (Norman *et al.,* 2004). Based on the best available information, NMFS believes that the likelihood of the survey encountering a false killer whale is discountable and, although L–DEO requested incidental take of 5 whales based on their average group size (Mobley et al., 2000), NMFS does not propose authorizing any take of false killer whales.

*Humpback Whale*

The humpback whale is found throughout all of the oceans of the world (Clapham 2009). The worldwide population is divided into northern and southern ocean populations, but genetic analyses suggest some gene flow (either past or present) between the North and South Pacific (*e.g.,* Jackson *et al,.* 2014; Bettriddge *et al,.* 2015). Although considered to be mainly a coastal species, humpback whales often traverse deep pelagic areas while migrating (Calambokidis *et al.,* 2001; Garrigue *et al.,* 2002; Zerbini *et al.,* 2011). Humpbacks migrate between summer feeding grounds in high latitudes and winter calving and breeding grounds in tropical waters (Clapham and Mead 1999). Northern Pacific humpback whales summer in

feeding grounds along the Pacific Rim and in the Bering and Okhotsk seas (Pike and MacAskie 1969; Rice 1978; Winn and Reichley 1985; Calambokidis *et al.,* 2000, 2001, 2008; Bettridge *et al.,* 2015). Humpbacks in the north Pacific winter in four different breeding areas: (1) along the coast of Mexico; (2) along the coast of Central America; (3) around the main Hawaiian Islands; and (4) in the western Pacific, particularly around the Ogasawara and Ryukyu islands in southern Japan and the northern Philippines (Calambokidis *et al.,* 2008; Bettridge *et al.,* 2015).

Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.,* 2015), NMFS established 14 distinct population segments (DPS) with different listing statuses (81 FR 62259); September 8, 20216) pursuant to the ESA. The DPSs that occur in United States waters do not necessarily equate to the existing stocks designated under the MMPA and shown in Table 1. Because the MMPA stocks cannot be portioned (*i.e,.* parts managed as ESA-listed while other parts managed as non-ESA listed), until such time as the MMPA stock delineations are reviewed in light of the DPS designations, NMFS considers the existing humpback whale stocks under the MMPA to be endangered and depleted for MMPA management purposes (*e.g.,* selection of a recovery factor, stock status).

NMFS has identified three DPSs of humpback whales that are found off the coasts of Washington, Oregon and California. These are: the Hawaii DPS (found predominately off Washington and southern British Columbia), which is not listed under the ESA; the Mexico DPS (found all along the west coast), which is listed as threatened under the ESA; and the Central America DPS (found all along the west coast, but most common off California and Oregon), which is listed as endangered under the ESA. According to Wade (2021), the probability that whales encountered in Oregon and California waters are from a given DPS are as follows: Central America DPS (42 percent); Mexico DPS (58 percent); Hawaii DPS (0 percent). The probability that humpback whales encountered in Washington and British Columbia waters are as follows: Central America DPS (6 percent); Mexico DPS (25 percent); Hawaii DPS (69 percent). Wade (2021) notes that the majority of humpback whales that may be found off of Washington are likely moving north of the United States border and feeding primarily off of southern British Columbia.

Humpback whales are the most common species of large cetacean reported off the coasts of Oregon and Washington from May to November (Green *et al.,* 1992; Calambokidis *et al.,* 2000, 2004). Humpbacks occur primarily over the continental shelf and slope during the summer, but a few individuals have been reported in offshore pelagic waters (Green *et al.,* 1992; Calambokidis *et al.,* 2004, 2015; Becker *et al.,* 2012; Barlow 2016; Carretta *et al.,* 2021). Biologically Important Areas (BIAs) for feeding humpback whales along the coasts of Oregon and Washington, which have been designated from May through November, are all within approximately 80 kilometers (km) from shore, and include the waters off northern Washington, and Stonewall and Heceta Bank, OR (Calambokidis *et al.,* 2015). Six humpback whale sightings (eight animals) were made off Washington and Oregon during the June through July 2012 L–DEO Juan de Fuca plate seismic survey. There were 98 humpback whale sightings (213 animals) made during the July 2012 L–DEO seismic survey off Oregon (RPS 2012a), and 11 sightings (23 animals) during the July 2012 L–DEO seismic survey off Oregon (RPS 2012c). Numerous humpback whale sightings were made during L–DEO's Cascadia summer survey off Oregon and Washington in 2021 (RPS).

On April 21, 2021, NMFS designated critical habitat in nearshore waters of the North Pacific Ocean for the endangered Central America and Western North Pacific DPSs and the threatened Mexico DPS of humpback whales (NMFS 2021). Critical habitat for the Central America and Mexico DPSs include waters within the California Current Ecosystem (CCE) off the coasts of California, Oregon, and Washington (Figure 1). Off Washington, critical habitat includes waters from the 50 m to 1200 m isobaths, as well as the strait of Juan de Fuca eastward to Angeles Point; however, there is an exclusion area of 1461 nautical square miles ($nmi^2$) around the Navy's Quinault Range Site. Off Oregon, the critical habitat spans from the 50 m to 1200 m isobath until 42.17 degrees north where the critical habitat south of 42.17 degrees north extends out to the 2000 m isobath (NMFS 2021). There is no critical habitat designated within the proposed survey regions, and ensonified areas would not extend into critical habitat. Humpback whales are expected to be uncommon in the proposed offshore survey areas.

*Blue Whale*

The blue whale has a cosmopolitan distribution and tends to be pelagic, only coming nearshore to feed and possibly to breed (Jefferson *et al.,* 2015). Although it has been suggested that there are at least five subpopulations of blue whales in the North Pacific (NMFS 1998), analysis of blue whales calls monitored from the U.S. Navy Sound surveillance system (SOSUS) and other offshore hydrophones (see Stafford *et al.,* 1999, 2001, 2007; Watkins *et al.,* 2000; Stafford 2003) suggest that there are two separate populations: one in eastern and one in the western North Pacific (Sears and Perrin 2018). The status of these two populations could differ substantially, as little is known about the population size in the western North Pacific (Branch *et al.,* 2016). Broad scale acoustic monitoring indicate that blue whales occurring in the northeast Pacific during summer and fall may winter in the eastern tropical Pacific (Stafford *et al.,* 1999, 2001).

The distribution of the species, at least during times of the year when feeding is prevalent, occurs in areas that provide large seasonal concentrations of euphausiids (Yochem and Leatherwood 1985). The eastern North Pacific stock feeds in California waters from June through November (Calambokidis *et al.,*1990; Mate *et al.,* 2015), and core areas have also been identified.

Blue whales are considered rare off Oregon, Washington, and B.C. (Buchanan et al. 2001; Gregr *et al.,* 2006; Ford 2014), although satellite-tracked individuals have been reported off the coast (Bailey *et al.,* 2009). Based on modeling of the dynamic topography of the region, blue whales could occur in relatively high densities off Oregon during summer and fall (Pardo et al. 2015: Hazen et al. 2017). Recent phenology analysis of marine mammal sightings revealed a peak of blue whale density over the Oregon continental shelf in September, and their sighting rates in the region have increased over the past three decades as a response to environmental changes influencing prey availability shifting their range northward (Derville *et al.,* 2022). Densities along the U.S. west coast, including Oregon, were predicted to be highest in shelf waters, with lower densities in deeper offshore areas (Becker *et al.,* 2012; Calambokidis *et al.,* 2015). Blue whales have been detected acoustically off Oregon (McDonald *et al.,* 1995; Stafford *et al.,* 1998; Von Saunder and Barlow 1999). Blue whales could be encountered in the proposed survey areas.

*Fin Whale*

The fin whale is widely distributed in all the World's oceans (Gambell 1985b), although it is most abundant in temperate and cold waters (Aguilar and García-Vernet 2018). Nonetheless, its overall range and distribution are not well known (Jefferson *et al.,* 2015). A review of fin whale distribution in the North Pacific noted the lack of sightings across pelagic waters between eastern and western winter areas (Mizroch *et al.,* 2009). Fin whales most commonly occur offshore, but can also be found in coastal areas (Jefferson *et al.,* 2015).

Most populations migrate seasonally between temperate waters where mating and calving occur in winter, and polar waters where feeding occurs in summer (Aguilar and García-Vernet 2018). Some animals may remain at high latitudes in winter or low latitudes in summer (Edwards *et al.,* 2015). The northern and southern fin whale populations likely do not interact owing to their alternate seasonal migration; the resulting genetic isolation has led to the recognition of two subspecies, *B. physalus quoyi* and *B. p. physalus* in the Southern and Northern hemispheres, respectively (Anguilar and García-Vernet 2018). The fin whale is known to use the shelf edge as a migration route (Evans 1987). Sergeant (1977) suggested that fin whales tend to follow steep slope contours, either because they detect them readily, or because the contours are areas of high biological productivity. However, fin whale movements have been reported to be complex (Jefferson *et al.,* 2015). Stafford *et al.* (2009) noted that sea-surface temperature is a good predictor variable for fin whale call detections in the North Pacific.

North Pacific fin whales summer from the Chukchi Sea to California and winter from California southwards (Gambell 1985b). Information about the seasonal distribution of fin whales in the North Pacific has been obtained from the detection of fin whale calls by bottom-mounted, offshore hydrophone arrays along the U.S. Pacific coast, in the central North Pacific, and in the western Aleutian Islands (Moore *et al.,* 1998, 2006; Watkins *et al.,* 2000a,b; Stafford *et al.,* 2007, 2009). Fin whale calls are recorded in the North Pacific year-round (*e.g.,* Moore *et al.,* 2006; Stafford *et al.,* 2007, 2009; Edwards *et al.,* 2015). In the central North Pacific, the Gulf of Alaska, and Aleutian Islands, call rates peak during fall and winter (Moore *et al.,* 1998, 2006; Watkins *et al.,* 2000a,b; Stafford *et al.,* 2009).

Fin whales are routinely sighted during surveys off Oregon and Washington (Barlow and Forney 2007; Barlow 2010, 2016; Adams *et al.,* 2014; Calambokidis *et al.,* 2015; Edwards *et al.,* 2015; Carretta *et al.,* 2021), including in coastal as well as offshore waters. They have also been detected acoustically in those waters during June–August (Edwards *et al.,* 2015). Eight fin whale sightings (19 animals) were made off Washington/Oregon during the June–July 2012 L–DEO Juan de Fuca plate seismic survey; sightings were made in waters 2369–3940 m deep (RPS 2012b). Fourteen fin whale sightings (28 animals) were made during the July 2012 L–DEO seismic surveys off southern Washington (RPS 2012a). No fin whales were sighted during the July 2012 L–DEO seismic survey off Oregon (RPS 2012c). During L–DEO's Cascadia survey during June–July 2021, five sightings of seven fin whales were made off Oregon (RPS 2021b). Fine whales were also seen off southern Oregon during July 2012 in water >2000 m deep during surveys by Adams *et al.,* (2014). Fin whales are likely to be encountered in the proposed survey area.

*Sei Whale*

The sei whale occurs in all ocean basins (Horwood 2018), but appears to prefer mid-latitude temperate waters (Jefferson et al. 2015). It undertakes seasonal migrations to feed in subpolar latitudes during summer and returns to lower latitudes during winter to calve (Horwood 2018). The sei whale is pelagic and generally not found in coastal waters (Harwood and Wilson 2001). It occurs in deeper waters characteristic of the continental shelf edge region (Hain *et al.,* 1985) and in other regions of steep bathymetric relief such as seamounts and canyons (Kenney and Winn 1987; Gregr and Trites 2001). On feeding grounds, sei whales associate with oceanic frontal systems (Horwood 1987) such as the cold eastern currents in the North Pacific (Perry *et al.,* 1999). Sei whales migrate from temperate zones occupied in winter to higher latitudes in the summer, where most feeding takes place (Gambell 1985a). During summer in the North Pacific, the sei whale can be found from the Bering Sea to the Gulf of Alaska and down to southern California, as well as in the western Pacific from Japan to Korea. Its winter distribution is concentrated at ~20° N (Rice 1998).

Sei whales are rare in the waters off Washington, Oregon, and California (Brueggeman *et al.,* 1990; Green *et al.,* 1992; Barlow 1994, 1997). Less than 20 confirmed sightings were reported in that region during extensive surveys during 1991–2014 (Green *et al.,* 1992, 1993; Hill and Barlow 1992; Carretta and Forney 1993; Mangels and Gerrodette 1994; Von Saunder and Barlow 1999; Barlow 2003, 2010, 2014; Forney 2007; Carretta *et al.,* 2021). Based on surveys conducted in 1991–2008, the estimated abundance of sei whales off the coasts of Oregon and Washington was 52 (Barlow 2010); for 2014, the abundance estimate was 468 (Barlow 2016). Two sightings of four individuals were made during the June–July 2012 L–DEO Juan de Fuca plate seismic survey off Washington/Oregon (RPS 2012b). No sei whales were sighted during the summer 2012 or 2021 L–DEO seismic surveys off Oregon and Washington (RPS 2012a,c, 2021). Sei whales could be encountered during the proposed survey, although this species is considered rare in these waters.

*Minke Whale*

The minke whale has a cosmopolitan distribution that spans from tropical to polar regions in both hemispheres (Jefferson *et al.,* 2015). In the Northern Hemisphere, the minke whale is usually seen in coastal areas, but can also be seen in pelagic waters during its northward migration in spring and summer and southward migration in autumn (Stewart and Leatherwood 1985). In the North Pacific, the summer range of the minke whale extends to the Chukchi Sea; in the winter, the whales move south to within 2° of the Equator (Perrin *et al.,* 2018).

The International Whaling Commission (IWC) recognizes three stocks of minke whales in the North Pacific: the Sea of Japan/East China Sea, the rest of the western Pacific west of 180° N, and the remainder of the Pacific (Donovan 1991). Minke whales are relatively common in the Bering and Chukchi seas and in the Gulf of Alaska but are not considered abundant in any other part of the eastern Pacific (Brueggeman *et al.,* 1990). In the far north, minke whales are thought to be migratory, but they are believed to be year-round residents in nearshore waters off west coast of the U.S. (Dorsey *et al.,* 1990).

Sightings have been made off Oregon and Washington in shelf and deeper waters (Green *et al.,* 1992; Adams *et al.,* 2014; Barlow 2016; Carretta *et al.,* 2021). An estimated abundance of 211 minke whales was reported for the Oregon/Washington region based on sightings data from 1991–2005 (Barlow and Forney 2007), whereas a 2008 survey did not record any minke whales while on survey effort (Barlow 2010). The abundance for Oregon/Washington for 2014 was estimated at 507 minke whales (Barlow 2016). There were no sightings of minke whales off Oregon/

Washington during L–DEO's summer seismic surveys in 2012 or 2021 (RPS 2012b,c, 2021). One minke whale was seen during the July 2012 L–DEO seismic survey off southern Washington (RPS 2012a). Minke whales are expected to be uncommon in the proposed survey areas.

*Sperm Whale*

The sperm whale is the largest of the toothed whales, with an extensive worldwide distribution (Rice 1989). Sperm whale distribution is linked to social structure: Mixed groups of adult females and juveniles animals of both sexes generally occur in tropical and subtropical waters, whereas adult makes are commonly found alone or in the same-sex aggregations, often occurring in higher latitudes outside the breeding season (Best 1979; Watkins and Moore 1982; Arnbom and Whitehead 1989; Whitehead and Waters 1990). Males can migrate north in the summer to feed in the Gulf of Alaska, Bering Sea, and waters around the Aleutian Islands (Kasuya and Miyashita 1988). Females generally inhabit waters over 1000 m deep at latitudes under 40 degrees where sea surface temperatures are under 15 degrees Celsius; adult males move to higher latitudes as they grow older and larger in size, returning to warm-water breeding grounds according to an unknown schedule (Whitehead 2018).

Sperm whales are distributed widely across the North Pacific (Rice 1989). Off California, they occur year-round (Dohl *et al.,* 1983: Barlow 1995; Forney *et al.,* 1995), with peak abundance from April to mid-June and from August to mid-November (Rice 1974). Off Oregon, sperm whales are seen in every season except winter (Green *et al.,* 1992). Sperm whales were sighted during surveys off Oregon in October 2011 and off Washington in June 2011 (Adams *et al.,* 2014). Sperm whale sightings were also made off Oregon and Washington during the 2014 Southwest Fisheries Science Center (SWFSC) vessel survey (Barlow 2016). Sperm whale were detected acoustically in waters off Oregon and Washington in August 2016 during the SWFSC Passive Acoustics Survey of Cetacean Abundance Levels (PASCAL) study using drifting acoustic recorders (Keating *et al.,* 2018). Oleson *et al.* (2009) noted a significant diel pattern in the occurrence of sperm whale clicks at offshore and inshore monitoring locations off Washington, whereby clicks were more commonly heard during the day at the offshore site and at night at the inshore location, suggesting possible diel movements up and down the slope in search of prey. Sperm whale acoustic detections were also reported at an inshore site from June through January 2009, with an absence of calls during February through May (Sirovic *et al.,* 2012). Sperm whales are likely to be encountered in the proposed survey areas.

*Baird's Beaked Whale*

Baird's beaked whale has a fairly extensive range across the North Pacific north of 30° N, and strandings have occurred as far north as the Pribilof Islands (Rice 1986). Two forms of Baird's beaked whales were previously recognized—the common slate-gray form and a smaller, rare black form (Morin *et al.,* 2017), however the small body size of physically mature individuals in the latter form, as well as recent genetic studies (Morin *et al.,* 2017) have identified this form as a new species called Sato's beaked whale (*Berardius minimus*) (Yamada *et al.,* 2019).The gray form is seen off Japan, in the Aleutians, and on the west coast of North America, whereas the black form has been reported for northern Japan and the Aleutians (Morin *et al.,* 2017). Baird's beaked whale is currently divided into three distinct stocks: Sea of Japan, Okhotsk Sea, and Bering Sea/eastern North Pacific (Balcomb 1989; Reyes 1991). Baird's beaked whales sometimes are seen close to shore, but their primary habitat is over or near the continental slope and oceanic seamounts in waters 1000–3000 m deep (Jefferson *et al.,* 2015).

Along the U.S. west coast, Baird's beaked whales have been sighted primarily along the continental slope (Green *et al.,* 1992; Becker *et al.,* 2012; Carretta *et al.,* 2021) from late spring to early fall (Green *et al.,* 1992). The whales move out from those areas in winter (Reyes 1991). In the eastern North Pacific Ocean, Baird's beaked whales apparently spend the winter and spring far offshore, and in June, they move onto the continental slope, where peak numbers occur during September and October. Green *et al.,* (1992) noted that Baird's beaked whales on the U.S. west coast were most abundant in the summer, and were not sighted in the fall or winter. MacLeod *et al.,* (2006) reported numerous sightings and strandings of *Berardius* spp. off the U.S. west coast.

Green *et al.,* (1992) sighted five groups during 75,050 km of aerial survey effort in 1989–1990 off Washington/Oregon spanning coastal to offshore waters: two in slope waters and three in offshore waters. Two groups were sighted during summer/fall 2008 surveys off Washington/Oregon, in waters >2000 m deep (Barlow 2010). Acoustic monitoring offshore Washington detected Baird's beaked whale pulses during January through November 2011, with peaks in February and July (Širović *et al.,* 2012b in USN 2015). Baird's beaked whales were detected acoustically in the waters off Oregon and Washington in August 2016 during the SWFSC PASCAL study using drifting acoustic recorders (Keating *et al.,* 2018). Baird's beaked whales could be encountered in the proposed survey regions.

*Cuvier's Beaked Whale*

Cuvier's beaked whale is probably the most widespread of the beaked whales, although it is not found in polar waters (Heyning 1989). Cuvier's beaked whale appears to prefer steep continental slope waters (Jefferson *et al.,* 2015) and is most common in water depths >1000 m (Heyning 1989). It is mostly known from strandings and strands more commonly than any other beaked whale (Heyning 1989). Its inconspicuous blows, deep-diving behavior, and tendency to avoid vessels all help to explain the infrequent sightings (Barlow and Gisiner 2006). The population in the California Current Large Marine Ecosystem seems to be declining (Moore and Barlow 2013).

MacLeod *et al.,* (2006) reported numerous sightings and strandings along the Pacific coast of the U.S. Cuvier's beaked whale is the most common beaked whale off the U.S. West Coast (Barlow 2010), and it is the beaked whale species that has stranded most frequently on the coasts of Oregon and Washington. From 1942–2010, there were 23 reported Cuvier's beaked whale strandings in Oregon and Washington (Moore and Barlow 2013). Most (75 percent) Cuvier's beaked whale strandings reported occurred in Oregon (Norman *et al.* 2004). Records of Cuvier's beaked whale in British Columbia are scarce, although 20 strandings, one incidental catch, and five sightings have been reported, including off western Vancouver Island (Ford 2014). Most strandings have been reported in summer (Ford 2014).

Four beaked whale sightings were reported in water depths over 2000 m off Oregon/Washington during surveys in 2008 (Barlow 2010). None were seen in 1996 or 2001 (Barlow 2003), and several were recorded from 1991–1995 (Barlow 1997). One Cuvier's beaked whale sighting was made during surveys in 2014 (Barlow 2016). Acoustic monitoring in Washington offshore waters detected Cuvier's beaked whale calls between January and November 2011 (Sirovic *et al.,* 2012b in USN 2015). Cuvier's beaked whales were

detected acoustically in waters off Oregon and Washington in August 2016 during the SWFSC PASCAL study using drifting acoustic recorders (Keating *et al.,* 2018). Curvier's beaked whales could be encountered during the proposed surveys.

*Blainville's Beaked Whale*

Blainville's beaked whale is found in tropical and warm temperate waters of all oceans (Pitman 2018). It has the widest distribution throughout the world of all Mesoplodon species (Pitman 2018). Like other beaked whales, Blainville's beaked whale is generally found in waters 200–1400 m deep (Gannier 2000; Jefferson *et al.,* 2015). Occasional occurrences in cooler, higher-latitude waters are presumably related to warm-water incursions (Reeves *et al.,* 2002). MacLeod *et al.,* (2006) reported stranding and sighting records in the eastern Pacific ranging from 37.3° N to 41.5° S. However, none of the 36 beaked whale stranding records in Oregon and Washington during 1930–2002 included Blainville's beaked whale (Norman *et al.,* 2004). One Blainville's beaked whale was found stranded (dead) on the Washington coast in November 2016 (COASST 2016).

There was one acoustic encounter with Blainville's beaked whales recorded in Quinault Canyon off Washington in waters 1400 m deep during 2011 (Baumann-Pickering *et al.,* 2014). Blainville's beaked whales were not detected acoustically off Washington or Oregon during the August 2016 SWFSC PASCAL study using drifting acoustic recorders (Keating *et al.,* 2018). Although Blainville's beaked whales could be encountered during the proposed surveys, an encounter would be unlikely because the proposed survey regions are beyond the northern limits of this tropical species' usual distribution.

*Hubbs' Beaked Whale*

Hubbs' beaked whale occurs in temperate waters of the North Pacific (Mead 1989). Its distribution appears to be correlated with the deep subarctic current (Mead *et al.,* 1982). Numerous stranding records have been reported for the west coast of the U.S. (MacLeod *et al.,* 2006). Most are from California, but at least seven strandings have been recorded along the B.C. coast as far north as Prince Rupert (Mead 1989; Houston 1990a; Willis and Baird 1998; Ford 2014). Several strandings are known from Washington/Oregon (*e.g.,* Norman *et al.,* 2004; Griffiths *et al.,* 2019). In addition, at least two sightings off Oregon/Washington, but outside the U.S. EEZ, were reported by Carretta *et al.* (2021), and one bycatch record off Oregon/Washington was reported by Griffiths *et al.* (2019). During the 2016 SWFSC PASCAL study using drifting acoustic recorders, detections were made of beaked whale sounds presumed to be from Hubbs' beaked whales off Washington and Oregon during August (Griffiths *et al.,* 2019). This species seems to be less common in the region than some of the other beaked whales.

*Stejneger's Beaked Whale*

Stejneger's beaked whale occurs in subarctic and cool temperate waters of the North Pacific (Mead 1989). Most records are from Alaskan waters, and the Aleutian Islands appear to be its center of distribution (Mead 1989; Wade *et al.,* 2003). After Cuvier's beaked whale, Stejneger's beaked whale was the second most commonly stranded beaked whale species in Oregon and Washington (Norman *et al.,* 2004). Stejneger's beaked whale calls were detected during acoustic monitoring offshore Washington between January and June 2011, with an absence of calls from mid-July–November 2011 (Širović *et al.,* 2012b in USN 2015). Analysis of these data suggest that this species could be more than twice as prevalent in this area than Baird's beaked whale (Baumann-Pickering *et al.,* 2014). Stejneger's beaked whales were also detected acoustically in waters off Oregon and Washington in August 2016 during the SWFSC PASCAL study using drifting acoustic recorders (Keating *et al.,* 2018).

*Striped Dolphin*

The striped dolphin has a cosmopolitan distribution in tropical to warm temperate waters from ~50° N to 40° S (Perrin *et al.,* 1994; Jefferson *et al.,* 2015). It occurs primarily in pelagic waters outside of the continental shelf, but has been observed approaching shore where there is deep water close to the coast (Jefferson *et al.,* 2015). Striped dolphins regularly occur off California (Becker *et al.,* 2012), including as far offshore as ~300 n.mi. during NOAA Fisheries vessel surveys (Carretta *et al.,* 2021). However, few sightings have been made off Oregon, and no sightings have been reported for Washington (Carretta *et al.,* 2021). However, strandings have occurred along the coasts of Oregon and Washington (Carretta *et al.,* 2016). During surveys off the U.S. west coast in 2014, striped dolphins were seen as far north as 44° N; based on those sightings, Barlow (2016) calculated an abundance estimate of 13,171 striped dolphins for Oregon/Washington. The abundance estimates for 2001, 2005, and 2008 were zero (Barlow 2016). It is possible, although unlikely, that striped dolphins could be encountered in the proposed survey area.

*Common Dolphin*

The common dolphin is found in tropical and warm temperate oceans around the world (Jefferson *et al.,* 2015), ranging from ~60° N to ~50° S (Jefferson *et al.,* 2015). It is the most abundant dolphin species in offshore areas of warm-temperate regions in the Atlantic and Pacific (Perrin 2018). It can be found in oceanic and coastal habitats; it is common in coastal waters 200–300 m deep and is also associated with prominent underwater topography, such as seamounts (Evans 1994). Short-beaked common dolphins have been sighted as far as 550 km from shore (Barlow *et al.,* 1997).

The distribution of short-beaked common dolphins along the U.S. west coast is variable and likely related to oceanographic changes (Heyning and Perrin 1994; Forney and Barlow 1998). It is the most abundant cetacean off California; some sightings have been made off Oregon, in offshore waters (Carretta *et al.,* 2021). During surveys off the west coast in 2014 and 2017, sightings were made as far north as 44° N (Barlow 2016; SIO n.d.). Based on the absolute dynamic topography of the region, short-beaked common dolphins could occur in relatively high densities off Oregon during July–December (Pardo *et al.,* 2015). In contrast, habitat modeling predicted moderate densities of common dolphins off the Columbia River estuary during summer, with lower densities off southern Oregon (Becker *et al.,* 2014). A group of six common dolphins was sighted during L–DEO's Cascadia summer survey just south of the Columbia River off Oregon (RPS 2021b). Common dolphins could be encountered in the proposed survey regions.

*Pacific White-Sided Dolphin*

The Pacific white-sided dolphin is found in cool temperate waters of the North Pacific from the southern Gulf of California to Alaska. Across the North Pacific, it appears to have a relatively narrow distribution between 38° N and 47° N (Brownell *et al.,* 1999). In the eastern North Pacific Ocean, the Pacific white-sided dolphin is one of the most common cetacean species, occurring primarily in shelf and slope waters (Green *et al.,* 1993; Barlow 2003, 2010). It is known to occur close to shore in certain regions, including (seasonally)

southern California (Brownell *et al.,* 1999).

Results of aerial and shipboard surveys strongly suggest seasonal north-south movements of the species between California and Oregon/Washington; the movements apparently are related to oceanographic influences, particularly water temperature (Green *et al.,* 1993; Forney and Barlow 1998; Buchanan *et al.,* 2001). During winter, this species is most abundant in California slope and offshore areas; as northern waters begin to warm in the spring, it appears to move north to slope and offshore waters off Oregon/Washington (Green *et al.,* 1992, 1993; Forney 1994; Forney *et al.,* 1995; Buchanan *et al.,* 2001; Barlow 2003). The highest encounter rates off Oregon and Washington have been reported during March–May in slope and offshore waters (Green *et al.,* 1992). Similarly, Becker *et al.,* (2014) predicted relatively high densities off southern Oregon in shelf and slope waters.

Based on year-round aerial surveys off Oregon/Washington, the Pacific white-sided dolphin was the most abundant cetacean species, with nearly all (97%) sightings occurring in May (Green *et al.,* 1992, 1993). Barlow (2003) also found that the Pacific white-sided dolphin was one of the most abundant marine mammal species off Oregon/Washington during 1996 and 2001 ship surveys, and it was the second most abundant species reported during 2008 surveys (Barlow 2010). Adams *et al.,* (2014) reported numerous offshore sightings off Oregon during summer, fall, and winter surveys in 2011 and 2012. Based on surveys conducted during 2014, the abundance was estimated at 20,711 for Oregon/Washington (Barlow 2016).

Fifteen Pacific white-sided dolphin sightings (231 animals) were made off Washington/Oregon during the June–July 2012 L–DEO Juan de Fuca plate seismic survey (RPS 2012b). There were fifteen Pacific white-sided dolphin sightings (462 animals) made during the July 2012 L–DEO seismic surveys off southern Washington (RPS 2012a). This species was not sighted during the July 2012 L–DEO seismic survey off Oregon (RPS 2012c). Numerous Pacific white-sided dolphin sightings were made during L–DEO's Cascadia summer survey off Oregon and Washington (RPS 2021b). Pacific white-sided dolphins are likely to be common in the proposed survey regions.

*Northern Right-Whale Dolphin*

The northern right whale dolphin is found in cool temperate and sub-arctic waters of the North Pacific, from the Gulf of Alaska to near northern Baja California, ranging from 30° N to 50° N (Reeves *et al.,* 2002). In the eastern North Pacific Ocean, the northern right whale dolphin is one of the most common marine mammal species, occurring primarily in shelf and slope waters ~100 to >2000 m deep (Green *et al.,* 1993; Barlow 2003). The northern right whale dolphin comes closer to shore where there is deep water, such as over submarine canyons (Reeves *et al.,* 2002).

Aerial and shipboard surveys suggest seasonal inshore-offshore and north-south movements in the eastern North Pacific Ocean between California and Oregon/Washington; the movements are believed to be related to oceanographic influences, particularly water temperature and presumably prey distribution and availability (Green *et al.,* 1993; Forney and Barlow 1998; Buchanan *et al.,* 2001). Green et al. (1992, 1993) found that northern right whale dolphins were most abundant off Oregon/Washington during fall, less abundant during spring and summer, and absent during winter, when this species presumably moves south to warmer California waters (Green *et al.,* 1992, 1993; Forney 1994; Forney *et al.,* 1995; Buchanan *et al.,* 2001; Barlow 2003).

Becker et al. (2014) predicted relatively high densities off southern Oregon, and moderate densities off northern Oregon and Washington. Based on year-round aerial surveys off Oregon/Washington, the northern right whale dolphin was the third most abundant cetacean species, concentrated in slope waters but also occurring in water out to ~550 km offshore (Green *et al.,* 1992, 1993). Barlow (2003, 2010) also found that the northern right whale dolphin was one of the most abundant marine mammal species off Oregon/Washington during 1996, 2001, 2005, and 2008 ship surveys. Offshore sightings were made in the waters of Oregon during summer, fall, and winter surveys in 2011 and 2012 (Adams *et al.,* 2014). During L–DEO's Cascadia survey during June–July 2021, one sighting of 15 northern right whale dolphins was made off Washington, and another sighting of 12 individuals was made off Oregon (RPS 2021b). Northern right whale dolphins are likely to be encountered in the proposed survey regions.

*Risso's Dolphin*

Risso's dolphin is distributed worldwide in mid-temperate and tropical oceans (Kruse *et al.,* 1999). Although it shows a preference for mid-temperate waters of the shelf and slope between 30° and 45° (Jefferson *et al.,* 2014). Although it occurs from coastal to deep water (~200–1000 m depth), it shows a strong preference for mid-temperate waters of upper continental slopes and steep shelf-edge areas (Hartman 2018).

Off the U.S. west coast, Risso's dolphin is believed to make seasonal north-south movements related to water temperature, spending colder winter months off California and moving north to waters off Oregon/Washington during the spring and summer as northern waters begin to warm (Green *et al.,* 1992, 1993; Buchanan *et al.,* 2001; Barlow 2003; Becker 2007). The distribution and abundance of Risso's dolphins are highly variable from California to Washington, presumably in response to changing oceanographic conditions on both annual and seasonal time scales (Forney and Barlow 1998; Buchanan *et al.,* 2001). The highest densities were predicted along the coasts of Washington, Oregon, and central and southern California (Becker *et al.,* 2012). Off Oregon and Washington, Risso's dolphins are most abundant over continental slope and shelf waters during spring and summer, less so during fall, and rare during winter (Green *et al.,* 1992, 1993). Green *et al.,* (1992, 1993) reported most Risso's dolphin groups off Oregon between ~45 and 47° N. Several sightings were made off southern Oregon during surveys in 1991–2014 (Barlow 2016; Carretta *et al.,* 2021). Sightings during ship surveys in summer/fall 2008 were mostly between ~30 and 38° N; none were reported in Oregon/Washington (Barlow 2010). Based on 2014 survey data, the abundance for Oregon/Washington was estimated at 430 (Barlow 2016). Risso's dolphins could be encountered in the proposed survey regions.

*Killer Whale*

The killer whale is cosmopolitan and globally fairly abundant, being observed in all oceans of the world (Ford 2018). It is very common in temperate waters and also frequents tropical waters, at least seasonally (Heyning and Dahlheim 1988). There are three distinct ecotypes, or forms, of killer whales recognized in the north Pacific: Resident, transient, and offshore. The three ecotypes differ morphologically, ecologically, behaviorally, and genetically. Resident killer whales exclusively prey upon fish, with a clear preference for salmon (Ford and Ellis 2006; Hanson *et al.,* 2010; Ford *et al.,* 2016), while transient killer whales exclusively prey upon marine mammals (Carretta *et al.,* 2019). Less is known about offshore killer whales, but they are believed to consume primarily fish, including several species of shark (Dahlheim *et*

*al.,* 2008). Killer whales occur in inshore inlets, along the coast, over the continental shelf, and in offshore waters (Ford 2014).

Currently, there are eight killer whale stocks recognized in the U.S. Pacific: (1) Alaska Residents, occurring from Southeast Alaska to the Aleutians and Bering Sea; (2) Northern Residents, from British Columbia through parts of the Southeast Alaska; (3) Southern Residents, mainly in inland waters of Washington State and southern British Columbia; (4) Gulf of Alaska, Aleutians, and Bering Sea Transients, from Prince William Sound through the Aleutians and Bering Sea; (5) AT1 Transients, from Prince William Sound through the Kenai Fjords; (6) West Coast Transients, from California through Southeast Alaska; (7) Offshore, from California through Alaska; and (8) Hawaiian (Muto *et al.,* 2021; Carretta *et al.,* 2021). Individuals from the West Coast Transient and Offshore stocks could be encountered in the proposed project areas. It is unlikely that individuals from the endangered Eastern North Pacific Southern Resident stock would be encountered in the offshore survey regions, as they are primarily found along the coasts and the proposed survey is located in waters deeper than 1600 m and at least 46 km from the shoreline.

The main diet of transient killer whales consists of marine mammals, in particular porpoises and seals. West coast transient killer whales (also known as Bigg's killer whales) range from Southeast Alaska to California (Muto *et al.,* 2021). The seasonal movements of transients are largely unpredictable (Baird 1994; Ford 2014). Green *et al.,* (1992) noted that most groups seen during their surveys off Oregon and Washington were likely transients; during those surveys, killer whales were sighted only in shelf waters. Two of 17 killer whales that stranded in Oregon were confirmed as transient (Stevens *et al.,* 1989 in Norman *et al.,* 2004).

Little is known about offshore killer whales, but they occur primarily over shelf waters and feed on fish, especially sharks (Ford 2014). Dahlheim *et al.,* (2008) reported sightings in Southeast Alaska during spring and summer. Eleven sightings of approximately 536 individuals were reported off Oregon/Washington during the 2008 SWFSC vessel survey (Barlow 2010). Killer whales were sighted offshore Washington during surveys from August 2004 to September 2008 (Oleson *et al.,* 2009). Keating *et al.,* (2015) analyzed cetacean whistles from recordings made during 2000–2012; several killer whale acoustic detections were made offshore Washington. Killer whales were sighted off Washington in July and September 2012 (Adams *et al.,* 2014).

During L–DEO's Cascadia surveys during June through July 2021 in the Northeast Pacific Ocean, a sighting of 20 killer whales was made near the shelf edge off northern Oregon (RPS 2021b). Killer whales could be encountered during the proposed survey, although it is unlikely the endangered Southern Resident Killer whales would occur as far offshore as the survey regions.

*Pygmy and Dwarf Sperm Whale*

Dwarf and pygmy sperm whales are distributed throughout tropical and temperate waters of the Atlantic, Pacific, and Indian oceans, but their precise distributions are unknown because much of what we know of the species comes from strandings (McAlpine 2018). They are difficult to sight at sea, because of their dive behavior and perhaps because of their avoidance reactions to ships and behavior changes in relation to survey aircraft (Würsig *et al.,* 1998). The two species are often difficult to distinguish from one another when sighted (McAlpine 2018).

Both *Kogia* species are sighted primarily along the continental shelf edge and slope and over deeper waters off the shelf (Hansen *et al.,* 1994; Davis *et al.,* 1998; Jefferson *et al.,* 2015). Stomach content analyses from stranded whales further support this distribution (McAlpine 2018). Recent data indicate that both *Kogia* species feed in the water column and on/near the seabed, likely using echolocation to search for prey (McAlpine 2018). Several studies have suggested that pygmy sperm whales live and feed mostly beyond the continental shelf edge, whereas dwarf sperm whales tend to occur closer to shore, often over the continental shelf and slope (Rice 1998; Wang *et al.,* 2002; MacLeod *et al.,* 2004; McAlpine 2018). It has also been suggested that the pygmy sperm whale is more temperate and the dwarf sperm whale more tropical, based at least partially on live sightings at sea from a large database from the eastern tropical Pacific (Wade and Gerrodette 1993; McAlpine 2018).

Pygmy and dwarf sperm whales are rarely sighted off Oregon and Washington, with only one sighting of an unidentified *Kogia* sp. beyond the U.S. EEZ, during the 1991–2014 NOAA vessel surveys (Carretta *et al.,* 2021). Norman *et al.,* (2004) reported eight confirmed stranding records of pygmy sperm whales for Oregon and Washington, five of which occurred during autumn and winter. Despite the limited number of sightings, it is possible that pygmy or dwarf sperm whales could be encountered within the proposed project areas.

*Dall's Porpoise*

Dall's porpoise is found in temperate to subarctic waters of the North Pacific and adjacent seas (Jefferson *et al.,* 2015). It is widely distributed across the North Pacific over the continental shelf and slope waters, and over deep (>2500 m) oceanic waters (Hall 1979). It is probably the most abundant small cetacean in the North Pacific Ocean, and its abundance changes seasonally, likely in relation to water temperature (Becker 2007).

Off Oregon and Washington, Dall's porpoise is widely distributed over shelf and slope waters, with concentrations near shelf edges, but is also commonly sighted in pelagic offshore waters (Morejohn 1979; Green *et al.,* 1992; Becker *et al.,* 2014; Fleming *et al.,* 2018; Carretta *et al.,* 2021). Combined results of various surveys out to ~550 km offshore indicate that the distribution and abundance of Dall's porpoise varies between seasons and years. North-south movements are believed to occur between Oregon/Washington and California in response to changing oceanographic conditions, particularly temperature and distribution and abundance of prey (Green *et al.,* 1992, 1993; Mangels and Gerrodette 1994; Barlow 1995; Forney and Barlow 1998; Buchanan *et al.,* 2001). Becker *et al.,* (2014) predicted high densities off southern Oregon throughout the year, with moderate densities to the north. According to predictive density distribution maps, the highest densities off southern Washington and Oregon occur along the 500-m isobath (Menza *et al.,* 2016).

Encounter rates reported by Green *et al.,* (1992) during aerial surveys off Oregon/Washington were highest in fall, lowest during winter, and intermediate during spring and summer. Encounter rates during the summer were similarly high in slope and shelf waters, and somewhat lower in offshore waters (Green *et al.,* 1992). Dall's porpoise was the most abundant species sighted off Oregon/Washington during 1996, 2001, 2005, and 2008 ship surveys up to ~550 km from shore (Barlow 2003, 2010). Oleson *et al.,* (2009) reported 44 sightings of 206 individuals off Washington during surveys form August 2004 to September 2008. Dall's porpoise were seen in the waters off Oregon during summer, fall, and winter surveys in 2011 and 2012 (Adams *et al.,* 2014).

Nineteen Dall's porpoise sightings (144 animals) were made off Washington/Oregon during the June–

July 2012 L–DEO Juan de Fuca plate seismic survey (RPS 2012b). There were 16 Dall's porpoise sightings (54 animals) made during the July 2012 L–DEO seismic surveys off southern Washington (RPS 2012a). This species was not sighted during the July 2012 L–DEO seismic survey off Oregon (RPS 2012c). During L–DEO's Cascadia survey during June–July 2021, one sighting of four individuals was made near the shelf edge off the Columbia River (RPS 2021b). Dall's porpoise is likely to be encountered during the proposed seismic surveys.

*Northern Fur Seal*

The northern fur seal is endemic to the North Pacific Ocean and occurs from southern California to the Bering Sea, Okhotsk Sea, and Honshu Island, Japan (Muto *et al.,* 2021). During the breeding season, most of the worldwide population of northern fur seals inhabits the Pribilof Islands in the southern Bering Sea (NMFS 2007; Lee *et al.,* 2014; Muto *et al.,* 2021). The rest of the population occurs at rookeries on Bogoslof Island in the Bering Sea, in Russia (Commander Islands, Robben Island, Kuril Islands), on San Miguel Island in southern California (NMFS 1993; Lee *et al.,* 2014), and on the Farallon Islands off central California (Muto *et al.,* 2021). In the U.S., two stocks are recognized—the Eastern Pacific and the California stocks (Muto *et al.,* 2021). The Eastern Pacific stock ranges from the Pribilof Islands and Bogoslof Island in the Bering Sea during summer to California during winter (Muto *et al.,* 2021). When not on rookery islands, northern fur seals are primarily pelagic but occasionally haul out on rocky shorelines (Muto *et al.,* 2021).

During the breeding season, adult males usually come ashore in May–August and may sometimes be present until November; adult females are found ashore from June–November (Carretta *et al.,* 2021; Muto *et al.,* 2021). After reproduction, northern fur seals spend the next 7–8 months feeding at sea (Roppel 1984). Immature seals can remain in southern foraging areas year-round until they are old enough to mate (NMFS 2007). In November, females and pups leave the Pribilof Islands and migrate through the Gulf of Alaska to feeding areas primarily off the coasts of B.C., Washington, Oregon, and California before migrating north again to the rookeries in spring (Ream *et al.,* 2005; Pelland *et al.,* 2014). Males usually migrate only as far south as the Gulf of Alaska (Kajimura 1984). Ream *et al.* (2005) showed that migrating females moved over the continental shelf as they migrated southeasterly. Instead of following depth contours, their travel corresponded with movements of the Alaska Gyre and the North Pacific Current (Ream *et al.,* 2005). Their foraging areas were associated with eddies, the subarctic-subtropical transition region, and coastal mixing (Ream *et al.,* 2005; Alford *et al.,* 2005). Some juveniles and non-pregnant females may remain in the Gulf of Alaska throughout the summer (Calkins 1986). The northern fur seals spends ~90% of its time at sea, typically in areas of upwelling along the continental slopes and over seamounts (Gentry 1981). The remainder of its life is spent on or near rookery islands or haulouts. Pups from the California stock also migrate to Washington, Oregon, and northern California after weaning (Lea *et al.,* 2009).

Northern fur seals were seen throughout the North Pacific during surveys conducted during 1987–1990, including off Washington and Oregon (Buckland *et al.,* 1993). Tagged adult fur seals were tracked from the Pribilof Islands to the waters off Washington/Oregon/California, with recorded movement throughout the region (Pelland *et al.,* 2014). Tracked adult male fur seals that were tagged on St. Paul Island in the Bering Sea in October 2009 wintered in the Bering Sea or northern North Pacific Ocean; females migrated to the Gulf of Alaska and the California Current (Sterling *et al.,* 2014). Some individuals reach California by December, after which time numbers increase off the west coast of North America (Ford 2014). The peak density shifts over the course of the winter and spring, with peak densities occurring in California in February, April off Oregon and Washington, and May off B.C. and Southeast Alaska (Ford 2014). The use of continental shelf and slope waters of B.C. and the northwestern U.S. by adult females during winter is well documented from pelagic sealing data (Bigg 1990).

Bonnell *et al.,* (1992) noted the presence of northern fur seals year-round off Oregon/Washington, with the greatest numbers (87%) occurring in January–May. Northern fur seals were seen as far out from the coast as 185 km, and numbers increased with distance from land; they were 5–6 times more abundant in offshore waters than over the shelf or slope (Bonnell *et al.,* 1992). The highest densities were seen in the Columbia River plume (~46° N) and in deep offshore waters (>2000 m) off central and southern Oregon (Bonnell *et al.,* 1992). The waters off Washington are a known foraging area for adult females, and concentrations of fur seals were also reported to occur near Cape Blanco, Oregon, at ~42.8° N (Pelland *et al.,* 2014). During L–DEO's Cascadia survey during June–July 2021, one northern fur seal was sighted off Washington near the shelf edge (RPS 2021b).

Northern fur seals could be observed in the proposed survey regions, in particular females and juveniles. However, adult males are generally ashore during the reproductive season from May–August; adult females are generally ashore from June through November.

*Guadalupe Fur Seal*

Most breeding and births occur at Isla Guadalupe, Mexico; a secondary rookery exists at Isla Benito del Este (Maravilla-Chavez and Lowry 1999; Aurioles-Gamboa *et al.,* 2010). A few Guadalupe fur seals are known to occur at California sea lion rookeries in the Channel Islands, primarily San Nicolas and San Miguel islands, and sightings have also been made at Santa Barbara and San Clemente islands (Stewart *et al.,* 1987; Carretta *et al.,* 2021). Guadalupe fur seals prefer rocky habitat for breeding and hauling out. They generally haul out at the base of towering cliffs on shores characterized by solid rock and large lava blocks (Peterson *et al.,* 1968), although they can also inhabit caves and recesses (Belcher and Lee 2002). While at sea, this species usually is solitary but typically gathers in the hundreds to thousands at breeding sites.

During the summer breeding season, most adults occur at rookeries in Mexico (Norris 2017 in USN 2019; Carretta *et al.,* 2021). Following the breeding season, adult males tend to move northward to forage. Females have been observed feeding south of Guadalupe Island, making an average round trip of 2375 km (Ronald and Gots 2003). Several rehabilitated Guadalupe fur seals that were satellite tagged and released in central California traveled as far north as B.C. (Norris *et al.,* 2015; Norris 2017 in USN 2019). Fur seals younger than two years old are more likely to travel to more northerly, offshore areas than older fur seals (Norris 2017 in USN 2019). Stranding data also indicates that fur seals younger than 2 years are more likely to occur in the proposed survey area, as this age class was most frequently reported (Lambourn *et al.,* 2012 in USN 2019). During 2015–2021, 724 Guadalupe fur seals stranded on the West Coast of the U.S., including 182 strandings along the coasts of Oregon and Washington during 2019–2021; NMFS declared this an unusual mortality event (NOAA 2021d). Guadalupe fur seals could be

encountered during the proposed seismic surveys, but most animals are likely to occur at their breeding sites farther south at the time of the surveys.

*California Sea Lion*

The primary range of the California sea lion includes the coastal areas and offshore islands of the eastern North Pacific Ocean from B.C. to central Mexico, including the Gulf of California (Jefferson *et al.,* 2015). However, its distribution is expanding (Jefferson *et al.,* 2015), and its secondary range extends into the Gulf of Alaska (Maniscalco *et al.,* 2004) and southern Mexico (Gallo-Reynoso and Solórzano-Velasco 1991), where it is occasionally recorded.

California sea lion rookeries are on islands located in southern California, western Baja California, and the Gulf of California (Carretta *et al.,* 2021). Five genetically distinct geographic populations have been identified: (1) Pacific Temperate (includes rookeries in U.S. waters and the Coronados Islands to the south), (2) Pacific Subtropical, (3) Southern Gulf of California, (4) Central Gulf of California, and (5) Northern Gulf of California (Schramm *et al.,* 2009). Animals from the Pacific Temperate population occur in the proposed project area.

In California and Baja California, births occur on land from mid-May to late-June. During August and September, after the mating season, the adult males migrate northward to feeding areas as far north as Washington (Puget Sound) and B.C. (Lowry *et al.,* 1992). They remain there until spring (March–May), when they migrate back to the breeding colonies (Lowry *et al.,* 1992; Weise *et al.,* 2006). The distribution of immature California sea lions is less well known but some make northward migrations that are shorter in length than the migrations of adult males (Huber 1991). However, most immature seals are presumed to remain near the rookeries for most of the year, as are females and pups (Lowry *et al.,* 1992).

California sea lions are coastal animals that often haul out on shore throughout the year, but peak numbers off Oregon and Washington occur during the fall (Bonnell *et al.,* 1992). During aerial surveys off the coasts of Oregon and Washington during 1989–1990, California sea lions were sighted at sea during the fall and winter, but no sightings were made during June–August (Bonnell *et al.,* 1992). Numbers off Oregon decrease during winter, as animals travel further north (Mate 1975 in Bonnell *et al.,* 1992). King (1983) noted that sea lions are rarely found more than 16 km offshore. During fall and winter surveys off Oregon and Washington, mean distance from shore was ~13 km and most were observed in water <200 m deep; however, sightings were made in water as deep as 356 m (Bonnell *et al.,* 1992). Weise *et al.,* (2006) reported that males normally forage almost exclusively over the continental shelf, but during anomalous climatic conditions they can forage farther out to sea (up to 450 km offshore).

During aerial surveys over the shelf and slope off Oregon and Washington (Adams *et al.,* 2014), California sea lions were seen during all survey months (January–February, June–July, September–October). Although most sightings occurred on the shelf, during February 2012, one sighting was made near the 2000-m depth contour, and during June 2011 and July 2012, sightings were made along the 200-m isobath off southern Oregon (Adams *et al.,* 2014). During October 2011, sightings were made off the Columbia River estuary near the 200-m isopleth and on the southern Oregon shelf; during September 2012, sightings occurred in nearshore waters off Washington and in shelf waters along the coast of Oregon (Adams *et al.,* 2014). Adams *et al.,* (2014) reported sightings more than 60 km off the coast of Oregon. During L–DEO's Cascadia survey during June–July 2021, four sightings of nine California sea lions were made in nearshore waters off Oregon (RPS 2021b). California sea lions were also taken as bycatch off Washington and Oregon in the west coast groundfish fishery during 2002–2009 (Jannot *et al.,* 2011). California sea lions could be encountered in the proposed project regions.

*Steller Sea Lion*

The Steller sea lion occurs along the North Pacific Rim from northern Japan to California (Loughlin *et al.,* 1984). It is distributed around the coasts to the outer shelf from northern Japan through the Kuril Islands and Okhotsk Sea, through the Aleutian Islands, central Bering Sea, southern Alaska, and south to California (NOAA 2021e). There are two stocks, or DPSs, of Steller sea lions—the Western and Eastern DPSs, which are divided at 144° W longitude (Muto *et al.,* 2021). The Western DPS is listed as endangered and includes animals that occur in Japan and Russia (Muto *et al.,* 2021); the Eastern DPS was delisted from threatened in 2013 (NMFS 2013a). Only individuals from the Eastern DPS could occur in the proposed survey regions.

Steller sea lions typically inhabit waters from the coast to the outer continental shelf and slope throughout their range; they are not considered migratory, although foraging animals can travel long distances (Loughlin *et al.,* 2003; Raum-Suryan *et al.,* 2002). Rookeries of Steller sea lions from the Eastern DPS are located in southeast Alaska, B.C., Oregon, and California; there are no rookeries in Washington (NMFS 2013a; Muto *et al.,* 2021). Breeding adults occupy rookeries from late-May to early-July (NMFS 2008). Federally designated critical habitat for Steller sea lions in Oregon and California includes all rookeries (NMFS 1993). Although the Eastern DPS was delisted from the ESA in 2013, the designated critical habitat remains valid (NOAA 2021e). The critical habitat in Oregon is located along the coast at Rogue Reef (Pyramid Rock) and Orford Reef (Long Brown Rock and Seal Rock). The critical habitat area includes aquatic zones that extend 0.9 km seaward and air zones extending 0.9 km above these terrestrial and aquatic zones (NMFS 1993). The nearest proposed seismic transect would be located 46 km from shore.

Non-breeding adults use haulouts or occupy sites at the periphery of rookeries during the breeding season (NMFS 2008). Pupping occurs from mid-May to mid-July (Pitcher and Calkins 1981) and peaks in June (Pitcher *et al.,* 2002). Territorial males fast and remain on land during the breeding season (NMFS 2008). Females with pups generally stay within 30 km of the rookeries in shallow (30–120 m) water when feeding (NMFS 2008). Tagged juvenile sea lions showed localized movements near shore (Briggs *et al.,* 2005). Loughlin *et al.,* (2003) reported that most (88%) at-sea movements of juvenile Steller sea lions in the Aleutian Islands were short (<15 km) foraging trips. The mean distance of juvenile sea lion trips at sea was 16.6 km, and the maximum trip distance recorded was 447 km. Long-range trips represented 6% of all trips at sea, and trip distance and duration increase with age (Loughlin *et al.,* 2003; Call *et al.,* 2007). Although Steller sea lions are not considered migratory, foraging animals can travel long distances outside of the breeding season (Loughlin *et al.,* 2003; Raum-Suryan *et al.,* 2002). During the summer, they mostly forage within 60 km from the coast; during winter, they can range up to 200 km from shore (Ford 2014).

During surveys off the coasts of Oregon and Washington, Bonnell *et al.,* (1992) noted that 89% of sea lions occurred over the shelf at a mean

distance of 21 km from the coast and near or in waters <200 m deep; the farthest sighting occurred ~40 km from shore, and the deepest sighting location was 1611 m deep. Sightings were made along the 200-m depth contour throughout the year (Bonnell *et al.,* 1992). During aerial surveys over the shelf and slope off Oregon and Washington, one Steller sea lion was seen on the Oregon shelf during January 2011, and two sightings totaling eight individuals were made on September 2012 off southern Oregon (Adams *et al.,* 2014). During a survey off Washington/Oregon June–July 2012, two Steller sea lions were seen from R/V *Langseth* (RPS 2012b) off southern Oregon. Eight sightings of 11 individuals were made from R//V *Northern Light* during a survey off southern Washington during July 2012 (RPS 2012a). No sightings were made during L–DEO's Cascadia summer survey off Oregon and Washington (RPS 2021b). Steller sea lions were also taken as bycatch off southern Oregon in the west coast groundfish fishery during 2002–2009 (Jannot *et al.,* 2011). Steller sea lions could be encountered in the proposed project regions.

*Northern Elephant Seal*

The northern elephant seal breeds in California and Baja California, primarily on offshore islands, from Cedros off the west coast of Baja California, north to the Farallons in Central California (Stewart *et al.,* 1994). Adult elephant seals engage in two long northward migrations per year, one following the breeding season, and another following the annual molt (Stewart and DeLong 1995). Between the two foraging periods, they return to land to molt, with females returning earlier than males (March–April vs. July–August). After the molt, adults then return to their northern feeding areas until the next winter breeding season. Breeding occurs from December–March (Stewart and Huber 1993). Females arrive in late December or January and give birth within ~1 week of their arrival. Juvenile elephant seals typically leave the rookeries in April or May and head north, traveling an average of 900–1000 km. Most elephant seals return to their natal rookeries when they start breeding (Huber *et al.,* 1991).

When not at their breeding rookeries, adults feed at sea far from the rookeries. Adult females and juveniles forage in the California current off California to B.C. (Le Boeuf *et al.,* 1986, 1993, 2000). Bonnell *et al.* (1992) reported that northern elephant seals were distributed equally in shelf, slope, and offshore waters during surveys conducted off Oregon and Washington, as far as 150 km from shore, in waters >2000 m deep. Telemetry data indicate that they range much farther offshore than that (Stewart and DeLong 1995). Males may feed as far north as the eastern Aleutian Islands and the Gulf of Alaska, whereas females feed south of 45° N (Le Boeuf *et al.,* 1993; Stewart and Huber 1993). Adult male elephant seals migrate north via the California current to the Gulf of Alaska during foraging trips, and could potentially be passing through the area off Washington in May and August (migrating to and from molting periods) and November and February (migrating to and from breeding periods), but likely their presence there is transient and short-lived. Most elephant seal sightings at sea off Washington were made during June, July, and September; off Oregon, sightings were recorded from November through May (Bonnell *et al.,* 1992). Northern elephant seal pups have been sighted at haulouts in the inland waters of Washington State (Jeffries *et al.,* 2000), and at least three were reported to have been born there (Hayward 2003). Pupping has also been observed at Shell Island (~43.3° N) off southern Oregon, suggesting a range expansion (Bonnell *et al.,* 1992; Hodder *et al.,* 1998). Northern elephant seals could be encountered during the proposed seismic surveys.

*Marine Mammal Hearing*

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.,* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, etc.). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

| Hearing group | Generalized hearing range * |
|---|---|
| Low-frequency (LF) cetaceans (baleen whales) | 7 Hz to 35 kHz. |
| Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales) | 150 Hz to 160 kHz. |
| High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*). | 275 Hz to 160 kHz. |
| Phocid pinnipeds (PW) (underwater) (true seals) | 50 Hz to 86 kHz. |
| Otariid pinnipeds (OW) (underwater) (sea lions and fur seals) | 60 Hz to 39 kHz. |

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

**Potential Effects of Specified Activities on Marine Mammals and Their Habitat**

This section includes a discussion of the ways that L–DEO's specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals may or may not impact marine mammal species or stocks.

*Description of Active Acoustic Sound Sources*

This section contains a brief technical background on sound, the characteristics of certain sound types, and on metrics used in this proposal inasmuch as the information is relevant to the specified activity and to a discussion of the potential effects of the specified activity on a marine mammals found later in this document.

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water. Amplitude is the height of the sound pressure wave or the ''loudness'' of a sound and is typically described using the relative unit of the dB. A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure (for underwater sound, this is 1 microPascal (μPa)) and is a logarithmic unit that accounts for large variations in amplitude; therefore, a relatively small change in dB corresponds to large changes in sound pressure. The source level (SL) represents the SPL referenced at a distance of 1 m from the source (referenced to 1 μPa) while the received level is the SPL at the listener's position (referenced to 1 μPa).

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Sound exposure level (SEL; represented as dB re 1 $\mu Pa^2 - s$) represents the total energy contained within a pulse and considers both intensity and duration of exposure. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-p) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source and is represented in the same units as the rms sound pressure. Another common metric is peak-to-peak sound pressure (pk-pk), which is the algebraic difference between the peak positive and peak negative sound pressures. Peak-to-peak pressure is typically approximately 6 dB higher than peak pressure (Southall *et al.,* 2007).

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam or beams or may radiate in all directions (omnidirectional sources), as is the case for pulses produced by the airgun arrays considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.,* vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including the following (Richardson *et al.,* 1995):

- *Wind and waves:* The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kHz (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Surf sound becomes important near shore, with measurements collected at a distance of 8.5 km from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions;
- *Precipitation:* Sound from rain and hail impacting the water surface can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times;
- *Biological:* Marine mammals can contribute significantly to ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz; and
- *Anthropogenic:* Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly. Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.,* a passing vessel) is sometimes termed background sound, as opposed to ambient sound.

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of this dependence on a large number of varying factors, ambient

sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from a given activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals. Details of source types are described in the following text.

Sounds are often considered to fall into one of two general types: Pulsed and non-pulsed (defined in the following). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see Southall *et al.,* (2007) for an in-depth discussion of these concepts.

Pulsed sound sources (*e.g.,* airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986, 2005; Harris, 1998; NIOSH, 1998; ISO, 2003) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems (such as those used by the U.S. Navy). The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Airgun arrays produce pulsed signals with energy in a frequency range from about 10–2,000 Hz, with most energy radiated at frequencies below 200 Hz. The amplitude of the acoustic wave emitted from the source is equal in all directions (*i.e.,* omnidirectional), but airgun arrays do possess some directionality due to different phase delays between guns in different directions. Airgun arrays are typically tuned to maximize functionality for data acquisition purposes, meaning that sound transmitted in horizontal directions and at higher frequencies is minimized to the extent possible.

*Acoustic Effects*

Here, we discuss the effects of active acoustic sources on marine mammals.

*Potential Effects of Underwater Sound*—Please refer to the information given previously (''Description of Active Acoustic Sound Sources'') regarding sound, characteristics of sound types, and metrics used in this document. Note that, in the following discussion, we refer in many cases to Finneran (2015), a review article concerning studies of noise-induced hearing loss conducted from 1996–2015. For study-specific citations, please see Finneran (2015). Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound from active acoustic sources can potentially result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007; Götz *et al.,* 2009). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent loss of hearing, if it occurs at all, will occur almost exclusively in cases where a noise is within an animal's hearing frequency range. We first describe specific manifestations of acoustic effects before providing discussion specific to the use of airgun arrays.

Richardson *et al.,* (1995) described zones of increasing intensity of effect that might be expected to occur, in relation to distance from a source and assuming that the signal is within an animal's hearing range. First is the area within which the acoustic signal would be audible (potentially perceived) to the animal, but not strong enough to elicit any overt behavioral or physiological response. The next zone corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological response. Third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain extent is the area within which masking (*i.e.,* when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold) may occur; the masking zone may be highly variable in size.

We describe the more severe effects of certain non-auditory physical or physiological effects only briefly as we do not expect that use of airgun arrays are reasonably likely to result in such effects (see below for further discussion). Potential effects from impulsive sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.,* 1973). Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to high level underwater sound or as a secondary effect of extreme behavioral reactions (*e.g.,* change in dive profile as a result of an avoidance reaction) caused by exposure to sound include neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007; Zimmer and Tyack, 2007; Tal *et al.,* 2015). The survey activities considered here do not involve the use of devices such as explosives or mid-frequency tactical sonar that are associated with these types of effects.

*Threshold Shift*—Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Finneran, 2015). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Repeated sound exposure that leads to TTS could cause PTS. In severe cases of PTS, there can be total or partial deafness, while in most cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985).

When PTS occurs, there is physical damage to the sound receptors in the ear (*i.e.,* tissue damage), whereas TTS represents primarily tissue fatigue and is reversible (Southall *et al.,* 2007). In

addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.,* Ward, 1997). Therefore, NMFS does not typically consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans but such relationships are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several dBs above (a 40-dB threshold shift approximates PTS onset; *e.g.,* Kryter *et al.,* 1966; Miller, 1974) that inducing mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.,* Southall *et al.,* 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulse sounds (such as airgun pulses as received close to the source) are at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.,* 2007). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

For mid-frequency cetaceans in particular, potential protective mechanisms may help limit onset of TTS or prevent onset of PTS. Such mechanisms include dampening of hearing, auditory adaptation, or behavioral amelioration (*e.g.,* Nachtigall and Supin, 2013; Miller *et al.,* 2012; Finneran *et al.,* 2015; Popov *et al.,* 2016).

TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts.

Finneran *et al.* (2015) measured hearing thresholds in three captive bottlenose dolphins before and after exposure to ten pulses produced by a seismic airgun in order to study TTS induced after exposure to multiple pulses. Exposures began at relatively low levels and gradually increased over a period of several months, with the highest exposures at peak SPLs from 196 to 210 dB and cumulative (unweighted) SELs from 193–195 dB. No substantial TTS was observed. In addition, behavioral reactions were observed that indicated that animals can learn behaviors that effectively mitigate noise exposures (although exposure patterns must be learned, which is less likely in wild animals than for the captive animals considered in this study). The authors note that the failure to induce more significant auditory effects was likely due to the intermittent nature of exposure, the relatively low peak pressure produced by the acoustic source, and the low-frequency energy in airgun pulses as compared with the frequency range of best sensitivity for dolphins and other mid-frequency cetaceans.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale, harbor porpoise, and Yangtze finless porpoise) exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). In general, harbor porpoises have a lower TTS onset than other measured cetacean species (Finneran, 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no direct data available on noise-induced hearing loss for mysticetes.

Critical questions remain regarding the rate of TTS growth and recovery after exposure to intermittent noise and the effects of single and multiple pulses. Data at present are also insufficient to construct generalized models for recovery and determine the time necessary to treat subsequent exposures as independent events. More information is needed on the relationship between auditory evoked potential and behavioral measures of TTS for various stimuli. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007, 2019), Finneran and Jenkins (2012), Finneran (2015), and NMFS (2018).

*Behavioral Effects*—Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific, and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007, 2019; Weilgart, 2007; Archer *et al.,* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals

that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.,* 1995; Nowacek *et al.,* 2007). However, many delphinids approach acoustic source vessels with no apparent discomfort or obvious behavioral change (*e.g.,* Barkaszi *et al.,* 2012).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely, and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark, 2000; Ng and Leung, 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013a, b). Variations in dive behavior may reflect disruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.;* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Visual tracking, passive acoustic monitoring, and movement recording tags were used to quantify sperm whale behavior prior to, during, and following exposure to airgun arrays at received levels in the range 140–160 dB at distances of 7–13 km, following a phase-in of sound intensity and full array exposures at 1–13 km (Madsen *et al.,* 2006; Miller *et al.,* 2009). Sperm whales did not exhibit horizontal avoidance behavior at the surface. However, foraging behavior may have been affected. The sperm whales exhibited 19 percent less vocal (buzz) rate during full exposure relative to post exposure, and the whale that was approached most closely had an extended resting period and did not resume foraging until the airguns had ceased firing. The remaining whales continued to execute foraging dives throughout exposure; however, swimming movements during foraging dives were 6 percent lower during exposure than control periods (Miller *et al.,* 2009). These data raise concerns that seismic surveys may impact foraging behavior in sperm whales, although more data are required to understand whether the differences were due to exposure or natural variation in sperm whale behavior (Miller *et al.,* 2009).

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2001, 2005, 2006; Gailey *et al.,* 2007, 2016).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs or amplitude of calls (Miller *et al.,* 2000; Fristrup *et al.,* 2003; Foote *et al.,* 2004; Holt *et al.,* 2012), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.,* 1994).

Cerchio *et al.,* (2014) used passive acoustic monitoring to document the presence of singing humpback whales off the coast of northern Angola and to opportunistically test for the effect of seismic survey activity on the number of singing whales. Two recording units were deployed between March and December 2008 in the offshore environment; numbers of singers were counted every hour. Generalized Additive Mixed Models were used to assess the effect of survey day (seasonality), hour (diel variation), moon phase, and received levels of noise (measured from a single pulse during each ten minute sampled period) on singer number. The number of singers significantly decreased with increasing received level of noise, suggesting that humpback whale breeding activity was disrupted to some extent by the survey activity.

Castellote *et al.,* (2012) reported acoustic and behavioral changes by fin whales in response to shipping and airgun noise. Acoustic features of fin whale song notes recorded in the Mediterranean Sea and northeast Atlantic Ocean were compared for areas with different shipping noise levels and traffic intensities and during a seismic airgun survey. During the first 72 h of the survey, a steady decrease in song received levels and bearings to singers indicated that whales moved away from the acoustic source and out of the study area. This displacement persisted for a time period well beyond the 10-day duration of seismic airgun activity,

providing evidence that fin whales may avoid an area for an extended period in the presence of increased noise. The authors hypothesize that fin whale acoustic communication is modified to compensate for increased background noise and that a sensitization process may play a role in the observed temporary displacement.

Seismic pulses at average received levels of 131 dB re 1 μPa²-s caused blue whales to increase call production (Di Iorio and Clark, 2010). In contrast, McDonald *et al.,* (1995) tracked a blue whale with seafloor seismometers and reported that it stopped vocalizing and changed its travel direction at a range of 10 km from the acoustic source vessel (estimated received level 143 dB pk-pk). Blackwell *et al.,* (2013) found that bowhead whale call rates dropped significantly at onset of airgun use at sites with a median distance of 41–45 km from the survey. Blackwell *et al.* (2015) expanded this analysis to show that whales actually increased calling rates as soon as airgun signals were detectable before ultimately decreasing calling rates at higher received levels (*i.e.,* 10-minute SELcum of ~127 dB). Overall, these results suggest that bowhead whales may adjust their vocal output in an effort to compensate for noise before ceasing vocalization effort and ultimately deflecting from the acoustic source (Blackwell *et al.,* 2013, 2015). These studies demonstrate that even low levels of noise received far from the source can induce changes in vocalization and/or behavior for mysticetes.

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.,* 1984). Humpback whales showed avoidance behavior in the presence of an active seismic array during observational studies and controlled exposure experiments in western Australia (McCauley *et al.,* 2000). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.,* 1994; Goold, 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Bejder *et al.,* 2006; Teilmann *et al.,* 2006).

Forney *et al.,* (2017) detail the potential effects of noise on marine mammal populations with high site fidelity, including displacement and auditory masking, noting that a lack of observed response does not imply absence of fitness costs and that apparent tolerance of disturbance may have population-level impacts that are less obvious and difficult to document. As we discuss in describing our proposed mitigation later in this document, avoidance of overlap between disturbing noise and areas and/or times of particular importance for sensitive species may be critical to avoiding population-level impacts because (particularly for animals with high site fidelity) there may be a strong motivation to remain in the area despite negative impacts. Forney *et al.,* (2017) state that, for these animals, remaining in a disturbed area may reflect a lack of alternatives rather than a lack of effects. The authors discuss several case studies, including western Pacific gray whales, which are a small population of mysticetes believed to be adversely affected by oil and gas development off Sakhalin Island, Russia (Weller *et al.,* 2002; Reeves *et al.,* 2005). Western gray whales display a high degree of interannual site fidelity to the area for foraging purposes, and observations in the area during airgun surveys has shown the potential for harm caused by displacement from such an important area (Weller *et al.,* 2006; Johnson *et al.,* 2007). Forney *et al.,* (2017) also discuss beaked whales, noting that anthropogenic effects in areas where they are resident could cause severe biological consequences, in part because displacement may adversely affect foraging rates, reproduction, or health, while an overriding instinct to remain could lead to more severe acute effects.

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England, 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.,* Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002; Purser and Radford, 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch, 1992; Daan *et al.,* 1996; Bradshaw *et al.,* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Stone (2015) reported data from at-sea observations during 1,196 seismic surveys from 1994 to 2010. When arrays of large airguns (considered to be 500 in³ or more) were firing, lateral displacement, more localized avoidance, or other changes in behavior were evident for most odontocetes. However, significant responses to large arrays were found only for the minke whale and fin whale. Behavioral

responses observed included changes in swimming or surfacing behavior, with indications that cetaceans remained near the water surface at these times. Cetaceans were recorded as feeding less often when large arrays were active. Behavioral observations of gray whales during a seismic survey monitored whale movements and respirations pre-, during, and post-seismic survey (Gailey *et al.,* 2016). Behavioral state and water depth were the best 'natural' predictors of whale movements and respiration and, after considering natural variation, none of the response variables were significantly associated with seismic survey or vessel sounds.

*Stress Responses*—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficiently to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.,* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003).

*Auditory Masking*—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995; Erbe *et al.,* 2016). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions.

Under certain circumstances, significant masking could disrupt behavioral patterns, which in turn could affect fitness for survival and reproduction. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in predicting any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007; Di Iorio and Clark, 2009; Holt *et al.,* 2009). Masking may be less in situations where the signal and noise come from different directions (Richardson *et al.,* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore, 2014). Masking can be tested directly in captive species (*e.g.,* Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.,* 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand, 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (*e.g.,* from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

Masking effects of pulsed sounds (even from large arrays of airguns) on marine mammal calls and other natural sounds are expected to be limited, although there are few specific data on this. Because of the intermittent nature and low duty cycle of seismic pulses,

animals can emit and receive sounds in the relatively quiet intervals between pulses. However, in exceptional situations, reverberation occurs for much or all of the interval between pulses (*e.g.,* Simard *et al.,* 2005; Clark and Gagnon 2006), which could mask calls. Situations with prolonged strong reverberation are infrequent. However, it is common for reverberation to cause some lesser degree of elevation of the background level between airgun pulses (*e.g.,* Gedamke 2011; Guerra *et al.,* 2011, 2016; Klinck *et al.,* 2012; Guan *et al.,* 2015), and this weaker reverberation presumably reduces the detection range of calls and other natural sounds to some degree. Guerra *et al.,* (2016) reported that ambient noise levels between seismic pulses were elevated as a result of reverberation at ranges of 50 km from the seismic source. Based on measurements in deep water of the Southern Ocean, Gedamke (2011) estimated that the slight elevation of background levels during intervals between pulses reduced blue and fin whale communication space by as much as 36–51 percent when a seismic survey was operating 450–2,800 km away. Based on preliminary modeling, Wittekind *et al.,* (2016) reported that airgun sounds could reduce the communication range of blue and fin whales 2000 km from the seismic source. Nieukirk *et al.,* (2012) and Blackwell *et al.,* (2013) noted the potential for masking effects from seismic surveys on large whales.

Some baleen and toothed whales are known to continue calling in the presence of seismic pulses, and their calls usually can be heard between the pulses (*e.g.,* Nieukirk *et al.,* 2012; Thode *et al.,* 2012; Bröker *et al.,* 2013; Sciacca *et al.,* 2016). As noted above, Cerchio *et al.,* (2014) suggested that the breeding display of humpback whales off Angola could be disrupted by seismic sounds, as singing activity declined with increasing received levels. In addition, some cetaceans are known to change their calling rates, shift their peak frequencies, or otherwise modify their vocal behavior in response to airgun sounds (*e.g.,* Di Iorio and Clark 2010; Castellote *et al.,* 2012; Blackwell *et al.,* 2013, 2015). The hearing systems of baleen whales are undoubtedly more sensitive to low-frequency sounds than are the ears of the small odontocetes that have been studied directly (*e.g.,* MacGillivray *et al.,* 2014). The sounds important to small odontocetes are predominantly at much higher frequencies than are the dominant components of airgun sounds, thus limiting the potential for masking. In general, masking effects of seismic pulses are expected to be minor, given the normally intermittent nature of seismic pulses.

*Ship Noise*

Vessel noise from the *Langseth* could affect marine animals in the proposed survey areas. Houghton *et al.,* (2015) proposed that vessel speed is the most important predictor of received noise levels, and Putland *et al.,* (2017) also reported reduced sound levels with decreased vessel speed. Sounds produced by large vessels generally dominate ambient noise at frequencies from 20 to 300 Hz (Richardson *et al.,* 1995). However, some energy is also produced at higher frequencies (Hermannsen *et al.,* 2014); low levels of high-frequency sound from vessels has been shown to elicit responses in harbor porpoise (Dyndo *et al.,* 2015). Increased levels of ship noise have been shown to affect foraging by porpoise (Teilmann *et al.,* 2015; Wisniewska *et al.,* 2018); Wisniewska *et al.,* (2018) suggest that a decrease in foraging success could have long-term fitness consequences.

Ship noise, through masking, can reduce the effective communication distance of a marine mammal if the frequency of the sound source is close to that used by the animal, and if the sound is present for a significant fraction of time (*e.g.,* Richardson *et al.* 1995; Clark *et al.,* 2009; Jensen *et al.,* 2009; Gervaise *et al.,* 2012; Hatch *et al.,* 2012; Rice *et al.,* 2014; Dunlop 2015; Erbe *et al.,* 2015; Jones *et al.,* 2017; Putland *et al.,* 2017). In addition to the frequency and duration of the masking sound, the strength, temporal pattern, and location of the introduced sound also play a role in the extent of the masking (Branstetter *et al.,* 2013, 2016; Finneran and Branstetter 2013; Sills *et al.,* 2017). Branstetter *et al.* (2013) reported that time-domain metrics are also important in describing and predicting masking. In order to compensate for increased ambient noise, some cetaceans are known to increase the source levels of their calls in the presence of elevated noise levels from shipping, shift their peak frequencies, or otherwise change their vocal behavior (*e.g.,* Martins *et al.,* 2016; O'Brien *et al.,* 2016; Tenessen and Parks 2016). Harp seals did not increase their call frequencies in environments with increased low-frequency sounds (Terhune and Bosker 2016). Holt *et al.* (2015) reported that changes in vocal modifications can have increased energetic costs for individual marine mammals. A negative correlation between the presence of some cetacean species and the number of vessels in an area has been demonstrated by several studies (*e.g.,* Campana *et al.* 2015; Culloch *et al.,* 2016).

Baleen whales are thought to be more sensitive to sound at these low frequencies than are toothed whales (*e.g.,* MacGillivray *et al.,* 2014), possibly causing localized avoidance of the proposed survey area during seismic operations. Reactions of gray and humpback whales to vessels have been studied, and there is limited information available about the reactions of right whales and rorquals (fin, blue, and minke whales). Reactions of humpback whales to boats are variable, ranging from approach to avoidance (Payne 1978; Salden 1993). Baker *et al.,* (1982, 1983) and Baker and Herman (1989) found humpbacks often move away when vessels are within several kilometers. Humpbacks seem less likely to react overtly when actively feeding than when resting or engaged in other activities (Krieger and Wing 1984, 1986). Increased levels of ship noise have been shown to affect foraging by humpback whales (Blair *et al.,* 2016). Fin whale sightings in the western Mediterranean were negatively correlated with the number of vessels in the area (Campana *et al.* 2015). Minke whales and gray seals have shown slight displacement in response to construction-related vessel traffic (Anderwald *et al.,* 2013).

Many odontocetes show considerable tolerance of vessel traffic, although they sometimes react at long distances if confined by ice or shallow water, if previously harassed by vessels, or have had little or no recent exposure to ships (Richardson *et al.* 1995). Dolphins of many species tolerate and sometimes approach vessels (*e.g.,* Anderwald *et al.,* 2013). Some dolphin species approach moving vessels to ride the bow or stern waves (Williams *et al.,* 1992). Pirotta *et al.,* (2015) noted that the physical presence of vessels, not just ship noise, disturbed the foraging activity of bottlenose dolphins. Sightings of striped dolphin, Risso's dolphin, sperm whale, and Cuvier's beaked whale in the western Mediterranean were negatively correlated with the number of vessels in the area (Campana *et al.,* 2015).

There are few data on the behavioral reactions of beaked whales to vessel noise, though they seem to avoid approaching vessels (*e.g.,* Würsig *et al.,* 1998) or dive for an extended period when approached by a vessel (*e.g.,* Kasuya 1986). Based on a single observation, Aguilar Soto *et al.,* (2006) suggest foraging efficiency of Cuvier's beaked whales may be reduced by close approach of vessels.

Sounds emitted by the *Langseth* are low frequency and continuous, but would be widely dispersed in both space and time. Vessel traffic associated with the proposed survey is of low density compared to traffic associated with commercial shipping, industry support vessels, or commercial fishing vessels, and would therefore be expected to represent an insignificant incremental increase in the total amount of anthropogenic sound input to the marine environment, and the effects of vessel noise described above are not expected to occur as a result of this survey. In summary, project vessel sounds would not be at levels expected to cause anything more than possible localized and temporary behavioral changes in marine mammals, and would not be expected to result in significant negative effects on individuals or at the population level. In addition, in all oceans of the world, large vessel traffic is currently so prevalent that it is commonly considered a usual source of ambient sound (NSF–USGS 2011).

*Ship Strike*

Vessel collisions with marine mammals, or ship strikes, can result in death or serious injury of the animal. Wounds resulting from ship strike may include massive trauma, hemorrhaging, broken bones, or propeller lacerations (Knowlton and Kraus, 2001). An animal at the surface may be struck directly by a vessel, a surfacing animal may hit the bottom of a vessel, or an animal just below the surface may be cut by a vessel's propeller. Superficial strikes may not kill or result in the death of the animal. These interactions are typically associated with large whales (*e.g.,* fin whales), which are occasionally found draped across the bulbous bow of large commercial ships upon arrival in port. Although smaller cetaceans are more maneuverable in relation to large vessels than are large whales, they may also be susceptible to strike. The severity of injuries typically depends on the size and speed of the vessel, with the probability of death or serious injury increasing as vessel speed increases (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Vanderlaan and Taggart, 2007; Conn and Silber, 2013). Impact forces increase with speed, as does the probability of a strike at a given distance (Silber *et al.,* 2010; Gende *et al.,* 2011).

Pace and Silber (2005) also found that the probability of death or serious injury increased rapidly with increasing vessel speed. Specifically, the predicted probability of serious injury or death increased from 45 to 75 percent as vessel speed increased from 10 to 14 kn, and exceeded 90 percent at 17 kn. Higher speeds during collisions result in greater force of impact, but higher speeds also appear to increase the chance of severe injuries or death through increased likelihood of collision by pulling whales toward the vessel (Clyne, 1999; Knowlton *et al.,* 1995). In a separate study, Vanderlaan and Taggart (2007) analyzed the probability of lethal mortality of large whales at a given speed, showing that the greatest rate of change in the probability of a lethal injury to a large whale as a function of vessel speed occurs between 8.6 and 15 kn. The chances of a lethal injury decline from approximately 80 percent at 15 kn to approximately 20 percent at 8.6 kn. At speeds below 11.8 kn, the chances of lethal injury drop below 50 percent, while the probability asymptotically increases toward one hundred percent above 15 kn.

The *Langseth* will travel at a speed of 4.6 kn (8.5 km/h) while towing seismic survey gear. At this speed, both the possibility of striking a marine mammal and the possibility of a strike resulting in serious injury or mortality are discountable. At average transit speed, the probability of serious injury or mortality resulting from a strike is less than 50 percent. However, the likelihood of a strike actually happening is again discountable. Ship strikes, as analyzed in the studies cited above, generally involve commercial shipping, which is much more common in both space and time than is geophysical survey activity. Jensen and Silber (2004) summarized ship strikes of large whales worldwide from 1975–2003 and found that most collisions occurred in the open ocean and involved large vessels (*e.g.,* commercial shipping). No such incidents were reported for geophysical survey vessels during that time period.

It is possible for ship strikes to occur while traveling at slow speeds. For example, a hydrographic survey vessel traveling at low speed (5.5 kn) while conducting mapping surveys off the central California coast struck and killed a blue whale in 2009. The State of California determined that the whale had suddenly and unexpectedly surfaced beneath the hull, with the result that the propeller severed the whale's vertebrae, and that this was an unavoidable event. This strike represents the only such incident in approximately 540,000 hours of similar coastal mapping activity ($p = 1.9 \times 10^{-6}$; 95% CI = $0–5.5 \times 10^{-6}$; NMFS, 2013b). In addition, a research vessel reported a fatal strike in 2011 of a dolphin in the Atlantic, demonstrating that it is possible for strikes involving smaller cetaceans to occur. In that case, the incident report indicated that an animal apparently was struck by the vessel's propeller as it was intentionally swimming near the vessel. While indicative of the type of unusual events that cannot be ruled out, neither of these instances represents a circumstance that would be considered reasonably foreseeable or that would be considered preventable.

Although the likelihood of the vessel striking a marine mammal is low, we propose a robust ship strike avoidance protocol (see Proposed Mitigation), which we believe eliminates any foreseeable risk of ship strike during transit. We anticipate that vessel collisions involving a seismic data acquisition vessel towing gear, while not impossible, represent unlikely, unpredictable events for which there are no preventive measures. Given the proposed mitigation measures, the relatively slow speed of the vessel towing gear, the presence of bridge crew watching for obstacles at all times (including marine mammals), and the presence of marine mammal observers, the possibility of ship strike is discountable and, further, were a strike of a large whale to occur, it would be unlikely to result in serious injury or mortality. No incidental take resulting from ship strike is anticipated, and this potential effect of the specified activity will not be discussed further in the following analysis.

*Stranding*—When a living or dead marine mammal swims or floats onto shore and becomes ''beached'' or incapable of returning to sea, the event is a ''stranding'' (Geraci *et al.,* 1999; Perrin and Geraci, 2002; Geraci and Lounsbury, 2005; NMFS, 2007). The legal definition for a stranding under the MMPA is that ''(A) a marine mammal is dead and is (i) on a beach or shore of the United States; or (ii) in waters under the jurisdiction of the United States (including any navigable waters); or (B) a marine mammal is alive and is (i) on a beach or shore of the United States and is unable to return to the water; (ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention; or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.''

Marine mammals strand for a variety of reasons, such as infectious agents, biotoxicosis, starvation, fishery interaction, ship strike, unusual oceanographic or weather events, sound exposure, or combinations of these stressors sustained concurrently or in

series. However, the cause or causes of most strandings are unknown (Geraci *et al.,* 1976; Eaton, 1979; Odell *et al.,* 1980; Best, 1982). Numerous studies suggest that the physiology, behavior, habitat relationships, age, or condition of cetaceans may cause them to strand or might pre-dispose them to strand when exposed to another phenomenon. These suggestions are consistent with the conclusions of numerous other studies that have demonstrated that combinations of dissimilar stressors commonly combine to kill an animal or dramatically reduce its fitness, even though one exposure without the other does not produce the same result (Chroussos, 2000; Creel, 2005; DeVries *et al.,* 2003; Fair and Becker, 2000; Foley *et al.,* 2001; Moberg, 2000; Relyea, 2005a; 2005b, Romero, 2004; Sih *et al.,* 2004).

There is no conclusive evidence that exposure to airgun noise results in behaviorally-mediated forms of injury. Behaviorally-mediated injury (*i.e.,* mass stranding events) has been primarily associated with beaked whales exposed to mid-frequency active (MFA) naval sonar. Tactical sonar and the alerting stimulus used in Nowacek *et al.,* (2004) are very different from the noise produced by airguns. One should therefore not expect the same reaction to airgun noise as to these other sources. As explained below, military MFA sonar is very different from airguns, and one should not assume that airguns will cause the same effects as MFA sonar (including strandings).

To understand why Navy MFA sonar affects beaked whales differently than airguns do, it is important to note the distinction between behavioral sensitivity and susceptibility to auditory injury. To understand the potential for auditory injury in a particular marine mammal species in relation to a given acoustic signal, the frequency range the species is able to hear is critical, as well as the species' auditory sensitivity to frequencies within that range. Current data indicate that not all marine mammal species have equal hearing capabilities across all frequencies and, therefore, species are grouped into hearing groups with generalized hearing ranges assigned on the basis of available data (Southall *et al.,* 2007, 2019). Hearing ranges as well as auditory sensitivity/susceptibility to frequencies within those ranges vary across the different groups. For example, in terms of hearing range, the high-frequency cetaceans (*e.g., Kogia* spp.) have a generalized hearing range of frequencies between 275 Hz and 160 kHz, while mid-frequency cetaceans—such as dolphins and beaked whales—have a generalized hearing range between 150 Hz to 160 kHz. Regarding auditory susceptibility within the hearing range, while mid-frequency cetaceans and high-frequency cetaceans have roughly similar hearing ranges, the high-frequency group is much more susceptible to noise-induced hearing loss during sound exposure, *i.e.,* these species have lower thresholds for these effects than other hearing groups (NMFS, 2018). Referring to a species as behaviorally sensitive to noise simply means that an animal of that species is more likely to respond to lower received levels of sound than an animal of another species that is considered less behaviorally sensitive. So, while dolphin species and beaked whale species—both in the mid-frequency cetacean hearing group—are assumed to generally hear the same sounds equally well and be equally susceptible to noise-induced hearing loss (auditory injury), the best available information indicates that a beaked whale is more likely to behaviorally respond to that sound at a lower received level compared to an animal from other mid-frequency cetacean species that are less behaviorally sensitive. This distinction is important because, while beaked whales are more likely to respond behaviorally to sounds than are many other species (even at lower levels), they cannot hear the predominant, lower frequency sounds from seismic airguns as well as sounds that have more energy at frequencies that beaked whales can hear better (such as military MFA sonar).

Navy MFA sonar affects beaked whales differently than airguns do because it produces energy at different frequencies than airguns. Mid-frequency cetacean hearing is generically thought to be best between 8.8 to 110 kHz, *i.e.,* these cutoff values define the range above and below which a species in the group is assumed to have declining auditory sensitivity, until reaching frequencies that cannot be heard (NMFS, 2018). However, beaked whale hearing is likely best within a higher, narrower range (20–80 kHz, with best sensitivity around 40 kHz), based on a few measurements of hearing in stranded beaked whales (Cook *et al.,* 2006; Finneran *et al.,* 2009; Pacini *et al.,* 2011) and several studies of acoustic signals produced by beaked whales (*e.g.,* Frantzis *et al.,* 2002; Johnson *et al.,* 2004, 2006; Zimmer *et al.,* 2005). While precaution requires that the full range of audibility be considered when assessing risks associated with noise exposure (Southall *et al.,* 2007, 2019a2019), animals typically produce sound at frequencies where they hear best. More recently, Southall *et al.,* (2019) suggested that certain species in the historical mid-frequency hearing group (beaked whales, sperm whales, and killer whales) are likely more sensitive to lower frequencies within the group's generalized hearing range than are other species within the group, and state that the data for beaked whales suggest sensitivity to approximately 5 kHz. However, this information is consistent with the general conclusion that beaked whales (and other mid-frequency cetaceans) are relatively insensitive to the frequencies where most energy of an airgun signal is found. Military MFA sonar is typically considered to operate in the frequency range of approximately 3–14 kHz (D'Amico *et al.,* 2009), *i.e.,* outside the range of likely best hearing for beaked whales but within or close to the lower bounds, whereas most energy in an airgun signal is radiated at much lower frequencies, below 500 Hz (Dragoset, 1990).

It is important to distinguish between energy (loudness, measured in dB) and frequency (pitch, measured in Hz). In considering the potential impacts of mid-frequency components of airgun noise (1–10 kHz, where beaked whales can be expected to hear) on marine mammal hearing, one needs to account for the energy associated with these higher frequencies and determine what energy is truly ''significant.'' Although there is mid-frequency energy associated with airgun noise (as expected from a broadband source), airgun sound is predominantly below 1 kHz (Breitzke *et al.,* 2008; Tashmukhambetov *et al.,* 2008; Tolstoy *et al.,* 2009). As stated by Richardson *et al.* (1995), ''[. . .] most emitted [seismic airgun] energy is at 10–120 Hz, but the pulses contain some energy up to 500–1,000 Hz.'' Tolstoy *et al.,* (2009) conducted empirical measurements, demonstrating that sound energy levels associated with airguns were at least 20 decibels (dB) lower at 1 kHz (considered ''mid-frequency'') compared to higher energy levels associated with lower frequencies (below 300 Hz) (''all but a small fraction of the total energy being concentrated in the 10–300 Hz range'' [Tolstoy *et al.,* 2009]), and at higher frequencies (*e.g.,* 2.6–4 kHz), power might be less than 10 percent of the peak power at 10 Hz (Yoder, 2002). Energy levels measured by Tolstoy *et al.,* (2009) were even lower at frequencies above 1 kHz. In addition, as sound propagates away from the source, it tends to lose higher-frequency components faster than low-frequency components (*i.e.,* low-frequency sounds

typically propagate longer distances than high-frequency sounds) (Diebold *et al.,* 2010). Although higher-frequency components of airgun signals have been recorded, it is typically in surface-ducting conditions (*e.g.,* DeRuiter *et al.,* 2006; Madsen *et al.,* 2006) or in shallow water, where there are advantageous propagation conditions for the higher frequency (but low-energy) components of the airgun signal (Hermannsen *et al.,* 2015). This should not be of concern because the likely behavioral reactions of beaked whales that can result in acute physical injury would result from noise exposure at depth (because of the potentially greater consequences of severe behavioral reactions). In summary, the frequency content of airgun signals is such that beaked whales will not be able to hear the signals well (compared to MFA sonar), especially at depth where we expect the consequences of noise exposure could be more severe.

Aside from frequency content, there are other significant differences between MFA sonar signals and the sounds produced by airguns that minimize the risk of severe behavioral reactions that could lead to strandings or deaths at sea, *e.g.,* significantly longer signal duration, horizontal sound direction, typical fast and unpredictable source movement. All of these characteristics of MFA sonar tend towards greater potential to cause severe behavioral or physiological reactions in exposed beaked whales that may contribute to stranding. Although both sources are powerful, MFA sonar contains significantly greater energy in the mid-frequency range, where beaked whales hear better. Short-duration, high energy pulses—such as those produced by airguns—have greater potential to cause damage to auditory structures (though this is unlikely for mid-frequency cetaceans, as explained later in this document), but it is longer duration signals that have been implicated in the vast majority of beaked whale strandings. Faster, less predictable movements in combination with multiple source vessels are more likely to elicit a severe, potentially anti-predator response. Of additional interest in assessing the divergent characteristics of MFA sonar and airgun signals and their relative potential to cause stranding events or deaths at sea is the similarity between the MFA sonar signals and stereotyped calls of beaked whales' primary predator: the killer whale (Zimmer and Tyack, 2007). Although generic disturbance stimuli—as airgun noise may be considered in this case for beaked whales—may also trigger antipredator responses, stronger responses should generally be expected when perceived risk is greater, as when the stimulus is confused for a known predator (Frid and Dill, 2002). In addition, because the source of the perceived predator (*i.e.,* MFA sonar) will likely be closer to the whales (because attenuation limits the range of detection of mid-frequencies) and moving faster (because it will be on faster-moving vessels), any antipredator response would be more likely to be severe (with greater perceived predation risk, an animal is more likely to disregard the cost of the response; Frid and Dill, 2002). Indeed, when analyzing movements of a beaked whale exposed to playback of killer whale predation calls, Allen *et al.,* (2014) found that the whale engaged in a prolonged, directed avoidance response, suggesting a behavioral reaction that could pose a risk factor for stranding. Overall, these significant differences between sound from MFA sonar and the mid-frequency sound component from airguns and the likelihood that MFA sonar signals will be interpreted in error as a predator are critical to understanding the likely risk of behaviorally-mediated injury due to seismic surveys.

The available scientific literature also provides a useful contrast between airgun noise and MFA sonar regarding the likely risk of behaviorally-mediated injury. There is strong evidence for the association of beaked whale stranding events with MFA sonar use, and particularly detailed accounting of several events is available (*e.g.,* a 2000 Bahamas stranding event for which investigators concluded that MFA sonar use was responsible; Evans and England, 2001). D'Amico *et al.,* (2009) reviewed 126 beaked whale mass stranding events over the period from 1950 (*i.e.,* from the development of modern MFA sonar systems) through 2004. Of these, there were two events where detailed information was available on both the timing and location of the stranding and the concurrent nearby naval activity, including verification of active MFA sonar usage, with no evidence for an alternative cause of stranding. An additional ten events were at minimum spatially and temporally coincident with naval activity likely to have included MFA sonar use and, despite incomplete knowledge of timing and location of the stranding or the naval activity in some cases, there was no evidence for an alternative cause of stranding. The U.S. Navy has publicly stated agreement that five such events since 1996 were associated in time and space with MFA sonar use, either by the U.S. Navy alone or in joint training exercises with the North Atlantic Treaty Organization. The U.S. Navy additionally noted that, as of 2017, a 2014 beaked whale stranding event in Crete coincident with naval exercises was under review and had not yet been determined to be linked to sonar activities (U.S. Navy, 2017). Separately, the International Council for the Exploration of the Sea reported in 2005 that, worldwide, there have been about 50 known strandings, consisting mostly of beaked whales, with a potential causal link to MFA sonar (ICES, 2005). In contrast, very few such associations have been made to seismic surveys, despite widespread use of airguns as a geophysical sound source in numerous locations around the world.

A more recent review of possible stranding associations with seismic surveys (Castellote and Llorens, 2016) states plainly that, ''[s]peculation concerning possible links between seismic survey noise and cetacean strandings is available for a dozen events but without convincing causal evidence.'' The authors' ''exhaustive'' search of available information found ten events worth further investigation via a ranking system representing a rough metric of the relative level of confidence offered by the data for inferences about the possible role of the seismic survey in a given stranding event. Only three of these events involved beaked whales. Whereas D'Amico *et al.,* (2009) used a 1–5 ranking system, in which ''1'' represented the most robust evidence connecting the event to MFA sonar use, Castellote and Llorens (2016) used a 1–6 ranking system, in which ''6'' represented the most robust evidence connecting the event to the seismic survey. As described above, D'Amico *et al.* (2009) found that two events were ranked ''1'' and ten events were ranked ''2'' (*i.e.,* 12 beaked whale stranding events were found to be associated with MFA sonar use). In contrast, Castellote and Llorens (2016) found that none of the three beaked whale stranding events achieved their highest ranks of 5 or 6. Of the ten total events, none achieved the highest rank of 6. Two events were ranked as 5: one stranding in Peru involving dolphins and porpoises and a 2008 stranding in Madagascar. This latter ranking can only broadly be associated with the survey itself, as opposed to use of seismic airguns. An exhaustive investigation of this stranding event, which did not involve beaked whales, concluded that use of a high-frequency mapping system (12-kHz multibeam echosounder) was the most

plausible and likely initial behavioral trigger of the event, which was likely exacerbated by several site- and situation-specific secondary factors. The review panel found that seismic airguns were used after the initial strandings and animals entering a lagoon system, that airgun use clearly had no role as an initial trigger, and that there was no evidence that airgun use dissuaded animals from leaving (Southall *et al.,* 2013).

However, one of these stranding events, involving two Cuvier's beaked whales, was contemporaneous with and reasonably associated spatially with a 2002 seismic survey in the Gulf of California conducted by L–DEO, as was the case for the 2007 Gulf of Cadiz seismic survey discussed by Castellote and Llorens (also involving two Cuvier's beaked whales). However, neither event was considered a ''true atypical mass stranding'' (according to Frantzis [1998]) as used in the analysis of Castellote and Llorens (2016). While we agree with the authors that this lack of evidence should not be considered conclusive, it is clear that there is very little evidence that seismic surveys should be considered as posing a significant risk of acute harm to beaked whales or other mid-frequency cetaceans. We have considered the potential for the proposed surveys to result in marine mammal stranding and have concluded that, based on the best available information, stranding is not expected to occur.

*Entanglement*—Entanglements occur when marine mammals become wrapped around cables, lines, nets, or other objects suspended in the water column. During seismic operations, numerous cables, lines, and other objects primarily associated with the airgun array and hydrophone streamers will be towed behind the *Langseth* near the water's surface. However, we are not aware of any cases of entanglement of mysticetes in seismic survey equipment. No incidents of entanglement of marine mammals with seismic survey gear have been documented in over 54,000 kt (100,000 km) of previous NSF-funded seismic surveys when observers were aboard (*e.g.,* Smultea and Holst 2003; Haley and Koski 2004; Holst 2004; Smultea *et al.,* 2004; Holst *et al.,* 2005a; Haley and Ireland 2006; SIO and NSF 2006b; Hauser *et al.,* 2008; Holst and Smultea 2008). Although entanglement with the streamer is theoretically possible, it has not been documented during tens of thousands of miles of NSF-sponsored seismic cruises or, to our knowledge, during hundreds of thousands of miles of industrial seismic cruises. There are a relative few deployed devices, and no interaction between marine mammals and any such device has been recorded during prior NSF surveys using the devices. There are no meaningful entanglement risks posed by the proposed survey, and entanglement risks are not discussed further in this document.

*Anticipated Effects on Marine Mammal Habitat*

*Physical Disturbance*—Sources of seafloor disturbance related to geophysical surveys that may impact marine mammal habitat include placement of anchors, nodes, cables, sensors, or other equipment on or in the seafloor for various activities. Equipment deployed on the seafloor has the potential to cause direct physical damage and could affect bottom-associated fish resources.

Placement of equipment, such as the heat flow probe in the seafloor, could damage areas of hard bottom where direct contact with the seafloor occurs and could crush epifauna (organisms that live on the seafloor or surface of other organisms). Damage to unknown or unseen hard bottom could occur, but because of the small area covered by most bottom-founded equipment and the patchy distribution of hard bottom habitat, contact with unknown hard bottom is expected to be rare and impacts minor. Seafloor disturbance in areas of soft bottom can cause loss of small patches of epifauna and infauna due to burial or crushing, and bottom-feeding fishes could be temporarily displaced from feeding areas. Overall, any effects of physical damage to habitat are expected to be minor and temporary.

*Effects to Prey*—Marine mammal prey varies by species, season, and location and, for some, is not well documented. Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. However, the reaction of fish to airguns depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Several studies have demonstrated that airgun sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017), though the bulk of studies indicate no or slight reaction to noise (*e.g.,* Miller and Cripps, 2013; Dalen and Knutsen, 1987; Pena *et al.,* 2013; Chapman and Hawkins, 1969; Wardle *et al.,* 2001; Sara *et al.,* 2007; Jorgenson and Gyselman, 2009; Blaxter *et al.,* 1981; Cott *et al.,* 2012; Boeger *et al.,* 2006), and that, most commonly, while there are likely to be impacts to fish as a result of noise from nearby airguns, such effects will be temporary. For example, investigators reported significant, short-term declines in commercial fishing catch rate of gadid fishes during and for up to five days after seismic survey operations, but the catch rate subsequently returned to normal (Engas *et al.,* 1996; Engas and Lokkeborg, 2002). Other studies have reported similar findings (Hassel *et al.,* 2004). Skalski *et al.,* (1992) also found a reduction in catch rates—for rockfish (*Sebastes* spp.) in response to controlled airgun exposure—but suggested that the mechanism underlying the decline was not dispersal but rather decreased responsiveness to baited hooks associated with an alarm behavioral response. A companion study showed that alarm and startle responses were not sustained following the removal of the sound source (Pearson *et al.,* 1992). Therefore, Skalski *et al.,* (1992) suggested that the effects on fish abundance may be transitory, primarily occurring during the sound exposure itself. In some cases, effects on catch rates are variable within a study, which may be more broadly representative of temporary displacement of fish in response to airgun noise (*i.e.,* catch rates may increase in some locations and decrease in others) than any long-term damage to the fish themselves (Streever *et al.,* 2016).

SPLs of sufficient strength have been known to cause injury to fish and fish mortality and, in some studies, fish auditory systems have been damaged by airgun noise (McCauley *et al.,* 2003; Popper *et al.,* 2005; Song *et al.,* 2008). However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012b. (2012) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long—both of which are conditions unlikely to occur for this survey that is necessarily transient in any given location and likely result in brief, infrequent noise exposure to prey species in any given area. For this survey, the sound source is constantly moving, and most fish would likely avoid the sound source prior to receiving sound of sufficient intensity to cause physiological or anatomical damage. In addition, ramp-up may

allow certain fish species the opportunity to move further away from the sound source.

A recent comprehensive review (Carroll *et al.,* 2017) found that results are mixed as to the effects of airgun noise on the prey of marine mammals. While some studies suggest a change in prey distribution and/or a reduction in prey abundance following the use of seismic airguns, others suggest no effects or even positive effects in prey abundance. As one specific example, Paxton *et al.,* (2017), which describes findings related to the effects of a 2014 seismic survey on a reef off of North Carolina, showed a 78 percent decrease in observed nighttime abundance for certain species. It is important to note that the evening hours during which the decline in fish habitat use was recorded (via video recording) occurred on the same day that the seismic survey passed, and no subsequent data is presented to support an inference that the response was long-lasting. Additionally, given that the finding is based on video images, the lack of recorded fish presence does not support a conclusion that the fish actually moved away from the site or suffered any serious impairment. In summary, this particular study corroborates prior studies indicating that a startle response or short-term displacement should be expected.

Available data suggest that cephalopods are capable of sensing the particle motion of sounds and detect low frequencies up to 1–1.5 kHz, depending on the species, and so are likely to detect airgun noise (Kaifu *et al.,* 2008; Hu *et al.,* 2009; Mooney *et al.,* 2010; Samson *et al.,* 2014). Auditory injuries (lesions occurring on the statocyst sensory hair cells) have been reported upon controlled exposure to low-frequency sounds, suggesting that cephalopods are particularly sensitive to low-frequency sound (Andre *et al.,* 2011; Sole *et al.,* 2013). Behavioral responses, such as inking and jetting, have also been reported upon exposure to low-frequency sound (McCauley *et al.,* 2000b; Samson *et al.,* 2014). Similar to fish, however, the transient nature of the survey leads to an expectation that effects will be largely limited to behavioral reactions and would occur as a result of brief, infrequent exposures.

With regard to potential impacts on zooplankton, McCauley *et al.,* (2017) found that exposure to airgun noise resulted in significant depletion for more than half the taxa present and that there were two to three times more dead zooplankton after airgun exposure compared with controls for all taxa, within 1 km of the airguns. However, the authors also stated that in order to have significant impacts on r-selected species (*i.e.,* those with high growth rates and that produce many offspring) such as plankton, the spatial or temporal scale of impact must be large in comparison with the ecosystem concerned, and it is possible that the findings reflect avoidance by zooplankton rather than mortality (McCauley *et al.,* 2017). In addition, the results of this study are inconsistent with a large body of research that generally finds limited spatial and temporal impacts to zooplankton as a result of exposure to airgun noise (*e.g.,* Dalen and Knutsen, 1987; Payne, 2004; Stanley *et al.,* 2011). Most prior research on this topic, which has focused on relatively small spatial scales, has showed minimal effects (*e.g.,* Kostyuchenko, 1973; Booman *et al.,* 1996; Sætre and Ona, 1996; Pearson *et al.,* 1994; Bolle *et al.,* 2012).

A modeling exercise was conducted as a follow-up to the McCauley *et al.* (2017) study (as recommended by McCauley *et al.,*), in order to assess the potential for impacts on ocean ecosystem dynamics and zooplankton population dynamics (Richardson *et al.,* 2017). Richardson *et al.,* (2017) found that for copepods with a short life cycle in a high-energy environment, a full-scale airgun survey would impact copepod abundance up to three days following the end of the survey, suggesting that effects such as those found by McCauley *et al.,* (2017) would not be expected to be detectable downstream of the survey areas, either spatially or temporally.

Notably, a recently described study produced results inconsistent with those of McCauley *et al.,* (2017). Researchers conducted a field and laboratory study to assess if exposure to airgun noise affects mortality, predator escape response, or gene expression of the copepod *Calanus finmarchicus* (Fields *et al.,* 2019). Immediate mortality of copepods was significantly higher, relative to controls, at distances of 5 m or less from the airguns. Mortality one week after the airgun blast was significantly higher in the copepods placed 10 m from the airgun but was not significantly different from the controls at a distance of 20 m from the airgun. The increase in mortality, relative to controls, did not exceed 30 percent at any distance from the airgun. Moreover, the authors caution that even this higher mortality in the immediate vicinity of the airguns may be more pronounced than what would be observed in free-swimming animals due to increased flow speed of fluid inside bags containing the experimental animals. There were no sublethal effects on the escape performance or the sensory threshold needed to initiate an escape response at any of the distances from the airgun that were tested. Whereas McCauley *et al.* (2017) reported an SEL of 156 dB at a range of 509–658 m, with zooplankton mortality observed at that range, Fields *et al.* (2019) reported an SEL of 186 dB at a range of 25 m, with no reported mortality at that distance. Regardless, if we assume a worst-case likelihood of severe impacts to zooplankton within approximately 1 km of the acoustic source, the brief time to regeneration of the potentially affected zooplankton populations does not lead us to expect any meaningful follow-on effects to the prey base for marine mammals.

A recent review article concluded that, while laboratory results provide scientific evidence for high-intensity and low-frequency sound-induced physical trauma and other negative effects on some fish and invertebrates, the sound exposure scenarios in some cases are not realistic to those encountered by marine organisms during routine seismic operations (Carroll *et al.,* 2017). The review finds that there has been no evidence of reduced catch or abundance following seismic activities for invertebrates, and that there is conflicting evidence for fish with catch observed to increase, decrease, or remain the same. Further, where there is evidence for decreased catch rates in response to airgun noise, these findings provide no information about the underlying biological cause of catch rate reduction (Carroll *et al.,* 2017).

In summary, impacts of the specified activity on marine mammal prey species will likely be limited to behavioral responses, the majority of prey species will be capable of moving out of the area during the survey, a rapid return to normal recruitment, distribution, and behavior for prey species is anticipated, and, overall, impacts to prey species will be minor and temporary. Prey species exposed to sound might move away from the sound source, experience TTS, experience masking of biologically relevant sounds, or show no obvious direct effects. Mortality from decompression injuries is possible in close proximity to a sound, but only limited data on mortality in response to airgun noise exposure are available (Hawkins *et al.,* 2014). The most likely impacts for most prey species in the survey area would be temporary avoidance of the area. The proposed survey would move through an area relatively quickly, limiting exposure to multiple impulsive sounds. In all cases,

sound levels would return to ambient once the survey moves out of the area or ends and the noise source is shut down and, when exposure to sound ends, behavioral and/or physiological responses are expected to end relatively quickly (McCauley *et al.,* 2000b). The duration of fish avoidance of a given area after survey effort stops is unknown, but a rapid return to normal recruitment, distribution, and behavior is anticipated. While the potential for disruption of spawning aggregations or schools of important prey species can be meaningful on a local scale, the mobile and temporary nature of this survey and the likelihood of temporary avoidance behavior suggest that impacts would be minor.

*Acoustic Habitat*—Acoustic habitat is the soundscape—which encompasses all of the sound present in a particular location and time, as a whole—when considered from the perspective of the animals experiencing it. Animals produce sound for, or listen for sounds produced by, conspecifics (communication during feeding, mating, and other social activities), other animals (finding prey or avoiding predators), and the physical environment (finding suitable habitats, navigating). Together, sounds made by animals and the geophysical environment (*e.g.,* produced by earthquakes, lightning, wind, rain, waves) make up the natural contributions to the total acoustics of a place. These acoustic conditions, termed acoustic habitat, are one attribute of an animal's total habitat.

Soundscapes are also defined by, and acoustic habitat influenced by, the total contribution of anthropogenic sound. This may include incidental emissions from sources such as vessel traffic, or may be intentionally introduced to the marine environment for data acquisition purposes (as in the use of airgun arrays). Anthropogenic noise varies widely in its frequency content, duration, and loudness and these characteristics greatly influence the potential habitat-mediated effects to marine mammals (please see also the previous discussion on masking under ''Acoustic Effects''), which may range from local effects for brief periods of time to chronic effects over large areas and for long durations. Depending on the extent of effects to habitat, animals may alter their communications signals (thereby potentially expending additional energy) or miss acoustic cues (either conspecific or adventitious). For more detail on these concepts see, *e.g.,* Barber *et al.,* 2010; Pijanowski *et al.,* 2011; Francis and Barber, 2013; Lillis *et al.,* 2014.

Problems arising from a failure to detect cues are more likely to occur when noise stimuli are chronic and overlap with biologically relevant cues used for communication, orientation, and predator/prey detection (Francis and Barber, 2013). Although the signals emitted by seismic airgun arrays are generally low frequency, they would also likely be of short duration and transient in any given area due to the nature of these surveys. As described previously, exploratory surveys such as these cover a large area but would be transient rather than focused in a given location over time and therefore would not be considered chronic in any given location.

Based on the information discussed herein, we conclude that impacts of the specified activity are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations.

## Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, primarily in the form of behavioral disruption and including through Temporary Threshold Shift (TTS) for low frequency cetaceans resulting from exposure to sound from seismic airguns. TTS is not expected for all other hearing groups and is considered to be unlikely for low frequency cetaceans. Given the small size of the Level A harassment isopleths (28.6 m for LF cetaceans and less than one meter for all other species) and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown, ramp-up, *etc.*) discussed in detail below in Proposed Mitigation section, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the proposed take numbers are estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimate.

### *Acoustic Thresholds*

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

*Level B Harassment*—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment

when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μPa)) for continuous (*e.g.,* vibratory pile-driving, drilling) and above RMS SPL 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources.

L–DEO's proposed survey includes the use of impulsive seismic sources (*e.g.,* GI-airgun) and therefore the 160 dB re 1 μPa (rms) criteria is applicable for analysis of Level B harassment.

*Level A harassment*—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). L–DEO's proposed survey includes the use of impulsive and intermittent sources.

For more information, see NMFS' 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

*Ensonified Area*

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

The proposed 2D survey would acquire data using a 2 GI-airgun cluster with a total discharge volume of 90 in$^3$ at a maximum tow depth of 2–4 m. L–DEO model results are used to determine the 160 dB rms radius for the 2–GI airgun array in deep water (>1000 m) down to a maximum depth of 2000 m, as animals are generally not anticipated to dive below 2000 m (Costa and Williams, 1999). Received sound levels for the two 45 in$^3$ GI airguns have been predicted by L–DEO's model (Diebold *et al.,* 2010) as a function of distance from the airguns. This modeling approach uses ray tracing for the direct wave traveling from the array to the receiver and its associated source ghost (reflection at the air-water interface in the vicinity of the array), in a constant-velocity half-space (infinite homogeneous ocean layer, unbounded by a seafloor). In addition, propagation measurements of pulses from a 36-airgun array at a tow depth of 6 m have been reported in deep water (~1600 m), intermediate water depth on the slope (~600–1100 m), and shallow water (~50) in the Gulf of Mexico in 2007–2008 (Tolstoy *et al.,* 2009; Diebold *et al.,* 2010).

For deep and intermediate-water cases, the field measurements cannot be used readily to derive mitigation radii, as at those sites the calibration hydrophone was located at a roughly constant depth of 350–500 m, which may not intersect all the sound pressure level (SPL) isopleths at their widest point from the sea surface down to the maximum relevant water depth (~2000 m) for marine mammals. At short ranges, where the direct arrivals dominate and the effects of seafloor interactions are minimal, the data recorded at the deep sites are suitable for comparison with modeled levels at the depth of the calibration hydrophone. At longer ranges, the comparison with the mitigation model—constructed from the maximum SPL through the entire water column at varying distances from the airgun array—is the most relevant.

In deep and intermediate-water depths, comparisons at short ranges between sound levels for direct arrivals recorded by the calibration hydrophone and model results for the same array tow depth are in good agreement (Fig. 12 and 14 in Appendix H of L–DEO's PEIS). Consequently, isopleths falling within this domain can be predicted reliably by the L–DEO model, although they may be imperfectly sampled by measurements recorded at a single depth. At greater distances, the calibration data show that seafloor-reflected and sub-seafloor-refracted arrivals dominate, whereas the direct arrivals become weak and/or incoherent. Aside from local topography effects, the region around the critical distance is where the observed levels rise closest to the mitigation model curve. However, the observed sound levels are found to fall almost entirely below the mitigation model curve. Thus, analysis of the Gulf of Mexico calibration measurements demonstrate that although simple, the L–DEO model is a robust tool for conservatively estimating isopleths and the deep water radii obtained from model results down to a maximum water depth of 2000 m.

A recent retrospective analysis of acoustic propagation of R/V *Langseth* sources in a coastal/shelf environment from the Cascadia Margin off Washington suggests that predicted (modeled) radii (using a similar approach) for R/V *Langseth* sources were 2–3 times larger than measured in shallow water (Crone *et al.,* 2014). Similarly, data collected by Crone *et al.* (2017) during a survey off New Jersey in 2014 and 2015 confirmed that in situ measurements and estimates of the 160- and 180-dB distances collected by R/V *Langseth* hydrophone streamer were 2–3 times smaller than the predicted operational mitigation radii. Five separate comparisons conducted of the L–DEO model with in situ received level have confirmed that the L–DEO model generated conservative mitigation zones, resulting in significantly larger zones.

The proposed surveys would acquire data with two 45 in$^3$ GI funs at a tow depth of 2–4 m. As the entire survey occurs in deep water (>1000 m), L–DEO used the deep-water radii obtained from the model results explained above down to a maximum warter depth of 2000 m (see Figure A–1 in L–DEO's application). The estimated distances to the Level B harassment isopleth for the proposed survey are shown in Table 3. The acoustic propagation modeling methodologies are described in greater detail in L–DEO's IHA application.

TABLE 3—PREDICTED RADIAL DISTANCES TO ISOPLETHS CORRESPONDING TO THE LEVEL B HARASSMENT THRESHOLD

[160 dB re 1μPa (rms)]

| Airgun configuration | Water depth (m) | Predicted distances (m) to a received sound level of 160 dB re 1 $\mu Pa_{rms}$ |
|---|---|---|
| Two 45-in$^3$ GI guns | >1,000 | 553 |

Predicted distances to Level A harassment isopleths, which vary based on marine mammal hearing groups, were calculated based on modeling performed by L–DEO using the PGS Nucleus source modeling software program and the NMFS User Spreadsheet, described below. The acoustic thresholds for impulsive sounds (*e.g.,* airguns) contained in the Technical Guidance were presented as dual metric acoustic thresholds using both $SEL_{cum}$ and peak sound pressure metrics (NMFS 2018). As dual metrics, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (*i.e.,* metric resulting in the largest isopleth). The $SEL_{cum}$ metric considers both level and duration of exposure, as well as auditory weighting functions by marine mammal hearing group. In recognition of the fact that the requirement to calculate Level A harassment ensonified areas could be more technically challenging to predict due to the duration component and the use of weighting functions in the new $SEL_{cum}$ thresholds, NMFS developed an optional User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to facilitate the estimation of take numbers.

In order to more realistically incorporate the Technical Guidance's weighting functions over the seismic array's full acoustic band, unweighted spectrum data for the *Langseth's* airgun array (modeled in 1 Hz bands) was used to make adjustments (dB) to the unweighted spectrum levels, by frequency, according to the weighting functions for each relevant marine mammal hearing group. These adjusted/weighted spectrum levels were then converted to pressures (μPa) in order to integrate them over the entire broadband spectrum, resulting in broadband weight source levels by hearing group that could be directly incorporated within the User Spreadsheet (*i.e.,* to override the Spreadsheet's more simple weighting factor adjustment). Using the User Spreadsheet's ''safe distance'' methodology for mobile sources (described by Sivle *et al.,* 2014) with the hearing group-specific weighted source levels, and inputs assuming spherical spreading propagation and source velocities (2.32 m/s) and shot intervals (every 2.69 s) specific to the planned survey, potential radial distances to auditory injury zones were then calculated for $SEL_{cum}$ thresholds. Outputs from the User Spreadsheet in the form of estimated distance to Level A harassment isopleths for the survey are shown in Table 4. NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the dual metrics ($SEL_{cum}$ and $Peak_{flat}$) is exceeded (*i.e.,* metric resulting in the largest isopleth).

TABLE 4—MODELED RADIAL DISTANCES (m) TO ISOPLETHS CORRESPONDING TO LEVEL A HARASSMENT THRESHOLDS

| Source (volume) | Level A harassment zones (m) | | | | |
|---|---|---|---|---|---|
| | LF | MF | HF | Phocid | Otariid |
| Two 45 cu in GI guns | 28.6 | 0 | 0.1 | 0.3 | 0 |

Note that because of some of the assumptions included in the methods used (*e.g.,* stationary receiver with no vertical or horizontal movement in response to the acoustic source), isopleths produced may be overestimates to some degree, which will ultimately result in some degree of overestimation of Level A harassment. However, these tools offer the best way to predict appropriate isopleths when more sophisticated modeling methods are not available. NMFS continues to develop ways to quantitatively refine these tools and will qualitatively address the output where appropriate. For mobile sources, such as the proposed seismic survey, the User Spreadsheet predicts the closest distance at which a stationary animal would not incur PTS if the sound source traveled by the animal in a straight line at a constant speed.

Auditory injury for all species is unlikely to occur given the small modeled zones of injury (estimated zone less than 30 m for low-frequency cetaceans and near zero for all other species). Additionally, animals are expected to have aversive/compensatory behavior in response to the activity (Nachtigall *et al.,* 2018) further limiting the likelihood of auditory injury for all species. L–DEO did not request authorization of take by Level A harassment, and no take by Level A harassment is proposed for authorization by NMFS.

*Marine Mammal Occurrence*

In this section we provide information about the occurrence of marine mammals, including density or other relevant information, which will inform the take calculations.

The U.S. Navy (USN) primarily use the Southwest Fishery Science Center (SWFSC) habitat-based cetacean density models to develop a marine species density database for the Northwest Training and Testing Study Area, which encompasses the proposed survey area (USN 2019). For species where density spatial modeling was unavailable, other data sources were used. The USN marine species density database is currently the most comprehensive density data set available for the California Current Ecosystem (CCE) which encompasses waters off the coast of California, Oregon, and Washington. However, GIS data layers are currently unavailable for this database; thus, in this analysis the USN data were only used for species for which density data were not available from an alternative spatially-explicit model (*i.e.,* minke, sei, and killer whales, *Kogia* spp., and pinnipeds).

For most pinnipeds, L–DEO used the highest densities for spring, summer, or fall from USN (2019), but corrected the estimates by projecting the most recent population growth/updated population estimates to 2022, when available. This same approach was used by NMFS for previous L–DEO surveys (*e.g,.* Northeast Pacific Ocean Survey (85 FR 19580; April 7, 2020)) in the region in 2021. For California sea lions, spring densities from USN (2019) were used directly, the density for the '40–70 km from shore' distance band was used for the Oregon survey region, and the density for the '70–450 km from shore' distance band was used for other survey regions. For the northern fur seal, the density for the spring for the 'up to 70 km from shore' distance band was used for the Oregon survey region, and the spring density for the '>130 km from shore' distance band was used for the other survey regions. For the Guadalupe fur seal and Steller sea lion, summer densities for the '200 m isobath to 300 km from shore' were used. For the gray whale, the summer/fall density for the '10–47 km from shore' distance band (USN 2019) was used for the Oregon survey region and

a density of zero was used for all other survey regions. For killer whales, the annual density for all stocks occurring offshore was used from USN (2019).

Spatially-explicit density data from summer/fall from the NOAA CetSound website (NOAA 2022) were used for most other species (*i.e.,* humpback, blue, fin, sperm, Baird's, beaked, and other small beaked whales; striped, short-beaked common, Pacific white-sided, Risso's, and northern right whale dolphins; and Dall's porpoise. CetMap (*https://cetsound.noaa.gov/cda)* provides output of summer/fall habitat-based density models for cetaceans in the CCE (Becker *et al.,* 2020) in the form of GIS layers; these were used to calculate takes in the survey area. The density estimates were available in the form of a GIS grid with each cell in the grid measuring ~7 km east-west by 10 km north-south. This grid was intersected with a GIS layer of the area expected to be ensonified to >160 dB SPL from the survey area. North, west, and south boundaries are based on overlap/intersection with geographic extents of all four combined survey regions; eastern grid coverage limit was defined by inclusion of cells that contained >25 percent overlap with the angled boundary of the survey area polygon. The densities from all grid cells overlapping the ensonified areas were averaged to calculate an average species-specific density for each species (Table 5).

TABLE 5—MODELED MARINE MAMMAL DENSITY VALUES AND DAILY ENSONIFIED AREA FOR L–DEO'S PROPOSED SURVEY *

| Species | Density (#/km$^2$) | Daily ensonified area (km$^2$) | Number of seismic days | Source |
|---|---|---|---|---|
| LF Cetaceans: | | | | |
| Humpback whale | 0.000464 | 221 | 6 | Becker et al. (2020). |
| *Blue whale* | 0.000226 | 221 | 6 | Becker et al. (2020). |
| *Fin whale* | 0.00241 | 221 | 6 | Becker et al. (2020). |
| *Sei whale* | 0.0004 | 221 | 6 | USN (2019). |
| Minke whale | 0.0013 | 221 | 6 | USN (2019). |
| MF Cetaceans: | | | | |
| *Sperm whale* | 0.002859 | 221 | 6 | Becker et al. (2020). |
| Baird's beaked whale | 0.000407 | 221 | 6 | Becker et al. (2020). |
| Small beaked whale | 0.002446 | 221 | 6 | Becker et al. (2020). |
| Striped dolphin | 0.002095 | 221 | 6 | Becker et al. (2020). |
| Short-beaked common dolphin | 0.004845 | 221 | 6 | Becker et al. (2020). |
| Pacific white-sided dolphin | 0.059902 | 221 | 6 | Becker et al. (2020). |
| Northern right-whale dolphin | 0.049535 | 221 | 6 | Becker et al. (2020). |
| Risso's dolphin | 0.009917 | 221 | 6 | Becker et al. (2020). |
| Killer whale | 0.00092 | 221 | 6 | USN (2019). |
| HF Cetaceans: | | | | |
| Pygmy/dwarf sperm whale | 0.00163 | 221 | 6 | USN (2019). |
| Dall's porpoise | 0.093613 | 221 | 6 | Becker et al. (2020). |
| Otariid Seals: | | | | |
| Northern fur seal | * 0.036115/0.032983 | 221 | 6 | USN (2019). |
| *Guadalupe fur seal* | 0.02945 | 221 | 6 | USN (2019). |
| California sea lion | * 1.2951/0.0714 | 221 | 6 | USN (2019). |
| Steller sea lion | 0.002573 | 221 | 6 | USN (2019). |
| Phocid Seal: | | | | |
| Northern elephant seal | 0.043301 | 221 | 6 | USN (2019). |

* Species in this table differ slightly from those included in L–DEO's application as NMFS has determined that their occurrence in the survey area is rare and unlikely to be encountered. For more information, please see the Description of Marine Mammals in the Area of Specified Activity section of this notice.

** Two different densities were used depending on water depth/distance from shore.

*Take Estimation*

Here we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization. In order to estimate the number of marine mammals predicted to be exposed to sound levels that would result in Level B harassment, radial distances from the airgun array to the predicted isopleth corresponding to the Level B harassment thresholds are calculated, as described above. Those radial distances are then used to calculate the area(s) around the airgun array predicted to be ensonified to sound levels that exceed the Level B harassment threshold. The distance for the 160-dB threshold (based on L–DEO model results) was used to draw a buffer around the area expected to be ensonified (*i.e.,* the survey area). The ensonified areas were then increased by 25 percent to account for potential delays, which is the equivalent to adding 25 percent to the proposed line km to be surveyed. The density for each species in Table 5 were then multiplied by the daily ensonified areas expected to be ensonified, increased by 25 percent, and then multiplied by the number of survey days (6) to estimate the Level B takes.

The marine mammals predicted to occur within these respective areas, based on the estimated densities, are assumed to be incidentally taken. Estimated exposures for the proposed survey are shown in Table 6.

TABLE 6—ESTIMATED TAKE BY LEVEL B HARASSMENT, AND PERCENTAGE OF MARINE MAMMAL STOCK POPULATION

| Species | MMPA stock | Estimated take by Level B harassment | Take by level B harassment proposed for authorization | Stock abundance | Percent of MMPA stock |
|---|---|---|---|---|---|
| Humpback whale [a] | California/Oregon Washington | 1 | [d] 2 | 4,973 | 0.04 |
| Blue whale | Eastern North Pacific | 0 | [d] 2 | 1,898 | 0.11 |
| Fin whale | California/Oregon Washington | 4 | 4 | 11,065 | 0.04 |
| Sei whale | Eastern North Pacific | 1 | [d] 2 | 519 | 0.39 |
| Minke whale | California/Oregon Washington | 2 | 2 | 915 | 0.22 |
| Sperm whale | California/Oregon Washington | 5 | [d] 7 | 1,997 | 0.35 |
| Baird's beaked whale | California/Oregon Washington | 1 | [d] 9 | 1,363 | 0.66 |
| Small beaked whale [b] | California/Oregon Washington | 4 | 4 | 3,044 | 0.13 |
| Striped dolphin | California/Oregon Washington | 3 | [d] 46 | 29,988 | 0.15 |
| Common dolphin | California/Oregon Washington | 8 | [d] 179 | 1,056,308 | 0.02 |
| Pacific white-sided dolphin | California/Oregon Washington | 99 | 99 | 34,998 | 0.28 |
| Northern right-whale dolphin | California/Oregon Washington | 82 | 82 | 29,285 | 0.28 |
| Risso's dolphin | California/Oregon Washington | 16 | [d] 22 | 6,336 | 0.35 |
| Killer whale | West Coast Transient | 2 | [d] 7 | 349 | 0.00 |
| | North Pacific Offshore | | | 300 | 0.00 |
| Pygmy/dwarf sperm whale | California/Oregon Washington | 3 | 3 | 4,111 | 0.07 |
| Dall's porpoise | California/Oregon Washington | 155 | 155 | 16,498 | 0.94 |
| Northern fur seal [c] | Eastern Pacific | 17 | 17 | 626,618 | 0.00 |
| | California | | | 530,376 | 0.00 |
| Guadalupe fur seal | Mexico | 49 | 49 | 34,187 | 0.14 |
| California sea lion | United States | 9 | 9 | 257,606 | 0.00 |
| Steller sea lion | Eastern | 4 | 4 | 43,201 | 0.01 |
| Northern elephant seal | California Breeding | 62 | 62 | 5,122 | 1.21 |

[a] Takes are allocated among the three DPSs in the area based on Wade 2021 (Oregon: 42 percent Central America DPS, 58 percent Mexico DPS; Washington: 6 percent Central America DPS, 25 percent Mexico DPS, 69 percent Hawaii DPS).
[b] Proposed takes include one each of Blainville's beaked whale, Stejneger's beaked whale, Cuvier's beaked whale, and Hubbs' beaked whale (see Appendix B of L–DEO's application for more information).
[c] In cases where multiple stocks are being affected, for the purposes of calculating the percentage of the stock impacted, the take is being analyzed as if all proposed takes occurred within each stock.
[d] Proposed take increased to mean group size from Barlow (2016).

**Proposed Mitigation**

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations.

L–DEO reviewed mitigation measures employed during seismic research surveys authorized by NMFS under previous incidental harassment authorizations, as well as recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), Weir and Dolman (2007), Nowacek *et al.* (2013), Wright (2014), and Wright and Cosentino (2015), and has proposed mitigation measures based on the above sources.

To reduce the potential for disturbance from acoustic stimuli associated with the activities, L–DEO proposed to implement mitigation measures for marine mammals. Mitigation measures that would be adopted during the planned survey include, but are not limited to: (1) Vessel speed or course alteration, provided that doing so would not compromise operation safety requirements. (2) GI-airgun shut down within EZs, and (3) ramp-up procedures.

*Vessel-Based Visual Mitigation Monitoring*

Visual monitoring requires the use of trained observers (herein referred to as visual protected species observers (PSOs)) to scan the ocean surface visually for the presence of marine mammals. The area to be scanned visually includes primarily the exclusion zone, within which observation of certain marine mammals requires shutdown of the acoustic source, but also the buffer zone. The buffer zone means an area beyond the exclusion zone to be monitored for the presence of marine mammals that may enter the exclusion zone. During pre-start clearance (*i.e.,* before ramp-up begins), the buffer zone also acts as an extension of the exclusion zone in that observations of marine mammals within the buffer zone would also prevent

airgun operations from beginning (*i.e.,* ramp-up). The buffer zone encompasses the area at and below the sea surface from the edge of the 100 m exclusion zone measured from the edges of the airgun array. Visual monitoring of the exclusion zone and adjacent waters is intended to establish and, when visual conditions allow, maintain zones around the sound source that are clear of marine mammals, thereby reducing or eliminating the potential for injury and minimizing the potential for more severe behavioral reactions for animals occurring closer to the vessel. Visual monitoring of the buffer zone is intended to (1) provide additional protection to naïve marine mammals that may be in the area during pre-clearance, and (2) during airgun use, aid in establishing and maintaining the exclusion zone by altering the visual observer and crew of marine mammals that are outside of, but may approach and enter, the exclusion zone.

L–DEO must use independent, dedicated, trained visual PSOs, meaning that the PSOs must be employed by a third-party observer provider, must not have tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of protected species and mitigation requirements, and must have successfully completed an approved PSO training course. PSO resumes shall be provided to NMFS for approval.

At least one visual PSO must have a minimum of 90 days at-sea experience working in that role during a shallow penetration or low-energy survey, with no more than 18 months elapsed since the conclusion of the at-sea experience. One PSO with such experience shall be designated as the lead for the entire protected species observation team. The lead PSO shall serve as primary point of contact for the vessel operator and ensure all PSO requirements per the IHA are met. To the maximum extent practicable, the experienced PSOs should be scheduled to be on duty with those PSOs with the appropriate training but who have not yet gained relevant experience.

During survey operations (*e.g.,* any day on which use of the acoustic source is planned to occur, and whenever the acoustic source is in the water, whether activated or not), a minimum of two PSOs must be on duty and conducting visual observations at all times during daylight hours (*i.e.,* from 30 minutes prior to sunrise through 30 minutes following sunset) and 30 minutes prior to and during ramp-up of the airgun array. Visual monitoring of the exclusion and buffer zones must begin no less than 30 minutes prior to ramp-up and must continue until one hour after use of the acoustic source ceases or until 30 minutes past sunset. Visual PSOs must coordinate to ensure 360 degree visual coverage around the vessel from the most appropriate observation posts, and must conduct visual observations using binoculars and the naked eye while free from distractions and in a consistent, systematic, and diligent manner.

PSOs shall establish and monitor the exclusion and buffer zones. These zones shall be based upon the radial distance from the edges of the acoustic source (rather than being based on the center of the array or around the vessel itself). During use of the acoustic source (*i.e.,* anytime airguns are active, including ramp-up) shall be communicated to the operator to prepare for the potential shutdown of the acoustic source.

During use of the airgun, detections of marine mammals within the buffer zone (but outside the exclusion zone) should be communicated to the operator to prepare for the potential shutdown of the acoustic source. Visual PSOs will immediately communicate all observations to the on duty acoustic PSO(s), including any determination by the PSO regarding species identification, distance, and bearing and the degree of confidence in the determination. Any observations of marine mammals by crew members shall be relayed to the PSO team. During good conditions (*e.g.,* daylight hours; Beaufort sea state (BSS) 3 or less), visual PSOs shall conduct observations when the acoustic source is not operating for comparison of sightings rates and behavior with and without use of the acoustic source and between acquisition periods, to the maximum extent practicable.

Visual PSOs may be on watch for a maximum of four consecutive hours followed by a break of at least one hour between watches and may conduct a maximum of 12 hours of observation per 24-hour period.

*Establishment of Exclusion and Buffer Zones*

An exclusion zone (EZ) is a defined area within which occurrence of a marine mammal triggers mitigation action intended to reduce the potential for certain outcome, *e.g.,* auditory injury, disruption of critical behaviors. The PSOs would establish a minimum EZ with a 100 m radius with an additional 100 m buffer zone (total of 200 m). The 200m zone would be based on radial distance from the edge of the airgun array (rather than being based on the center of the array or around the vessel itself). With certain exceptions (described below), if a marine mammal appears within or enters this zone, the acoustic source would be shut down.

The 100 m EZ, with additional 100 m buffer zone, is intended to be precautionary in the sense that it would be expected to contain sound exceeding the injury criteria for all cetacean hearing groups, (based on the dual criteria of $SEL_{cum}$ and peak SPL), while also providing a consistent, reasonably observable zone within which PSOs would typically be able to conduct effective observational effort. Additionally, a 100 m EZ is expected to minimize the likelihood that marine mammals will be exposed to levels likely to result in more severe behavioral responses. Although significantly greater distances may be observed from an elevated platform under good conditions, we believe that 100 m is regularly attainable for PSOs using the naked eye during typical conditions.

An extended 500 m exclusion zone must be established for all beaked whales, dwarf and pygmy sperm whales, killer whales, a large whale with a calf, and groups of six or more large whales during all survey effort. No buffer zone is required.

*Pre-Clearance and Ramp-Up*

Ramp-up (sometimes referred to as ''soft start'') is the gradual and systematic increase of emitted sound levels from an airgun array. Ramp-up would begin with one GI airgun 45 cu in first being activated, followed by the second after 5 minutes. The intent of pre-clearance observation (30 minutes) is to ensure no marine mammals are observed within the buffer zone prior to the beginning of ramp-up. During pre-clearance is the only time observations of marine mammals in the buffer zone would prevent operations (*i.e.,* the beginning of ramp-up). The intent of ramp-up is to warn protected species of pending seismic operations and to allow sufficient time for those animals to leave the immediate vicinity. A ramp-up procedure, involving a step-wise increase in the number of airguns are activated and the full volume is achieve, is required at all times as part of the activation of the acoustic source. All operators must adhere to the following pre-clearance and ramp-up requirements:

- The operator must notify a designated PSO of the planned start of ramp-up as agreed upon with the lead PSO; the notification time should not be less than 60 minutes prior to the planned ramp-up in order to allow PSOs time to monitor the exclusion and buffer

zones for 30 minutes prior to the initiation of ramp-up (pre-clearance);

- Ramp-ups shall be scheduled so as to minimize the time spent with the source activated prior to reaching the designated run-in;
- One of the PSOs conducting pre-clearance observations must be notified again immediately prior to initiating ramp-up procedures and the operator must receive confirmation from the PSO to proceed;
- Ramp-up may not be initiated if any marine mammal is within the applicable exclusion or buffer zone. If a marine mammal is observed within the applicable exclusion zone or the buffer zone during the 30 minutes pre-clearance period, ramp-up may not begin until the animal(s) has been observed exiting the zones or until an additional time period has elapsed with no further sightings (15 minutes for small odontocetes and pinnipeds, and 30 minutes for Mysticetes and all other odontocetes, including sperm whales, pygmy sperm whales, dwarf sperm whales, beaked whales, pilot whales, killer whales, Risso's dolphin);
- PSOs must monitor the exclusion and buffer zones during ramp-up, and ramp-up must cease and the source must be shut down upon detection of a marine mammal within the applicable exclusion zone. Once ramp-up has begun, detections of marine mammals within the buffer zone do not require shutdown, but such observation shall be communicated to the operator to prepare for the potential shutdown.
- If the acoustic source is shut down for brief periods (*i.e.,* less than 30 minutes) for reasons other than that described for shutdown (*e.g.,* mechanical difficulty), it may be activated again without ramp-up if PSOs have maintained constant observation and no detections of marine mammals have occurred within the applicable exclusion zone. For any longer shutdown, pre-start clearance observation and ramp-up are required. For any shutdown at night or in periods of poor visibility (*e.g.,* BSS 4 or greater), ramp-up is required, but if the shutdown period was brief and constant observation was maintained, pre-start clearance watch is not required.
- Testing of the acoustic source involving all elements requires ramp-up. Testing limited to individual source elements or strings does not require ramp-up but does require pre-start clearance watch.

*Shutdown*

The shutdown of an airgun array requires the immediate de-activation of all individual airgun elements of the array. Any PSO on duty will have the authority to delay the start of survey operations or to call for shutdown of the acoustic source if a marine mammal is detected within the applicable exclusion zone. The operator must also establish and maintain clear lines of communication directly between PSOs on duty and crew controlling the acoustic source to ensure that shutdown commands are conveyed swiftly while allowing PSOs to maintain watch. When both visual and acoustic PSOs are on duty, all detections will be immediately communicated to the remainder of the on-duty PSO team for potential verification of visual observations by the acoustic PSO or of acoustic detections by visual PSOs. When the airgun array is active (*i.e.,* anytime one or more airguns is active, including during ramp-up) and (1) a marine mammal appears within or enters the applicable exclusion zone and/or (2) a marine mammal (other than delphinids, see below) is detected acoustically and localized within the applicable exclusion zone, the acoustic source will be shut down. When shutdown is called for by a PSO, the acoustic source will be immediately deactivated and any dispute resolved only following deactivation.

Following a shutdown, airgun activity would not resume until the marine mammal has clear the EZ. The animal would be considered to have cleared the EZ if it is visually observed to have departed the EZ, or it has not been seen within the EZ for 15 minutes in the case of small odontocetes and pinnipeds, and 30 minutes for Mysticetes and all other odontocetes, including sperm whales, beaked whales, pilot whales, killer whales, and Risso's dolphin) with no further observation of the marine mammal(s).

The shutdown requirement can be waived for small dolphins if an individual is visually detected and localized within an exclusion zone. As defined here, the small dolphin group is intended to encompass those members of the Family Delphinidae most likely to voluntarily approach the source vessel for purposes of interacting with the vessel and/or airgun array (*e.g.,* bow riding). This exception to the shutdown requirement applies solely to specific genera of small dolphins-*Delphinus, Stenella,* and *Lissodelphis.*

We propose this small dolphin exception because shutdown requirements for small dolphins under all circumstances represent practicability concerns without likely commensurate benefits for the animals in question. Small dolphins are generally the most commonly observed marine mammals in the specific geographic region and would typically be the only marine mammals likely to intentionally approach the vessel. As described above, auditory injury is extremely unlikely to occur for mid-frequency cetaceans (*e.g.,* delphinids), as this group is relatively insensitive to sound produced at the predominant frequencies in an airgun pulse while also having a relatively high threshold for the onset of auditory injury *(i.e.,* permanent threshold shift).

A large body of anecdotal evidence indicates that small dolphins commonly approach vessels and/or towed arrays during active sound production for purposes of bow riding, with no apparent effect observed in those delphinids (*e.g.,* Barkaszi *et al.,* 2012). The potential for increased shutdowns resulting from such a measure would require the *Langseth* to revisit the missed track line to reacquire data, resulting in an overall increase in the total sound energy input to the marine environment and an increase in the total duration over which the survey is active in a given area. Although other mid-frequency hearing specialists (*e.g.,* large delphinids) are no more likely to incur auditory injury than are small dolphins, they are much less likely to approach vessels. Therefore, retaining a shutdown requirement for large delphinids would not have similar impacts in terms of either practicability for the applicant or corollary increase in sound energy output and time on the water. We do anticipate some benefit for a shutdown requirement for large delphinids in that it simplifies somewhat the total range of decision-making for PSOs and may preclude any potential for physiological effects other than to the auditory system as well as some more severe behavioral reactions for any such animals in close proximity to the source vessel. Visual PSOs shall use best professional judgment in making the decision to call for a shutdown if there is uncertainty regarding identification (*i.e.,* whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived or one of the species with a larger exclusion zone).

Upon implementation of shutdown, the source may be reactivated after the marine mammal(s) has been observed exiting the applicable exclusion zone (*i.e.,* animal is not required to fully exit the buffer zone where applicable) or following a clearance period (15 minutes for small odontocetes and pinnipeds, and 30 minutes for mysticetes and all other odontocetes, including sperm whales, beaked whales, pilot whales, killer whales, and Risso's

dolphin) with no further observation of the marine mammal(s).

L–DEO must implement shutdown if a marine mammal species for which take was not authorized, or a species for which authorization was granted but the takes have been met, approaches the Level B harassment zones.

*Vessel Strike Avoidance*

These measures apply to all vessels associated with the planned survey activity; however, we note that these requirements do not apply in any case where compliance would create an imminent and serious threat to a person or vessel or to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply. These measures include the following:

1. Vessel operators and crews must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course, as appropriate and regardless of vessel size, to avoid striking any marine mammal. A single marine mammal at the surface may indicate the presence of submerged animals in the vicinity of the vessel; therefore, precautionary measures should be exercised when an animal is observed. A visual observer aboard the vessel must monitor a vessel strike avoidance zone around the vessel (specific distances detailed below), to ensure the potential for strike is minimized. Visual observers monitoring the vessel strike avoidance zone can be either third-party observers or crew members, but crew members responsible for these duties must be provided sufficient training to distinguish marine mammals from other phenomena and broadly to identify a marine mammal to broad taxonomic group (*i.e.,* as a large whale or other marine mammal);

2. Vessel speeds must be reduced to 10 kn or less when mother/calf pairs, pods, or large assemblages of any marine mammal are observed near a vessel;

3. All vessels must maintain a minimum separation distance of 100 m from large whales (*i.e.,* sperm whales and all mysticetes);

4. All vessels must attempt to maintain a minimum separation distance of 50 m from all other marine mammals, with an exception made for those animals that approach the vessel; and

5. When marine mammals are sighted while a vessel is underway, the vessel should take action as necessary to avoid violating the relevant separation distance (*e.g.,* attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area). If marine mammals are sighted within the relevant separation distance, the vessel should reduce speed and shift the engine to neutral, not engaging the engines until animals are clear of the area. This recommendation does not apply to any vessel towing gear.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Proposed Monitoring and Reporting**

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

*Vessel-Based Visual Monitoring*

As described above, PSO observations would take place during daytime airgun operations. During seismic operations, at least three visual PSO would be based aboard the *Langseth.* Two visual PSOs would be on duty at all time during daytime hours. Monitoring shall be conducted in accordance with the following requirements:

- PSOs shall be independent, dedicated and trained and must be employed by a third-party observer provider;
- PSOs shall have no tasks other than to conduct visual observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of protected species and mitigation requirements (including brief alerts regarding maritime hazards);
- PSOs shall have successfully completed an approved PSO training course appropriate for their designated task (visual or acoustic);
- NMFS must review and approve PSO resumes accompanied by a relevant training course information packet that includes the name and qualifications (*i.e.,* experience, training completed, or educational background) of the instructor(s), the course outline or syllabus, and course reference material as well as a document stating successful completion of the course;
- NMFS shall have one week to approve PSOs from the time that the necessary information is submitted, after which PSOs meeting the minimum requirements shall automatically be considered approved;
- PSOs must successfully complete relevant training, including completion of all required coursework and passing (80 percent or greater) a written and/or oral examination developed for the training program;
- PSOs must have successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences, a minimum of 30 semester hours or equivalent in the biological sciences, and at least one undergraduate course in math or statistics; and

• The educational requirements may be waived if the PSO has acquired the relevant skills through alternate experience. Requests for such a waiver shall be submitted to NMFS and must include written justification. Requests shall be granted or denied (with justification) by NMFS within one week of receipt of submitted information. Alternate experience that may be considered includes, but is not limited to (1) secondary education and/or experience comparable to PSO duties; (2) previous work experience conducting academic, commercial, or government-sponsored protected species surveys; or (3) previous work experience as a PSO; the PSO should demonstrate good standing and consistently good performance of PSO duties.

PSOs must use standardized data collection forms, whether hard copy or electronic. PSOs must record detailed information about any implementation of mitigation requirements, including the distance of animals to the acoustic source and description of specific actions that ensued, the behavior of the animal(s), any observed changes in behavior before and after implementation of mitigation, and if shutdown was implemented, the length of time before any subsequent ramp-up of the acoustic source. If required mitigation was not implemented, PSOs should record a description of the circumstances. At a minimum, the following information must be recorded:

• Vessel name and call sign;
• PSO names and affiliations;
• Date and participants of PSO briefings (as discussed in General Requirement);
• Dates of departure and return to port with port name;
• Dates and times (Greenwich Mean Time) of survey effort and times corresponding with PSO effort;
• Vessel location (latitude/longitude) when survey effort began and ended and vessel location at beginning and end of visual PSO duty shifts;
• Vessel heading and speed at beginning and end of visual PSO duty shifts and upon any line change;
• Environmental conditions while on visual survey (at beginning and end of PSO shift and whenever conditions changed significantly), including BSS and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon;
• Factors that may have contributed to impaired observations during each PSO shift change or as needed as environmental conditions changed (*e.g.,* vessel traffic, equipment malfunctions); and
• Survey activity information, such as acoustic source power output while in operation, number and volume of airguns operating in the array, tow depth of the array, and any other notes of significance (*i.e.,* pre-start clearance, ramp-up, shutdown, testing, shooting, ramp-up completion, end of operations, streamers, *etc.*).

The following information should be recorded upon visual observation of any marine mammal:

• Watch status (sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);
• PSO who sighted the animal;
• Time of sighting;
• Vessel location at time of sighting;
• Water depth;
• Direction of vessel's travel (compass direction);
• Direction of animal's travel relative to the vessel;
• Pace of the animal;
• Estimated distance to the animal and its heading relative to vessel at initial sighting;
• Identification of the animal (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified) and the composition of the group if there is a mix of species;
• Estimated number of animals (high/low/best);
• Estimated number of animals by cohort (adults, yearlings, juveniles, calves, group composition, *etc.*);
• Description (as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);
• Detailed behavior observations (*e.g.,* number of blows/breaths, number of surfaces, breaching, spyhopping, diving, feeding, traveling; as explicit and detailed as possible; note any observed changes in behavior);
• Animal's closest point of approach (CPA) and/or closest distance from any element of the acoustic source;
• Platform activity at time of sighting (*e.g.,* deploying, recovering, testing, shooting, data acquisition, other); and
• Description of any actions implemented in response to the sighting (*e.g.,* delays, shutdown, ramp-up) and time and location of the action.

*Reporting*

L–DEO must submit a draft comprehensive report to NMFS on all activities and monitoring results within 90 days of the completion of the survey or expiration of the IHA, whichever comes sooner. A final report must be submitted within 30 days following resolution of any comments on the draft report. The report would describe the operations that were conducted and sightings of marine mammals near the operations. The report would provide full documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day report would summarize the dates and locations of seismic operations, and all marine mammal sightings (dates, times, locations, activities, associated seismic survey activities). The report would also include estimates of the number and nature of exposures that occurred above the harassment threshold based on PSO observations and including an estimate of those that were not detected, in consideration of both the characteristics and behaviors of the species of marine mammals that affect detectability, as well as the environmental factors that affect detectability.

The draft report shall also include geo-referenced time-stamped vessel tracklines for all time periods during which airguns were operating. Tracklines should include points recording any change in airgun status (*e.g.,* when the airguns began operating, when they were turned off, or when they changed from full array to single gun or vice versa). GIS files shall be provided in ESRI shapefile format and include the UTC date and time, latitude in decimal degrees, and longitude in decimal degrees. All coordinates shall be referenced to the WGS84 geographic coordinate system. In addition to the report, all raw observational data shall be made available to NMFS. The report must summarize the information submitted in interim monthly reports as well as additional data collected as described above and in the IHA. A final report must be submitted within 30 days following resolution of any comments on the draft report.

*Reporting Injured or Dead Marine Mammals*

Discovery of injured or dead marine mammals—In the event that personnel involved in survey activities covered by the authorization discover an injured or dead marine mammal, the L–DEO shall report the incident to the Office of Protected Resources (OPR), NMFS and to the NMFS West Coast Regional Stranding Coordinator as soon as feasible. The report must include the following information:

• Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
• Species identification (if known) or description of the animal(s) involved;

- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Vessel strike—In the event of a ship strike of a marine mammal by any vessel involved in the activities covered by the authorization, L–DEO shall report the incident to OPR, NMFS and to the NMFS West Coast Regional Stranding Coordinator as soon as feasible. The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Vessel's speed during and leading up to the incident;
- Vessel's course/heading and what operations were being conducted (if applicable);
- Status of all sound sources in use;
- Description of avoidance measures/requirements that were in place at the time of the strike and what additional measure were taken, if any, to avoid strike;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;
- Species identification (if known) or description of the animal(s) involved;
- Estimated size and length of the animal that was struck;
- Description of the behavior of the animal immediately preceding and following the strike;
- If available, description of the presence and behavior of any other marine mammals present immediately preceding the strike;
- Estimated fate of the animal (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and
- To the extent practicable, photographs or video footage of the animal(s).

*Actions To Minimize Additional Harm to Live-Stranded (or Milling) Marine Mammals*

In the event of a live stranding (or near-shore atypical milling) event within 50 km of the survey operations, where the NMFS stranding network is engaged in herding or other interventions to return animals to the water, the Director of OPR, NMFS (or designee) will advise L–DEO of the need to implement shutdown procedures for all active acoustic sources operating within 50 km of the stranding. Shutdown procedures for live stranding or milling marine mammals include the following: If at any time, the marine mammal the marine mammal(s) die or are euthanized, or if herding/intervention efforts are stopped, the Director of OPR, NMFS (or designee) will advise the IHA-holder that the shutdown around the animals' location is no longer needed. Otherwise, shutdown procedures will remain in effect until the Director of OPR, NMFS (or designee) determines and advises L–DEO that all live animals involved have left the area (either of their own volition or following an intervention).

If further observations of the marine mammals indicate the potential for re-stranding, additional coordination with the IHA-holder will be required to determine what measures are necessary to minimize that likelihood (*e.g.,* extending the shutdown or moving operations farther away) and to implement those measures as appropriate.

Additional Information Requests—if NMFS determines that the circumstances of any marine mammal stranding found in the vicinity of the activity suggest investigation of the association with survey activities is warranted, and an investigation into the stranding is being pursued, NMFS will submit a written request to L–DEO indicating that the following initial available information must be provided as soon as possible, but no later than 7 business days after the request for information:

- Status of all sound source use in the 48 hours preceding the estimated time of stranding and within 50 km of the discovery/notification of the stranding by NMFS; and
- If available, description of the behavior of any marine mammal(s) observed preceding (*i.e.,* within 48 hours and 50 km) and immediately after the discovery of the stranding.

In the event that the investigation is still inconclusive, the investigation of the association of the survey activities is still warranted, and the investigation is still being pursued, NMFS may provide additional information requests, in writing, regarding the nature and location of survey operations prior to the time period above.

*Reporting Species of Concern*

To support NMFS's goal of improving our understanding of occurrence of marine mammal species or stocks in the area (*e.g.,* presence, abundance, distribution, density), L–DEO will immediately report observations of Southern Resident killer whales or North Pacific right whales to OPR, NMFS. Although, the likelihood of encountering either species is considered to be rare and unexpected.

**Negligible Impact Analysis and Determination**

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the discussion of our analysis applies to all the species listed in Table 6, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar, except where a species- or stock-specific discussion is warranted. NMFS does not anticipate that serious injury or mortality would occur as a result from low-energy surveys, even in the absence of mitigation, and no serious injury or mortality is proposed to be authorized. As discussed in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section, non-auditory physical effects and vessel strike are not expected to occur. NMFS expects that all potential take would be in the form of Level B behavioral harassment in the form of temporary avoidance of the area or decreased

foraging (if such activity was occurring), responses that are considered to be of low severity, and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007, 2021). TTS is not expect for most hearing groups (HF, MF, otariids and phocids) and is considered to be highly unlikely for LF cetaceans. Even repeated Level B harassment of some small subset of an overall stock is unlikely to result in any significant realized decrease in viability for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. As described above, Level A harassment is not expected to occur given the estimated small size of the Level A harassment zones.

In addition to being temporary, the maximum expected Level B harassment zone around the survey vessel is 553 m. Therefore, the ensonified area surrounding the vessel is relatively small compared to the overall distribution of animals in the area and their use of the habitat. Feeding behavior is not likely to be significantly impacted as prey species are mobile and are broadly distributed throughout the survey area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the short duration (6 days) and temporary nature of the disturbance and the availability of similar habitat and resources in the surrounding area, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

The entire U.S. West Coast within 47 km of the coast is a BIA for migrating gray whale potential presence January to July and October to December. The BIA for northbound gray whale migration is broken into two phases, Phase A (within 8 km of shore) and Phase B (within 5 km of shore), which are active from January to July and March to July, respectively. The BIA for southbound migration includes waters within 10 km of shore and is active from October to March. All planned survey areas are outside of all gray whale BIAs and no takes of gray whales are proposed for authorization. There are also two humpback whale feeding BIAs (Stonewall and Heceta Bank) adjacent to the survey area, however no overlap occurs between the survey area and the BIAs. There are no rookeries, mating or calving grounds known to be biologically important to marine mammals within the proposed survey area.

Critical habitat for the Mexico and Central America DPSs of humpback whales has been established along the U.S. West Coast (86 FR 21082; May 5, 2021), and NMFS has expanded the Southern Resident killer whale critical habitat to include coastal waters of Washington, Oregon, and California (86 FR 41668; August 2, 2021). No part of L–DEO's proposed seismic survey will occur in or near these critical habitats.

No permanent hearing impairment (Level A harassment) is anticipated or proposed to be authorized. Authorized takes of killer whales is expected to comprise almost entirely of the West Coast Transient and/or North Pacific Offshore stocks as Southern Resident killer whales are typically confined to coastal and inland waters. Therefore take of Southern Resident killer whales is unlikely given the far offshore location of the proposed survey, and no take of Southern Resident killer whales is proposed for authorization.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- The proposed activity is temporary and of relatively short duration (6 days);
- The anticipated impacts of the proposed activity on marine mammals would be temporary behavioral changes due to avoidance of the area around the vessel;
- No take by Level A harassment is proposed for authorization;
- The availability of alternative areas of similar habitat value for marine mammals to temporarily vacate the survey area during the proposed survey to avoid exposure to sounds from the activity is readily abundant;
- The potential adverse effects on fish or invertebrate species that serve as prey species for marine mammals from the proposed survey would be temporary and spatially limited, and impacts to marine mammal foraging would be minimal; and
- The proposed mitigation measures, including visual, shutdowns, and enhanced measures for areas of biological importance (*e.g.,* additional monitoring vessel, daylight operations only) are expected to minimize potential impacts to marine mammals (both amount and severity).

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

**Small Numbers**

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS proposes to authorize is below one third of the estimated stock abundance for all species (in fact, take of individuals is less than ten percent of the abundance of the affected stocks, see Table 6). This is likely a conservative estimate because we assume all takes are of different individual animals, which is likely not the case. Some individuals may be encountered multiple times in a day, but PSOs would count them as separate individuals if they cannot be identified.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

**Unmitigable Adverse Impact Analysis and Determination**

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

**Endangered Species Act**

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal

agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the ESA Interagency Cooperation Division within NMFS' Office of Protected Resources (OPR).

NMFS is proposing to authorize take of blue whales, fin whales, sei whales, sperm whales, Central America DPS humpback whales, Mexico DPS humpback whales, and Guadalupe fur seal, which are listed under the ESA. The NMFS OPR Permits and Conservation Division has requested initiation of Section 7 consultation with the NMFS OPR ESA Interagency Cooperation Division for the issuance of this IHA. NMFS will conclude the ESA consultation prior to reaching a determination regarding the proposed issuance of the authorization.

## Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to L–DEO for conducting geophysical surveys in the Northeast Pacific Ocean during Summer 2022, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities.*

## Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed survey. We also request comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, one-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical activities as described in the Description of Proposed Activities section of this notice is planned or (2) the activities as described in the Description of Proposed Activities section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: June 16, 2022.

**Kimberly Damon-Randall,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

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# FEDERAL REGISTER

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Part III

## Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 484

Medicare Program; Calendar Year (CY) 2023 Home Health Prospective Payment System Rate Update; Home Health Quality Reporting Program Requirements; Home Health Value-Based Purchasing Expanded Model Requirements; and Home Infusion Therapy Services Requirements; Proposed Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Part 484**

**[CMS–1766–P]**

**RIN 0938–AU77**

# Medicare Program; Calendar Year (CY) 2023 Home Health Prospective Payment System Rate Update; Home Health Quality Reporting Program Requirements; Home Health Value-Based Purchasing Expanded Model Requirements; and Home Infusion Therapy Services Requirements

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would set forth routine updates to the Medicare home health and home infusion therapy services payment rates for calendar year (CY) 2023 in accordance with existing statutory and regulatory requirements. This proposed rule discusses home health utilization; proposes a methodology for determining the difference between assumed versus actual behavior change on estimated aggregate expenditures for home health payments as result of the change in the unit of payment to 30 days and the implementation of the Patient Driven Groupings Model (PDGM) case-mix adjustment methodology; and proposes a temporary retrospective and permanent prospective adjustment to the CY 2023 home health payment rates. This rule proposes reassignment of certain diagnosis codes under the PDGM. and proposes to establish a permanent mitigation policy to smooth the impact of year-to-year changes in home health payments related to changes in the home health wage index. This rule also proposes recalibration of the PDGM case-mix weights and updates the low utilization payment adjustment (LUPA) thresholds, functional impairment levels, comorbidity adjustment subgroups for CY 2023 and the fixed-dollar loss ratio (FDL) used for outlier payments. Additionally, this rule discusses the future collection of data regarding the use of telecommunications technology during a 30-day home health period of care on home health claims. In addition, this rule proposes changes to the Home Health Quality Reporting Program (HH QRP) requirements; changes to the expanded Home Health Value-Based Purchasing (HHVBP) Model; and updates to the home infusion therapy services payment rates for CY 2023.

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on August 16, 2022.

**ADDRESSES:** In commenting, please refer to file code CMS–1766–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *https://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1766–P, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1766–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Brian Slater, (410) 786–5229, for home health and home infusion therapy payment inquiries.

For general information about home infusion payment, send your inquiry via email to *HomeInfusionPolicy@cms.hhs.gov.*

For general information about the Home Health Prospective Payment System (HH PPS), send your inquiry via email to *HomeHealthPolicy@cms.hhs.gov.*

For information about the Home Health Quality Reporting Program (HH QRP), send your inquiry via email to *HHQRPquestions@cms.hhs.gov.*

For more information about the expanded Home Health Value-Based Purchasing Model, please visit the Expanded HHVBP Model web page at *https://innovation.cms.gov/innovation-models/expanded-home-health-value-based-purchasing-model.*

**SUPPLEMENTARY INFORMATION:**

## I. Executive Summary and Advancing Health Information Exchange

### *A. Executive Summary*

#### 1. Purpose and Legal Authority

##### a. Home Health Prospective Payment System (HH PPS)

As required under section 1895(b) of the Social Security Act (the Act), this proposed rule would update the payment rates for HHAs for CY 2023. In addition, the rule would: recalibrate the case-mix weights under section 1895(b)(4)(A)(i) and (b)(4)(B) of the Act for 30-day periods of care in CY 2023; determine the impact of differences between assumed behavior changes and actual behavior changes on estimated aggregate expenditures for CYs 2020–2021 in accordance with section 1895(b)(3)(D)(i) of the Act; propose a permanent payment adjustment to the CY 2023 30-day payment rate and solicit comments on a temporary payment adjustment to the 30-day payment rate in accordance with section 1895(b)(3)(D)(ii) and (iii) of the Act; update the LUPA thresholds, functional impairment levels, and comorbidity subgroups for CY 2023; and update the CY 2023 fixed-dollar loss ratio (FDL) for outlier payments (so that outlier payments as a percentage of estimated total payments are not to exceed 2.5 percent, as required by section 1895(b)(5)(A) of the Act). This proposed rule also includes a solicitation of comments on the collection of data on the use of telecommunications technology on home health claims.

##### b. Home Health (HH) Quality Reporting Program (QRP)

This proposed rule proposes to end the suspension of the collection of Outcome and Assessment Information Set (OASIS) data on non-Medicare and non-Medicaid patients under section 704 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, and to require HHAs to report all-payer OASIS data for purposes of the HH QRP, beginning with the CY 2025 program year. We are proposing to amend the regulatory text to make a technical change that consolidates the statutory references to data submission. We also propose to codify in our regulations the factors we adopted in the CY 2019 HH PPS final rule as the factors we will consider when determining whether to remove measures from the HH QRP measure set. Finally, we are requesting feedback on a Request for Information on Health Equity in the HH QRP.

c. Expanded Home Health Value Based Purchasing (HHVBP) Model

In accordance with the statutory authority at section 1115A of the Act, we are proposing updated policies, new definitions and modifying existing definitions, and conforming regulation text changes for the expanded Home Health Value-Based Purchasing (HHVBP) expanded Model and requesting comment on a potential future approach to health equity in the expanded HHVBP Model.

d. Medicare Coverage of Home Infusion Therapy

This proposed rule discusses updates to the home infusion therapy services payment rates for CY 2023 under section 1834(u) of the Act.

2. Summary of the Provisions of This Rule

a. Home Health Prospective Payment System (HH PPS)

In section II.B.1. of this proposed rule, we provide monitoring and data analysis on PDGM utilization for CYs 2020 and 2021. In section II.B.2. of this rule, we propose payment adjustments to reflect the impact of differences between assumed behavior changes and actual behavior changes on estimated aggregate payment expenditures under the HH PPS. In section II.B.3 of this rule, we discuss the proposal to reassign certain ICD–10–CM codes related to the PDGM clinical groups and comorbidity subgroups.

In section II.B.4. of this rule, we are proposing the recalibration of the PDGM case-mix weights, LUPA thresholds, functional levels, and comorbidity adjustment subgroups for CY 2023.

In section II.B.5. of this rule, we propose to update the home health wage index, the CY 2023 national, standardized 30-day period payment rates and the CY 2023 national per-visit payment amounts by the home health payment update percentage. The proposed home health payment update percentage for CY 2023 would be 2.9 percent. This rule also proposes a permanent 5-percent cap on HHA's applicable wage index reductions from their wage index from the prior year, regardless of the circumstances causing the decline. Additionally, this rule proposes the FDL ratio to ensure that aggregate outlier payments do not exceed 2.5 percent of the total aggregate payments, as required by section 1895(b)(5)(A) of the Act.

In section II.B.6. of this proposed rule, we include a comment solicitation on the collection of data on the use of telecommunications technology on home health claims.

b. HH QRP

In section III.D. of this proposed rule, we are proposing to end the temporary suspension of non-Medicare/non-Medicaid data under section 704 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 and, in accordance with section 1895(b)(3)(B)(v) of the Act, to require HHAs to report all-payer OASIS data for purposes of the HH QRP, beginning with the CY 2025 program year. In section III.E. of this rule, we are proposing technical changes in § 484.245(b)(1). In section III.F. of this rule, we are proposing to codify in our regulations the factors we adopted in the CY 2019 HH PPS final rule as the factors we will consider when determining whether to remove measures from the HH QRP measure set. Lastly, in section III.G. of this rule, we are requesting feedback on a Request for Information on Health Equity in the HH QRP.

c. Expanded Home Health Value Based Purchasing (HHVBP) Model

In section IV. of this proposed rule, we are proposing to change the HHA baseline year to CY 2022 for all HHAs that were certified prior to January 1, 2022 starting in the CY 2023 performance year. We would make conforming regulation text changes at § 484.350(b) and (c). We are also proposing to amend the Model baseline year from CY 2019 to CY 2022 starting in the CY 2023 performance year to enable CMS to measure competing HHAs performance on benchmarks and achievement thresholds that are more current. We are making conforming amendments to definitions in § 484.345. In section IV.C. of this proposed rule, we have included an RFI related to a potential future approach to health equity in the expanded HHVBP Model.

d. Medicare Coverage of Home Infusion Therapy

In section V. of this proposed rule, we discuss updates to the home infusion therapy services payment rates for CY 2023, under section 1834(u) of the Act.

3. Summary of Costs, Transfers, and Benefits

**TABLE 1: SUMMARY OF COSTS, TRANSFERS, AND BENEFITS**

| Provision Description | Costs and Cost Savings | Transfers | Benefits |
|---|---|---|---|
| CY 2023 HH PPS Payment Rate Update | | The overall economic impact related to the changes in payments under the HH PPS for CY 2023 is estimated to be $-810 million (-4.2 percent). The $810 million decrease in estimated payments for CY 2023 reflects the effects of the CY 2023 home health payment update percentage of 2.9 percent ($560 million increase), an estimated -6.9 percent decrease that reflects the effects of the permanent behavioral adjustment (1.3 billion) and an estimated -0.2 percent decrease that reflects the effects of an updated FDL ($40 million decrease). | To ensure that home health payments are consistent with statutory payment authority for CY 2023. |
| HH QRP | The total costs beginning in CY 2025 is an estimated $267,157,680.3 based upon the collection of OASIS data on all patients, regardless of payer. | | |
| Expanded HHVBP Model | | The overall economic impact of the expanded HHVBP Model for CYs 2023 through 2027 is an estimated $3.376 billion in total savings to Fee-for-Service (FFS) Medicare from a reduction in unnecessary hospitalizations and skilled nursing facility (SNF) usage as a result of greater quality improvements in the HH industry. As for payments to HHAs, there are no aggregate increases or decreases expected to be applied to the HHAs competing in the expanded Model. | |
| Medicare Coverage of Home Infusion Therapy | | The overall economic impact of the statutorily-required home infusion therapy payment rate updates is expected to be minimal, based on the percentage increase of the Consumer Price Index (CPI-U) reduced by the productivity adjustment. The CPI-U for June of 2022 was not yet available for this proposed rule. | To ensure that payment for home infusion therapy services are consistent with statutory authority for CY 2023. |

*B. Advancing Health Information Exchange*

The Department of Health and Human Services (HHS) has a number of initiatives designed to encourage and support the adoption of interoperable health information technology and to promote nationwide health information exchange to improve health care and patient access to their digital health information.

To further interoperability in post-acute care settings, CMS and the Office of the National Coordinator for Health Information Technology (ONC) participate in the Post-Acute Care Interoperability Workgroup (PACIO) to facilitate collaboration with industry stakeholders to develop Health Level Seven International® (HL7) Fast Healthcare Interoperability Resources® (FHIR) standards.[1] These standards could support the exchange and reuse of patient assessment data derived from the Minimum Data Set (MDS), Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI), Long-term Care Hospital (LTCH) Continuity Assessment Record and Evaluation (CARE) Data Set (LCDS), Outcome and Assessment Information Set (OASIS), and other sources. The PACIO Project has focused on HL7 FHIR implementation guides for functional status, cognitive status and new use cases on advance directives, re-assessment timepoints, and Speech, Language, Swallowing, Cognitive communication and Hearing (SPLASCH) pathology. We encourage PAC provider and health information technology (IT) vendor participation as the efforts advance.

The CMS Data Element Library (DEL) continues to be updated and serves as a resource for PAC assessment data elements and their associated mappings to health IT standards, such as Logical Observation Identifiers Names and Codes (LOINC) and Systematized Nomenclature of Medicine Clinical Terms (SNOMED). The DEL furthers CMS' goal of data standardization and interoperability. Standards in the DEL (*https://del.cms.gov/DELWeb/pubHome*) can be referenced on the CMS website and in the ONC Interoperability Standards Advisory (ISA). The 2022 ISA is available at *https://www.healthit.gov/isa.*

The 21st Century Cures Act (Cures Act) (Pub. L. 114–255, enacted December 13, 2016) required HHS and ONC to take steps to further

[1] *http://pacioproject.org/.*

interoperability for providers in settings across the care continuum. Section 4003(b) of the Cures Act required ONC to take steps to advance interoperability through the development of a trusted exchange framework and common agreement aimed at establishing a universal floor of interoperability across the country. On January 18, 2022, ONC announced a significant milestone by releasing the Trusted Exchange Framework [2] and Common Agreement Version 1.[3] The Trusted Exchange Framework is a set of non-binding principles for health information exchange, and the Common Agreement is a contract that advances those principles. The Common Agreement and the Qualified Health Information Network Technical Framework Version 1 [4] (incorporated by reference into the Common Agreement) establish the technical infrastructure model and governing approach for different health information networks and their users to securely share clinical information with each other—all under commonly agreed to terms. The technical and policy architecture of how exchange occurs under the Trusted Exchange Framework and the Common Agreement follows a network-of-networks structure, which allows for connections at different levels and is inclusive of many different types of entities at those different levels, such as health information networks, healthcare practices, hospitals, public health agencies, and Individual Access Services (IAS) Providers.[5] For more information, we refer readers to *https://www.healthit.gov/topic/interoperability/trusted-exchange-framework-and-common-agreement.*

We invite readers to learn more about these important developments and how they are likely to affect HHAs.

## II. Home Health Prospective Payment System

### *A. Overview of the Home Health Prospective Payment System*

#### 1. Statutory Background

Section 1895(b)(1) of the Act requires the Secretary to establish a Home Health Prospective Payment System (HH PPS) for all costs of home health services paid under Medicare. Section 1895(b)(2) of the Act requires that, in defining a prospective payment amount, the Secretary will consider an appropriate unit of service and the number, type, and duration of visits provided within that unit, potential changes in the mix of services provided within that unit and their cost, and a general system design that provides for continued access to quality services. In accordance with the statute, as amended by the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33, enacted August 5, 1997), we published a final rule in the July 3, 2000 **Federal Register** (65 FR 41128) to implement the HH PPS legislation.

Section 5201(c) of the Deficit Reduction Act of 2005 (DRA) (Pub. L.109–171, enacted February 8, 2006) added new section 1895(b)(3)(B)(v) to the Act, requiring home health agencies (HHAs) to submit data for purposes of measuring health care quality, and linking the quality data submission to the annual applicable payment percentage increase. This data submission requirement is applicable for CY 2007 and each subsequent year. If an HHA does not submit quality data, the home health market basket percentage increase is reduced by 2 percentage points. In the November 9, 2006 **Federal Register** (71 FR 65935), we published a final rule to implement the pay-for-reporting requirement of the DRA, which was codified at § 484.225(h) and (i) in accordance with the statute. The pay-for-reporting requirement was implemented on January 1, 2007.

Section 51001(a)(1)(B) of the Bipartisan Budget Act of 2018 (BBA of 2018) (Pub. L. 115–123) amended section 1895(b) of the Act to require a change to the home health unit of payment to 30-day periods beginning January 1, 2020. Section 51001(a)(2)(A) of the BBA of 2018 added a new subclause (iv) under section 1895(b)(3)(A) of the Act, requiring the Secretary to calculate a standard prospective payment amount (or amounts) for 30-day units of service furnished that end during the 12-month period beginning January 1, 2020, in a budget neutral manner, such that estimated aggregate expenditures under the HH PPS during CY 2020 are equal to the estimated aggregate expenditures that otherwise would have been made under the HH PPS during CY 2020 in the absence of the change to a 30-day unit of service. Section 1895(b)(3)(A)(iv) of the Act requires that the calculation of the standard prospective payment amount (or amounts) for CY 2020 be made before the application of the annual update to the standard prospective payment amount as required by section 1895(b)(3)(B) of the Act.

Additionally, section 1895(b)(3)(A)(iv) of the Act requires that in calculating the standard prospective payment amount (or amounts), the Secretary must make assumptions about behavior changes that could occur as a result of the implementation of the 30-day unit of service under section 1895(b)(2)(B) of the Act and case-mix adjustment factors established under section 1895(b)(4)(B) of the Act. Section 1895(b)(3)(A)(iv) of the Act further requires the Secretary to provide a description of the behavior assumptions made in notice and comment rulemaking. CMS finalized these behavior assumptions in the CY 2019 HH PPS final rule with comment period (83 FR 56461).

Section 51001(a)(2)(B) of the BBA of 2018 also added a new subparagraph (D) to section 1895(b)(3) of the Act. Section 1895(b)(3)(D)(i) of the Act requires the Secretary to annually determine the impact of differences between assumed behavior changes, as described in section 1895(b)(3)(A)(iv) of the Act, and actual behavior changes on estimated aggregate expenditures under the HH PPS with respect to years beginning with 2020 and ending with 2026. Section 1895(b)(3)(D)(ii) of the Act requires the Secretary, at a time and in a manner determined appropriate, through notice and comment rulemaking, to provide for one or more permanent increases or decreases to the standard prospective payment amount (or amounts) for applicable years, on a prospective basis, to offset for such increases or decreases in estimated aggregate expenditures, as determined under section 1895(b)(3)(D)(i) of the Act. Additionally, 1895(b)(3)(D)(iii) of the Act requires the Secretary, at a time and in a manner determined appropriate, through notice and comment rulemaking, to provide for one or more temporary increases or decreases to the payment amount for a unit of home

[2] The Trusted Exchange Framework (TEF): Principles for Trusted Exchange (Jan. 2022), *https://www.healthit.gov/sites/default/files/page/2022-01/Trusted_Exchange_Framework_0122.pdf.*

[3] Common Agreement for Nationwide Health Information Interoperability Version 1 (Jan. 2022), *https://www.healthit.gov/sites/default/files/page/2022-01/Common_Agreement_for_Nationwide_Health_Information_Interoperability_Version_1.pdf.*

[4] Qualified Health Information Network (QHIN) Technical Framework (QTF) Version 1.0 (Jan. 2022), *https://rce.sequoiaproject.org/wp-content/uploads/2022/01/QTF_0122.pdf.*

[5] The Common Agreement defines Individual Access Services (IAS) as ''with respect to the Exchange Purposes definition, the services provided utilizing the Connectivity Services, to the extent consistent with Applicable Law, to an Individual with whom the QHIN, Participant, or Subparticipant has a Direct Relationship to satisfy that Individual's ability to access, inspect, or obtain a copy of that Individual's Required Information that is then maintained by or for any QHIN, Participant, or Subparticipant.'' The Common Agreement defines ''IAS Provider'' as: ''Each QHIN, Participant, and Subparticipant that offers Individual Access Services.'' *See* Common Agreement for Nationwide Health Information Interoperability Version 1, at 7 (Jan. 2022), *https://www.healthit.gov/sites/default/files/page/2022-01/Common_Agreement_for_Nationwide_Health_Information_Interoperability_Version_1.pdf.*

health services for applicable years, on a prospective basis, to offset for such increases or decreases in estimated aggregate expenditures, as determined under section 1895(b)(3)(D)(i) of the Act. Such a temporary increase or decrease shall apply only with respect to the year for which such temporary increase or decrease is made, and the Secretary shall not take into account such a temporary increase or decrease in computing the payment amount for a unit of home health services for a subsequent year. Finally, section 51001(a)(3) of the BBA of 2018 amends section 1895(b)(4)(B) of the Act by adding a new clause (ii) to require the Secretary to eliminate the use of therapy thresholds in the case-mix system for CY 2020 and subsequent years.

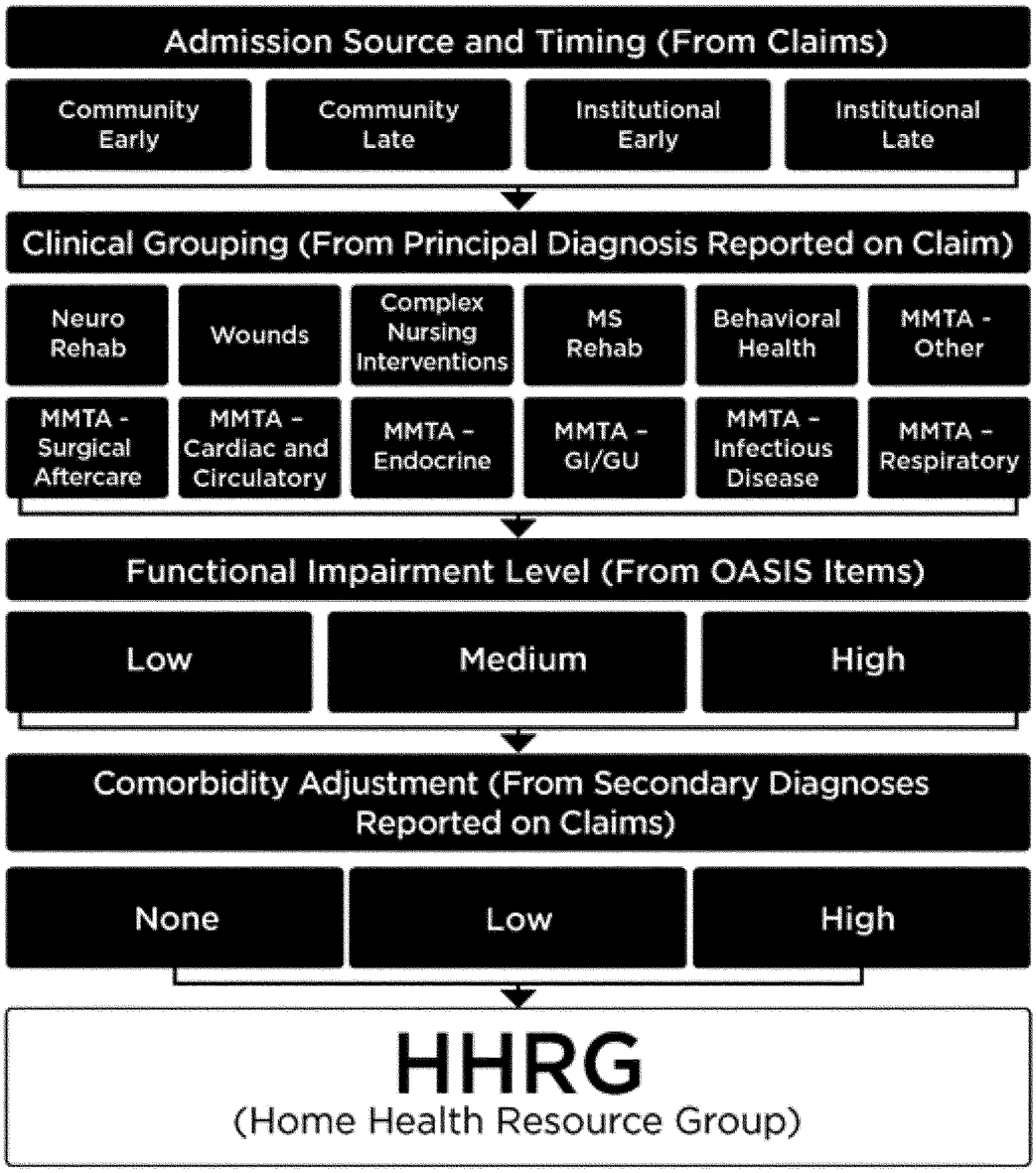
2. Current System for Payment of Home Health Services

For home health periods of care beginning on or after January 1, 2020, Medicare makes payment under the HH PPS on the basis of a national, standardized 30-day period payment rate that is adjusted for case-mix and area wage differences in accordance with section 51001(a)(1)(B) of the BBA of 2018. The national, standardized 30-day period payment rate includes payment for the six home health disciplines (skilled nursing, home health aide, physical therapy, speech-language pathology, occupational therapy, and medical social services). Payment for non-routine supplies (NRS) is also part of the national, standardized 30-day period rate. Durable medical equipment (DME) provided as a home health service, as defined in section 1861(m) of the Act, is paid the fee schedule amount or is paid through the competitive bidding program and such payment is not included in the national, standardized 30-day period payment amount. Additionally, the 30-day period payment rate does not include payment for certain injectable osteoporosis drugs and negative pressure wound therapy (NPWT) using a disposable device, but such drug and services must be billed by the HHA while a patient is under a home health plan of care, as the law requires consolidated billing of osteoporosis drugs and NPWT using a disposable device.

To better align payment with patient care needs and to better ensure that clinically complex and ill beneficiaries have adequate access to home health care, in the CY 2019 HH PPS final rule with comment period (83 FR 56406), we finalized case-mix methodology refinements through the Patient-Driven Groupings Model (PDGM) for home health periods of care beginning on or after January 1, 2020. The PDGM did not change eligibility or coverage criteria for Medicare home health services, and as long as the individual meets the criteria for home health services as described at 42 CFR 409.42, the individual can receive Medicare home health services, including therapy services. For more information about the role of therapy services under the PDGM, we refer readers to the Medicare Learning Network (MLN) Matters article SE2000 available at *https://www.cms.gov/regulations-and-guidanceguidance transmittals2020-transmittals/se20005*. To adjust for case-mix for 30-day periods of care beginning on and after January 1, 2020, the HH PPS uses a 432-category case-mix classification system to assign patients to a home health resource group (HHRG) using patient characteristics and other clinical information from Medicare claims and the Outcome and Assessment Information Set (OASIS) assessment instrument. These 432 HHRGs represent the different payment groups based on five main case-mix categories under the PDGM, as shown in Figure B1. Each HHRG has an associated case-mix weight that is used in calculating the payment for a 30-day period of care. For periods of care with visits less than the low-utilization payment adjustment (LUPA) threshold for the HHRG, Medicare pays national per-visit rates based on the discipline(s) providing the services. Medicare also adjusts the national standardized 30-day period payment rate for certain intervening events that are subject to a partial payment adjustment (PEP). For certain cases that exceed a specific cost threshold, an outlier adjustment may also be available.

Under this case-mix methodology, case-mix weights are generated for each of the different PDGM payment groups by regressing resource use for each of the five categories (admission source, timing, clinical grouping, functional impairment level, and comorbidity adjustment) using a fixed effects model. A detailed description of each of the case-mix variables under the PDGM have been described previously, and we refer readers to the CY 2021 HH PPS final rule (85 FR 70303 through 70305).

**FIGURE B1: CASE-MIX VARIABLES IN THE PDGM**




*B. Proposed Provisions for CY 2023 Payment Under the HH PPS*

1. Monitoring the Effects of the Implementation of PDGM

a. Routine PDGM Monitoring

CMS routinely analyzes Medicare home health benefit utilization, including but not limited to, overall total 30-day periods of care and average periods of care per HHA user; distribution of the type of visits in a 30-day period of care; the percentage of periods that receive the LUPA; estimated costs; the percentage of 30-day periods of care by clinical group, comorbidity adjustment, admission source, timing, and functional impairment level; GG items by response type; and the proportion of 30-day periods of care with and without any therapy visits, nursing visits, and/or aide/social worker visits. For the monitoring included in this rule, we examine simulated CY 2018 and CY 2019 data and actual CY 2020 and CY 2021 data for 30-day periods of care. We provide interpretation of results for CY 2020 and CY 2021. We refer readers to the CY 2022 HH PPS final rule (86 FR 35881) for discussion about simulated data for CYs 2018 and 2019.

(1) Utilization

Table B2 shows the overall utilization of home health and Table B3 shows the average utilization of visits per 30-day period of care by home health discipline. This data indicates the average number of 30-day periods of care per unique HHA user is similar per 30-day period of care between CY 2020 and CY 2021. Table B3 shows utilization of visits per 30-day period of care by home health discipline over time. The data indicates that the number of 30-day periods of care decreased between CY 2018 and CY 2021. Table B4 shows the proportion of 30-day periods of care that are LUPAs and the average number of visits per discipline of those LUPA 30-day periods of care over time.

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**TABLE B2: OVERALL UTILIZATION OF HOME HEALTH SERVICES, CYs 2018-2021**

| Volume of Periods and Number of Beneficiaries | CY2018 (Simulated) | CY 2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|
| 30-Day Periods of Care | 9,336,898 | 8,744,171 | 8,423,688 | 8,962,690 |
| Unique Beneficiaries | 2 980,385 | 2 802,560 | 2,850,916 | 2,944,305 |
| Average Number of 30-Day Periods per Unique Beneficiary | 3.13 | 3.12 | 2.95 | 3.04 |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health Limited Data Set (LDS). CY 2020 PDGM data was accessed from the Chronic Conditions Data Warehouse (CCW) Virtual Research Data Center (VRDC) on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.
**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

**TABLE B3: UTILIZATION OF VISITS PER 30-DAY PERIODS OF CARE BY HOME HEALTH DISCIPLINE, CYs 2018-2021**

| Discipline | CY 2018 (Simulated) | CY 2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|
| Skilled Nursing | 4.53 | 4.49 | 4.35 | 4.05 |
| Physical Therapy | 3.30 | 3.33 | 2.70 | 2.73 |
| Occupational Therapy | 1.02 | 1.07 | 0.79 | 0.77 |
| Speech Therapy | 0.21 | 0.21 | 0.16 | 0.15 |
| Home Health Aide | 0.72 | 0.67 | 0.54 | 0.47 |
| Social Worker | 0.08 | 0.08 | 0.06 | 0.05 |
| Total (all disciplines) | **9.86** | **9.85** | **8.60** | **8.22** |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavior assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.
**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

**TABLE B4: THE PROPORTION OF 30-DAY PERIODS OF CARE THAT ARE LUPAs AND THE AVERAGE NUMBER OF VISITS BY HOME HEALTH DISCIPLINE FOR LUPA HOME HEALTH PERIODS, CYs 2018-2021**

| | CY 2018 (Simulated) | CY 2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|
| Total LUPA % of Overall 30-day Periods | 6.7% | 6.8% | 8.7% | 7.8% |
| Discipline (Average # visits for LUPA home health periods) | | | | |
| Skilled Nursing | 1.15 | 1.14 | 1.19 | 1.12 |
| Physical Therapy | 0.43 | 0.46 | 0.53 | 0.55 |
| Occupational Therapy | 0.07 | 0.07 | 0.08 | 0.08 |
| Speech Therapy | 0.02 | 0.02 | 0.02 | 0.02 |
| Home Health Aide | 0.01 | 0.01 | 0.01 | 0.01 |
| Social Worker | 0.01 | 0.01 | 0.01 | 0.01 |
| Total | 1.69 | 1.71 | 1.84 | 1.78 |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.

**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

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(2) Analysis of 2020 Cost Report Data for 30-Day Periods of Care

In the CY 2020 HH PPS final rule with comment period (84 FR 60483), we provided a summary of analysis on FY 2017 HHA cost report data and how such data, if used, would impact our estimate of the percentage difference between the CY 2020 30-day payment amount and estimated, average HHA costs for a 30-day period of care. In that rule, we utilized FY 2017 cost reports and CY 2017 home health claims to estimate the costs of both 60-day episodes of care and 30-day periods of care. We then updated the estimated CY 2017 60-day episode costs and 30-day period of care costs by the home health market basket update, reduced by the productivity adjustment for CYs 2018, 2019, and 2020 to calculate the 2020 estimated 60-day episode costs and 30-day period of care costs. As stated in the CY 2020 HH PPS final rule with comment period (84 FR 60485), we estimated that the CY 2020 30-day payment amount was approximately 16 percent higher than the average costs for a 30-day period of care. In MedPAC's March 2020 Report to Congress,[6] their review of home health payment adequacy found that ''access is more than adequate in most areas and that Medicare payments are substantially in excess of costs''.

In this proposed rule, we examined 2020 HHA Medicare cost reports, as this is the most recent and complete cost report data at the time of rulemaking, and CY 2021 home health claims, to estimate 30-day period of care costs. We excluded LUPAs and PEPs in the average number of visits. The 2020 average NRS costs per visit is $4.53. To update the estimated 30-day period of care costs, we begin with the 2020 average costs per visit with NRS for each discipline and multiply that amount by the CY 2021 home health payment update percentage of 2.0 percent. That amount for each discipline is then multiplied by the 2021 average number of visits by discipline to determine the 2021 Estimated 30-day Period Costs. Table B5 shows the estimated average costs for 30-day periods of care by discipline with NRS and the total 30-day period of care costs with NRS for CY 2021.

[6] *http://www.medpac.gov/docs/default-source/reports/mar20_medpac_ch9_sec.pdf?sfvrsn=0.*

**TABLE B5: ESTIMATED COSTS FOR 30-DAY PERIODS OF CARE IN CY 2021**

| Discipline | 2020 Average Costs per visit with NRS | 2021 Home Health Payment Update | 2021 Average Number of Visits | 2021 Estimated 30-Day Period Costs |
|---|---|---|---|---|
| Skilled Nursing | $154.77 | 1.02 | 4.30 | $678.82 |
| Physical Therapy | $170.04 | 1.02 | 2.93 | $508.18 |
| Occupational Therapy | $165.86 | 1.02 | 0.84 | $142.11 |
| Speech Pathology | $192.39 | 1.02 | 0.16 | $31.40 |
| Medical Social Services | $264.92 | 1.02 | 0.06 | $16.21 |
| Home Health Aides | $82.25 | 1.02 | 0.52 | $43.63 |
| **Total** | | | | **$1,420.35** |

**Source:** 2020 Medicare cost report data obtained on January 18, 2022. Home health visit information came from 30-day periods of care with a through date in CY 2021 (obtained from the CCW VRDC on March 21, 2022).
**Notes**: The 2021 average number of visits excludes LUPAs and PEPs.

The CY 2021 national, standardized 30-day period payment rate was $1,901.12, which is approximately 34 percent more than the estimated CY 2021 30-day period average facility cost of $1,420.35. Note that in the CY 2020 HH PPS final rule with comment period (84 FR 60484), the average number of visits for a 30-day period of care in 2017 was estimated to be 10.5 visits for non-LUPA, non-PEP 30-day periods of care. Using actual CY 2021 claims data, the average number of visits in a non-LUPA-non-PEP 30-day period of care was 8.81 visits—a decrease of approximately 16 percent. We recognize that with the COVID–19 public health emergency (PHE), the 2020 data on the Medicare cost reports may not reflect the most recent changes such as increased telecommunications technology costs, increased personal protective equipment (PPE) costs, and hazard pay. In its March 2022 Report to Congress, MedPAC assumed a cost growth of 3.47 percent for both CY 2021 and CY 2027.[7] Furthermore, MedPAC noted that for more than a decade, payments under the HH PPS have significantly exceeded HHAs' costs primarily due to two factors. First, agencies have reduced the average number of visits per episode to reduce episode costs. Second, cost growth in recent years has been lower than the annual payment updates. As shown in Table B3 in this proposed rule, HHAs have reduced visits under the PDGM in CY 2021.

(3) Clinical Groupings and Comorbidities

Each 30-day period of care is grouped into one of 12 clinical groups, which describe the primary reason for which a patient is receiving home health services under the Medicare home health benefit. The clinical grouping is based on the principal diagnosis reported on the home health claim. Table B6 shows the distribution of the 12 clinical groups over time.

[7] *https://www.medpac.gov/wp-content/uploads/2022/03/Mar22_MedPAC_ReportToCongress_Ch8_SEC.pdf.*

**TABLE B6: DISTRIBUTION OF 30-DAY PERIODS OF CARE BY THE 12 PDGM CLINICAL GROUPS, CYs 2018-2021**

| Clinical Grouping | CY 2018 (Simulated) | CY2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|
| Behavioral Health | 1.7% | 1.5% | 2.3% | 2.4% |
| Complex Nursing | 2.6% | 2.5% | 3.5% | 3.3% |
| MMTA – Cardiac | 16.5% | 16.1% | 18.9% | 18.5% |
| MMTA – Endocrine | 17.3% | 17.4% | 7.2% | 6.9% |
| MMTA – GI/GU | 2.2% | 2.3% | 4.7% | 4.7% |
| MMTA – Infectious | 2.9% | 2.7% | 4.8% | 4.6% |
| MMTA – Other | 4.7% | 4.7% | 3.1% | 3.6% |
| MMTA – Respiratory | 4.3% | 4.1% | 7.8% | 8.0% |
| MMTA – Surgical Aftercare | 1.8% | 1.8% | 3.6% | 3.4% |
| MS Rehab | 17.1% | 17.3% | 19.4% | 19.8% |
| Neuro Rehab | 14.4% | 14.5% | 10.5% | 10.9% |
| Wounds | 14.5% | 15.1% | 14.2% | 13.9% |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.
**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

Thirty-day periods of care will receive a comorbidity adjustment category based on the presence of certain secondary diagnoses reported on home health claims. These diagnoses are based on a home health specific list of clinically and statistically significant secondary diagnosis subgroups with similar resource use. We refer readers to section II.B.4.c. of this proposed rule and the CY 2020 final rule with comment period (84 FR 60493) for further information on the comorbidity adjustment categories. Home health 30-day periods of care can receive a low or a high comorbidity adjustment, or no comorbidity adjustment. Table B7 shows the distribution of 30-day periods of care by comorbidity adjustment category for all 30-day periods.

**TABLE B7: DISTRIBUTION OF 30-DAY PERIODS OF CARE BY COMORBIDITY ADJUSTMENT CATEGORY FOR 30-DAY PERIODS, CYs 2018-2021**

| Comorbidity Adjustment | CY 2018 (Simulated) | CY 2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|
| None | 55.6% | 52.0% | 49.1% | 49.6% |
| Low | 35.3% | 38.0% | 36.9% | 36.9% |
| High | 9.2% | 10.0% | 14.0% | 13.5% |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.
**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

(4) Admission Source and Timing

Each 30-day period of care is classified into one of two admission source categories—community or institutional—depending on what healthcare setting was utilized in the 14 days prior to receiving home health care. Thirty-day periods of care for beneficiaries with any inpatient acute care hospitalizations, inpatient psychiatric facility (IPF) stays, skilled nursing facility (SNF) stays, inpatient rehabilitation facility (IRF) stays, or long-term care hospital (LTCH) stays within 14-days prior to a home health admission will be designated as institutional admissions. The institutional admission source category will also include patients that had an acute care hospital stay during a previous 30-day period of care and within 14 days prior to the subsequent, contiguous 30-day period of care and for which the patient was not discharged from home health and readmitted.

Thirty-day periods of care are classified as ''early'' or ''late'' depending

on when they occur within a sequence of 30-day periods of care. The first 30-day period of care is classified as early and all subsequent 30-day periods of care in the sequence (second or later) are classified as late. A subsequent 30-day period of care would not be considered early unless there is a gap of more than 60 days between the end of one previous period of care and the start of another. Information regarding the timing of a 30-day period of care comes from Medicare home health claims data and not the OASIS assessment to determine if a 30-day period of care is ''early'' or ''late''. Table B8 shows the distribution of 30-day periods of care by admission source and timing.

**TABLE B8: DISTRIBUTION OF 30-DAY PERIODS OF CARE BY ADMISSION SOURCE AND PERIOD TIMING, CYs 2018-2021**

| Admission Source | Period Timing | CY 2018 (Simulated) | CY 2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|---|
| Community | Early | 13.5% | 13.8% | 12.4% | 11.6% |
| Community | Late | 61.1% | 60.9% | 61.8% | 63.9% |
| Institutional | Early | 18.6% | 18.4% | 20.0% | 18.6% |
| Institutional | Late | 6.8% | 6.9% | 5.8% | 5.9% |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.
**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

(5) Functional Impairment Level

Each 30-day period of care is placed into one of three functional impairment levels (low, medium, or high) based on responses to certain OASIS functional items associated with grooming, bathing, dressing, ambulating, transferring, and risk for hospitalization. The specific OASIS items that are used for the functional impairment level are found in Table B7 in the CY 2020 HH PPS final rule with comment period (84 FR 60490). Responses to these OASIS items are grouped together into response categories with similar resource use and each response category has associated points. A more detailed description as to how these response categories were established can be found in the technical report, ''Overview of the Home Health Groupings Model'' posted on the HHA web page.[8] The sum of these points results in a functional impairment score used to group 30-day periods of care into a functional impairment level with similar resource use. The scores associated with the functional impairment levels vary by clinical group to account for differences in resource utilization. A patient's functional impairment level will remain the same for the first and second 30-day periods of care unless there is a significant change in condition that warrants an ''other follow-up'' assessment prior to the second 30-day period of care. For each 30-day period of care, the Medicare claims processing system will look for occurrence code 50 on the claim to correspond to the M0090 date of the applicable assessment. Table B9 shows the distribution of 30-day periods by functional impairment level.

**TABLE B9: DISTRIBUTION OF 30-DAY PERIODS OF CARE BY FUNCTIONAL IMPAIRMENT LEVEL, CYs 2018-2021**

| Functional Impairment Level | CY 2018 (Simulated) | CY 2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|
| Low | 33.9% | 31.9% | 25.7% | 23.2% |
| Medium | 34.9% | 35.5% | 32.7% | 32.6% |
| High | 31.2% | 32.6% | 41.7% | 44.2% |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.
**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

[8] *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HomeHealthPPS/HH-PDGM.*

(6) CY 2023 Discussion and Analysis of GG Items

The Improving Medicare Post-Acute Care Transformation Act of 2014 (IMPACT Act) (Pub. L. 113–185, enacted on October 6, 2014) amended Title XVIII of the Act to include new data reporting requirements for certain post-acute care (PAC) providers, such as HHAs. Section 1899B(b)(1)(A) of the Act requires that HHAs report standardized patient assessment data beginning no later than January 1, 2019. Since the standardized patient assessment data categories included functional status, such as mobility and self-care at admission and discharge, in accordance with section 1899B(b)(1)(B)(i) of the Act, CMS finalized adding the functional items, Section GG, ''Functional Abilities and Goals'', to the OASIS data set, effective January 1, 2019, in order to measure functional status across PAC providers. However, for payment purposes under the PDGM, CMS did not have the data to determine the effect, if any, of these newly added items on resource costs during a home health period of care. Therefore, the GG functional items are not currently used to determine the functional impairment level under the PDGM. CMS continues to use the M1800–1860 items to determine functional impairment level for case-mix purposes. As such, the purpose of the following analysis is to explore the relationship between the M1800–1860 items used in the PDGM and the analogous GG items. The analysis of the M1800 functional items and the analogous GG items shows there was a small decline in the percentage of individuals who were associated with the ''most independent'' responses with a large percentage of the responses using the ''Activity not Attempted'' (ANA) response option. If the activity was not attempted, there are various codes that explain the reason for this response, such as ''Not attempted due to medical or safety concerns,'' and ''Not applicable.''

To conduct this analysis, we reviewed OASIS data from January 1, 2019, to December 31, 2021, that was linked to 30-day home health periods. Responses for each of the M1800 functional items used in the PDGM functional scores were compared to the responses of the analogous GG items. There is a correlation between the current responses to the M1800–1860 items and the GG items; however, certain information in the M1800 items is collected at follow—up, but is not collected at follow-up for the GG items (for example, the M1800 items associated with upper and lower body dressing are collected at follow up, but the analogous GG item is not collected at follow-up). Additionally, ongoing analysis of the GG items shows a significant amount of ANA responses, making it difficult to map to the corresponding M1800–1860 item responses. Figure B2 demonstrates the frequencies by response type in CY 2021 of the OASIS GG items.

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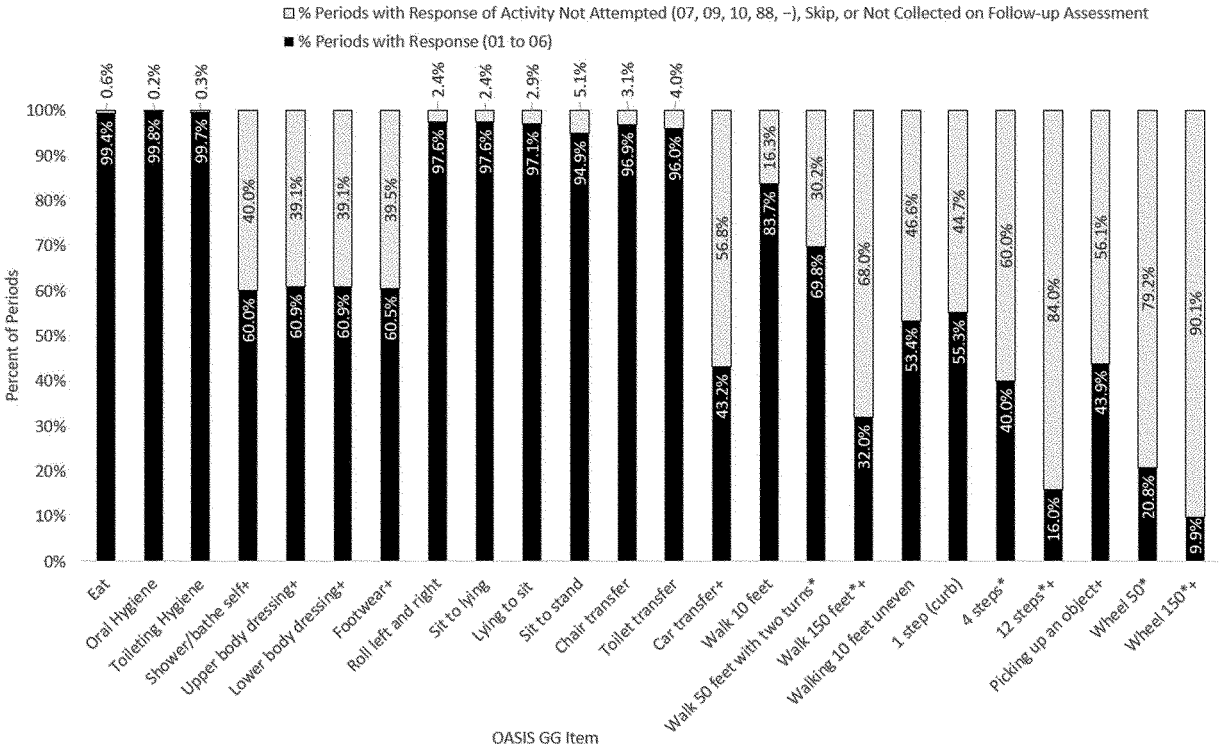
**FIGURE B2: OASIS GG ITEM FREQUENCIES BY RESPONSE TYPE IN CY 2021**




**Source:** CY 2021 home health periods linked to OASIS data accessed from the CCW VRDC in March 2022. Sample composed of 8,944,681 home health periods ending in 2021. +Item is not collected on the follow-up assessment. **Please note:** *Item is skipped if a prior item has an "Activity Not Attempted" (07, 09, 10, 88, –) response. Wheel 50 and Wheel 150 are skipped if the patient is not indicated as using a wheelchair.

(7) Therapy Visits

Beginning in CY 2020, section 1895(b)(4)(B)(ii) of the Act eliminated the use of therapy thresholds in calculating payments for CY 2020 and subsequent years. Prior to implementation of the PDGM, HHAs could receive an adjustment to payment based on the number of therapy visits provided during a 60-day episode of care. We examined the proportion of actual 30-day periods of care with and without therapy visits. To be covered as skilled therapy, the services must require the skills of a qualified therapist (that is, physical therapy (PT), occupational therapy (OT), or speech-language pathology (SLP)) or qualified therapist assistant and must be reasonable and necessary for the treatment of the patient's illness or injury.[9] As shown in Table B2, we monitor the number of visits per 30-day period of care by each home health discipline. Any 30-day period of care can include both therapy and non-therapy visits. If any 30-day period of care consisted of only visits for PT, OT, and/or SLP, then this 30-day period of care is considered ''therapy only''. If any 30-day period of care consisted of only visits for skilled nursing, home health aide, or social worker, then this 30-day period of care is considered ''no therapy''. If any 30-day period of care consisted of at least one therapy visit and one non-therapy, then this 30-day period of care is considered ''therapy + non-therapy''. Table B10 shows the proportion of 30-day periods of care with only therapy visits, at least one therapy visit and one non-therapy visit, and no therapy visits. Figure B3 shows the proportion of 30-day periods of care by the number of therapy visits (excluding zero) provided during 30-day periods of care.

**TABLE B10: PROPORTION OF 30-DAY PERIODS OF CARE WITH ONLY THERAPY, AT LEAST ONE THERAPY VISIT, AND NO THERAPY VISITS FOR CYs 2018-2021**

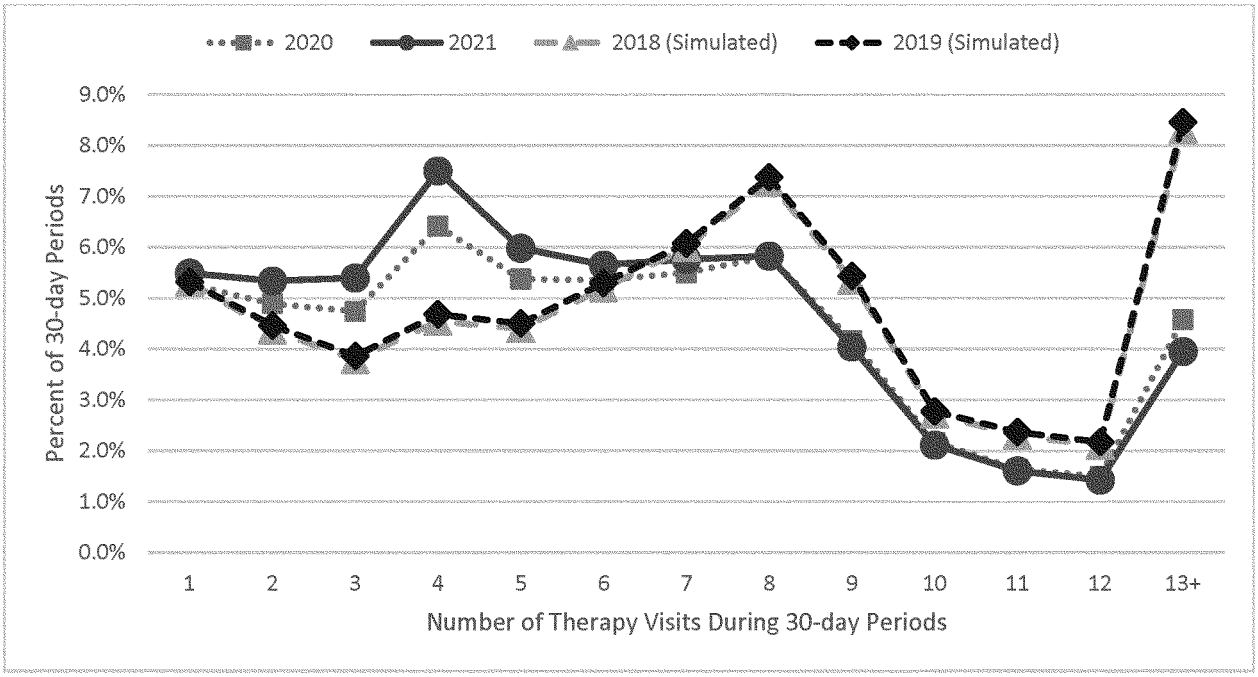
| 30-day Period Visit Type | CY 2018 (Simulated) | CY 2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|
| Therapy Only | 13.5% | 14.4% | 15.2% | 17.8% |
| Therapy + Non-therapy | 48.2% | 48.4% | 42.2% | 42.3% |
| No Therapy | 38.3% | 37.2% | 42.6% | 39.9% |
| **Total 30-day periods** | **9,336,898** | **8,744,171** | **8,423,688** | **8,962,690** |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.

**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

[9] Medicare Benefit Policy Manual, Chapter 7 Home Health Services, Section 40.2 Skilled Therapy Services *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c07.pdf.*

**FIGURE B3: PROPORTION OF 30-DAY PERIODS OF CARE BY THE NUMBER OF THERAPY VISITS DURING 30-DAY PERIODS, CYs 2018-2021**




**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.
**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis. Thirty-day periods with ≥13 therapy visits were combined into one category for illustrative purposes only.

Both Table B10 and Figure B3, as previously discussed, indicate there have been changes in the distribution of both therapy and non-therapy visits in CY 2021 compared to CY 2020. For example, the percent of 30-day periods with seven or less therapy visits during a 30-day period increased in CY 2021 compared to CY 2020.

In addition, we also examined the proportion of 30-day periods of care with and without skilled nursing, social work, or home health aide visits. Table B11 shows the number of 30-day periods of care with only skilled nursing visits, at least one skilled nursing visit and one other visit type (therapy or non-therapy), and no skilled nursing visits. Table B12 shows the number of 30-day periods of care with and without home health aide and/or social worker visits.

**TABLE B11: PROPORTION OF 30-DAY PERIODS OF CARE WITH ONLY SKILLED NURSING, SKILLED NURSING + OTHER VISIT TYPE, AND NO SKILLED NURSING VISITS FOR CYs 2018-2021**

| 30-day Period Visit Type | CY 2018 (Simulated) | CY 2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|
| Skilled Nursing Only | 33.8% | 33.1% | 38.5% | 36.2% |
| Skilled Nursing + Other | 51.6% | 51.5% | 45.3% | 44.9% |
| No Skilled Nursing | 14.7% | 15.5% | 16.2% | 18.9% |
| **Total 30-day periods** | **9,336,898** | **8,744,171** | **8,423,688** | **8,962,690** |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.
**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

**TABLE B12: PROPORTION OF 30-DAY PERIODS OF CARE WITH AND WITHOUT HOME HEALTH AIDE AND/OR SOCIAL WORKER VISITS FOR CYs 2018-2021**

| 30-day Period Visit Type | CY 2018 (Simulated) | CY 2019 (Simulated) | CY 2020 | CY 2021 |
|---|---|---|---|---|
| Any HH aide and/or social worker | 16.6% | 15.9% | 13.2% | 12.2% |
| No HH aide and/or social worker | 83.4% | 84.1% | 86.8% | 87.8% |
| **Total 30-day periods** | **9,336,898** | **8,744,171** | **8,423,688** | **8,962,690** |

**Source:** CY 2018 and CY 2019 simulated PDGM data with behavioral assumptions came from the Home Health LDS. CY 2020 PDGM data was accessed from the CCW VRDC on July 12, 2021. CY 2021 PDGM data was accessed from the CCW VRDC on March 21, 2022.

**Note:** There are approximately 540,000 60-day episodes that started in 2019 and ended in 2020 that are not included in the analysis.

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We will continue to monitor the provision of home health services, including any changes in the number and duration of home health visits, composition of the disciplines providing such services, and overall home health payments to determine if refinements to the case-mix adjustment methodology may be needed in the future.

2. Proposed Methodology for Behavioral Assumptions and Adjustments Under the HH PPS,

a. Background and Comment Solicitation From the CY 2022 HH PPS Proposed Rule

(1) Background

As discussed in section II.A.1. of this rule, starting in CY 2020, the Secretary was statutorily required to change the unit of payment under the HH PPS from a 60-day episode of care to a 30-day period of care. CMS was also required to make assumptions about behavior changes that could occur as a result of the implementation of the 30-day unit of payment and the case-mix adjustment factors that eliminated the use of therapy thresholds, when calculating the standard prospective payment amount for CY 2020. In the CY 2019 HH PPS final rule with comment period (83 FR 56455), we finalized the following three behavior assumptions:

- *Clinical Group Coding:* The clinical group is determined by the principal diagnosis code for the patient as reported by the HHA on the home health claim. This behavior assumption assumes that HHAs will change their documentation and coding practices and put the highest paying diagnosis code as the principal diagnosis code in order to have a 30-day period be placed into a higher-paying clinical group.
- *Comorbidity Coding:* The PDGM further adjusts payments based on patients' secondary diagnoses as reported by the HHA on the home health claim. The OASIS only allows HHAs to designate 1 principal diagnosis and 5 secondary diagnoses while the home health claim allows HHAs to designate 1 principal diagnosis and up to 24 secondary diagnoses. This behavior assumption assumes that by considering additional ICD–10– CM diagnosis codes listed on the home health claim (beyond the 6 allowed on the OASIS), more 30-day periods of care will receive a comorbidity adjustment.
- *LUPA Threshold:* This behavior assumption assumes that for one-third of LUPAs that are 1 to 2 visits away from the LUPA threshold HHAs will provide 1 to 2 extra visits to receive a full 30-day payment.

As described in the CY 2020 final rule with comment period (84 FR 60512), in order to calculate the CY 2020 budget neutral 30-day payment amounts both with and without behavior assumptions, we first calculated the total, aggregate amount of expenditures that would occur under the pre-PDGM case-mix adjustment methodology (60-day episodes under 153 case-mix groups). We then calculated what the 30-day payment amount would need to be set at in order for CMS to pay the same total expenditures in CY 2020 with the application of a 30-day unit of payment under the PDGM.

We initially determined a negative 8.39 percent behavior change adjustment to the base payment rate would be needed in order to ensure that the payment rate in CY 2020 would be budget neutral, as required by law. However, based on the comments received and reconsideration as to the frequency of the assumed behaviors during the first year of the transition to a new unit of payment and case-mix adjustment methodology, we finalized in the CY 2020 HH PPS final rule with comment period (84 FR 60519) a negative 4.36 percent behavior change assumption adjustment (''assumed behaviors'') in order to calculate the 30-day payment rate in a budget-neutral manner for CY 2020. After applying the wage index budget neutrality factor and the home health payment update, the CY 2020 30-day payment rate was set at $1,864.03.

Our data analysis in section II.B.1. of this proposed rule compares the 2018 simulated 30-day periods with behavior assumptions applied and actual 30-day periods. Specifically, Tables B4, B6, and B7 indicate that the three assumed behavior changes did occur as a result of the implementation of the PDGM. Additionally, this monitoring shows that other behaviors, such as changes in the provision of therapy and changes in functional impairment levels also occurred. Overall, the actual 30-day periods are similar to the simulated 30-day periods, which is supporting evidence that HHAs did make behavioral changes. However, we remind readers that by law we are required to ensure that estimated aggregate expenditures under the HH PPS during CY 2020 are equal to the estimated aggregate expenditures that otherwise would have been made under the HH PPS during CY 2020 in the absence of the change to a 30-day unit of payment. Regardless of the magnitude and frequency of individual behavior change (for example, LUPAs, therapy, etc.), the occurrence of any behavior change is captured by the methodology to determine the impact on aggregate expenditures.

We remind readers that in the CY 2020 HH PPS final rule (84 FR 60513), we stated that we interpret actual behavior changes to encompass both behavior changes that were previously outlined as assumed by CMS, and other behavior changes not identified at the

time the budget-neutral 30-day payment rate for CY 2020 was established. Subsequently, our analysis resulted in the identification of other behavior changes that occurred after the implementation of the PDGM. For example, Table B10 and Figure B3 in section II.B.1. of this proposed rule indicates the number of therapy visits declined in CYs 2020 and 2021. However, the data, as depicted in Figure B3, also indicates a slight decline in therapy visits began in CY 2019 after the finalization of the removal of therapy thresholds, but prior to implementation of the PDGM. This suggests HHAs were already beginning to decrease their therapy provision. Although not originally one of the three finalized behavior assumptions, the decline in therapy utilization is indicative of an additional behavior change.

Each Health Insurance Prospective Payment System (HIPPS) code is assigned a case-mix weight and the case-mix weight determines the base payment of non-LUPA claims prior to any other adjustments (for example outlier). Prior to the PDGM, the first position of the HIPPS code was a numeric value that represented the interaction of episode timing and number of therapy visits (grouping step). The second, third, and fourth positions of the pre-PDGM HIPPS code reflected clinical severity, functional severity, and service utilization respectively. Therefore, to evaluate how the decrease in therapy visits related to payments, we compared the average case mix weights of CY 2018 actual 60-day episodes and CY 2021 simulated 60-day episodes. Prior to the PDGM, the average case-mix weight for CY 2018 60-day episodes was 1.0176. When we set therapy levels at the pre-PDGM (that is, CY 2018) level and kept the clinical and functional levels at the PDGM levels (that is, CY 2021) the average case-mix weight was 1.0389. After the PDGM, the average case-mix weight for CY 2021 simulated 60-day episodes was 0.9664. When we kept therapy levels at the PDGM (that is, CY 2021) level and set the clinical and functional levels at the pre-PDGM levels (that is, CY 2018) the average case-mix weight was 0.9361. By controlling for therapy levels, we were able to determine the change in 60-day episode case-mix weights were largely driven by therapy utilization. The decrease in therapy visits led to a decrease in case-mix weight, and therefore a decrease in aggregate expenditures under the pre-PDGM HH PPS.

(2) Summary of Comment Solicitation From the CY 2022 Proposed Rule

As required by section 1895(b)(3)(D)(i) of the Act, CMS must annually determine the impact of differences between assumed and actual behavior changes on estimated aggregate expenditures under the HH PPS with respect to years beginning with 2020 and ending with 2026. Section 1895(b)(3)(D)(ii) and (iii) of the Act requires that CMS make permanent and temporary adjustments to the payment rate to offset for such increases or decreases in estimated aggregate expenditures through notice and comment rulemaking. Therefore, to evaluate the impact of assumed versus actual behavior changes for CYs 2020 through 2026, we developed a methodology that uses actual claims data for 30-day periods under the 432-group case-mix model (PDGM claims) to simulate 60-day episodes under the 153-group case-mix model (representing pre-PDGM HH PPS claims) in order to estimate what aggregate expenditures would have been in the absence of the PDGM. This methodology mirrors the initial approach used to calculate the CY 2020 30-day period payment amount for the PDGM, where we used a single year of claims data (that is, CY 2018 claims data for 60-day episodes of care under the 153-group case-mix model) and simulated payments for 30-day periods of care with the application of the PDGM case-mix adjustment methodology. We then compared actual aggregate expenditures under the existing system (that is, 60-day episodes of care under the 153-group case-mix model) to simulated payments under the PDGM for 30-day periods of care with assumed behavior changes, and used the difference between the two amounts to construct the budget neutrality factor. We described this methodology in the CY 2022 HH PPS proposed rule (86 FR 35889 through 35892). For determining the impact of the difference between assumed and actual behavior changes on overall expenditures for CY 2020 and CY 2021, we analyzed a single year of claims data (for example, CY 2020 claims data for 30-day periods of care under the 432-group PDGM case-mix model) and simulated payments for 60-day episodes of care under the 153-group case-mix model. We then compared the actual aggregate expenditures under the PDGM to what aggregate expenditures would have been pre-PDGM.

In the CY 2022 HH PPS proposed rule (86 FR 35892), we solicited comments on this approach (86 FR 35892). Commenters raised concerns about this methodology, most notably about the elimination of therapy thresholds, the onset of the COVID–19 PHE, interpretation of section 1895(b)(3)(D)(i) of the Act, the differing case-mix weight systems (153 vs 432 case-mix groups), and inappropriate data exclusions and assumptions when creating the simulated 60-day episodes.

Commenters stated that there has been a large decrease in therapy utilization since the implementation of the PDGM. Commenters stated several possible reasons for the decrease in therapy utilization, including that the PDGM resulted in significant differences in payment incentives. Specifically, commenters noted that HHAs could have received higher payments if certain therapy volume thresholds were met pre-PDGM; whereas that incentive no longer exists under the PDGM. Therefore, many commenters indicated the estimated aggregate expenditures calculated with simulated 60-day episodes (pre PDGM) is inaccurate because it does not control for the payment incentives which would have been present under the old system. However, we stated in the CY 2019 HH PPS final rule with comment period (83 FR 56481), that the PDGM is not limiting or prohibiting the provision of therapy services or the number of home health periods of care. In addition, we believe that regardless of the case-mix system in place, HHAs should continue to provide the most appropriate care to Medicare home health beneficiaries, in accordance with the home health CoP requirements at § 484.60.

While overall utilization may have decreased in the early months of CY 2020 due to the onset of the COVID–19 PHE, the methodology described in the CY 2022 HH PPS proposed rule used the same claims dataset (for example, CY 2020) to compare aggregate expenditures under the two payment systems. Any effect of the COVID–19 PHE is included in the estimated aggregate expenditures for both simulated 60-day episodes and actual 30-day periods, and therefore this methodology ensures that any differences between the two calculated amounts is not attributable to the COVID–19 PHE. In other words, any potential changes due to the COVID–19 PHE (for example, decreased utilization) in the 30-day periods would also be present in the simulated 60-day episodes, making the two datasets comparable.

However, we recognize that the COVID–19 PHE presented unique challenges for all healthcare settings, including HHAs. For example, we understand elective procedures were

cancelled or postponed and some beneficiaries decreased the care in their home, including potentially both the number of care providers furnishing services inside their homes and the frequency of services to avoid exposure to COVID–19. While we believe the proposed methodology presented best controls for the effects of the COVID–19 PHE, we are soliciting comments on how the COVID–19 PHE may have impacted service provision in a manner not reflected in the proposed methodology described above. We expect that such comments will include empirical evidence to support the commenter's position on how the COVID–19 PHE affected provider behavior.

Commenters stated that the statute requires CMS to analyze solely the differences between the three assumed behavior changes (clinical group coding, comorbidity coding, LUPA threshold) that were incorporated into the original CY 2020 rate setting and what the actual behavior change was for just those three assumptions. Commenters stated that any adjustments to the 30-day payment amount must be related to the impact of those three assumed behavior changes and the actual behavior changes for those same three assumptions on estimated aggregate expenditures; rather than other behavior changes that occurred that impacted aggregate expenditures. As such, commenters presented an alternative method that compares aggregate expenditures between the CY 2018 simulated 30-day periods with the three behavior assumptions applied to the CY 2020 actual 30-day periods. As we have stated previously in the CY 2020 HH PPS final rule with comment period and in the CY 2022 HH PPS final rule (84 FR 60513, 86 FR 62248), we interpret actual behavior changes to encompass both behavior changes that were previously outlined, as assumed by CMS, and other behavior changes not identified at the time that the budget neutral 30-day payment amount for CY 2020 was determined. We use claims data to calculate estimated aggregate expenditures under the HH PPS, regardless of methodology. All claims data are products of behavior changes, (whether or not acknowledged in previous rules), as well as interactions between behaviors. Therefore, any behavior changes observed under the PDGM are considered when determining an adjustment.

A few commenters also proposed determining the extent to which nominal case-mix changes affected aggregate expenditures under the PDGM versus the old payment system as an alternative methodology to evaluate the behavior change assumptions. In order to evaluate case-mix changes, CMS previously utilized a regression model that estimated whether changes in case-mix were due to changes in agency coding practices or other nominal factors, versus real changes in patient characteristics or acuity. While changes in nominal case-mix may be supplemental to our findings, the law requires CMS to determine the effect of the difference between assumed versus actual behavioral changes on estimated aggregate expenditures, which are not factored into our calculations of case-mix adjustment authority. Section 1895(b)(3)(B)(iv) of the Act states that CMS has the authority to adjust for case-mix changes that are a result of changes in the coding or classification of different units of services that do not reflect real changes in case mix. Therefore, at this time we do not believe analyses of nominal case-mix change is the most accurate method to evaluate what aggregate expenditures would have been in absence of the PDGM. Upon continued review of what the law requires us to do in regards to determining the difference between assumed versus actual behaviors on estimated aggregate expenditures, we continue to believe that the best reading of the law requires us to retrospectively determine if the 30-day payment amount in CY 2020 resulted in the same estimated aggregate expenditures that would have been made if the change in the unit of payment and the PDGM case-mix adjustment methodology had not been implemented.

Furthermore, if the estimated aggregate expenditures are determined not to be equal, we are required, by law, to make permanent and temporary adjustments to the PDGM payment rate so that the expenditures across the two payments systems would be equal. We believe using the methodology described previously in the CY 2022 HH PPS proposed rule (85 FR 35890 through 35892 and in this proposed rule, best satisfies our interpretation of section 1895(b)(3)(D)(i) of the Act.

Lastly, commenters raised concerns about the differing case-mix weight systems and that the data exclusions and assumptions made when creating the simulated 60-day episodes introduced some level of bias. Commenters stated that each case-mix system are unique to each payment system as they are dependent on the underlying variables used to describe clinical characteristics or resource use. For this reason, commenters had concerns that the two case-mix weight systems (153 vs 432 case-mix groups) are not comparable. We recognize that the underlying variables in the payment regression are different, but a case-mix of 1.0 is interpreted the same way under both systems. For example, a case-mix of 1.000 means the predicted resource use for a particular home health 60-day episode or 30-day period is equal to overall average resource use. Therefore, we disagree with commenters that comparing the two case-mix systems is flawed. We note there may be some selection bias present due to the data exclusions and assumptions described in section II.B.2.b. of this proposed rule, but we believe this is minimal and does not significantly affect the overall calculation of estimated aggregate expenditures. For example, when we dropped fewer claims we got approximately the same results. Therefore, if we did not exclude claims (for example, there was no linked OASIS data available in the CCW VRDC) or make assumptions about which two 30-day periods to combine, we would further introduce informational and analytical bias.

We reiterate that this methodology uses simulated 60-day episodes priced using the pre-PDGM payment system parameters to determine what the estimated aggregate expenditures would have been in the absence of the PDGM and a 30-day unit of payment. The resulting estimated aggregate expenditures from the pre-PDGM payment system are compared to actual aggregate expenditures from the PDGM 30-day periods to determine, if a permanent prospective adjustment and/or a temporary retrospective adjustment are needed to offset the difference in estimated aggregate expenditures. We propose to use this methodology, as described in this section of this rule, for CYs 2020 through 2026. We refer readers to sections II.B.2.d and II.B.2.e of this proposed rule for our preliminary results of our analysis for CYs 2020 and 2021, respectively.

b. Proposed Method To Annually Determine the Impact of Differences Between Assumed Behavior Changes and Actual Behavior Changes on Estimated Aggregate Expenditures

We analyzed data to determine if the CY 2020 30-day payment amount resulted in the same estimated aggregate expenditures that would have been paid if the PDGM and change in the unit of payment had not been implemented. To evaluate if the 30-day budget neutral payment amount for CY 2020 maintained budget neutrality given the change to a 30-day unit of payment and the implementation of a new case-mix adjustment methodology without

therapy thresholds was accurate, we used actual CY 2020 30-day period claims data to simulate 60-day episodes, and we determined what CY 2020 payments would have been under the 153-group case-mix system and 60-day unit of payment. To do this, we used the following steps:

The first step in repricing CY 2020 PDGM claims was to calculate estimated aggregate expenditures under the pre-PDGM, 153-group case-mix system and 60-day unit of payment, by determining which PDGM 30-day periods of care could be grouped together to form simulated 60-day episodes of care. To facilitate grouping, we made some exclusions and assumptions as described later in this section prior to pricing out the simulated 60-day episodes of care. We note in the early months of CY 2020, there were 60-day episodes which started in 2019 and ended in 2020 and therefore, some of these exclusions and assumptions may be specific to the first year of the PDGM. We identify, through footnotes, if an exclusion or assumption is specific to CY 2020 only. The following describes the steps in determining the annual estimated aggregate expenditures including the exclusions and assumptions made when simulating 60-day episodes from actual 30-day periods.

(1) Exclusions

- Claims where the claim occurrence code 50 date (OASIS assessment date) occurred on or after October 31 of that year. This exclusion was applied to ensure the simulated 60-day episodes contained both 30-day periods from the same year and would not overlap into the following year (for example, 2021, 2022, 2023). This is done because any 30-day periods with an OASIS assessment date in November or December might be part of a simulated 60-day episode that would continue into the following year and where payment would have been made based on the ''through'' date. For CYs 2021 through 2026, we also excluded claims with an OASIS assessment date before January 1 of that year. [10] Again, this is to ensure a simulated 60-day episode (simulated from two 30-day periods) does not overlap years.
- Beneficiaries and all of their claims if they have overlapping claims from the same provider (as identified by CMS Certification Number (CCN)).[11]
- Beneficiaries and all of their claims if three or more claims from the same provider are linked to the same occurrence code 50 date.[12]

(2) Assumptions

- If two 30-day periods of care from the same provider reference the same OASIS assessment date (using occurrence code 50), then we assume those two 30-day periods of care would have been billed as a 60-day episode of care under the 153-group system.
- If two 30 day-periods of care reference different OASIS assessment dates and each of those assessment dates is referenced by a single 30-day period of care, and those two 30-day periods of care occur together close in time (that is, the ''from'' date of the later 30-day period of care is between 0 to 14 days after the ''through'' date of the earlier 30-day period of care), then we assume those two 30-day periods of care also would have been billed as a 60-day episode of care under the 153-group system.
- For all other 30-day periods of care, we assume that they would not be combined with another 30-day period of care and would have been billed as a single 30-day period.

(3) Calculating Estimated Aggregate Expenditures—Pricing Simulated 60-Day Episode Claims

After application of the exclusions and assumptions described previously we have the simulated the 60-day episode datasets for each year. Starting with CY 2020, we assign each 60-day episode of care as a normal episode, PEP, LUPA, or outlier based on the payment parameters established in the CY 2020 final rule with comment period (84 FR 60478) for 60-day episodes of care. Next, using the October 2019 3M Home Health Grouper (v8219) [13] we assign a HIPPS code to each simulated 60-day episode of care using the 153-group methodology. Finally, we price the CY 2020 simulated 60-day episodes of care using the payment parameters described in the CY 2020 final rule with comment period (84 FR 60537) for 60-day episodes of care. For CYs 2021 through 2026, we would adjust the simulated 60-day base payment rate to align with current payments for the analysis year (that is, wage index budget neutrality factor, HH payment update). For example, to calculate the CY 2021 simulated 60-day episode base payment rate, we would start with the final CY 2020 60-day base payment rate ($3,220.79) and multiply by the final CY 2021 wage index budget neutrality factor (0.9999) and the CY 2021 HH payment update (1.020) to get an adjusted 60-day base payment rate ($3,284.88) for CY 2021. We would use the 60-day base payment rate ($3,284.88) to price the CY 2021 simulated 60-day claims under the pre-PDGM HH PPS (60-day episodes under 153 case-mix groups) based on actual behaviors. Once each claim is priced under the pre-PDGM HH PPS, we calculate the estimated aggregate expenditures for all simulated 60-day episodes in CY 2021. This method would be used to reprice claims to simulated 60-day episodes for each subsequent year (that is, through CY 2026).

Next, we calculated the PDGM aggregate expenditures for CY 2020 using those specific 30-day periods that were used to create the simulated 60-day episodes. Therefore, both the actual CY 2020 PDGM expenditures and the simulated pre-PDGM CY 2020 aggregate expenditures are based on the same claims for the permanent adjustment calculation.

c. Calculating Permanent and Temporary Payment Adjustments

To offset for such increases or decreases in estimated aggregate expenditures as a result of the impact of differences between assumed behavior changes and actual behavior changes, in any given year, we calculate a permanent prospective adjustment by determining what the 30 day base payment amount should have been in order to achieve the same estimated aggregate expenditures as obtained from the simulated 60-day episodes. This would be our recalculated base payment rate. The percent change between the actual 30-day base payment rate and the recalculated 30-day base payment rate would be the permanent prospective adjustment.

To calculate a temporary retrospective adjustment for each year we would determine the dollar amount difference between the estimated aggregate expenditures from all 30-day periods using the recalculated 30-day base payment rate, and the aggregate expenditures for all 30-day periods using the actual 30-day base payment rate for the same year. In determining the temporary retrospective dollar

[10] There are no 30-day PDGM claims which started in CY 2019 and ended in CY 2020, and therefore this exclusion would not apply to the CY 2020 dataset.

[11] All of a beneficiary's claims are dropped so as not to create problems with assigning episode timing if only a subset of claims is dropped.

[12] This is done because if three or more claims link to the same OASIS it would not be clear which claims should be joined to simulate a 60-day episode.

[13] *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HomeHealthPPS/CaseMixGrouperSoftware.*

amount, we use the full dataset of actual 30-day periods using both the actual and recalculated base payment rates to ensure utilization and distribution of claims are the same. In accordance with section 1895(b)(3)(D)(iii) of the Act, the temporary adjustment is to be applied on a prospective basis and shall apply only with respect to the year for which such temporary increase or decrease is made. Therefore, after we determine the dollar amount to be reconciled in any given year, we calculate a temporary adjustment factor to be applied to the base payment rate. The temporary adjustment factor is based on an estimated number of 30-day periods in the next year using historical data trends, and as applicable, we control for a permanent adjustment factor, case-mix weight recalibration neutrality factor, wage index budget neutrality factor, and the home health payment update. The temporary adjustment factor is applied last.

d. CY 2020 Results

Using the methodology described previously, we simulated 60-day episodes using actual CY 2020 30-day periods to determine what the CY 2020 permanent and temporary payment adjustments should be to offset for such increases or decreases in estimated aggregate expenditures. For CY 2020, we began with 8,423,688 30-day periods and dropped 603,157 30-day periods that had a claim occurrence code 50 date after October 31, 2020. We also eliminated 79,328 30-day periods that didn't appear to group with another 30-day period to form a 60-day episode if the 30-day period had a ''from date'' before January 15, 2020 or a ''through date'' after November 30, 2020. This was done to ensure a 30-day period would not have been part of a 60-day episode that would have overlapped into CY 2021. Applying the additional exclusions and assumptions as described previously, an additional 14,062 30-day periods were excluded from this analysis. Additionally, we excluded 66,469 simulated 60-day episodes of care where no OASIS information was available in the CCW VRDC or could not be grouped to a HIPPS due to a missing primary diagnosis or other reason. Our simulated 60-day episodes of care produced a distribution of two 30-day periods of care (70.6 percent) and single 30-day periods of care (29.4 percent). This distribution is similar to what we found when we simulated 30-day periods of care for implementation of the PDGM. After all exclusions and assumptions were applied, the final dataset included 7,618,061 actual 30-day periods of care and 4,463,549 simulated 60-day episodes of care for CY 2020.

Using the final dataset for CY 2020 (7,618,061 actual 30-day periods which made up the 4,463,549 simulated 60-day episodes) we determined the estimated aggregate expenditures under the pre-PDGM HH PPS was lower than the actual estimated aggregate expenditures under the PDGM HH PPS (see Table B13). This indicates that aggregate expenditures under the PDGM were higher than if the 153-group payment system was still in place in CY 2020. As described previously, we recalculated what the CY 2020 30-day base payment rate should have been to equal aggregate expenditures that we calculated using the simulated CY 2020 60-day episodes. The percent change between the two payment rates would be the permanent adjustment. Next, we calculated the difference in aggregate expenditures for all CY 2020 PDGM 30-day claims using the actual and recalculated payment rates. This difference is the retrospective dollar amount needed to offset payment. Our results are shown in Table B13.

**TABLE B13: CY 2020 PROPOSED PERMANENT AND TEMPORARY ADJUSTMENTS**

| | Budget-neutral 30-day Payment Rate with Assumed Behavior Changes | Budget-neutral 30-day Payment Rate with Actual Behavior Changes | Adjustment |
|---|---|---|---|
| **Base Payment Rate** | $1,864.03 | $1,742.52 | **Permanent** - 6.52% |
| **Aggregate Expenditures** | $15,170,223,126 | $14,297,150,005 | **Temporary** - $873,073,121 |

**Source**: CY 2020 Home Health Claims Data, Periods that begin and end in CY 2020 accessed on the CCW July 12, 2021.

As shown in Table B13, a permanent prospective adjustment of −6.52 percent to the CY 2023 30-day payment rate would be required to offset for such increases in estimated aggregate expenditures in future years. Additionally, we determined that our initial estimate of base payment rates required to achieve budget neutrality resulted in excess expenditures of HHAs of approximately $873 million in CY 2020. This would require a temporary adjustment to offset for such increase in estimated aggregate expenditures for CY 2020.

e. CY 2021 Preliminary Results

We will continue the practice of using the most recent complete home health claims data at the time of rulemaking. The CY 2021 analysis presented in this proposed rule is considered preliminary and as more data become available from the latter half of CY 2021, we will update our results in the final rule. Using the methodology described previously, we simulated 60-day episodes using actual CY 2021 30-day periods to determine what the permanent and temporary payment adjustments should be to offset for such increases or decreases in estimated aggregate expenditures as a result of the impact of differences between assumed behavior changes and actual behavior changes. For CY 2021, we began with 8,962,690 30-day periods of care and dropped 478,105 30-day periods of care that had claim occurrence code 50 date after October 31, 2021. We also excluded 968,361 30-day periods of care that had claim occurrence code 50 date before January 1, 2021 to ensure the 30-day period would not be part of a simulated 60-day episode that began in

CY 2020. Applying the additional exclusions and assumptions as described previously, an additional 4,853 30-day periods were excluded.

Additionally, we excluded 11,143 simulated 60-day episodes of care where no OASIS information was available in the CCW VRDC or could not be grouped to a HIPPS due to a missing primary diagnosis or other reason. Our simulated 60-day episodes of care produced a distribution of two 30-day periods of care (69.1 percent) and single 30-day periods of care (30.9 percent) that was similar to what we found when we simulated two 30-day periods of care for implementation of the PDGM. After all exclusions and assumptions were applied, the final dataset included 7,494,836 actual 30-day periods of care and 4,431,238 simulated 60-day episodes of care for CY 2021.

Using the final dataset for CY 2021 (7,494,836 actual 30-day periods which made up the 4,431,238 simulated 60-day episodes) we determined the estimated aggregate expenditures under the pre-PDGM HH PPS was lower than the actual estimated aggregate expenditures under the PDGM HH PPS. This indicates that aggregate expenditures under the PDGM were higher than if the 153-group payment system was still in place in CY 2021. As described previously, we recalculated what the CY 2021 30-day base payment rate should have been to equal aggregate expenditures that we calculated using the simulated CY 2021 60-day episodes. We note, the actual CY 2021 base payment rate of $1,901.12 does not account for any adjustments previously made for CY 2020 and therefore to evaluate changes for only CY 2021 we need to control for the −6.52 percent prospective adjustment that we determined for CY 2020. Therefore, using the recalculated CY 2020 base payment rate of $1,742.52, multiplied by the CY 2021 wage index budget neutrality factor (0.9999) and the CY 2021 HH payment update (1.020), the CY 2021 base payment rate for assumed behavior would have been $1,777.19. The percent change between the two payment rates would be the permanent adjustment. Next, we calculated the difference in aggregate expenditures for all CY 2021 PDGM 30-day claims using the actual and recalculated payment rates. This difference is the retrospective dollar amount needed to offset payment. Our results are shown in Table B14.

**TABLE B14: CY 2021 PROPOSED PERMANENT AND TEMPORARY ADJUSTMENTS**

| | Budget-neutral 30-day Payment Rate with Assumed Behavior Changes | Budget-neutral 30-day Payment Rate with Actual Behavior Changes | Adjustment |
|---|---|---|---|
| | | | **Permanent** |
| **Base Payment Rate** | $1,777.19 | $1,754.88 | -1.26% |
| | | | **Temporary** |
| **Aggregate Expenditures** | $16,491,173,256* | $15,343,249,798 | -$1,147,923,458 |

**Source**: CY 2021 Home Health Claims Data, Periods that end in CY 2021 accessed on the CCW March 21, 2022
***Note**: The estimated aggregate expenditures for assumed behavior ($16.5 billion), uses the CY 2021 payment rate of $1,901.12 as this is what CMS actually paid in CY 2021.

As shown in Table B14, a permanent prospective adjustment of −1.26 percent and would be required to offset for such increases in estimated aggregate expenditures in future years. Additionally, we determined that our initial estimate of base payment rates required to achieve budget neutrality resulted in excess expenditures of approximately $1.1 billion in CY 2021. This would require a one-time temporary adjustment factor to offset for such increases in estimated aggregate expenditures for CY 2021.

f. Proposed CY 2023 Permanent and Temporary Adjustments

The percent change between the actual CY 2021 base payment rate of $1,901.12 and the CY 2021 recalculated base payment rate of $1,754.88 is the total permanent adjustment for CYs 2020 and 2021, because no previous adjustments were applied to the CY 2020 rate to reset the CY 2021 rate. The summation of the dollar amount for CYs 2020 and 2021 is the amount that represents the temporary payment adjustment to offset for increased aggregate expenditures in both CYs 2020 and 2021. Our results are shown in Table B15 and B16.

**TABLE B15: TOTAL PERMANENT ADJUSTMENT FOR CYs 2020 AND 2021**

| Actual CY 2021 Base Payment Rate (Assumed Behavior) | Recalculated CY 2021 Base Payment Rate (Actual Behavior) | Total Permanent Prospective Adjustment |
|---|---|---|
| $1,901.12 | $1,754.88 | -7.69% |

**Source**: CY 2021 Home Health Claims Data, Periods that end in CY 2021 accessed on the CCW March 21, 2022.

**TABLE B16: TOTAL TEMPORARY ADJUSTMENT FOR CYs 2020 AND 2021**

| CY 2020 Temporary Adjustment | CY 2021 Temporary Adjustment | Total Temporary Adjustment Dollar Amount for CYs 2020 and 2021 |
|---|---|---|
| - $873,073,121 | - $1,147,923,458 | - $2,020,996,579 |

**Source**: CY 2020 Home Health Claims Data, Periods that begin and end in CY 2020 accessed on the CCW July 12, 2021. CY 2021 Home Health Claims Data, Periods that end in CY 2021 accessed on the CCW March 21, 2022.

To offset the increase in estimated aggregate expenditures for CYs 2020 and 2021 based on the impact of the differences between assumed and actual behavior changes, CMS would need to apply a −7.69 percent permanent adjustment to the CY 2023 base payment rate as well as implement a temporary adjustment of approximately $2.0 billion to reconcile retrospective overpayments in CYs 2020 and 2021. We recognize that applying the full permanent and temporary adjustment immediately would result in a significant negative adjustment in a single year. However, if the PDGM base 30-day payment rate remains higher than it should be, then there would likely be a compounding effect potentially creating the need for a larger reduction in future years. Therefore, we propose initially to apply only the permanent adjustment of −7.69 percent to the CY 2023 base payment rate. We believe this could mitigate the need for a larger permanent adjustment and could reduce the amount of any additional temporary adjustments in future years. We are soliciting comments on the application of only the permanent payment adjustment to the CY 2023 30-day payment rate. Additionally, we solicit comments on how best to collect the temporary payment adjustment of approximately $2.0 billion for CYs 2020 and 2021. As noted previously, we will update these permanent and temporary adjustments in the final rule to reflect more complete claims data for CY 2021.

3. Proposed Reassignment of Specific ICD–10–CM Codes Under the PDGM

a. Background

The 2009 final rule, ''HIPAA Administrative Simplification: Modifications to Medical Data Code Set Standards To Adopt ICD–10–CM and ICD–10–PCS'' [14] (74 FR 3328, January 16, 2009), set October 1, 2013, as the compliance date for all covered entities under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to use the International Classification of Diseases, 10th Revision, Clinical Modification (ICD–10–CM) and the International Classification of Diseases, 10th Revision, Procedure Coding System (ICD–10–PCS) medical data code sets. The ICD–10–CM diagnosis codes are granular and specific, and provide HHAs a better opportunity to report codes that best reflect the patient's conditions that support the need for home health services. However, as stated in the CY 2019 HH PPS final rule with comment period (83 FR 56473), because the ICD–10–CM is comprehensive, it also contains many codes that may not support the need for home health services. For example, diagnosis codes that indicate death as the outcome are Medicare covered codes, but are not relevant to home health. In addition, diagnosis and procedure coding guidelines may specify the sequence of ICD–10–CM coding conventions. For example, the underlying condition must be listed first (for example, Parkinson's disease must be listed prior to Dementia if both codes were listed on a claim). Therefore, not all the ICD–10–CM diagnosis codes are appropriate as principal diagnosis codes for grouping home health periods into clinical groups or to be placed into a comorbidity subgroup when listed as a secondary diagnosis. As such, each ICD–10–CM diagnosis code is assigned, including those diagnosis codes designated as ''not assigned'' (NA), to a clinical group and comorbidity subgroup within the HH PPS grouper software (HHGS). We remind commenters the ICD–10–CM diagnosis code list is updated each fiscal year with an effective date of October 1st and therefore, the HH PPS is generally subject to a minimum of two HHGS releases, one in October and one in January of each year, to ensure that claims are submitted with the most current code set available. Likewise, there may be new ICD–10–CM diagnosis codes created (for example, codes for emergency use) or a new or revised edit in the Medicare Code Editor (MCE) so an update to the HHGS may occur on the first of each quarter (January, April, July, October).

b. Methodology for ICD–10–CM Diagnosis Code Assignments

Although it is not our intent to review all ICD–10–CM diagnosis codes each year, we recognize that occasionally some ICD–10–CM diagnosis codes may require changes to their assigned clinical group and/or comorbidity subgroup. For example, there may be an update to the MCE unacceptable principal diagnosis list, or we receive public comments from interested parties requesting specific changes. Any addition or removal of a specific diagnosis code to the ICD–10–CM code set (for example, three new diagnosis codes, Z28.310, Z28.311 and Z28.39, for

[14] *https://www.federalregister.gov/documents/2009/01/16/E9-743/hipaa-administrative-simplification-modifications-to-medical-data-code-set-standards-to-adopt.*

reporting COVID–19 vaccination status were effective April 1, 2022) or minor tweaks to a descriptor of an existing ICD–10–CM diagnosis code generally would not require rulemaking, and may occur at any time. However, if an ICD–10–CM diagnosis code is to be reassigned from one clinical group and/or a comorbidity subgroup to another, which may affect payment, then we believe it is appropriate to propose these changes through notice and comment rulemaking.

We rely on the expert opinion of our clinical reviewers (for example, nurse consultants and medical officers) and current ICD–10–CM coding guidelines to determine if the ICD–10–CM diagnosis codes under review for reassignment are significantly similar or different to the existing clinical group and/or comorbidity subgroup assignment. As we stated in the CY 2018 proposed rule (82 FR 35313), the intent of the clinical groups is to reflect the reported principal diagnosis, clinical relevance, and coding guidelines and conventions. Therefore, for the purposes of assignment of ICD–10–CM diagnosis codes into the PDGM clinical groups we would not conduct additional statistical analysis as such decisions are clinically based and the clinical groups are part of the overall case-mix weights.

In the CY 2019 final rule with comment period (83 FR 56486), we stated the home health-specific comorbidity list is based on the principles of patient assessment by body systems and their associated diseases, conditions, and injuries to develop larger categories of conditions that identified clinically relevant relationships associated with increased resource use meaning the diagnoses have at least as high as the median resource use and are reported in more than 0.1 percent of 30-day periods of care. If specific ICD–10–CM diagnosis codes are to be reassigned to a different comorbidity subgroup (including NA), we will first evaluate the clinical characteristics (as discussed previously for clinical groups) and if the ICD–10–CM diagnosis code does not meet the clinical criteria, then no reassignment will occur. However, if an ICD–10–CM diagnosis code does meet the clinical criteria for a comorbidity subgroup reassignment, then we will evaluate the resource consumption associated with the ICD–10–CM diagnosis codes, the current assigned comorbidity subgroup, and the proposed (reassigned) comorbidity subgroup. This analysis is to ensure that any reassignment of an ICD–10–CM diagnosis code (if reported as secondary) in any given year would not significantly alter the overall resource use of a specific comorbidity subgroup. For resource consumption, we use non-LUPA 30-day periods to evaluate the total number of 30-day periods for the comorbidity subgroup(s) and the ICD–10–CM diagnosis code, the average number of visits per 30-day periods for the comorbidity subgroup(s) and the ICD–10–CM diagnosis code, and the average resource use for the comorbidity subgroup(s) and the ICD–10–CM diagnosis code. The average resource use measures the costs associated with visits performed during a home health period, and was previously described in the CY 2019 final rule with comment period (83 FR 56450).

c. Proposed ICD–10–CM Diagnosis Code Reassignments to a PDGM Clinical Group or Comorbidity Subgroup

The following section proposes reassignment of 320 diagnosis codes to a different clinical group when listed as a principal diagnosis, reassignment of 37 diagnosis codes to a different comorbidity subgroup when listed as a secondary diagnosis, and the establishment of a new comorbidity subgroup for certain neurological conditions and disorders. Due to the amount of diagnosis codes proposed for reassignment this year, we have posted the ''CY 2023 Proposed Reassignment of ICD–10–CM Diagnosis Codes for HH PDGM Clinical Groups and Comorbidity Subgroups'' supplemental file on the Home Health Prospective Payment System Regulations and Notices web page.[15] The supplemental file can be accessed through the CY 2023 Home Health Prospective Payment System Rate Update; Home Health Quality Reporting Requirements; and Home Infusion Therapy Requirements link. The following tables are included in the supplemental file:

| Tables (Tab) | Description |
|---|---|
| TABLE 1.A - Unspecified Diagnosis Codes | List of unspecified diagnosis codes proposed to be reassigned to no clinical group, "NA" |
| TABLE 1.B - Gout Related Diagnosis Codes | List of gout related diagnosis codes proposed to be reassigned from no clinical group, "NA", to clinical group E, musculoskeletal rehabilitation |
| TABLE 1.C - G Diagnosis Codes Related to Specified Neuropathy or Unspecified Neuropathy | List of G codes related to specified neuropathy or unspecified polyneuropathy proposed to be reassigned to new comorbidity subgroup, neurological 12 |

(1) Proposed Clinical Group Reassignment of Certain Unspecified Diagnosis Codes

We remind readers that in the CY 2019 final rule with comment period (83 FR 56473) we stated that whenever possible, the most specific code that describes a medical disease, condition, or injury should be used. Generally, ''unspecified'' codes are used when there is lack of information about location or severity of medical conditions in the medical record. However, we would expect a provider to use a precise code whenever more specific codes are available. Furthermore, if additional information regarding the diagnosis is needed, we would expect the HHA to follow-up with the referring provider in order to ensure the care plan is sufficient in

[15] Home Health Prospective Payment System Regulations and Notices web page. *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HomeHealthPPS/Home-Health-Prospective-Payment-System-Regulations-and-Notices.*

meeting the needs of the patient. For example, T14.90 ''Injury, unspecified'' does not provide sufficient information (for example, the type and extent of the injury) that would be necessary in care planning for home health services. The ICD–10–CM code set also includes laterality. We believe a home health clinician should not report an ''unspecified'' code if that clinician can identify the side or site of a condition. For example, a home health clinician should be able to state whether a fracture of the arm is on the right or left arm. In the FY 2022 Inpatient Prospective Payment System/Long-Term Care Hospital Prospective Payment System (IPPS/LTCH PPS) final rule (86 FR 44940 through 44943), CMS finalized the implementation of a new MCE to expand the list of unacceptable principal diagnoses for ''unspecified'' ICD–10–CM diagnosis codes when there are other diagnosis codes available in that diagnosis code subcategory that further specify the anatomic site. As such, we reviewed the ICD–10–CM diagnosis codes where ''unspecified'' is used. We identified 159 ICD–10–CM diagnosis codes currently accepted as a principal diagnosis that have more specific codes available for such medical conditions that would more accurately identify the primary reason for home health services. For example, S59.109A (Unspecified physeal fracture of upper end of radius, unspecified arm, initial encounter for closed fracture) does not specify which arm has the fracture; whereas, S59.101A (Unspecified physeal fracture of upper end of radius, right arm, initial encounter for closed fracture) does indicate the fracture is on the right arm and therefore more accurately identifies the primary reason for home health services. Therefore, in accordance with our expectation that the most precise code be used, we believe these 159 ICD–10 CM diagnosis codes are not acceptable as principal diagnoses and we propose to reassign them to ''no clinical group'' (NA). We refer readers to Table 1.A of the CY 2023 Proposed Reassignment of ICD–10–CM Diagnosis Codes supplemental file [16] for the list of the 159 unspecified diagnosis codes.

We also determined that B78.9 strongyloidiasis, unspecified was assigned to clinical group C (Wounds), and should be reassigned to clinical group K (MMTA—Infectious Disease, Neoplasms, and Blood-Forming Diseases) because it would be consistent with the assignment of the other strongyloidiasis codes. We also identified that N83.201 unspecified ovarian cyst, right side was assigned to clinical group A (MMTA-Other) and should be reassigned to clinical group J (MMTA—Gastrointestinal Tract and Genitourinary System) because it would be consistent with the assignment of other ovarian cyst codes. We propose to reassign these two ICD–10–CM diagnosis codes' clinical groups as shown in Table B17.

**TABLE B17: REASSIGNMENT OF CLINICAL GROUP FOR "UNSPECIFIED" ICD–10–CM DIAGNOSIS CODES**

| ICD-10–CM Code | Code Description | Reassigned Clinical Group | Reassigned Clinical Group Description |
|---|---|---|---|
| B78.9 | Strongyloidiasis, unspecified | K | MMTA - Infectious Disease, Neoplasms, and Blood-Forming Diseases |
| N83.201 | Unspecified ovarian cyst, right side | J | MMTA - Gastrointestinal Tract and Genitourinary System |

(2) Proposed Clinical Group Reassignment of Gout-Related Codes

We identified that certain groups of gout-related ICD–10–CM diagnosis codes, such as idiopathic gout and drug-induced gout, were assigned to clinical group E (musculoskeletal rehabilitation) when listed as a principal diagnosis. However, other groups of gout related ICD–10–CM diagnosis codes, such as gout due to renal impairment, were assigned to ''no clinical group'' (NA). Therefore, we reviewed all gout-related codes and determined there are 144 gout related codes with an anatomical site specified, not currently assigned to a clinical group that should be moved to clinical group E (musculoskeletal rehabilitation) for consistency with the aforementioned gout codes. In the ICD–10–CM code set, gout codes and osteoarthritis codes are found in chapter 13 Diseases of the Musculoskeletal System and Connective Tissue (M00–M99). Gout and osteoarthritis affect similar joints such as the fingers, toes, and knees and they can initially be treated with medications. However, generally, as a part of a treatment program, once the initial inflammation is reduced, physical therapy can be started to stretch and strengthen the affected joint to restore flexibility and joint function. Because those cases may require therapy, we believe gout codes are more appropriately placed into MS rehab along with other codes affecting the musculoskeletal system. We refer readers to Table 1.B of the CY 2023 Proposed Reassignment of ICD–10–CM Diagnosis Codes supplemental file for the list of the 144 gout related codes. We propose to reassign these 144 gout-related ICD–10–CM diagnosis codes to clinical group E (musculoskeletal rehabilitation).

(3) Proposed Clinical Group Reassignment of Crushing Injury-Related Codes

We identified 12 ICD–10–CM diagnosis codes related to crushing injury of the face, skull, and head that warrant reassignment. These codes are listed in Table B18.

[16] Home Health Prospective Payment System Regulations and Notices web page. *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HomeHealthPPS/Home-Health-Prospective-Payment-System-Regulations-and-Notices.*

## TABLE B18: ICD–10–CM DIAGNOSIS CODES RELATED TO CRUSHING INJURY OF FACE, SKULL, AND HEAD

| ICD–10–CM Code | Code Description | Current Clinical Group | Current Clinical Group Description |
|---|---|---|---|
| S07.0XXA | Crushing injury of face, initial encounter | A | MMTA – Other |
| S07.0XXD | Crushing injury of face, subsequent encounter | A | MMTA – Other |
| S07.0XXS | Crushing injury of face, sequela | A | MMTA – Other |
| S07.1XXA | Crushing injury of skull, initial encounter | A | MMTA – Other |
| S07.1XXD | Crushing injury of skull, subsequent encounter | A | MMTA – Other |
| S07.1XXS | Crushing injury of skull, sequela | A | MMTA – Other |
| S07.8XXA | Crushing injury of other parts of head, initial encounter | A | MMTA – Other |
| S07.8XXD | Crushing injury of other parts of head, subsequent encounter | A | MMTA – Other |
| S07.8XXS | Crushing injury of other parts of head, sequela | A | MMTA – Other |
| S07.9XXA | Crushing injury of head, part unspecified, initial encounter | A | MMTA – Other |
| S07.9XXD | Crushing injury of head, part unspecified, subsequent encounter | A | MMTA – Other |
| S07.9XXS | Crushing injury of head, part unspecified, sequela | A | MMTA – Other |

Our clinical advisors reviewed the 12 ICD–10–CM diagnosis codes related to crushing injury of the face, skull, and head and determined that reassignment of these codes to clinical group B (Neurological Rehabilitation) is clinically appropriate because they are consistent with other diagnosis codes in clinical group E that describe injuries requiring neurological rehabilitation. Therefore, we propose to reassign the ICD–10–CM diagnosis codes listed in Table B18 from clinical group A (MMTA-Other) to clinical group B (Neurological Rehabilitation).

(4) Proposed Clinical Group Reassignment of Lymphedema-Related Codes

We received questions from interested parties regarding three lymphedema codes with conflicting clinical group assignments when listed as a principal diagnosis. These codes are listed in Table B19.

## TABLE B19: ICD–10–CM DIAGNOSIS CODE RELATED TO LYMPHEDEMA

| ICD-10 CM Diagnosis Code | Code Description | Current Clinical Group | Current Clinical Group Description |
|---|---|---|---|
| I89.0 | Lymphedema, not elsewhere classified | E | Musculoskeletal Rehabilitation |
| I97.2 | Postmastectomy lymphedema syndrome | E | Musculoskeletal Rehabilitation |
| Q82.0 | Hereditary lymphedema | A | MMTA – Other |

Our clinical advisors reviewed the three ICD–10–CM diagnosis codes related to lymphedema and determined that assessing and treating lymphedema is similar to the assessment and staging of wounds. It requires the assessment of pulses, evaluation of the color and amount of drainage, and measurement. In addition, some lymphedema can require compression bandaging, similar to wound care. Because of these similarities, we determined the reassignment of the three ICD–10–CM diagnosis codes related to lymphedema to clinical group C (Wounds) is clinically appropriate. Therefore, we propose to reassign the ICD–10–CM diagnosis codes listed in Table B19 from clinical group E (Musculoskeletal Rehabilitation) and clinical group A (MMTA-Other) to clinical group C (Wounds).

(5) Proposed Behavioral Health Comorbidity Subgroups

Our clinical advisors reviewed the ICD–10–CM diagnosis code F60.5

(obsessive-compulsive personality disorder) which is currently assigned to the comorbidity subgroup behavioral 6 (Schizotypal, Persistent Mood, and Adult Personality Disorders). However, they noted that behavioral 5 (Phobias, Other Anxiety and Obsessive-Compulsive Disorders) contains other obsessive-compulsive disorders (for example, F42.8 and F42.9) and clinically F60.5 should be reassigned to the comorbidity subgroup behavioral 5. In addition, we evaluated resource consumption related to the comorbidity subgroup behavioral 5, the comorbidity subgroup behavioral 6, and F60.5 and found no significant variations negating a reassignment, meaning the reassignment is still in alignment with the actual costs of providing care. Therefore, we propose to reassign diagnosis code F60.5 to behavioral 5 when listed as a secondary diagnosis.

(6) Proposed Circulatory Comorbidity Subgroups

We reviewed Q82.0 (hereditary lymphedema) for clinical group reassignment, as described in section II.B.3.4. of this rule. During this review, we discovered Q82.0 is not currently assigned to a comorbidity subgroup when listed as a secondary diagnosis. The comorbidity subgroup circulatory 10 includes ICD–10–CM diagnosis codes related to varicose veins and lymphedema and our clinical advisors determined that Q82.0 should be assigned to the comorbidity subgroup circulatory 10 similar to other lymphedema diagnosis codes. In addition, we evaluated resource consumption related to the comorbidity subgroup circulatory 10 and Q82.0 and found no significant variations negating a reassignment. Therefore, we propose to assign diagnosis code Q82.0 to circulatory 10 (varicose veins and lymphedema) when listed as a secondary diagnosis.

(7) Proposed Neoplasm Comorbidity Subgroups

(i) Malignant Neoplasm of Upper Respiratory

In response to interested parties' questions regarding upper respiratory malignant neoplasms, we reviewed 14 ICD–10–CM diagnosis codes related to malignant neoplasms of the upper respiratory tract currently assigned to the comorbidity subgroup neoplasm 6 (malignant neoplasms of trachea, bronchus, lung, and mediastinum). These 14 codes are listed in Table B20.

**TABLE B20: ICD–10–CM DIAGNOSIS CODE RELATED TO MALIGNANT NEOPLASMS OF UPPER RESPIRATORY TRACT**

| ICD–10–CM Diagnosis Code | Code Description |
|---|---|
| C30.0 | Malignant neoplasm of nasal cavity |
| C30.1 | Malignant neoplasm of middle ear |
| C31.0 | Malignant neoplasm of maxillary sinus |
| C31.1 | Malignant neoplasm of ethmoidal sinus |
| C31.2 | Malignant neoplasm of frontal sinus |
| C31.3 | Malignant neoplasm of sphenoid sinus |
| C31.8 | Malignant neoplasm of overlapping sites of accessory sinuses |
| C31.9 | Malignant neoplasm of accessory sinus, unspecified |
| C32.0 | Malignant neoplasm of glottis |
| C32.1 | Malignant neoplasm of supraglottis |
| C32.2 | Malignant neoplasm of subglottis |
| C32.3 | Malignant neoplasm of laryngeal cartilage |
| C32.8 | Malignant neoplasm of overlapping sites of larynx |
| C32.9 | Malignant neoplasm of larynx, unspecified |

Our clinical advisors reviewed the codes listed in Table B20 and determined that C32.3, C32.8, and C32.9 are currently assigned to the most clinically appropriate neoplasm comorbidity subgroup (neoplasm 6), and therefore no further analysis was conducted for these three ICD–10 CM diagnosis codes. However, upon review of all the neoplasm comorbidity subgroups, they determined that the remaining 11 codes listed in Table B20 should be reassigned to neoplasm 1 (malignant neoplasms of lip, oral cavity, and pharynx, including head and neck

cancers) in alignment with clinically similar diagnosis codes already assigned (for example, C11.0 malignant neoplasm of superior wall of nasopharynx). In addition, we evaluated resource consumption related to the comorbidity subgroup, neoplasm 1, as well as diagnosis codes, C30.0, C30.1, C31.0, C31.1, C31.2, C31.3, C31.8, C31.9, C32.0, C32.1, or C32.2 and found no significant variations negating a reassignment.

Therefore, we propose to reassign diagnosis codes C30.0, C30.1, C31.0, C31.1, C31.2, C31.3, C31.8, C31.9, C32.0, C32.1, or C32.2 from neoplasm 6 to neoplasm 1 when listed as a secondary diagnosis.

(ii) Malignant Neoplasm of Unspecified Adrenal Gland

While reviewing unspecified codes for a change in clinical group, we noticed that ICD–10–CM diagnosis codes C74.00 (malignant neoplasm of cortex of unspecified adrenal gland) and C74.90 (malignant neoplasm of unspecified part of unspecified adrenal gland) were coded as ''N/A'' instead of placed in a comorbidity subgroup. The comorbidity subgroup neoplasm 15 currently includes ICD–10–CM diagnosis codes related to malignant neoplasm of adrenal gland, endocrine glands and related structures; specifically, C74.10 (malignant neoplasm of medulla of unspecified adrenal gland). At this time, we believe that C74.00 and C74.90 should be reassigned to neoplasm 15 based on clinical similarities of other codes currently assigned. In addition, we evaluated resource consumption related to the comorbidity subgroup neoplasm 15, as well as diagnosis codes C74.00, and C74.90 and found no significant variations negating a reassignment. Therefore, we propose to reassign diagnosis codes C74.00 and C74.90 from ''NA'' to neoplasm 15 (malignant neoplasm of adrenal gland, endocrine glands and related structures) when listed as secondary diagnoses.

(8) Proposed New Neurological Comorbidity Subgroup

In response to a comment received, we discussed in the CY 2022 final rule (86 FR 62263, 62264) our review of ICD–10–CM diagnosis codes related to specified neuropathy or unspecified polyneuropathy. These include specific ICD–10–CM G-codes. We stated that the codes were assigned to the most clinically appropriate subgroup at the time. However, upon further clinical review we believe a new neurological comorbidity subgroup to include ICD–10–CM diagnosis codes related to nondiabetic neuropathy is warranted. We identified 18 ICD–10–CM diagnosis codes for potential reassignment to a proposed new comorbidity subgroup, neurological 12. We refer readers to Table 1.C of the CY 2023 Proposed Reassignment of ICD–10–CM Diagnosis Codes supplemental file for a list of the G-codes related to specified neuropathy or unspecified polyneuropathy. Of the 18 codes, 11 diagnosis codes were not currently assigned a comorbidity group and seven diagnosis codes were assigned to neurological 11 comorbidity subgroup.

Using claims data from the CY 2021 HH PPS analytical file, we identified that the 18 diagnosis G-codes related to specified neuropathy or unspecified polyneuropathy would have sufficient claims (>400,000) for a new comorbidity subgroup. The removal of the seven codes from the neurological 11 comorbidity subgroup, would still allow for sufficient claims (>250,000) and include the remaining 146 diagnosis codes currently listed in the neurological 11 comorbidity subgroup. We evaluated resource consumption related to the comorbidity subgroup neurological 11, the 18 diagnosis G-codes, and the proposed comorbidity subgroup neurological 12 and found no significant variations negating a reassignment. A new neurological comorbidity subgroup allows more clinically similar codes, nondiabetic neuropathy, to be grouped together. Therefore, we propose to reassign the 18 diagnosis codes listed in Table 1.C of the CY 2023 Proposed Reassignment of ICD–10 CM Diagnosis Codes supplemental file, to the new comorbidity subgroup neurological 12 (nondiabetic neuropathy) when listed as secondary diagnoses. In conjunction with the proposed new comorbidity subgroup, we propose to change the description of the current comorbidity subgroup, neurological 11, from ''Diabetic Retinopathy and Macular Edema'' to ''Disease of the Macula and Blindness/Low Vision''.

(9) Proposed Respiratory Comorbidity Subgroups

(i) J18.2 Hypostatic Pneumonia, Unspecified Organism

Our clinical advisors reviewed the ICD–10–CM diagnosis code J18.2 (hypostatic pneumonia, unspecified organism) which is currently assigned to the comorbidity subgroup respiratory 4 (bronchitis, emphysema, and interstitial lung disease). However, respiratory 2 (whooping cough and pneumonia) contains other pneumonia with unspecified organism (for example, J18.1 and J18.8). Clinically, J18.2 is similar to the other pneumonias in respiratory 2 and therefore, should be reassigned from comorbidity subgroup respiratory 4 to comorbidity subgroup respiratory 2. In addition, we evaluated resource consumption related to the comorbidity subgroups respiratory 2 and respiratory 4, and J18.2 and found no significant variations negating a reassignment.

Therefore, we propose to reassign diagnosis code J18.2 (hypostatic pneumonia, unspecified organism) to respiratory 2 when listed as a secondary diagnosis.

(ii) J98.2 Interstitial Emphysema and J98.3 Compensatory Emphysema

Our clinical advisors reviewed the ICD–10–CM diagnosis codes J98.2, interstitial emphysema and J98.3, compensatory emphysema, which are currently assigned to the comorbidity subgroup respiratory 9 (respiratory failure and atelectasis). However, respiratory 4 (bronchitis, emphysema, and interstitial lung disease) contains other emphysema codes (for example, J43.0 through J43.9) and therefore clinically we believe it is appropriate to reassign J98.2 and J98.3 to the comorbidity subgroup respiratory 9. In addition, we evaluated resource consumption related to the comorbidity subgroups respiratory 4 and respiratory 9, as well as diagnosis codes J98.2, and J98.3 and found no significant variations negating a reassignment. Therefore, we propose to reassign diagnosis codes J98.2 and J98.3 to respiratory 4 when listed as a secondary diagnosis.

(iii) U09.9 Post COVID–19 Condition, Unspecified

Our clinical advisors reviewed the ICD–10–CM diagnosis code U09.9 (post COVID–19 condition, unspecified), which is currently assigned to the comorbidity subgroup, respiratory 2 (whooping cough and pneumonia). However, respiratory 10 (2019 novel Coronavirus) contains other COVID–19 codes (for example, U07.1). Therefore, we believe clinically that U09.9 should be reassigned to the comorbidity subgroup, respiratory 10. In addition, we evaluated resource consumption related to the comorbidity subgroups respiratory 2 and respiratory 10, and diagnosis codes U09.9 and found no significant variations negating a reassignment.

Therefore, we propose to reassign diagnosis code U09.9 to respiratory 10 when listed as a secondary diagnosis.

We solicit comments on all of the proposed clinical group and

comorbidity subgroup reassignments described in this section.

4. Proposed CY 2023 PDGM LUPA Thresholds and PDGM Case-Mix Weights

a. Proposed CY 2023 PDGM LUPA Thresholds

Under the HH PPS, LUPAs are paid when a certain visit threshold for a payment group during a 30-day period of care is not met. In the CY 2019 HH PPS final rule (83 FR 56492), we finalized that the LUPA thresholds would be set at the 10th percentile of visits or 2 visits, whichever is higher, for each payment group. This means the LUPA threshold for each 30 day period of care varies depending on the PDGM payment group to which it is assigned. If the LUPA threshold for the payment group is met under the PDGM, the 30-day period of care will be paid the full 30-day period case-mix adjusted payment amount (subject to any PEP or outlier adjustments). If a 30-day period of care does not meet the PDGM LUPA visit threshold, then payment will be made using the CY 2023 per-visit payment amounts as described in Section II.B.5.c. of this proposed rule. For example, if the LUPA visit threshold is four, and a 30-day period of care has four or more visits, it is paid the full 30-day period payment amount; if the period of care has three or less visits, payment is made using the per-visit payment amounts.

In the CY 2019 HH PPS final rule with comment period (83 FR 56492), we finalized our policy that the LUPA thresholds for each PDGM payment group would be reevaluated every year based on the most current utilization data available at the time of rulemaking. However, as CY 2020 was the first year of the new case-mix adjustment methodology, we stated in the CY 2021 final rule (85 FR 70305, 70306) that we would maintain the LUPA thresholds that were finalized and shown in Table 17 of the CY 2020 HH PPS final rule with comment period (84 FR 60522) for CY 2021 payment purposes. We stated that at that time, we did not have sufficient CY 2020 data to reevaluate the LUPA thresholds for CY 2021.

In the CY 2022 HH PPS final rule (86 FR 62249), we finalized the proposal to recalibrate the PDGM case-mix weights, functional impairment levels, and comorbidity subgroups while maintaining the LUPA thresholds for CY 2022. We stated that because there are several factors that contribute to how the case-mix weight is set for a particular case-mix group (such as the number of visits, length of visits, types of disciplines providing visits, and non-routine supplies) and the case-mix weight is derived by comparing the average resource use for the case-mix group relative to the average resource use across all groups, we believe the PHE would have impacted utilization within all case-mix groups similarly. Therefore, the impact of any reduction in resource use caused by the PHE on the calculation of the case-mix weight would be minimized since the impact would be accounted for both in the numerator and denominator of the formula used to calculate the case-mix weight. However, in contrast, the LUPA thresholds are based on the number of overall visits in a particular case-mix group (the threshold is the 10th percentile of visits or 2 visits, whichever is greater) instead of a relative value (like what is used to generate the case-mix weight) that would control for the impacts of the PHE. We noted that visit patterns and some of the decrease in overall visits in CY 2020 may not be representative of visit patterns in CY 2022. Therefore, to mitigate any potential future and significant short-term variability in the LUPA thresholds due to the COVID–19 PHE, we finalized the proposal to maintain the LUPA thresholds finalized and displayed in Table 17 in the CY 2020 HH PPS final rule with comment period (84 FR 60522) for CY 2022 payment purposes.

For CY 2023, we are proposing to update the LUPA thresholds using CY 2021 Medicare home health claims (as of March 21, 2022) linked to OASIS assessment data. After reviewing the CY 2021 home health claims utilization data we determined that visit patterns have stabilized. Our data analysis indicates that visits in 2021 were similar to visits in 2020. We believe that CY 2021 data will be more indicative of visit patterns in CY 2023 rather than continuing to use the LUPA thresholds derived from the CY 2018 data pre-PDGM. Therefore, we are proposing to update the LUPA thresholds for CY 2023 using data from CY 2021. In general, there is not much variation in the updated LUPA thresholds; 280 case-mix groups had no change in their LUPA threshold. There are 120 case-mix groups that had their LUPA threshold go down by one visit and 18 case-mix groups that have their LUPA threshold go up by a visit. There are 12 case-mix groups that had their LUPA threshold go down by two visits and 2 case-mix groups that had their LUPA threshold go down by three visits.

The proposed LUPA thresholds for the CY 2023 PDGM payment groups with the corresponding Health Insurance Prospective Payment System (HIPPS) codes and the case-mix weights are listed in Table B26. We solicit public comments on the proposed updates to the LUPA thresholds for CY 2023.

b. CY 2023 Functional Impairment Levels

Under the PDGM, the functional impairment level is determined by responses to certain OASIS items associated with activities of daily living and risk of hospitalization; that is, responses to OASIS items M1800–M1860 and M1033. A home health period of care receives points based on each of the responses associated with these functional OASIS items, which are then converted into a table of points corresponding to increased resource use. The sum of all of these points results in a functional score which is used to group home health periods into a functional level with similar resource use. That is, the higher the points, the higher the response is associated with increased resource use. The sum of all of these points results in a functional impairment score which is used to group home health periods into one of three functional impairment levels with similar resource use. The three functional impairment levels of low, medium, and high were designed so that approximately one-third of home health periods from each of the clinical groups fall within each level. This means home health periods in the low impairment level have responses for the functional OASIS items that are associated with the lowest resource use, on average. Home health periods in the high impairment level have responses for the functional OASIS items that are associated with the highest resource use on average.

For CY 2023, we propose to use CY 2021 claims data to update the functional points and functional impairment levels by clinical group. The CY 2018 HH PPS proposed rule (82 FR 35320) and the technical report from December 2016, posted on the Home Health PPS Archive webpage located at: *https://www.cms.gov/medicare/home-health-pps/home-health-pps-archive*, provide a more detailed explanation as to the construction of these functional impairment levels using the OASIS items. We are proposing to use this same methodology previously finalized to update the functional impairment levels for CY 2023. The updated OASIS functional points table and the table of functional impairment levels by clinical group for CY 2023 are listed in Tables B21 and B22, respectively. We solicit public comments on the updates to

functional points and the functional impairment levels by clinical group.

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## TABLE B21: PROPOSED OASIS POINTS TABLE FOR CY 2023

| | Responses | Points 2023 | Percent of Periods in 2021 with this Response Category |
|---|---|---|---|
| **M1800: Grooming** | 0 or 1 | **0** | **31.6%** |
| | 2 or 3 | **3** | **68.4%** |
| **M1810: Current Ability to Dress Upper Body** | 0 or 1 | **0** | **26.3%** |
| | 2 or 3 | **5** | **73.7%** |
| **M1820: Current Ability to Dress Lower Body** | 0 or 1 | **0** | **12.4%** |
| | 2 | **4** | **64.8%** |
| | 3 | **12** | **22.8%** |
| **M1830: Bathing** | 0 or 1 | **0** | **3.1%** |
| | 2 | **2** | **12.3%** |
| | 3 or 4 | **9** | **51.2%** |
| | 5 or 6 | **17** | **33.5%** |
| **M1840: Toilet Transferring** | 0 or 1 | **0** | **63.6%** |
| | 2, 3 or 4 | **5** | **36.4%** |
| **M1850: Transferring** | 0 | **0** | **1.8%** |
| | 1 | **3** | **22.5%** |
| | 2, 3, 4 or 5 | **6** | **75.7%** |
| **M1860: Ambulation/Locomotion** | 0 or 1 | **0** | **3.9%** |
| | 2 | **6** | **15.1%** |
| | 3 | **5** | **63.4%** |
| | 4, 5 or 6 | **20** | **17.5%** |
| **M1033: Risk of Hospitalization** | Three or fewer items marked (Excluding responses 8, 9 or 10) | **0** | **66.2%** |
| | Four or more items marked (Excluding responses 8, 9 or 10) | **10** | **33.8%** |

**Source**: CY 2021 Home Health Claims Data, Periods that end in CY 2021 accessed from the CCW on March 21, 2022.

**Note:** For item M1860, the point values for response 2 is worth more than the point values for response 3. There may be times in which the resource use for certain OASIS items associated with functional impairment will result in a seemingly inverse relationship to the response reported. However, this is the result of the direct association between the responses reported on the OASIS items and actual resource use.

**TABLE BB22: PROPOSED THRESHOLDS FOR FUNCTIONAL LEVELS BY CLINICAL GROUP, FOR CY 2023**

| Clinical Group | Level of Impairment | Points (2023) |
|---|---|---|
| **MMTA – Other** | Low | **0-31** |
| | Medium | **32-42** |
| | High | **43+** |
| **Behavioral Health** | Low | **0-30** |
| | Medium | **31-42** |
| | High | **43+** |
| **Complex Nursing Interventions** | Low | **0-32** |
| | Medium | **33-53** |
| | High | **54+** |
| **Musculoskeletal Rehabilitation** | Low | **0-32** |
| | Medium | **33-44** |
| | High | **45+** |
| **Neuro Rehabilitation** | Low | **0-34** |
| | Medium | **35-50** |
| | High | **51+** |
| **Wound** | Low | **0-32** |
| | Medium | **33-50** |
| | High | **51+** |
| **MMTA - Surgical Aftercare** | Low | **0-32** |
| | Medium | **33-42** |
| | High | **43+** |
| **MMTA - Cardiac and Circulatory** | Low | **0-30** |
| | Medium | **31-42** |
| | High | **43+** |
| **MMTA - Endocrine** | Low | **0-29** |
| | Medium | **30-42** |
| | High | **43+** |
| **MMTA - Gastrointestinal tract and Genitourinary system** | Low | **0-32** |
| | Medium | **33-47** |
| | High | **48+** |
| **MMTA - Infectious Disease, Neoplasms, and Blood-Forming Diseases** | Low | **0-32** |
| | Medium | **33-44** |
| | High | **45+** |
| **MMTA - Respiratory** | Low | **0-32** |
| | Medium | **33-45** |
| | High | **46+** |

**Source**: CY 2021 Home Health Claims Data, Periods that end in CY 2021 accessed from the CCW on March 21, 2022.

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c. CY 2023 Comorbidity Subgroups

Thirty-day periods of care receive a comorbidity adjustment category based on the presence of certain secondary diagnoses reported on home health claims. These diagnoses are based on a home-health specific list of clinically and statistically significant secondary diagnosis subgroups with similar resource use, meaning the diagnoses have at least as high as the median resource use and are reported in more than 0.1 percent of 30-day periods of care. Home health 30-day periods of care can receive a comorbidity adjustment under the following circumstances:

- *Low comorbidity adjustment:* There is a reported secondary diagnosis on the home health-specific comorbidity subgroup list that is associated with higher resource use.
- *High comorbidity adjustment:* There are two or more secondary diagnoses on the home health-specific comorbidity subgroup interaction list that are associated with higher resource use when both are reported together compared to when they are reported separately. That is, the two diagnoses may interact with one another, resulting in higher resource use.
- *No comorbidity adjustment:* A 30-day period of care receives no comorbidity adjustment if no secondary diagnoses exist or do not meet the criteria for a low or high comorbidity adjustment.

In the CY 2019 HH PPS final rule with comment period (83 FR 56406), we stated that we would continue to examine the relationship of reported comorbidities on resource utilization and make the appropriate payment refinements to help ensure that payment is in alignment with the actual costs of providing care. For CY 2023, we propose to use the same methodology used to establish the comorbidity subgroups to update the comorbidity subgroups using CY 2021 home health data.

For CY 2023, we propose to update the comorbidity subgroups to include 23 low comorbidity adjustment subgroups as identified in Table B23 and 94 high comorbidity adjustment interaction subgroups as identified in Table B24. The proposed 23 low comorbidity adjustment subgroups and 94 high comorbidity adjustment interactions reflect the proposed coding changes detailed in section II.B.3.c. of this proposed rule. The proposed CY 2023 low comorbidity adjustment subgroups and the high comorbidity adjustment interaction subgroups including those diagnoses within each of these comorbidity adjustments will also be posted on the HHA Center webpage at *https://www.cms.gov/Center/Provider-Type/Home-Health-Agency-HHA-Center*.

We invite comments on the proposed updates to the low comorbidity adjustment subgroups and the high comorbidity adjustment interactions for CY 2023.

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## TABLE B23: LOW COMORBIDITY ADJUSTMENT SUBGROUPS FOR CY 2023

| Low Comorbidity Subgroup | Description |
|---|---|
| Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae |
| Circulatory 10 | Varicose Veins and Lymphedema |
| Circulatory 2 | Hemolytic, Aplastic, and Other Anemias |
| Circulatory 7 | Atherosclerosis, includes Peripheral Vascular Disease, Aortic Aneurysms and Hypotension |
| Circulatory 9 | Other Venous Embolism and Thrombosis |
| Endocrine 4 | Other Combined Immunodeficiencies and Malnutrition, includes graft-versus-host-disease |
| Gastrointestinal 1 | Crohn's, Ulcerative Colitis, and other Functional Intestinal Disorders |
| Heart 10 | Dysrhythmias, includes Atrial Fibrillation and Atrial Flutter |
| Heart 11 | Heart Failure |
| Musculoskeletal 2 | Rheumatoid Arthritis |
| Neoplasm 1 | Malignant Neoplasms of Lip, Oral Cavity and Pharynx, includes Head and Neck Cancers |
| Neoplasm 18 | Secondary Neoplasms of Urinary and Reproductive Systems, Skin, Brain, and Bone |
| Neoplasm 2 | Malignant Neoplasms of Digestive Organs, includes Gastrointestinal Cancers |
| Neoplasm 6 | Malignant neoplasms of trachea, bronchus, lung, and mediastinum |
| Neurological 10 | Diabetes with neuropathy |
| Neurological 11 | Disease of the Macula and Blindness/Low Vision |
| Neurological 12 | Nondiabetic neuropathy |
| Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| Respiratory 10 | 2019 Novel Coronavirus |
| Skin 1 | Cutaneous Abscess, Cellulitis, and Lymphangitis |
| Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |

**Source**: CY 2021 Home Health Claims Data, Periods that end in CY 2021 accessed on the CCW March 21, 2022.

## TABLE B24: HIGH COMORBIDITY ADJUSTMENT INTERACTIONS FOR CY 2023

| Comorbidity Subgroup Interaction | Comorbidity Group | Description | Comorbidity Group | Description |
|---|---|---|---|---|
| 1 | Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae | Renal 3 | Other disorders of the kidney and ureter, excluding chronic kidney disease and ESRD |
| 2 | Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae | Endocrine 3 | Type 1, Type 2, and Other Specified Diabetes |
| 3 | Circulatory 9 | Other Venous Embolism and Thrombosis | Endocrine 3 | Type 1, Type 2, and Other Specified Diabetes |

| Comorbidity Subgroup Interaction | Comorbidity Group | Description | Comorbidity Group | Description |
|---|---|---|---|---|
| 4 | Circulatory 9 | Other Venous Embolism and Thrombosis | Renal 3 | Other disorders of the kidney and ureter, excluding chronic kidney disease and ESRD |
| 5 | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease | Neurological 8 | Epilepsy |
| 6 | Endocrine 5 | Obesity, and Disorders of Metabolism and Fluid Balance | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 7 | Heart 11 | Heart Failure | Neurological 11 | Disease of the Macula and Blindness/Low Vision |
| 8 | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease | Renal 1 | Chronic kidney disease and ESRD |
| 9 | Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae | Infectious 1 | C-diff, MRSA, E-coli |
| 10 | Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae | Circulatory 2 | Hemolytic, Aplastic, and Other Anemias |
| 11 | Behavioral 5 | Phobias, Other Anxiety and Obsessive Compulsive Disorders | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 12 | Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae | Neurological 10 | Diabetes with neuropathy |
| 13 | Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae | Heart 11 | Heart Failure |
| 14 | Neurological 10 | Diabetes with neuropathy | Skin 1 | Cutaneous Abscess, Cellulitis, and Lymphangitis |
| 15 | Endocrine 1 | Hypothyroidism | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 16 | Neurological 4 | Alzheimer's disease and related dementias | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 17 | Heart 12 | Other Heart Diseases | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 18 | Behavioral 2 | Mood Disorders, includes Depression and Bipolar Disorder | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |

| Comorbidity Subgroup Interaction | Comorbidity Group | Description | Comorbidity Group | Description |
|---|---|---|---|---|
| 19 | Neurological 8 | Epilepsy | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 20 | Endocrine 1 | Hypothyroidism | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 21 | Behavioral 4 | Psychotic, major depressive, and dissociative disorders, includes unspecified dementia, eating disorder and intellectual disabilities | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 22 | Circulatory 10 | Varicose Veins and Lymphedema | Heart 12 | Other Heart Diseases |
| 23 | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia | Respiratory 5 | Chronic Obstructive Pulmonary Disease, and Asthma, and Bronchiectasis |
| 24 | Endocrine 5 | Obesity, and Disorders of Metabolism and Fluid Balance | Skin 1 | Cutaneous Abscess, Cellulitis, and Lymphangitis |
| 25 | Behavioral 2 | Mood Disorders, includes Depression and Bipolar Disorder | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 26 | Behavioral 2 | Mood Disorders, includes Depression and Bipolar Disorder | Circulatory 10 | Varicose Veins and Lymphedema |
| 27 | Circulatory 10 | Varicose Veins and Lymphedema | Circulatory 4 | Hypertensive Chronic Kidney Disease |
| 28 | Circulatory 9 | Other Venous Embolism and Thrombosis | Endocrine 4 | Other Combined Immunodeficiencies and Malnutrition, includes graft-versus-host-disease |
| 29 | Endocrine 3 | Type 1, Type 2, and Other Specified Diabetes | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 30 | Heart 7 | Chronic Ischemic Heart Disease | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 31 | Circulatory 10 | Varicose Veins and Lymphedema | Endocrine 3 | Type 1, Type 2, and Other Specified Diabetes |
| 32 | Neurological 10 | Diabetes with neuropathy | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 33 | Heart 12 | Other Heart Diseases | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 34 | Neurological 4 | Alzheimer's disease and related dementias | Skin 3 | Diseases of arteries, arterioles and capillaries with |

| Comorbidity Subgroup Interaction | Comorbidity Group | Description | Comorbidity Group | Description |
|---|---|---|---|---|
| | | | | ulceration and non-pressure chronic ulcers |
| 35 | Behavioral 5 | Phobias, Other Anxiety and Obsessive Compulsive Disorders | Circulatory 10 | Varicose Veins and Lymphedema |
| 36 | Heart 10 | Dysrhythmias, includes Atrial Fibrillation and Atrial Flutter | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 37 | Circulatory 4 | Hypertensive Chronic Kidney Disease | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 38 | Circulatory 4 | Hypertensive Chronic Kidney Disease | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 39 | Circulatory 2 | Hemolytic, Aplastic, and Other Anemias | Skin 1 | Cutaneous Abscess, Cellulitis, and Lymphangitis |
| 40 | Heart 11 | Heart Failure | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 41 | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease | Renal 3 | Other disorders of the kidney and ureter, excluding chronic kidney disease and ESRD |
| 42 | Circulatory 4 | Hypertensive Chronic Kidney Disease | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 43 | Circulatory 1 | Nutritional, Enzymatic, and Other Heredity Anemias | Skin 1 | Cutaneous Abscess, Cellulitis, and Lymphangitis |
| 44 | Circulatory 10 | Varicose Veins and Lymphedema | Heart 11 | Heart Failure |
| 45 | Circulatory 10 | Varicose Veins and Lymphedema | Endocrine 5 | Obesity, and Disorders of Metabolism and Fluid Balance |
| 46 | Heart 11 | Heart Failure | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 47 | Respiratory 4 | Bronchitis, Emphysema, and Interstitial Lung Disease | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 48 | Circulatory 2 | Hemolytic, Aplastic, and Other Anemias | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease |
| 49 | Heart 10 | Dysrhythmias, includes Atrial Fibrillation and Atrial Flutter | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 50 | Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae | Neurological 11 | Disease of the Macula and Blindness/Low Vision |

| Comorbidity Subgroup Interaction | Comorbidity Group | Description | Comorbidity Group | Description |
|---|---|---|---|---|
| 51 | Neurological 11 | Disease of the Macula and Blindness/Low Vision | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 52 | Behavioral 2 | Mood Disorders, includes Depression and Bipolar Disorder | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 53 | Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 54 | Circulatory 10 | Varicose Veins and Lymphedema | Heart 10 | Dysrhythmias, includes Atrial Fibrillation and Atrial Flutter |
| 55 | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 56 | Circulatory 2 | Hemolytic, Aplastic, and Other Anemias | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 57 | Behavioral 5 | Phobias, Other Anxiety and Obsessive Compulsive Disorders | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 58 | Endocrine 4 | Other Combined Immunodeficiencies and Malnutrition, includes graft-versus-host-disease | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 59 | Circulatory 10 | Varicose Veins and Lymphedema | Endocrine 4 | Other Combined Immunodeficiencies and Malnutrition, includes graft-versus-host-disease |
| 60 | Musculoskeletal 3 | Joint Pain | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 61 | Skin 1 | Cutaneous Abscess, Cellulitis, and Lymphangitis | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 62 | Endocrine 1 | Hypothyroidism | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 63 | Heart 9 | Valve Disorders | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 64 | Respiratory 9 | Respiratory Failure and Atelectasis | Skin 3 | Diseases of arteries, arterioles and capillaries with |

| Comorbidity Subgroup Interaction | Comorbidity Group | Description | Comorbidity Group | Description |
|---|---|---|---|---|
| | | | | ulceration and non-pressure chronic ulcers |
| 65 | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia | Renal 3 | Other disorders of the kidney and ureter, excluding chronic kidney disease and ESRD |
| 66 | Circulatory 1 | Nutritional, Enzymatic, and Other Heredity Anemias | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 67 | Circulatory 1 | Nutritional, Enzymatic, and Other Heredity Anemias | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 68 | Heart 8 | Other Pulmonary Heart Diseases | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 69 | Musculoskeletal 2 | Rheumatoid Arthritis | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 70 | Heart 11 | Heart Failure | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 71 | Endocrine 5 | Obesity, and Disorders of Metabolism and Fluid Balance | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 72 | Circulatory 7 | Atherosclerosis, includes Peripheral Vascular Disease, Aortic Aneurysms and Hypotension | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 73 | Circulatory 2 | Hemolytic, Aplastic, and Other Anemias | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 74 | Musculoskeletal 4 | Lumbar Spinal Stenosis | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 75 | Neurological 12 | Nondiabetic neuropathy | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 76 | Endocrine 3 | Type 1, Type 2, and Other Specified Diabetes | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 77 | Neurological 5 | Spinal Muscular Atrophy, Systemic atrophy and Motor Neuron Disease | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |

| Comorbidity Subgroup Interaction | Comorbidity Group | Description | Comorbidity Group | Description |
|---|---|---|---|---|
| 78 | Endocrine 4 | Other Combined Immunodeficiencies and Malnutrition, includes graft-versus-host-disease | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia |
| 79 | Behavioral 4 | Psychotic, major depressive, and dissociative disorders, includes unspecified dementia, eating disorder and intellectual disabilities | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 80 | Circulatory 1 | Nutritional, Enzymatic, and Other Heredity Anemias | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 81 | Musculoskeletal 3 | Joint Pain | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 82 | Neurological 4 | Alzheimer's disease and related dementias | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 83 | Respiratory 2 | Whooping cough | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 84 | Heart 11 | Heart Failure | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 85 | Neurological 10 | Diabetes with neuropathy | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 86 | Circulatory 10 | Varicose Veins and Lymphedema | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers |
| 87 | Infectious 1 | C-diff, MRSA, E-coli | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 88 | Cerebral 4 | Sequelae of Cerebrovascular Diseases, includes Cerebral Atherosclerosis and Stroke Sequelae | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 89 | Renal 3 | Other disorders of the kidney and ureter, excluding chronic kidney disease and ESRD | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 90 | Endocrine 3 | Type 1, Type 2, and Other Specified Diabetes | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 91 | Endocrine 4 | Other Combined Immunodeficiencies and Malnutrition, includes graft-versus-host-disease | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |

| Comorbidity Subgroup Interaction | Comorbidity Group | Description | Comorbidity Group | Description |
|---|---|---|---|---|
| 92 | Neurological 7 | Paraplegia, Hemiplegia and Quadriplegia | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 93 | Heart 10 | Dysrhythmias, includes Atrial Fibrillation and Atrial Flutter | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |
| 94 | Skin 3 | Diseases of arteries, arterioles and capillaries with ulceration and non-pressure chronic ulcers | Skin 4 | Stages Two-Four and unstageable pressure ulcers by site |

**Source**: CY 2021 Home Health Claims Data, Periods that end in CY 2021 accessed from the CCW March 21, 2022.

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d. CY 2023 PDGM Case-Mix Weights

As finalized in the CY 2019 HH PPS final rule with comment period (83 FR 56502), the PDGM places patients into meaningful payment categories based on patient and other characteristics, such as timing, admission source, clinical grouping using the reported principal diagnosis, functional impairment level, and comorbid conditions. The PDGM case-mix methodology results in 432 unique case-mix groups called home health resource groups (HHRGs). We also finalized a policy in the CY 2019 HH PPS final rule with comment period (83 FR 56515) to recalibrate annually the PDGM case-mix weights using a fixed effects model with the most recent and complete utilization data available at the time of annual rulemaking. Annual recalibration of the PDGM case-mix weights ensures that the case-mix weights reflect, as accurately as possible, current home health resource use and changes in utilization patterns. To generate the proposed recalibrated CY 2023 case-mix weights, we used CY 2021 home health claims data with linked OASIS data (as of March 21, 2021). These data are the most current and complete data available at this time. We believe that recalibrating the case-mix weights using data from CY 2021 would be reflective of PDGM utilization and patient resource use for CY 2023. The proposed recalibrated case-mix weights will be updated based on more complete CY 2021 claims data for the final rule.

The claims data provide visit-level data and data on whether non-routine supplies (NRS) were provided during the period and the total charges of NRS. We determine the case-mix weight for each of the 432 different PDGM payment groups by regressing resource use on a series of indicator variables for each of the categories using a fixed effects model as described in the following steps:

*Step 1:* Estimate a regression model to assign a functional impairment level to each 30-day period. The regression model estimates the relationship between a 30-day period's resource use and the functional status and risk of hospitalization items included in the PDGM, which are obtained from certain OASIS items. We refer readers to Table B21 for further information on the OASIS items used for the functional impairment level under the PDGM. We measure resource use with the cost-per-minute + NRS approach that uses information from 2020 home health cost reports. We use 2020 home health cost report data because it is the most complete cost report data available at the time of rulemaking. Other variables in the regression model include the 30-day period's admission source, clinical group, and 30-day period timing. We also include home health agency level fixed effects in the regression model. After estimating the regression model using 30-day periods, we divide the coefficients that correspond to the functional status and risk of hospitalization items by 10 and round to the nearest whole number. Those rounded numbers are used to compute a functional score for each 30-day period by summing together the rounded numbers for the functional status and risk of hospitalization items that are applicable to each 30-day period. Next, each 30-day period is assigned to a functional impairment level (low, medium, or high) depending on the 30-day period's total functional score. Each clinical group has a separate set of functional thresholds used to assign 30-day periods into a low, medium or high functional impairment level. We set those thresholds so that we assign roughly a third of 30-day periods within each clinical group to each functional impairment level (low, medium, or high).

*Step 2:* A second regression model estimates the relationship between a 30-day period's resource use and indicator variables for the presence of any of the comorbidities and comorbidity interactions that were originally examined for inclusion in the PDGM. Like the first regression model, this model also includes home health agency level fixed effects and includes control variables for each 30-day period's admission source, clinical group, timing, and functional impairment level. After we estimate the model, we assign comorbidities to the low comorbidity adjustment if any comorbidities have a coefficient that is statistically significant (p-value of 0.05 or less) and which have a coefficient that is larger than the 50th percentile of positive and statistically significant comorbidity coefficients. If two comorbidities in the model and their interaction term have coefficients that sum together to exceed $150 and the interaction term is statistically significant (p-value of 0.05 or less), we assign the two comorbidities together to the high comorbidity adjustment.

*Step 3:* After Step 2, each 30-day period is assigned to a clinical group, admission source category, episode timing category, functional impairment level, and comorbidity adjustment category. For each combination of those variables (which represent the 432 different payment groups that comprise the PDGM), we then calculate the 10th percentile of visits across all 30-day periods within a particular payment group. If a 30-day period's number of visits is less than the 10th percentile for their payment group, the 30-day period is classified as a Low Utilization Payment Adjustment (LUPA). If a payment group has a 10th percentile of visits that is less than two, we set the

LUPA threshold for that payment group to be equal to two. That means if a 30-day period has one visit, it is classified as a LUPA and if it has two or more visits, it is not classified as a LUPA.

*Step 4:* Take all non-LUPA 30-day periods and regress resource use on the 30-day period's clinical group, admission source category, episode timing category, functional impairment level, and comorbidity adjustment category. The regression includes fixed effects at the level of the home health agency. After we estimate the model, the model coefficients are used to predict each 30-day period's resource use. To create the case-mix weight for each 30-day period, the predicted resource use is divided by the overall resource use of the 30-day periods used to estimate the regression.

The case-mix weight is then used to adjust the base payment rate to determine each 30-day period's payment. Table B25 shows the coefficients of the payment regression used to generate the weights, and the coefficients divided by average resource use.

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## TABLE B25: COEFFICIENT OF PAYMENT REGRESSION AND COEFFICIENT DIVIDED BY AVERAGE RESOURCE USE

| Variable | Coefficient | Percentage of 30-Day Periods for this Model | Coefficient Divided by Average Resource Use |
|---|---|---|---|
| **Clinical Group and Functional Impairment Level (MMTA - Other - Low is excluded)** | | | |
| **MMTA - Other - Medium Functional** | $152.20 | 1.1% | 0.1028 |
| **MMTA - Other - High Functional** | $317.60 | 1.1% | 0.2145 |
| **MMTA - Surgical Aftercare - Low Functional** | -$24.71 | 1.4% | -0.0167 |
| **MMTA - Surgical Aftercare - Medium Functional** | $145.03 | 0.9% | 0.0979 |
| **MMTA - Surgical Aftercare - High Functional** | $356.97 | 1.0% | 0.2411 |
| **MMTA - Cardiac and Circulatory - Low Functional** | -$46.75 | 6.4% | -0.0316 |
| **MMTA - Cardiac and Circulatory - Medium Functional** | $126.40 | 6.6% | 0.0854 |
| **MMTA - Cardiac and Circulatory - High Functional** | $298.41 | 5.8% | 0.2015 |
| **MMTA - Endocrine - Low Functional** | $338.60 | 2.4% | 0.2287 |
| **MMTA - Endocrine - Medium Functional** | $437.25 | 2.5% | 0.2953 |
| **MMTA - Endocrine - High Functional** | $594.17 | 2.1% | 0.4013 |
| **MMTA - Gastrointestinal tract and Genitourinary system - Low Functional** | -$72.68 | 1.7% | -0.0491 |
| **MMTA - Gastrointestinal tract and Genitourinary system - Medium Functional** | $130.08 | 1.5% | 0.0878 |
| **MMTA - Gastrointestinal tract and Genitourinary system - High Functional** | $260.39 | 1.5% | 0.1759 |
| **MMTA - Infectious Disease, Neoplasms, and Blood-Forming Diseases - Low Functional** | -$17.53 | 1.9% | -0.0118 |
| **MMTA - Infectious Disease, Neoplasms, and Blood-Forming Diseases - Medium Functional** | $126.08 | 1.1% | 0.0851 |
| **MMTA - Infectious Disease, Neoplasms, and Blood-Forming Diseases - High Functional** | $312.51 | 1.5% | 0.2111 |
| **MMTA - Respiratory - Low Functional** | -$31.20 | 3.2% | -0.0211 |
| **MMTA - Respiratory - Medium Functional** | $145.08 | 2.4% | 0.0980 |
| **MMTA - Respiratory - High Functional** | $322.21 | 2.5% | 0.2176 |
| **Behavioral Health - Low Functional** | -$94.58 | 0.8% | -0.0639 |
| **Behavioral Health - Medium Functional** | $104.75 | 0.8% | 0.0707 |
| **Behavioral Health - High Functional** | $247.44 | 0.8% | 0.1671 |
| **Complex - Low Functional** | -$87.93 | 1.1% | -0.0594 |
| **Complex - Medium Functional** | $125.39 | 0.8% | 0.0847 |
| **Complex - High Functional** | $90.24 | 1.0% | 0.0609 |
| **MS Rehab - Low Functional** | $109.45 | 7.9% | 0.0739 |
| **MS Rehab - Medium Functional** | $236.08 | 5.0% | 0.1594 |
| **MS Rehab - High Functional** | $436.63 | 6.7% | 0.2949 |
| **Neuro - Low Functional** | $237.17 | 3.8% | 0.1602 |

| Variable | Coefficient | Percentage of 30-Day Periods for this Model | Coefficient Divided by Average Resource Use |
|---|---|---|---|
| **Neuro - Medium Functional** | $411.70 | 3.6% | 0.2780 |
| **Neuro - High Functional** | $622.49 | 3.7% | 0.4204 |
| **Wound - Low Functional** | $500.34 | 5.3% | 0.3379 |
| **Wound - Medium Functional** | $663.36 | 4.3% | 0.4480 |
| **Wound - High Functional** | $856.63 | 4.8% | 0.5785 |
| **Admission Source with Timing (Community Early is excluded)** | | | |
| **Community – Late** | -$549.55 | 64.2% | -0.3711 |
| **Institutional – Early** | $324.97 | 18.3% | 0.2195 |
| **Institutional – Late** | $195.43 | 5.9% | 0.1320 |
| **Comorbidity Adjustment (No Comorbidity Adjustment - is excluded)** | | | |
| **Comorbidity Adjustment - Has at least one comorbidity from comorbidity list, no interaction from interaction list** | $86.90 | 51.5% | 0.0587 |
| **Comorbidity Adjustment - Has at least one interaction from interaction list** | $298.93 | 16.4% | 0.2019 |
| **Constant** | $1,389.08 | | |
| **Average Resource Use** | $1,480.69 | | |
| **Number of 30-day Periods** | 8,291,253 | | |
| **Adjusted R-Squared** | 0.3259 | | |

**Source**: CY 2021 Home Health Claims Data, Periods that end in CY 2021 accessed on the CCW March 21, 2022.

The case-mix weights proposed for CY 2023 are listed in Table B26 and will also be posted on the HHA Center web-page [17] upon display of this proposed rule.

[17] HHA Center web page: *https://www.cms.gov/Center/Provider-Type/Home-Health-Agency-HHA-Center.*

## Table B26: CASE-MIX WEIGHTS AND LUPA THRESHOLDS FOR EACH HHRG PAYMENT GROUP

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 1FC11 | Behavioral Health – High | Early - Community | 0 | 1.1052 | 4 |
| 1FC21 | Behavioral Health - High | Early - Community | 1 | 1.1639 | 4 |
| 1FC31 | Behavioral Health - High | Early - Community | 2 | 1.3071 | 4 |
| 2FC11 | Behavioral Health - High | Early - Institutional | 0 | 1.3247 | 4 |
| 2FC21 | Behavioral Health - High | Early - Institutional | 1 | 1.3834 | 4 |
| 2FC31 | Behavioral Health - High | Early - Institutional | 2 | 1.5266 | 4 |
| 3FC11 | Behavioral Health - High | Late - Community | 0 | 0.7341 | 2 |
| 3FC21 | Behavioral Health - High | Late - Community | 1 | 0.7928 | 2 |
| 3FC31 | Behavioral Health - High | Late - Community | 2 | 0.9360 | 2 |
| 4FC11 | Behavioral Health - High | Late - Institutional | 0 | 1.2372 | 3 |
| 4FC21 | Behavioral Health - High | Late - Institutional | 1 | 1.2959 | 3 |
| 4FC31 | Behavioral Health - High | Late - Institutional | 2 | 1.4391 | 3 |
| 1FA11 | Behavioral Health - Low | Early - Community | 0 | 0.8743 | 3 |
| 1FA21 | Behavioral Health - Low | Early - Community | 1 | 0.9329 | 3 |
| 1FA31 | Behavioral Health - Low | Early - Community | 2 | 1.0761 | 3 |
| 2FA11 | Behavioral Health - Low | Early - Institutional | 0 | 1.0937 | 3 |
| 2FA21 | Behavioral Health - Low | Early - Institutional | 1 | 1.1524 | 3 |
| 2FA31 | Behavioral Health - Low | Early - Institutional | 2 | 1.2956 | 3 |
| 3FA11 | Behavioral Health - Low | Late - Community | 0 | 0.5031 | 2 |
| 3FA21 | Behavioral Health - Low | Late - Community | 1 | 0.5618 | 2 |
| 3FA31 | Behavioral Health - Low | Late - Community | 2 | 0.7050 | 2 |
| 4FA11 | Behavioral Health - Low | Late - Institutional | 0 | 1.0062 | 2 |
| 4FA21 | Behavioral Health - Low | Late - Institutional | 1 | 1.0649 | 3 |
| 4FA31 | Behavioral Health - Low | Late - Institutional | 2 | 1.2081 | 3 |
| 1FB11 | Behavioral Health - Medium | Early - Community | 0 | 1.0089 | 4 |
| 1FB21 | Behavioral Health - Medium | Early - Community | 1 | 1.0676 | 4 |
| 1FB31 | Behavioral Health - Medium | Early - Community | 2 | 1.2108 | 4 |
| 2FB11 | Behavioral Health - Medium | Early - Institutional | 0 | 1.2283 | 3 |
| 2FB21 | Behavioral Health - Medium | Early - Institutional | 1 | 1.2870 | 4 |
| 2FB31 | Behavioral Health - Medium | Early - Institutional | 2 | 1.4302 | 4 |
| 3FB11 | Behavioral Health - Medium | Late - Community | 0 | 0.6377 | 2 |
| 3FB21 | Behavioral Health - Medium | Late - Community | 1 | 0.6964 | 2 |
| 3FB31 | Behavioral Health - Medium | Late - Community | 2 | 0.8396 | 2 |
| 4FB11 | Behavioral Health - Medium | Late - Institutional | 0 | 1.1409 | 3 |
| 4FB21 | Behavioral Health - Medium | Late - Institutional | 1 | 1.1995 | 3 |
| 4FB31 | Behavioral Health - Medium | Late - Institutional | 2 | 1.3427 | 3 |
| 1DC11 | Complex - High | Early - Community | 0 | 0.9991 | 2 |
| 1DC21 | Complex - High | Early - Community | 1 | 1.0578 | 2 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 1DC31 | Complex - High | Early - Community | 2 | 1.2010 | 2 |
| 2DC11 | Complex - High | Early - Institutional | 0 | 1.2185 | 3 |
| 2DC21 | Complex - High | Early - Institutional | 1 | 1.2772 | 3 |
| 2DC31 | Complex - High | Early - Institutional | 2 | 1.4204 | 4 |
| 3DC11 | Complex - High | Late - Community | 0 | 0.6279 | 2 |
| 3DC21 | Complex - High | Late - Community | 1 | 0.6866 | 2 |
| 3DC31 | Complex - High | Late - Community | 2 | 0.8298 | 2 |
| 4DC11 | Complex - High | Late - Institutional | 0 | 1.1311 | 3 |
| 4DC21 | Complex - High | Late - Institutional | 1 | 1.1897 | 3 |
| 4DC31 | Complex - High | Late - Institutional | 2 | 1.3329 | 3 |
| 1DA11 | Complex - Low | Early - Community | 0 | 0.8787 | 2 |
| 1DA21 | Complex - Low | Early - Community | 1 | 0.9374 | 2 |
| 1DA31 | Complex - Low | Early - Community | 2 | 1.0806 | 2 |
| 2DA11 | Complex - Low | Early - Institutional | 0 | 1.0982 | 3 |
| 2DA21 | Complex - Low | Early - Institutional | 1 | 1.1569 | 3 |
| 2DA31 | Complex - Low | Early - Institutional | 2 | 1.3001 | 3 |
| 3DA11 | Complex - Low | Late - Community | 0 | 0.5076 | 2 |
| 3DA21 | Complex - Low | Late - Community | 1 | 0.5663 | 2 |
| 3DA31 | Complex - Low | Late - Community | 2 | 0.7095 | 2 |
| 4DA11 | Complex - Low | Late - Institutional | 0 | 1.0107 | 2 |
| 4DA21 | Complex - Low | Late - Institutional | 1 | 1.0694 | 2 |
| 4DA31 | Complex - Low | Late - Institutional | 2 | 1.2126 | 3 |
| 1DB11 | Complex - Medium | Early - Community | 0 | 1.0228 | 2 |
| 1DB21 | Complex - Medium | Early - Community | 1 | 1.0815 | 2 |
| 1DB31 | Complex - Medium | Early - Community | 2 | 1.2247 | 2 |
| 2DB11 | Complex - Medium | Early - Institutional | 0 | 1.2423 | 4 |
| 2DB21 | Complex - Medium | Early - Institutional | 1 | 1.3010 | 4 |
| 2DB31 | Complex - Medium | Early - Institutional | 2 | 1.4442 | 4 |
| 3DB11 | Complex - Medium | Late - Community | 0 | 0.6517 | 2 |
| 3DB21 | Complex - Medium | Late - Community | 1 | 0.7104 | 2 |
| 3DB31 | Complex - Medium | Late - Community | 2 | 0.8536 | 2 |
| 4DB11 | Complex - Medium | Late - Institutional | 0 | 1.1548 | 3 |
| 4DB21 | Complex - Medium | Late - Institutional | 1 | 1.2135 | 3 |
| 4DB31 | Complex - Medium | Late - Institutional | 2 | 1.3567 | 3 |
| 1HC11 | MMTA - Cardiac - High | Early - Community | 0 | 1.1397 | 4 |
| 1HC21 | MMTA - Cardiac - High | Early - Community | 1 | 1.1984 | 3 |
| 1HC31 | MMTA - Cardiac - High | Early - Community | 2 | 1.3416 | 3 |
| 2HC11 | MMTA - Cardiac - High | Early - Institutional | 0 | 1.3591 | 4 |
| 2HC21 | MMTA - Cardiac - High | Early - Institutional | 1 | 1.4178 | 4 |
| 2HC31 | MMTA - Cardiac - High | Early - Institutional | 2 | 1.5610 | 4 |
| 3HC11 | MMTA - Cardiac - High | Late - Community | 0 | 0.7685 | 2 |
| 3HC21 | MMTA - Cardiac - High | Late - Community | 1 | 0.8272 | 2 |
| 3HC31 | MMTA - Cardiac - High | Late - Community | 2 | 0.9704 | 3 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 4HC11 | MMTA - Cardiac - High | Late - Institutional | 0 | 1.2717 | 4 |
| 4HC21 | MMTA - Cardiac - High | Late - Institutional | 1 | 1.3303 | 3 |
| 4HC31 | MMTA - Cardiac - High | Late - Institutional | 2 | 1.4735 | 4 |
| 1HA11 | MMTA - Cardiac - Low | Early - Community | 0 | 0.9066 | 4 |
| 1HA21 | MMTA - Cardiac - Low | Early - Community | 1 | 0.9652 | 3 |
| 1HA31 | MMTA - Cardiac - Low | Early - Community | 2 | 1.1084 | 3 |
| 2HA11 | MMTA - Cardiac - Low | Early - Institutional | 0 | 1.1260 | 3 |
| 2HA21 | MMTA - Cardiac - Low | Early - Institutional | 1 | 1.1847 | 4 |
| 2HA31 | MMTA - Cardiac - Low | Early - Institutional | 2 | 1.3279 | 4 |
| 3HA11 | MMTA - Cardiac - Low | Late - Community | 0 | 0.5354 | 2 |
| 3HA21 | MMTA - Cardiac - Low | Late - Community | 1 | 0.5941 | 2 |
| 3HA31 | MMTA - Cardiac - Low | Late - Community | 2 | 0.7373 | 2 |
| 4HA11 | MMTA - Cardiac - Low | Late - Institutional | 0 | 1.0385 | 3 |
| 4HA21 | MMTA - Cardiac - Low | Late - Institutional | 1 | 1.0972 | 3 |
| 4HA31 | MMTA - Cardiac - Low | Late - Institutional | 2 | 1.2404 | 3 |
| 1HB11 | MMTA - Cardiac - Medium | Early - Community | 0 | 1.0235 | 4 |
| 1HB21 | MMTA - Cardiac - Medium | Early - Community | 1 | 1.0822 | 4 |
| 1HB31 | MMTA - Cardiac - Medium | Early - Community | 2 | 1.2254 | 4 |
| 2HB11 | MMTA - Cardiac - Medium | Early - Institutional | 0 | 1.2430 | 4 |
| 2HB21 | MMTA - Cardiac - Medium | Early - Institutional | 1 | 1.3017 | 4 |
| 2HB31 | MMTA - Cardiac - Medium | Early - Institutional | 2 | 1.4449 | 4 |
| 3HB11 | MMTA - Cardiac - Medium | Late - Community | 0 | 0.6524 | 2 |
| 3HB21 | MMTA - Cardiac - Medium | Late - Community | 1 | 0.7110 | 2 |
| 3HB31 | MMTA - Cardiac - Medium | Late - Community | 2 | 0.8542 | 2 |
| 4HB11 | MMTA - Cardiac - Medium | Late - Institutional | 0 | 1.1555 | 4 |
| 4HB21 | MMTA - Cardiac - Medium | Late - Institutional | 1 | 1.2142 | 3 |
| 4HB31 | MMTA - Cardiac - Medium | Late - Institutional | 2 | 1.3574 | 4 |
| 1IC11 | MMTA - Endocrine - High | Early - Community | 0 | 1.3394 | 4 |
| 1IC21 | MMTA - Endocrine - High | Early - Community | 1 | 1.3981 | 4 |
| 1IC31 | MMTA - Endocrine - High | Early - Community | 2 | 1.5413 | 4 |
| 2IC11 | MMTA - Endocrine - High | Early - Institutional | 0 | 1.5589 | 4 |
| 2IC21 | MMTA - Endocrine - High | Early - Institutional | 1 | 1.6176 | 4 |
| 2IC31 | MMTA - Endocrine - High | Early - Institutional | 2 | 1.7608 | 4 |
| 3IC11 | MMTA - Endocrine - High | Late - Community | 0 | 0.9683 | 3 |
| 3IC21 | MMTA - Endocrine - High | Late - Community | 1 | 1.0270 | 3 |
| 3IC31 | MMTA - Endocrine - High | Late - Community | 2 | 1.1702 | 3 |
| 4IC11 | MMTA - Endocrine - High | Late - Institutional | 0 | 1.4714 | 4 |
| 4IC21 | MMTA - Endocrine - High | Late - Institutional | 1 | 1.5301 | 4 |
| 4IC31 | MMTA - Endocrine - High | Late - Institutional | 2 | 1.6733 | 4 |
| 1IA11 | MMTA - Endocrine - Low | Early - Community | 0 | 1.1668 | 4 |
| 1IA21 | MMTA - Endocrine - Low | Early - Community | 1 | 1.2255 | 4 |
| 1IA31 | MMTA - Endocrine - Low | Early - Community | 2 | 1.3687 | 3 |
| 2IA11 | MMTA - Endocrine - Low | Early - Institutional | 0 | 1.3863 | 3 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 2IA21 | MMTA - Endocrine - Low | Early - Institutional | 1 | 1.4450 | 4 |
| 2IA31 | MMTA - Endocrine - Low | Early - Institutional | 2 | 1.5882 | 4 |
| 3IA11 | MMTA - Endocrine - Low | Late - Community | 0 | 0.7957 | 3 |
| 3IA21 | MMTA - Endocrine - Low | Late - Community | 1 | 0.8544 | 2 |
| 3IA31 | MMTA - Endocrine - Low | Late - Community | 2 | 0.9976 | 3 |
| 4IA11 | MMTA - Endocrine - Low | Late - Institutional | 0 | 1.2988 | 3 |
| 4IA21 | MMTA - Endocrine - Low | Late - Institutional | 1 | 1.3575 | 3 |
| 4IA31 | MMTA - Endocrine - Low | Late - Institutional | 2 | 1.5007 | 3 |
| 1IB11 | MMTA - Endocrine - Medium | Early - Community | 0 | 1.2334 | 4 |
| 1IB21 | MMTA - Endocrine - Medium | Early - Community | 1 | 1.2921 | 4 |
| 1IB31 | MMTA - Endocrine - Medium | Early - Community | 2 | 1.4353 | 4 |
| 2IB11 | MMTA - Endocrine - Medium | Early - Institutional | 0 | 1.4529 | 4 |
| 2IB21 | MMTA - Endocrine - Medium | Early - Institutional | 1 | 1.5116 | 4 |
| 2IB31 | MMTA - Endocrine - Medium | Early - Institutional | 2 | 1.6548 | 4 |
| 3IB11 | MMTA - Endocrine - Medium | Late - Community | 0 | 0.8623 | 3 |
| 3IB21 | MMTA - Endocrine - Medium | Late - Community | 1 | 0.9210 | 3 |
| 3IB31 | MMTA - Endocrine - Medium | Late - Community | 2 | 1.0642 | 3 |
| 4IB11 | MMTA - Endocrine - Medium | Late - Institutional | 0 | 1.3654 | 4 |
| 4IB21 | MMTA - Endocrine - Medium | Late - Institutional | 1 | 1.4241 | 3 |
| 4IB31 | MMTA - Endocrine - Medium | Late - Institutional | 2 | 1.5673 | 4 |
| 1JC11 | MMTA - GI/GU - High | Early - Community | 0 | 1.1140 | 3 |
| 1JC21 | MMTA - GI/GU - High | Early - Community | 1 | 1.1727 | 2 |
| 1JC31 | MMTA - GI/GU - High | Early - Community | 2 | 1.3159 | 2 |
| 2JC11 | MMTA - GI/GU - High | Early - Institutional | 0 | 1.3335 | 4 |
| 2JC21 | MMTA - GI/GU - High | Early - Institutional | 1 | 1.3921 | 3 |
| 2JC31 | MMTA - GI/GU - High | Early - Institutional | 2 | 1.5353 | 3 |
| 3JC11 | MMTA - GI/GU - High | Late - Community | 0 | 0.7428 | 2 |
| 3JC21 | MMTA - GI/GU - High | Late - Community | 1 | 0.8015 | 2 |
| 3JC31 | MMTA - GI/GU - High | Late - Community | 2 | 0.9447 | 2 |
| 4JC11 | MMTA - GI/GU - High | Late - Institutional | 0 | 1.2460 | 3 |
| 4JC21 | MMTA - GI/GU - High | Late - Institutional | 1 | 1.3047 | 3 |
| 4JC31 | MMTA - GI/GU - High | Late - Institutional | 2 | 1.4479 | 3 |
| 1JA11 | MMTA - GI/GU - Low | Early - Community | 0 | 0.8890 | 3 |
| 1JA21 | MMTA - GI/GU - Low | Early - Community | 1 | 0.9477 | 2 |
| 1JA31 | MMTA - GI/GU - Low | Early - Community | 2 | 1.0909 | 2 |
| 2JA11 | MMTA - GI/GU - Low | Early - Institutional | 0 | 1.1085 | 3 |
| 2JA21 | MMTA - GI/GU - Low | Early - Institutional | 1 | 1.1672 | 3 |
| 2JA31 | MMTA - GI/GU - Low | Early - Institutional | 2 | 1.3104 | 4 |
| 3JA11 | MMTA - GI/GU - Low | Late - Community | 0 | 0.5179 | 2 |
| 3JA21 | MMTA - GI/GU - Low | Late - Community | 1 | 0.5766 | 2 |
| 3JA31 | MMTA - GI/GU - Low | Late - Community | 2 | 0.7198 | 2 |
| 4JA11 | MMTA - GI/GU - Low | Late - Institutional | 0 | 1.0210 | 3 |
| 4JA21 | MMTA - GI/GU - Low | Late - Institutional | 1 | 1.0797 | 3 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 4JA31 | MMTA - GI/GU - Low | Late - Institutional | 2 | 1.2229 | 3 |
| 1JB11 | MMTA - GI/GU - Medium | Early - Community | 0 | 1.0260 | 3 |
| 1JB21 | MMTA - GI/GU - Medium | Early - Community | 1 | 1.0847 | 3 |
| 1JB31 | MMTA - GI/GU - Medium | Early - Community | 2 | 1.2279 | 2 |
| 2JB11 | MMTA - GI/GU - Medium | Early - Institutional | 0 | 1.2454 | 4 |
| 2JB21 | MMTA - GI/GU - Medium | Early - Institutional | 1 | 1.3041 | 4 |
| 2JB31 | MMTA - GI/GU - Medium | Early - Institutional | 2 | 1.4473 | 4 |
| 3JB11 | MMTA - GI/GU - Medium | Late - Community | 0 | 0.6548 | 2 |
| 3JB21 | MMTA - GI/GU - Medium | Late - Community | 1 | 0.7135 | 2 |
| 3JB31 | MMTA - GI/GU - Medium | Late - Community | 2 | 0.8567 | 2 |
| 4JB11 | MMTA - GI/GU - Medium | Late - Institutional | 0 | 1.1580 | 3 |
| 4JB21 | MMTA - GI/GU - Medium | Late - Institutional | 1 | 1.2167 | 3 |
| 4JB31 | MMTA - GI/GU - Medium | Late - Institutional | 2 | 1.3599 | 3 |
| 1KC11 | MMTA - Infectious - High | Early - Community | 0 | 1.1492 | 2 |
| 1KC21 | MMTA - Infectious - High | Early - Community | 1 | 1.2079 | 2 |
| 1KC31 | MMTA - Infectious - High | Early - Community | 2 | 1.3511 | 2 |
| 2KC11 | MMTA - Infectious - High | Early - Institutional | 0 | 1.3687 | 3 |
| 2KC21 | MMTA - Infectious - High | Early - Institutional | 1 | 1.4273 | 3 |
| 2KC31 | MMTA - Infectious - High | Early - Institutional | 2 | 1.5705 | 3 |
| 3KC11 | MMTA - Infectious - High | Late - Community | 0 | 0.7780 | 2 |
| 3KC21 | MMTA - Infectious - High | Late - Community | 1 | 0.8367 | 2 |
| 3KC31 | MMTA - Infectious - High | Late - Community | 2 | 0.9799 | 2 |
| 4KC11 | MMTA - Infectious - High | Late - Institutional | 0 | 1.2812 | 3 |
| 4KC21 | MMTA - Infectious - High | Late - Institutional | 1 | 1.3399 | 3 |
| 4KC31 | MMTA - Infectious - High | Late - Institutional | 2 | 1.4831 | 3 |
| 1KA11 | MMTA - Infectious - Low | Early - Community | 0 | 0.9263 | 2 |
| 1KA21 | MMTA - Infectious - Low | Early - Community | 1 | 0.9850 | 2 |
| 1KA31 | MMTA - Infectious - Low | Early - Community | 2 | 1.1282 | 2 |
| 2KA11 | MMTA - Infectious - Low | Early - Institutional | 0 | 1.1458 | 3 |
| 2KA21 | MMTA - Infectious - Low | Early - Institutional | 1 | 1.2045 | 3 |
| 2KA31 | MMTA - Infectious - Low | Early - Institutional | 2 | 1.3476 | 3 |
| 3KA11 | MMTA - Infectious - Low | Late - Community | 0 | 0.5551 | 2 |
| 3KA21 | MMTA - Infectious - Low | Late - Community | 1 | 0.6138 | 2 |
| 3KA31 | MMTA - Infectious - Low | Late - Community | 2 | 0.7570 | 2 |
| 4KA11 | MMTA - Infectious - Low | Late - Institutional | 0 | 1.0583 | 3 |
| 4KA21 | MMTA - Infectious - Low | Late - Institutional | 1 | 1.1170 | 3 |
| 4KA31 | MMTA - Infectious - Low | Late - Institutional | 2 | 1.2602 | 3 |
| 1KB11 | MMTA - Infectious - Medium | Early - Community | 0 | 1.0233 | 2 |
| 1KB21 | MMTA - Infectious - Medium | Early - Community | 1 | 1.0820 | 2 |
| 1KB31 | MMTA - Infectious - Medium | Early - Community | 2 | 1.2252 | 2 |
| 2KB11 | MMTA - Infectious - Medium | Early - Institutional | 0 | 1.2427 | 3 |
| 2KB21 | MMTA - Infectious - Medium | Early - Institutional | 1 | 1.3014 | 3 |
| 2KB31 | MMTA - Infectious - Medium | Early - Institutional | 2 | 1.4446 | 4 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 3KB11 | MMTA - Infectious - Medium | Late - Community | 0 | 0.6521 | 2 |
| 3KB21 | MMTA - Infectious - Medium | Late - Community | 1 | 0.7108 | 2 |
| 3KB31 | MMTA - Infectious - Medium | Late - Community | 2 | 0.8540 | 2 |
| 4KB11 | MMTA - Infectious - Medium | Late - Institutional | 0 | 1.1553 | 3 |
| 4KB21 | MMTA - Infectious - Medium | Late - Institutional | 1 | 1.2140 | 3 |
| 4KB31 | MMTA - Infectious - Medium | Late - Institutional | 2 | 1.3571 | 3 |
| 1AC11 | MMTA - Other - High | Early - Community | 0 | 1.1526 | 4 |
| 1AC21 | MMTA - Other - High | Early - Community | 1 | 1.2113 | 4 |
| 1AC31 | MMTA - Other - High | Early - Community | 2 | 1.3545 | 3 |
| 2AC11 | MMTA - Other - High | Early - Institutional | 0 | 1.3721 | 4 |
| 2AC21 | MMTA - Other - High | Early - Institutional | 1 | 1.4308 | 4 |
| 2AC31 | MMTA - Other - High | Early - Institutional | 2 | 1.5740 | 4 |
| 3AC11 | MMTA - Other - High | Late - Community | 0 | 0.7815 | 2 |
| 3AC21 | MMTA - Other - High | Late - Community | 1 | 0.8402 | 2 |
| 3AC31 | MMTA - Other - High | Late - Community | 2 | 0.9834 | 2 |
| 4AC11 | MMTA - Other - High | Late - Institutional | 0 | 1.2846 | 3 |
| 4AC21 | MMTA - Other - High | Late - Institutional | 1 | 1.3433 | 3 |
| 4AC31 | MMTA - Other - High | Late - Institutional | 2 | 1.4865 | 4 |
| 1AA11 | MMTA - Other - Low | Early - Community | 0 | 0.9381 | 3 |
| 1AA21 | MMTA - Other - Low | Early - Community | 1 | 0.9968 | 3 |
| 1AA31 | MMTA - Other - Low | Early - Community | 2 | 1.1400 | 3 |
| 2AA11 | MMTA - Other - Low | Early - Institutional | 0 | 1.1576 | 3 |
| 2AA21 | MMTA - Other - Low | Early - Institutional | 1 | 1.2163 | 3 |
| 2AA31 | MMTA - Other - Low | Early - Institutional | 2 | 1.3595 | 4 |
| 3AA11 | MMTA - Other - Low | Late - Community | 0 | 0.5670 | 2 |
| 3AA21 | MMTA - Other - Low | Late - Community | 1 | 0.6257 | 2 |
| 3AA31 | MMTA - Other - Low | Late - Community | 2 | 0.7689 | 2 |
| 4AA11 | MMTA - Other - Low | Late - Institutional | 0 | 1.0701 | 3 |
| 4AA21 | MMTA - Other - Low | Late - Institutional | 1 | 1.1288 | 3 |
| 4AA31 | MMTA - Other - Low | Late - Institutional | 2 | 1.2720 | 3 |
| 1AB11 | MMTA - Other - Medium | Early - Community | 0 | 1.0409 | 4 |
| 1AB21 | MMTA - Other - Medium | Early - Community | 1 | 1.0996 | 4 |
| 1AB31 | MMTA - Other - Medium | Early - Community | 2 | 1.2428 | 3 |
| 2AB11 | MMTA - Other - Medium | Early - Institutional | 0 | 1.2604 | 4 |
| 2AB21 | MMTA - Other - Medium | Early - Institutional | 1 | 1.3191 | 4 |
| 2AB31 | MMTA - Other - Medium | Early - Institutional | 2 | 1.4623 | 4 |
| 3AB11 | MMTA - Other - Medium | Late - Community | 0 | 0.6698 | 2 |
| 3AB21 | MMTA - Other - Medium | Late - Community | 1 | 0.7285 | 2 |
| 3AB31 | MMTA - Other - Medium | Late - Community | 2 | 0.8717 | 2 |
| 4AB11 | MMTA - Other - Medium | Late - Institutional | 0 | 1.1729 | 3 |
| 4AB21 | MMTA - Other - Medium | Late - Institutional | 1 | 1.2316 | 3 |
| 4AB31 | MMTA - Other - Medium | Late - Institutional | 2 | 1.3748 | 4 |
| 1LC11 | MMTA - Respiratory - High | Early - Community | 0 | 1.1557 | 3 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 1LC21 | MMTA - Respiratory - High | Early - Community | 1 | 1.2144 | 3 |
| 1LC31 | MMTA - Respiratory - High | Early - Community | 2 | 1.3576 | 2 |
| 2LC11 | MMTA - Respiratory - High | Early - Institutional | 0 | 1.3752 | 4 |
| 2LC21 | MMTA - Respiratory - High | Early - Institutional | 1 | 1.4339 | 4 |
| 2LC31 | MMTA - Respiratory - High | Early - Institutional | 2 | 1.5771 | 4 |
| 3LC11 | MMTA - Respiratory - High | Late - Community | 0 | 0.7846 | 2 |
| 3LC21 | MMTA - Respiratory - High | Late - Community | 1 | 0.8433 | 2 |
| 3LC31 | MMTA - Respiratory - High | Late - Community | 2 | 0.9865 | 2 |
| 4LC11 | MMTA - Respiratory - High | Late - Institutional | 0 | 1.2877 | 3 |
| 4LC21 | MMTA - Respiratory - High | Late - Institutional | 1 | 1.3464 | 3 |
| 4LC31 | MMTA - Respiratory - High | Late - Institutional | 2 | 1.4896 | 3 |
| 1LA11 | MMTA - Respiratory - Low | Early - Community | 0 | 0.9171 | 2 |
| 1LA21 | MMTA - Respiratory - Low | Early - Community | 1 | 0.9757 | 2 |
| 1LA31 | MMTA - Respiratory - Low | Early - Community | 2 | 1.1189 | 3 |
| 2LA11 | MMTA - Respiratory - Low | Early - Institutional | 0 | 1.1365 | 3 |
| 2LA21 | MMTA - Respiratory - Low | Early - Institutional | 1 | 1.1952 | 4 |
| 2LA31 | MMTA - Respiratory - Low | Early - Institutional | 2 | 1.3384 | 4 |
| 3LA11 | MMTA - Respiratory - Low | Late - Community | 0 | 0.5459 | 2 |
| 3LA21 | MMTA - Respiratory - Low | Late - Community | 1 | 0.6046 | 2 |
| 3LA31 | MMTA - Respiratory - Low | Late - Community | 2 | 0.7478 | 2 |
| 4LA11 | MMTA - Respiratory - Low | Late - Institutional | 0 | 1.0490 | 3 |
| 4LA21 | MMTA - Respiratory - Low | Late - Institutional | 1 | 1.1077 | 3 |
| 4LA31 | MMTA - Respiratory - Low | Late - Institutional | 2 | 1.2509 | 3 |
| 1LB11 | MMTA - Respiratory - Medium | Early - Community | 0 | 1.0361 | 3 |
| 1LB21 | MMTA - Respiratory - Medium | Early - Community | 1 | 1.0948 | 3 |
| 1LB31 | MMTA - Respiratory - Medium | Early - Community | 2 | 1.2380 | 3 |
| 2LB11 | MMTA - Respiratory - Medium | Early - Institutional | 0 | 1.2556 | 4 |
| 2LB21 | MMTA - Respiratory - Medium | Early - Institutional | 1 | 1.3143 | 4 |
| 2LB31 | MMTA - Respiratory - Medium | Early - Institutional | 2 | 1.4575 | 4 |
| 3LB11 | MMTA - Respiratory - Medium | Late - Community | 0 | 0.6650 | 2 |
| 3LB21 | MMTA - Respiratory - Medium | Late - Community | 1 | 0.7237 | 2 |
| 3LB31 | MMTA - Respiratory - Medium | Late - Community | 2 | 0.8669 | 2 |
| 4LB11 | MMTA - Respiratory - Medium | Late - Institutional | 0 | 1.1681 | 3 |
| 4LB21 | MMTA - Respiratory - Medium | Late - Institutional | 1 | 1.2268 | 3 |
| 4LB31 | MMTA - Respiratory - Medium | Late - Institutional | 2 | 1.3700 | 4 |
| 1GC11 | MMTA - Surgical Aftercare - High | Early - Community | 0 | 1.1792 | 3 |
| 1GC21 | MMTA - Surgical Aftercare - High | Early - Community | 1 | 1.2379 | 2 |
| 1GC31 | MMTA - Surgical Aftercare - High | Early - Community | 2 | 1.3811 | 2 |
| 2GC11 | MMTA - Surgical Aftercare - High | Early - Institutional | 0 | 1.3987 | 4 |
| 2GC21 | MMTA - Surgical Aftercare - High | Early - Institutional | 1 | 1.4574 | 4 |
| 2GC31 | MMTA - Surgical Aftercare - High | Early - Institutional | 2 | 1.6006 | 4 |
| 3GC11 | MMTA - Surgical Aftercare - High | Late - Community | 0 | 0.8081 | 2 |
| 3GC21 | MMTA - Surgical Aftercare - High | Late - Community | 1 | 0.8668 | 2 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 3GC31 | MMTA - Surgical Aftercare - High | Late - Community | 2 | 1.0100 | 2 |
| 4GC11 | MMTA - Surgical Aftercare - High | Late - Institutional | 0 | 1.3112 | 4 |
| 4GC21 | MMTA - Surgical Aftercare - High | Late - Institutional | 1 | 1.3699 | 4 |
| 4GC31 | MMTA - Surgical Aftercare - High | Late - Institutional | 2 | 1.5131 | 4 |
| 1GA11 | MMTA - Surgical Aftercare - Low | Early - Community | 0 | 0.9214 | 2 |
| 1GA21 | MMTA - Surgical Aftercare - Low | Early - Community | 1 | 0.9801 | 2 |
| 1GA31 | MMTA - Surgical Aftercare - Low | Early - Community | 2 | 1.1233 | 2 |
| 2GA11 | MMTA - Surgical Aftercare - Low | Early - Institutional | 0 | 1.1409 | 3 |
| 2GA21 | MMTA - Surgical Aftercare - Low | Early - Institutional | 1 | 1.1996 | 4 |
| 2GA31 | MMTA - Surgical Aftercare - Low | Early - Institutional | 2 | 1.3428 | 4 |
| 3GA11 | MMTA - Surgical Aftercare - Low | Late - Community | 0 | 0.5503 | 2 |
| 3GA21 | MMTA - Surgical Aftercare - Low | Late - Community | 1 | 0.6090 | 2 |
| 3GA31 | MMTA - Surgical Aftercare - Low | Late - Community | 2 | 0.7522 | 2 |
| 4GA11 | MMTA - Surgical Aftercare - Low | Late - Institutional | 0 | 1.0534 | 3 |
| 4GA21 | MMTA - Surgical Aftercare - Low | Late - Institutional | 1 | 1.1121 | 3 |
| 4GA31 | MMTA - Surgical Aftercare - Low | Late - Institutional | 2 | 1.2553 | 3 |
| 1GB11 | MMTA - Surgical Aftercare - Medium | Early - Community | 0 | 1.0361 | 2 |
| 1GB21 | MMTA - Surgical Aftercare - Medium | Early - Community | 1 | 1.0948 | 2 |
| 1GB31 | MMTA - Surgical Aftercare - Medium | Early - Community | 2 | 1.2380 | 2 |
| 2GB11 | MMTA - Surgical Aftercare - Medium | Early - Institutional | 0 | 1.2555 | 4 |
| 2GB21 | MMTA - Surgical Aftercare - Medium | Early - Institutional | 1 | 1.3142 | 4 |
| 2GB31 | MMTA - Surgical Aftercare - Medium | Early - Institutional | 2 | 1.4574 | 4 |
| 3GB11 | MMTA - Surgical Aftercare - Medium | Late - Community | 0 | 0.6649 | 2 |
| 3GB21 | MMTA - Surgical Aftercare - Medium | Late - Community | 1 | 0.7236 | 2 |
| 3GB31 | MMTA - Surgical Aftercare - Medium | Late - Community | 2 | 0.8668 | 2 |
| 4GB11 | MMTA - Surgical Aftercare - Medium | Late - Institutional | 0 | 1.1681 | 3 |
| 4GB21 | MMTA - Surgical Aftercare - Medium | Late - Institutional | 1 | 1.2268 | 3 |
| 4GB31 | MMTA - Surgical Aftercare - Medium | Late - Institutional | 2 | 1.3700 | 4 |
| 1EC11 | MS Rehab - High | Early - Community | 0 | 1.2330 | 5 |
| 1EC21 | MS Rehab - High | Early - Community | 1 | 1.2917 | 4 |
| 1EC31 | MS Rehab - High | Early - Community | 2 | 1.4349 | 4 |
| 2EC11 | MS Rehab - High | Early - Institutional | 0 | 1.4525 | 5 |
| 2EC21 | MS Rehab - High | Early - Institutional | 1 | 1.5112 | 5 |
| 2EC31 | MS Rehab - High | Early - Institutional | 2 | 1.6544 | 5 |
| 3EC11 | MS Rehab - High | Late - Community | 0 | 0.8619 | 2 |
| 3EC21 | MS Rehab - High | Late - Community | 1 | 0.9206 | 2 |
| 3EC31 | MS Rehab - High | Late - Community | 2 | 1.0638 | 3 |
| 4EC11 | MS Rehab - High | Late - Institutional | 0 | 1.3650 | 4 |
| 4EC21 | MS Rehab - High | Late - Institutional | 1 | 1.4237 | 5 |
| 4EC31 | MS Rehab - High | Late - Institutional | 2 | 1.5669 | 5 |
| 1EA11 | MS Rehab - Low | Early - Community | 0 | 1.0121 | 4 |
| 1EA21 | MS Rehab - Low | Early - Community | 1 | 1.0707 | 4 |
| 1EA31 | MS Rehab - Low | Early - Community | 2 | 1.2139 | 4 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 2EA11 | MS Rehab - Low | Early - Institutional | 0 | 1.2315 | 5 |
| 2EA21 | MS Rehab - Low | Early - Institutional | 1 | 1.2902 | 5 |
| 2EA31 | MS Rehab - Low | Early - Institutional | 2 | 1.4334 | 5 |
| 3EA11 | MS Rehab - Low | Late - Community | 0 | 0.6409 | 2 |
| 3EA21 | MS Rehab - Low | Late - Community | 1 | 0.6996 | 2 |
| 3EA31 | MS Rehab - Low | Late - Community | 2 | 0.8428 | 2 |
| 4EA11 | MS Rehab - Low | Late - Institutional | 0 | 1.1440 | 4 |
| 4EA21 | MS Rehab - Low | Late - Institutional | 1 | 1.2027 | 4 |
| 4EA31 | MS Rehab - Low | Late - Institutional | 2 | 1.3459 | 4 |
| 1EB11 | MS Rehab - Medium | Early - Community | 0 | 1.0976 | 5 |
| 1EB21 | MS Rehab - Medium | Early - Community | 1 | 1.1563 | 4 |
| 1EB31 | MS Rehab - Medium | Early - Community | 2 | 1.2995 | 4 |
| 2EB11 | MS Rehab - Medium | Early - Institutional | 0 | 1.3170 | 5 |
| 2EB21 | MS Rehab - Medium | Early - Institutional | 1 | 1.3757 | 5 |
| 2EB31 | MS Rehab - Medium | Early - Institutional | 2 | 1.5189 | 5 |
| 3EB11 | MS Rehab - Medium | Late - Community | 0 | 0.7264 | 2 |
| 3EB21 | MS Rehab - Medium | Late - Community | 1 | 0.7851 | 2 |
| 3EB31 | MS Rehab - Medium | Late - Community | 2 | 0.9283 | 2 |
| 4EB11 | MS Rehab - Medium | Late - Institutional | 0 | 1.2296 | 4 |
| 4EB21 | MS Rehab - Medium | Late - Institutional | 1 | 1.2882 | 4 |
| 4EB31 | MS Rehab - Medium | Late - Institutional | 2 | 1.4314 | 4 |
| 1BC11 | Neuro - High | Early - Community | 0 | 1.3585 | 4 |
| 1BC21 | Neuro - High | Early - Community | 1 | 1.4172 | 4 |
| 1BC31 | Neuro - High | Early - Community | 2 | 1.5604 | 4 |
| 2BC11 | Neuro - High | Early - Institutional | 0 | 1.5780 | 5 |
| 2BC21 | Neuro - High | Early - Institutional | 1 | 1.6367 | 5 |
| 2BC31 | Neuro - High | Early - Institutional | 2 | 1.7799 | 4 |
| 3BC11 | Neuro - High | Late - Community | 0 | 0.9874 | 2 |
| 3BC21 | Neuro - High | Late - Community | 1 | 1.0461 | 3 |
| 3BC31 | Neuro - High | Late - Community | 2 | 1.1893 | 3 |
| 4BC11 | Neuro - High | Late - Institutional | 0 | 1.4905 | 4 |
| 4BC21 | Neuro - High | Late - Institutional | 1 | 1.5492 | 4 |
| 4BC31 | Neuro - High | Late - Institutional | 2 | 1.6924 | 4 |
| 1BA11 | Neuro - Low | Early - Community | 0 | 1.0983 | 4 |
| 1BA21 | Neuro - Low | Early - Community | 1 | 1.1570 | 4 |
| 1BA31 | Neuro - Low | Early - Community | 2 | 1.3002 | 4 |
| 2BA11 | Neuro - Low | Early - Institutional | 0 | 1.3178 | 4 |
| 2BA21 | Neuro - Low | Early - Institutional | 1 | 1.3765 | 4 |
| 2BA31 | Neuro - Low | Early - Institutional | 2 | 1.5197 | 5 |
| 3BA11 | Neuro - Low | Late - Community | 0 | 0.7272 | 2 |
| 3BA21 | Neuro - Low | Late - Community | 1 | 0.7859 | 2 |
| 3BA31 | Neuro - Low | Late - Community | 2 | 0.9291 | 2 |
| 4BA11 | Neuro - Low | Late - Institutional | 0 | 1.2303 | 4 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 4BA21 | Neuro - Low | Late - Institutional | 1 | 1.2890 | 4 |
| 4BA31 | Neuro - Low | Late - Institutional | 2 | 1.4322 | 4 |
| 1BB11 | Neuro - Medium | Early - Community | 0 | 1.2162 | 4 |
| 1BB21 | Neuro - Medium | Early - Community | 1 | 1.2749 | 4 |
| 1BB31 | Neuro - Medium | Early - Community | 2 | 1.4181 | 4 |
| 2BB11 | Neuro - Medium | Early - Institutional | 0 | 1.4356 | 5 |
| 2BB21 | Neuro - Medium | Early - Institutional | 1 | 1.4943 | 5 |
| 2BB31 | Neuro - Medium | Early - Institutional | 2 | 1.6375 | 5 |
| 3BB11 | Neuro - Medium | Late - Community | 0 | 0.8450 | 2 |
| 3BB21 | Neuro - Medium | Late - Community | 1 | 0.9037 | 2 |
| 3BB31 | Neuro - Medium | Late - Community | 2 | 1.0469 | 2 |
| 4BB11 | Neuro - Medium | Late - Institutional | 0 | 1.3482 | 4 |
| 4BB21 | Neuro - Medium | Late - Institutional | 1 | 1.4069 | 4 |
| 4BB31 | Neuro - Medium | Late - Institutional | 2 | 1.5501 | 4 |
| 1CC11 | Wound - High | Early - Community | 0 | 1.5167 | 4 |
| 1CC21 | Wound - High | Early - Community | 1 | 1.5754 | 4 |
| 1CC31 | Wound - High | Early - Community | 2 | 1.7186 | 4 |
| 2CC11 | Wound - High | Early - Institutional | 0 | 1.7361 | 5 |
| 2CC21 | Wound - High | Early - Institutional | 1 | 1.7948 | 4 |
| 2CC31 | Wound - High | Early - Institutional | 2 | 1.9380 | 4 |
| 3CC11 | Wound - High | Late - Community | 0 | 1.1455 | 3 |
| 3CC21 | Wound - High | Late - Community | 1 | 1.2042 | 3 |
| 3CC31 | Wound - High | Late - Community | 2 | 1.3474 | 3 |
| 4CC11 | Wound - High | Late - Institutional | 0 | 1.6486 | 4 |
| 4CC21 | Wound - High | Late - Institutional | 1 | 1.7073 | 4 |
| 4CC31 | Wound - High | Late - Institutional | 2 | 1.8505 | 4 |
| 1CA11 | Wound - Low | Early - Community | 0 | 1.2760 | 4 |
| 1CA21 | Wound - Low | Early - Community | 1 | 1.3347 | 4 |
| 1CA31 | Wound - Low | Early - Community | 2 | 1.4779 | 4 |
| 2CA11 | Wound - Low | Early - Institutional | 0 | 1.4955 | 4 |
| 2CA21 | Wound - Low | Early - Institutional | 1 | 1.5542 | 4 |
| 2CA31 | Wound - Low | Early - Institutional | 2 | 1.6974 | 4 |
| 3CA11 | Wound - Low | Late - Community | 0 | 0.9049 | 2 |
| 3CA21 | Wound - Low | Late - Community | 1 | 0.9636 | 3 |
| 3CA31 | Wound - Low | Late - Community | 2 | 1.1068 | 3 |
| 4CA11 | Wound - Low | Late - Institutional | 0 | 1.4080 | 3 |
| 4CA21 | Wound - Low | Late - Institutional | 1 | 1.4667 | 4 |
| 4CA31 | Wound - Low | Late - Institutional | 2 | 1.6099 | 4 |
| 1CB11 | Wound - Medium | Early - Community | 0 | 1.3861 | 4 |
| 1CB21 | Wound - Medium | Early - Community | 1 | 1.4448 | 4 |
| 1CB31 | Wound - Medium | Early - Community | 2 | 1.5880 | 4 |
| 2CB11 | Wound - Medium | Early - Institutional | 0 | 1.6056 | 4 |
| 2CB21 | Wound - Medium | Early - Institutional | 1 | 1.6643 | 5 |

| HIPPS | Clinical Group and Functional Level | Admission Source and Timing | Comorbidity Adjustment (0 = none, 1 = single comorbidity, 2 = interaction) | Proposed Recalibrated Weight for 2023 | LUPA Visit Threshold (LUPAs have fewer visits than the threshold) |
|---|---|---|---|---|---|
| 2CB31 | Wound - Medium | Early - Institutional | 2 | 1.8075 | 5 |
| 3CB11 | Wound - Medium | Late - Community | 0 | 1.0150 | 3 |
| 3CB21 | Wound - Medium | Late - Community | 1 | 1.0737 | 3 |
| 3CB31 | Wound - Medium | Late - Community | 2 | 1.2169 | 3 |
| 4CB11 | Wound - Medium | Late - Institutional | 0 | 1.5181 | 4 |
| 4CB21 | Wound - Medium | Late - Institutional | 1 | 1.5768 | 4 |
| 4CB31 | Wound - Medium | Late - Institutional | 2 | 1.7200 | 4 |

**Source**: CY 2021 Home Health Claims Data, Periods that end in CY 2021 accessed on the CCW March 21, 2022.

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For CY 2023, there are 238 groups that experience a −5% to 0% change in case-mix weights and 183 groups that experience a 0% to +5% change in weights compared to their CY 2022 case-mix weights. There are 10 groups that experience a change between +5% and +10% and one group that experiences a 10% to 12% increase in weights compared to the CY 2022 case-mix weights. Changes to the PDGM case-mix weights are implemented in a budget neutral manner by multiplying the CY 2023 national standardized 30-day period payment rate by a case-mix budget neutrality factor. Typically, the case-mix weight budget neutrality factor

is also calculated using the most recent, complete home health claims data available. However, in the CY 2022 HH PPS proposed rule (86 FR 35908), due to the COVID–19 PHE, we discussed using the previous calendar year's home health claims data (CY 2019) to determine if there were significant differences between utilizing CY 2019 and CY 2020 claims data. We noted that CY 2020 was the first year of actual PDGM utilization data, therefore, if we were to use CY 2019 data due to the PHE we would need to simulate 30-day periods from 60-day episodes under the old system. We determined that using CY 2020 utilization data was more appropriate than using CY 2019 utilization data, as it is actual PDGM utilization data. For CY 2023, we will continue the practice of using the most recent complete home health claims data at the time of rulemaking, which is CY 2021 data. The case-mix budget neutrality factor is calculated as the ratio of 30-day base payment rates such that total payments when the CY 2023 PDGM case mix weights (developed using CY 2021 home health claims data) are applied to CY 2021 utilization (claims) data are equal to total payments when CY 2022 PDGM case-mix weights (developed using CY 2020 home health claims data) are applied to CY 2021 utilization data. This produces a case-mix budget neutrality factor for CY 2023 of 0.9895.

We invite comments on the CY 2023 proposed case-mix weights and proposed case-mix weight budget neutrality factor.

5. Proposed CY 2023 Home Health Payment Rate Updates

a. Proposed CY 2023 Home Health Market Basket Update for HHAs

Section 1895(b)(3)(B) of the Act requires that the standard prospective payment amounts for home health be increased by a factor equal to the applicable home health market basket update for those HHAs that submit quality data as required by the Secretary. In the CY 2019 HH PPS final rule with comment period (83 FR 56425), we finalized a rebasing of the home health market basket to reflect 2016 cost report data. A detailed description of how we rebased the HHA market basket is available in the CY 2019 HH PPS final rule with comment period (83 FR 56425 through 56436).

Section 1895(b)(3)(B) of the Act requires that in CY 2015 and in subsequent calendar years, except CY 2018 (under section 411(c) of the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) (Pub. L. 114–10, enacted April 16, 2015)), and CY 2020 (under section 53110 of the Bipartisan Budget Act of 2018 (BBA) (Pub. L. 115–123, enacted February 9, 2018)), the market basket percentage under the HHA prospective payment system, as described in section 1895(b)(3)(B) of the Act, be annually adjusted by changes in economy-wide productivity. Section 1886(b)(3)(B)(xi)(II) of the Act defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable fiscal year, calendar year, cost reporting period, or other annual period). The United States Department of Labor's Bureau of Labor Statistics (BLS) publishes the official measures of productivity for the United States economy. We note that previously the productivity measure referenced in section 1886(b)(3)(B)(xi)(II) was published by BLS as private nonfarm business multifactor productivity. Beginning with the November 18, 2021 release of productivity data, BLS replaced the term ''multifactor productivity'' with ''total factor productivity'' (TFP). BLS noted that this is a change in terminology only and will not affect the data or methodology. As a result of the BLS name change, the productivity measure referenced in section 1886(b)(3)(B)(xi)(II) of the Act is now published by BLS as ''private nonfarm business total factor productivity''. We refer readers to *https://www.bls.gov* for the BLS historical published TFP data. A complete description of IGI's TFP projection methodology is available on the CMS website at *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/MarketBasketResearch.*

The proposed home health update percentage for CY 2023 is based on the estimated home health market basket update, specified at section 1895(b)(3)(B)(iii) of the Act, of 3.3 percent (based on IHS Global Inc.'s first-quarter 2022 forecast with historical data through fourth-quarter 2021). The estimated CY 2023 home health market basket update of 3.3 percent is then reduced by a productivity adjustment, as mandated by the section 3401 of the Patient Protection and Affordable Care Act (the Affordable Care Act) (Pub. L. 111–148), currently estimated to be 0.4 percentage point for CY 2023. In effect, the proposed home health payment update percentage for CY 2023 is a 2.9 percent increase. Section 1895(b)(3)(B)(v) of the Act requires that the home health update be decreased by 2 percentage points for those HHAs that do not submit quality data as required by the Secretary. For HHAs that do not submit the required quality data for CY 2023, the home health payment update would be 0.9 percent (2.9 percent minus 2 percentage points). If more recent data become available after the publication of this proposed rule and before the publication of the final rule (for example, more recent estimates of the home health market basket update and productivity adjustment), we would use such data, if appropriate, to determine the home health payment update percentage for CY 2023 in the final rule.

b. CY 2023 Home Health Wage Index

(1) Proposed CY 2023 Home Health Wage Index

Sections 1895(b)(4)(A)(ii) and (b)(4)(C) of the Act require the Secretary to provide appropriate adjustments to the proportion of the payment amount under the HH PPS that account for area wage differences, using adjustment factors that reflect the relative level of wages and wage-related costs applicable to the furnishing of home health services. Since the inception of the HH PPS, we have used inpatient hospital wage data in developing a wage index to be applied to home payments. We propose to continue this practice for CY 2023, as we continue to believe that, in the absence of home health-specific wage data that accounts for area differences, using inpatient hospital wage data is appropriate and reasonable for the HH PPS.

In the CY 2021 HH PPS final rule (85 FR 70298), we finalized our proposal to adopt the revised Office of Management and Budget (OMB) delineations with a 5-percent cap on wage index decreases, where the estimated reduction in a geographic area's wage index would be capped at 5-percent in CY 2021 only, meaning no cap would be applied to wage index decreases for the second year (CY 2022). Therefore, we proposed and finalized the use of the FY 2022 pre-floor, pre reclassified hospital wage index with no 5-percent cap on decreases as the CY 2022 wage adjustment to the labor portion of the HH PPS rates (86 FR 62285). For CY 2023, we propose to base the HH PPS wage index on the FY 2023 hospital pre-floor, pre-reclassified wage index for hospital cost reporting periods beginning on or after October 1, 2018, and before October 1, 2019 (FY 2019 cost report data). The proposed CY 2023 HH PPS wage index would not take into

account any geographic reclassification of hospitals, including those in accordance with section 1886(d)(8)(B) or 1886(d)(10) of the Act. We also propose that the CY 2023 HH PPS wage index would include a 5-percent cap on wage index decreases as discussed later in this section. If finalized, we will apply the appropriate wage index value to the labor portion of the HH PPS rates based on the site of service for the beneficiary (defined by section 1861(m) of the Act as the beneficiary's place of residence).

To address those geographic areas in which there are no inpatient hospitals, and thus, no hospital wage data on which to base the calculation of the CY 2023 HH PPS wage index, we propose to continue to use the same methodology discussed in the CY 2007 HH PPS final rule (71 FR 65884) to address those geographic areas in which there are no inpatient hospitals. For rural areas that do not have inpatient hospitals, we propose to use the average wage index from all contiguous Core Based Statistical Areas (CBSAs) as a reasonable proxy. Currently, the only rural area without a hospital from which hospital wage data could be derived is Puerto Rico. However, for rural Puerto Rico, we do not apply this methodology due to the distinct economic circumstances that exist there (for example, due to the close proximity to one another of almost all of Puerto Rico's various urban and non-urban areas, this methodology would produce a wage index for rural Puerto Rico that is higher than that in half of its urban areas). Instead, we propose to continue to use the most recent wage index previously available for that area. The most recent wage index previously available for rural Puerto Rico is 0.4047, which is what we propose to use. For urban areas without inpatient hospitals, we use the average wage index of all urban areas within the State as a reasonable proxy for the wage index for that CBSA. For CY 2023, the only urban area without inpatient hospital wage data is Hinesville, GA (CBSA 25980). Using the average wage index of all urban areas in Georgia as proxy, we propose the CY 2023 wage index value for Hinesville, GA to be 0.8535.

On February 28, 2013, OMB issued Bulletin No. 13–01, announcing revisions to the delineations of MSAs, Micropolitan Statistical Areas, and CBSAs, and guidance on uses of the delineation of these areas. In the CY 2015 HH PPS final rule (79 FR 66085 through 66087), we adopted OMB's area delineations using a 1-year transition.

On August 15, 2017, OMB issued Bulletin No. 17–01 in which it announced that one Micropolitan Statistical Area, Twin Falls, Idaho, now qualifies as a Metropolitan Statistical Area. The new CBSA (46300) comprises the principal city of Twin Falls, Idaho in Jerome County, Idaho and Twin Falls County, Idaho. The CY 2022 HH PPS wage index value for CBSA 46300, Twin Falls, Idaho, will be 0.8803. Bulletin No. 17–01 is available at *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/bulletins/2017/b-17-01.pdf.*

On April 10, 2018, OMB issued OMB Bulletin No. 18–03, which superseded the August 15, 2017 OMB Bulletin No. 17–01. On September 14, 2018, OMB issued OMB Bulletin No. 18–04 which superseded the April 10, 2018, OMB Bulletin No. 18–03. These bulletins established revised delineations for Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and provided guidance on the use of the delineations of these statistical areas. A copy of OMB Bulletin No. 18–04 may be obtained at: *https://www.bls.gov/bls/omb-bulletin-18-04-revised-delineations-of-metropolitan-statistical-areas.pdf.*

On March 6, 2020, OMB issued Bulletin No. 20–01, which provided updates to and superseded OMB Bulletin No. 18–04 that was issued on September 14, 2018. The attachments to OMB Bulletin No. 20–01 provided detailed information on the update to statistical areas since September 14, 2018, and were based on the application of the 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas to Census Bureau population estimates for July 1, 2017, and July 1, 2018. (For a copy of this bulletin, we refer readers to *https://www.whitehouse.gov/wp-content/uploads/2020/03/Bulletin-20-01.pdf.*) In OMB Bulletin No. 20–01, OMB announced one new Micropolitan Statistical Area, one new component of an existing Combined Statistical Are and changes to New England City and Town Area (NECTA) delineations. In the CY 2021 HH PPS final rule (85 FR 70298) we stated that if appropriate, we would propose any updates from OMB Bulletin No. 20–01 in future rulemaking. After reviewing OMB Bulletin No. 20–01, we have determined that the changes in Bulletin 20–01 encompassed delineation changes that would not affect the Medicare home health wage index for CY 2022. Specifically, the updates consisted of changes to NECTA delineations and the re-designation of a single rural county into a newly created Micropolitan Statistical Area. The Medicare home health wage index does not utilize NECTA definitions, and, as most recently discussed in the CY 2021 HH PPS final rule (85 FR 70298) we include hospitals located in Micropolitan Statistical areas in each State's rural wage index. In other words, these OMB updates did not affect any geographic areas for purposes of the wage index calculation for CY 2022.

The proposed CY 2023 wage index is available on the CMS website at: *https://www.cms.gov/Center/Provider-Type/Home-Health-Agency-HHA-Center.*

(2) Proposed Permanent Cap on Wage Index Decreases

As discussed in section II.B.5.b.1 of this proposed rule, we have proposed and finalized temporary transition policies in the past to mitigate significant changes to payments due to changes to the home health wage index. Specifically, in the CY 2015 HH PPS final rule (79 FR 66086), we implemented a 50/50 blend for all geographic areas consisting of the wage index values using the then-current OMB area delineations and the wage index values using OMB's new area delineations based on OMB Bulletin No. 13–01. In the CY 2021 HH PPS final rule (85 FR 73100), we adopted the revised OMB delineations with a 5-percent cap on wage index decreases, where the estimated reduction in a geographic area's wage index would be capped at 5-percent in CY 2021. We explained that we believed the 5-percent cap would provide greater transparency and would be administratively less complex than the prior methodology of applying a 50/50 blended wage index. We noted that this transition approach struck an appropriate balance by providing a transition period to mitigate the resulting short-term instability and negative impacts on providers and time for them to adjust to their new labor market area delineations and wage index values.

In the CY 2022 HH PPS final rule (86 FR 62285), a few commenters stated that providers should be protected against substantial payment reductions due to dramatic reductions in wage index values from one year to the next. Because we did not propose any transition policy in the CY 2022 proposed rule, we did not extend the transition period for CY 2022. In the CY 2022 HH PPS final rule, we stated that we continued to believe that applying the 5-percent cap transition policy in year one provided an adequate safeguard against any significant payment reductions associated with the adoption of the revised CBSA delineations in CY 2021, allowed for sufficient time to make operational

changes for future calendar years, and provided a reasonable balance between mitigating some short-term instability in home health payments and improving the accuracy of the payment adjustment for differences in area wage levels. However, we acknowledged that certain changes to wage index policy may significantly affect Medicare payments. In addition, we reiterated that our policy principles with regard to the wage index include generally using the most current data and information available and providing that data and information, as well as any approaches to addressing any significant effects on Medicare payments resulting from these potential scenarios, in notice and comment rulemaking. With these policy principles in mind, we considered for this CY 2023 HH PPS proposed rule how best to address the potential scenarios, which commenters raised concerns; that is, scenarios in which changes to wage index policy may significantly affect Medicare home health payments.

In the past, we have established transition policies of limited duration to phase in significant changes to labor market areas. In taking this approach in the past, we sought to mitigate short-term instability and fluctuations that can negatively impact providers due to wage index changes. Sections 1895(b)(4)(A)(ii) and (b)(4)(C) of the Act requires the Secretary to provide appropriate adjustments to the proportion of the payment amount under the HH PPS that account for area wage differences, using adjustment factors that reflect the relative level of wages and wage-related costs applicable to the furnishing of home health services. We have previously stated that, because the wage index is a relative measure of the value of labor in prescribed labor market areas, we believe it is important to implement new labor market area delineations with as minimal a transition as is reasonably possible. However, we recognize that changes to the wage index have the potential to create instability and significant negative impacts on certain providers even when labor market areas do not change. In addition, year-to-year fluctuations in an area's wage index can occur due to external factors beyond a provider's control, such as the COVID–19 PHE, and for an individual provider, these fluctuations can be difficult to predict. We also recognize that predictability in Medicare payments is important to enable providers to budget and plan their operations.

In light of these considerations, we are proposing a permanent approach to smooth year-to-year changes in providers' wage indexes. We are proposing a policy that increases the predictability of home health payments for providers and mitigates instability and significant negative impacts to providers resulting from changes to the wage index.

As previously discussed, we believe that applying a 5-percent cap on wage index decreases for CY 2021 provided greater transparency and was administratively less complex than prior transition methodologies. In addition, we believe this methodology mitigates short-term instability and fluctuations that can negatively impact providers due to wage index changes. Lastly, we note that we believe the 5-percent cap we applied to all wage index decreases for CY 2021 provided an adequate safeguard against significant payment reductions related to the adoption of the revised CBSAs. However, as discussed earlier in this section of this proposed rule, we recognize there are circumstances that a one-year mitigation policy would not effectively address future years in which providers continue to be negatively affected by significant wage index decreases.

Typical year-to-year variation in the home health wage index has historically been within 5-percent, and we expect this will continue to be the case in future years. Therefore, we believe that applying a 5-percent cap on all wage index decreases in future years, regardless of the reason for the decrease, would effectively mitigate instability in home health payments due to any significant wage index decreases that may affect providers in any year that commenters raised in the CY 2022 HH PPS final rule. Additionally, we believe that applying a 5-percent cap on all wage index decreases would increase the predictability of home health payments for providers, enabling them to more effectively budget and plan their operations. Lastly, we believe that applying a 5-percent cap on all wage index decreases, from the prior year, would have a small overall impact on the labor market area wage index system. As discussed in further detail in section VII.C. of this proposed rule, we estimate that applying a 5-percent cap on all wage index decreases, from the prior year, will have a very small effect on the wage index budget neutrality factors for CY 2023. Because the wage index is a measure of the value of labor (wage and wage-related costs) in a prescribed labor market area relative to the national average, we anticipate that most providers will not experience year-to-year wage index declines greater than 5-percent in any given year. We believe that applying a 5-percent cap on all wage index decreases, from the prior year, would continue to maintain the accuracy of the overall labor market area wage index system.

Therefore, for CY 2023 and subsequent years, we are proposing to apply a permanent 5 percent cap on any decrease to a geographic area's wage index from its wage index in the prior year, regardless of the circumstances causing the decline. That is, we are proposing that a geographic area's wage index for CY 2023 would not be less than 95 percent of its final wage index for CY 2022, regardless of whether the geographic area is part of an updated CBSA, and that for subsequent years, a geographic area's wage index would not be less than 95 percent of its wage index calculated in the prior CY. We further propose that if a geographic area's prior CY wage index is calculated based on the 5-percent cap, then the following year's wage index would not be less than 95 percent of the geographic area's capped wage index. For example, if a geographic area's wage index for CY 2023 is calculated with the application of the 5-percent cap, then its wage index for CY 2024 would not be less than 95 percent of its capped wage index in CY 2023. Likewise, we are proposing to make the corresponding regulations text changes at § 484.220(c) as follows: Beginning on January 1, 2023, CMS will apply a cap on decreases to the home health wage index such that the wage index applied to a geographic area is not less than 95 percent of the wage index applied to that geographic area in the prior CY. This 5-percent cap on negative wage index changes would be implemented in a budget neutral manner through the use of wage index budget neutrality factors.

In section VII.C. of this proposed rule, we estimate the impact to payments for providers in CY 2023 based on this proposed policy. We also note that we would examine the effects of this policy on an ongoing basis in the future in order to assess its appropriateness.

c. CY 2023 Annual Payment Update

(1) Background

The HH PPS has been in effect since October 1, 2000. As set forth in the July 3, 2000 final rule (65 FR 41128), the base unit of payment under the HH PPS was a national, standardized 60-day episode payment rate. As finalized in the CY 2019 HH PPS final rule with comment period (83 FR 56406), and as described in the CY 2020 HH PPS final rule with comment period (84 FR 60478), the unit of home health payment changed from a 60-day episode to a 30-day period effective for those 30-

day periods beginning on or after January 1, 2020.

As set forth in § 484.220, we adjust the national, standardized prospective payment rates by a case-mix relative weight and a wage index value based on the site of service for the beneficiary. To provide appropriate adjustments to the proportion of the payment amount under the HH PPS to account for area wage differences, we apply the appropriate wage index value to the labor portion of the HH PPS rates. In the CY 2019 HH PPS final rule with comment period (83 FR 56435), we finalized rebasing the home health market basket to reflect 2016 Medicare cost report data. We also finalized a revision to the labor share to reflect the 2016-based home health market basket compensation (Wages and Salaries plus Benefits) cost weight. We finalized that for CY 2019 and subsequent years, the labor share would be 76.1 percent and the non-labor share would be 23.9 percent. The following are the steps we take to compute the case-mix and wage-adjusted 30-day period payment amount for CY 2023:

- Multiply the national, standardized 30-day period rate by the patient's applicable case mix weight.
- Divide the case-mix adjusted amount into a labor (76.1 percent) and a non labor portion (23.9 percent).
- Multiply the labor portion by the applicable wage index based on the site of service of the beneficiary.
- Add the wage-adjusted portion to the non-labor portion, yielding the case-mix and wage adjusted 30-day period payment amount, subject to any additional applicable adjustments.

We provide annual updates of the HH PPS rate in accordance with section 1895(b)(3)(B) of the Act. Section 484.225 sets forth the specific annual percentage update methodology. In accordance with section 1895(b)(3)(B)(v) of the Act and § 484.225(i), for an HHA that does not submit home health quality data, as specified by the Secretary, the unadjusted national prospective 30-day period rate is equal to the rate for the previous calendar year increased by the applicable home health payment update, minus 2 percentage points. Any reduction of the percentage change would apply only to the calendar year involved and would not be considered in computing the prospective payment amount for a subsequent calendar year.

The final claim that the HHA submits for payment determines the total payment amount for the period and whether we make an applicable adjustment to the 30-day case-mix and wage-adjusted payment amount. The end date of the 30-day period, as reported on the claim, determines which calendar year rates Medicare will use to pay the claim.

We may adjust a 30-day case-mix and wage-adjusted payment based on the information submitted on the claim to reflect the following:

- A LUPA is provided on a per-visit basis as set forth in §§ 484.205(d)(1) and 484.230.
- A PEP adjustment as set forth in §§ 484.205(d)(2) and 484.235.
- An outlier payment as set forth in §§ 484.205(d)(3) and 484.240.

(2) CY 2023 National, Standardized 30-Day Period Payment Amount

Section 1895(b)(3)(A)(i) of the Act requires that the standard prospective payment rate and other applicable amounts be standardized in a manner that eliminates the effects of variations in relative case-mix and area wage adjustments among different home health agencies in a budget-neutral manner. To determine the CY 2023 national, standardized 30-day period payment rate, we apply a permanent behavioral adjustment factor, a case-mix weights recalibration budget neutrality factor, a wage index budget neutrality factor and the home health payment update percentage discussed in section II.C.2. of this proposed rule. As discussed in section II.B.2.f. of this proposed rule, we are implementing a permanent behavior adjustment of −7.69 percent to prevent further overpayments. The permanent behavior adjustment factor is 0.9231 (1 − 0.0769). As discussed previously, to ensure the changes to the PDGM case-mix weights are implemented in a budget neutral manner, we apply a case-mix weights budget neutrality factor to the CY 2022 national, standardized 30-day period payment rate. The proposed case-mix weights budget neutrality factor for CY 2023 is 0.9895. Additionally, we also apply a wage index budget neutrality to ensure that wage index updates and revisions are implemented in a budget neutral manner. Typically, the wage index budget neutrality factor is calculated using the most recent, complete home health claims data available. However, in the CY 2022 HH PPS final rule due to the COVID–19 PHE, we looked at using the previous calendar year's home health claims data (CY 2019) to determine if there were significant differences between utilizing 2019 and 2020 claims data. Our analysis showed that there was only a small difference between the wage index budget neutrality factors calculated using CY 2019 and CY 2020 home health claims data. Therefore, for CY 2022 we decided to continue our practice of using the most recent, complete home health claims data available; that is, we used CY 2020 claims data for the CY 2022 payment rate updates. For CY 2023 rate setting, we do not anticipate significant differences between using pre COVID–19 PHE data (CY 2019 claims) and the most recent claims data at the time of rulemaking (CY 2021 claims). Therefore, we will continue our practice of using the most recent, complete utilization data at the time of rulemaking; that is, we are using CY 2021 claims data for CY 2023 payment rate updates.

To calculate the wage index budget neutrality factor, we first determine the payment rate needed for non-LUPA 30-day periods using the CY 2023 wage index so those total payments are equivalent to the total payments for non-LUPA 30-day periods using the CY 2022 wage index and the CY 2022 national standardized 30-day period payment rate adjusted by the case-mix weights recalibration neutrality factor. Then, by dividing the payment rate for non-LUPA 30-day periods using the CY 2023 wage index with a 5-percent cap on wage index decreases by the payment rate for non-LUPA 30-day periods using the CY 2022 wage index, we obtain a wage index budget neutrality factor of 0.9975. We then apply the wage index budget neutrality factor of 0.9975 to the 30-day period payment rate.

Next, we would update the 30-day period payment rate by the CY 2023 home health payment update percentage of 2.9 percent. The CY 2023 national, standardized 30-day period payment rate is calculated in Table B27.

**TABLE B27: CY 2023 NATIONAL, STANDARDIZED 30-DAY PERIOD PAYMENT AMOUNT**

| CY 2022 National Standardized 30-Day Period Payment | Permanent BA Adjustment Factor | Case-Mix Weights Budget Neutrality Factor | Wage Index Budget Neutrality Factor | CY 2023 HH Payment Update | CY 2023 National, Standardized 30-Day Period Payment |
|---|---|---|---|---|---|
| $2,031.64 | 0.9231 | 0.9895 | 0.9975 | 1.029 | $1,904.76 |

The CY 2023 national, standardized 30-day period payment rate for a HHA that does not submit the required quality data is updated by the CY 2023 home health payment update of 2.9 percent minus 2 percentage points and is shown in Table B28.

**TABLE B28: CY 2023 NATIONAL, STANDARDIZED 30-DAY PERIOD PAYMENT AMOUNT FOR HHAS THAT DO NOT SUBMIT THE QUALITY DATA**

| CY 2022 National Standardized 30-Day Period Payment | Permanent BA Adjustment Factor | Case-Mix Weights Budget Neutrality Factor | Wage Index Budget Neutrality Factor | CY 2023 HH Payment Update Minus 2 Percentage Points | CY 2023 National, Standardized 30-Day Period Payment |
|---|---|---|---|---|---|
| $2,031.64 | 0.9231 | 0.9895 | 0.9975 | 1.009 | $1,867.74 |

(3) CY 2023 National Per-Visit Rates for 30-Day Periods of Care

The national per-visit rates are used to pay LUPAs and are also used to compute imputed costs in outlier calculations. The per-visit rates are paid by type of visit or HH discipline. The six HH disciplines are as follows:

- Home health aide (HH aide).
- Medical Social Services (MSS).
- Occupational therapy (OT).
- Physical therapy (PT).
- Skilled nursing (SN).
- Speech-language pathology (SLP).

To calculate the CY 2023 national per-visit rates, we started with the CY 2022 national per-visit rates. Then we applied a wage index budget neutrality factor to ensure budget neutrality for LUPA per-visit payments. We calculated the wage index budget neutrality factor by simulating total payments for LUPA 30-day periods of care using the CY 2023 wage index with a 5-percent cap on wage index decreases and comparing it to simulated total payments for LUPA 30-day periods of care using the CY 2022 wage index (with no 5-percent cap). By dividing the total payments for LUPA 30-day periods of care using the CY 2023 wage index by the total payments for LUPA 30-day periods of care using the CY 2022 wage index, we obtained a wage index budget neutrality factor of 0.9992. We apply the wage index budget neutrality factor in order to calculate the CY 2022 national per visit rates.

The LUPA per-visit rates are not calculated using case-mix weights. Therefore, no case mix weights budget neutrality factor is needed to ensure budget neutrality for LUPA payments. Additionally, we are not applying the permanent adjustment to the per visit payment rates but only the case-mix adjusted payment rate. Lastly, the per-visit rates for each discipline are updated by the CY 2023 home health payment update percentage of 2.9 percent. The national per-visit rates are adjusted by the wage index based on the site of service of the beneficiary. The per-visit payments for LUPAs are separate from the LUPA add-on payment amount, which is paid for episodes that occur as the only episode or initial episode in a sequence of adjacent episodes. The CY 2023 national per visit rates for HHAs that submit the required quality data are updated by the CY 2023 home health payment update percentage of 2.9 percent and are shown in Table B29.

**TABLE B29: CY 2023 NATIONAL PER-VISIT PAYMENT AMOUNTS**

| HH Discipline | CY 2022 Per-Visit Payment Amount | Wage Index Budget Neutrality Factor | CY 2023 HH Payment Update | CY 2023 Per-Visit Payment Amount |
|---|---|---|---|---|
| Home Health Aide | $71.04 | 0.9992 | 1.029 | $73.04 |
| Medical Social Services | $251.48 | 0.9992 | 1.029 | $258.57 |
| Occupational Therapy | $172.67 | 0.9992 | 1.029 | $177.54 |
| Physical Therapy | $171.49 | 0.9992 | 1.029 | $176.32 |
| Skilled Nursing | $156.90 | 0.9992 | 1.029 | $161.32 |
| Speech-Language Pathology | $186.41 | 0.9992 | 1.029 | $191.66 |

The CY 2023 per-visit payment rates for HHAs that do not submit the required quality data are updated by the CY 2023 home health payment update percentage of 2.9 percent minus 2 percentage points and are shown in Table B30.

**TABLE B30: CY 2023 NATIONAL PER-VISIT PAYMENT AMOUNTS FOR HHAS THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA**

| HH Discipline | CY 2022 Per-Visit Payment Amount | Wage Index Budget Neutrality Factor | CY 2022 HH Payment Update Minus 2 Percentage Points | CY 2023 National, Standardized 30-Day Period Payment |
|---|---|---|---|---|
| Home Health Aide | $71.04 | 0.9992 | 1.009 | $71.62 |
| Medical Social Services | $251.48 | 0.9992 | 1.009 | $253.54 |
| Occupational Therapy | $172.67 | 0.9992 | 1.009 | $174.08 |
| Physical Therapy | $171.49 | 0.9992 | 1.009 | $172.89 |
| Skilled Nursing | $156.90 | 0.9992 | 1.009 | $158.19 |
| Speech-Language Pathology | $186.41 | 0.9992 | 1.009 | $187.94 |

(4) LUPA Add-On Factors

Prior to the implementation of the 30-day unit of payment, LUPA episodes were eligible for a LUPA add-on payment if the episode of care was the first or only episode in a sequence of adjacent episodes. As stated in the CY 2008 HH PPS final rule, the average visit lengths in these initial LUPAs are 16 to 18 percent higher than the average visit lengths in initial non-LUPA episodes (72 FR 49848). LUPA episodes that occur as the only episode or as an initial episode in a sequence of adjacent episodes are adjusted by applying an additional amount to the LUPA payment before adjusting for area wage differences. In the CY 2014 HH PPS final rule (78 FR 72305), we changed the methodology for calculating the LUPA add-on amount by finalizing the use of three LUPA add-on factors: 1.8451 for SN; 1.6700 for PT; and 1.6266 for SLP. We multiply the per-visit payment amount for the first SN, PT, or SLP visit in LUPA episodes that occur as the only episode or an initial episode in a sequence of adjacent episodes by the appropriate factor to determine the LUPA add-on payment amount.

In the CY 2019 HH PPS final rule with comment period (83 FR 56440), in addition to finalizing a 30-day unit of payment, we finalized our policy of continuing to multiply the per-visit payment amount for the first skilled nursing, physical therapy, or speech-language pathology visit in LUPA periods that occur as the only period of care or the initial 30-day period of care in a sequence of adjacent 30-day periods of care by the appropriate add-on factor (1.8451 for SN, 1.6700 for PT, and 1.6266 for SLP) to determine the LUPA add-on payment amount for 30-day periods of care under the PDGM. For example, using the proposed CY 2023 per-visit payment rates for HHAs that submit the required quality data, for LUPA periods that occur as the only period or an initial period in a sequence of adjacent periods, if the first skilled visit is SN, the payment for that visit would be $297.65 (1.8451 multiplied by $161.32), subject to area wage adjustment.

(5) Occupational Therapy LUPA Add-On Factor

In order to implement Division CC, section 115, of CAA 2021, CMS finalized changes to regulations at § 484.55(a)(2) and (b)(3) that allowed occupational therapists to conduct initial and comprehensive assessments for all Medicare beneficiaries under the home health benefit when the plan of care does not initially include skilled nursing care, but either PT or SLP (86 FR 62351). This change, led to us

establishing a LUPA add-on factor for calculating the LUPA add-on payment amount for the first skilled occupational therapy (OT) visit in LUPA periods that occurs as the only period of care or the initial 30-day period of care in a sequence of adjacent 30-day periods of care.

As stated in the CY 2022 HH PPS final rule with comment period (86 FR 62289) since there was not sufficient data regarding the average excess of minutes for the first visit in LUPA periods when the initial and comprehensive assessments are conducted by occupational therapists we finalized the use of the PT LUPA add-on factor of 1.6700 as a proxy. We also stated that we would use the PT LUPA add-on factor as a proxy until we have CY 2022 data to establish a more accurate OT add-on factor for the LUPA add-on payment amounts (86 FR 62289). Therefore, we continue to believe the similarity in the per-visit payment rates for both PT and OT make the PT LUPA add-on factor the most appropriate proxy until we have CY 2022 data to propose a LUPA add-on factor specific to OT in future rulemaking.

d. Proposed Payments for High-Cost Outliers Under the HH PPS

(1) Background

Section 1895(b)(5) of the Act allows for the provision of an addition or adjustment to the home health payment amount otherwise made in the case of outliers because of unusual variations in the type or amount of medically necessary care. Under the HH PPS and the previous unit of payment (that is, 60-day episodes), outlier payments were made for 60-day episodes whose estimated costs exceed a threshold amount for each HHRG. The episode's estimated cost was established as the sum of the national wage-adjusted per visit payment amounts delivered during the episode. The outlier threshold for each case-mix group or PEP adjustment defined as the 60-day episode payment or PEP adjustment for that group plus a fixed-dollar loss (FDL) amount. For the purposes of the HH PPS, the FDL amount is calculated by multiplying the home health FDL ratio by a case's wage-adjusted national, standardized 60-day episode payment rate, which yields an FDL dollar amount for the case. The outlier threshold amount is the sum of the wage and case-mix adjusted PPS episode amount and wage-adjusted FDL amount. The outlier payment is defined to be a proportion of the wage-adjusted estimated cost that surpasses the wage-adjusted threshold. The proportion of additional costs over the outlier threshold amount paid as outlier payments is referred to as the loss-sharing ratio.

As we noted in the CY 2011 HH PPS final rule (75 FR 70397 through 70399), section 3131(b)(1) of the Affordable Care Act amended section 1895(b)(3)(C) of the Act to require that the Secretary reduce the HH PPS payment rates such that aggregate HH PPS payments were reduced by 5 percent. In addition, section 3131(b)(2) of the Affordable Care Act amended section 1895(b)(5) of the Act by redesignating the existing language as section 1895(b)(5)(A) of the Act and revised the language to state that the total amount of the additional payments or payment adjustments for outlier episodes could not exceed 2.5 percent of the estimated total HH PPS payments for that year. Section 3131(b)(2)(C) of the Affordable Care Act also added section 1895(b)(5)(B) of the Act, which capped outlier payments as a percent of total payments for each HHA for each year at 10 percent.

As such, beginning in CY 2011, we reduced payment rates by 5 percent and targeted up to 2.5 percent of total estimated HH PPS payments to be paid as outliers. To do so, we first returned the 2.5 percent held for the target CY 2010 outlier pool to the national, standardized 60-day episode rates, the national per visit rates, the LUPA add-on payment amount, and the NRS conversion factor for CY 2010. We then reduced the rates by 5 percent as required by section 1895(b)(3)(C) of the Act, as amended by section 3131(b)(1) of the Affordable Care Act. For CY 2011 and subsequent calendar years we targeted up to 2.5 percent of estimated total payments to be paid as outlier payments, and apply a 10 percent agency-level outlier cap.

In the CY 2017 HH PPS proposed and final rules (81 FR 43737 through 43742 and 81 FR 76702), we described our concerns regarding patterns observed in home health outlier episodes. Specifically, we noted the methodology for calculating home health outlier payments may have created a financial incentive for providers to increase the number of visits during an episode of care in order to surpass the outlier threshold; and simultaneously created a disincentive for providers to treat medically complex beneficiaries who require fewer but longer visits. Given these concerns, in the CY 2017 HH PPS final rule (81 FR 76702), we finalized changes to the methodology used to calculate outlier payments, using a cost-per-unit approach rather than a cost-per-visit approach. This change in methodology allows for more accurate payment for outlier episodes, accounting for both the number of visits during an episode of care and the length of the visits provided. Using this approach, we now convert the national per-visit rates into per 15-minute unit rates. These per 15-minute unit rates are used to calculate the estimated cost of an episode to determine whether the claim will receive an outlier payment and the amount of payment for an episode of care. In conjunction with our finalized policy to change to a cost-per-unit approach to estimate episode costs and determine whether an outlier episode should receive outlier payments, in the CY 2017 HH PPS final rule we also finalized the implementation of a cap on the amount of time per day that would be counted toward the estimation of an episode's costs for outlier calculation purposes (81 FR 76725). Specifically, we limit the amount of time per day (summed across the six disciplines of care) to 8 hours (32 units) per day when estimating the cost of an episode for outlier calculation purposes.

In the CY 2017 HH PPS final rule (81 FR 76724), we stated that we did not plan to re-estimate the average minutes per visit by discipline every year. Additionally, the per unit rates used to estimate an episode's cost were updated by the home health update percentage each year, meaning we would start with the national per visit amounts for the same calendar year when calculating the cost-per-unit used to determine the cost of an episode of care (81 FR 76727). We will continue to monitor the visit length by discipline as more recent data becomes available, and may propose to update the rates as needed in the future.

In the CY 2019 HH PPS final rule with comment period (83 FR 56521), we finalized a policy to maintain the current methodology for payment of high-cost outliers upon implementation of PDGM beginning in CY 2020 and calculated payment for high-cost outliers based upon 30-day period of care. Upon implementation of the PDGM and 30-day unit of payment, we finalized the FDL ratio of 0.56 for 30-day periods of care in CY 2020. Given that CY 2020 was the first year of the PDGM and the change to a 30-day unit of payment, we finalized to maintain the same FDL ratio of 0.56 in CY 2021 as we did not have sufficient CY 2020 data at the time of CY 2021 rulemaking to proposed a change to the FDL ratio for CY 2021. In the CY 2022 HH PPS final rule with comment period (86 FR 62292), we estimated that outlier payments would be approximately 1.8 percent of total HH PPS final rule payments if we maintained an FDL of 0.56 in CY 2022. Therefore, in order to

pay up to, but no more than, 2.5 percent of total payments as outlier payments we finalized an FDL of 0.40 for CY 2022.

(2) FDL Ratio for CY 2023

For a given level of outlier payments, there is a trade-off between the values selected for the FDL ratio and the loss-sharing ratio. A high FDL ratio reduces the number of periods that can receive outlier payments, but makes it possible to select a higher loss-sharing ratio, and therefore, increase outlier payments for qualifying outlier periods. Alternatively, a lower FDL ratio means that more periods can qualify for outlier payments, but outlier payments per period must be lower.

The FDL ratio and the loss-sharing ratio are selected so that the estimated total outlier payments do not exceed the 2.5 percent aggregate level (as required by section 1895(b)(5)(A) of the Act). Historically, we have used a value of 0.80 for the loss-sharing ratio, which, we believe, preserves incentives for agencies to attempt to provide care efficiently for outlier cases. With a loss-sharing ratio of 0.80, Medicare pays 80 percent of the additional estimated costs that exceed the outlier threshold amount. Using CY 2021 claims data (as of March 21, 2022) and given the statutory requirement that total outlier payments do not exceed 2.5 percent of the total payments estimated to be made under the HH PPS, we are proposing an FDL ratio of 0.44 for CY 2023. CMS will update the FDL, if needed, once we have more complete CY 2021 claims data.

*K. Comment Solicitation on the Collection of Data on the Use of Telecommunications Technology Under the Medicare Home Health Benefit*

Even prior to the COVID–19 PHE, CMS acknowledged the importance of technology in allowing HHAs the flexibility of furnishing services remotely. In the CY 2019 HH PPS final rule with comment (83 FR 56406), for purposes of the Medicare home health benefit, we finalized the definition of ''remote patient monitoring'' in regulation at 42 CFR 409.46(e) as the collection of physiologic data (for example, electrocardiogram (ECG), blood pressure, glucose monitoring) digitally stored and/or transmitted by the patient and/or caregiver to the HHA. In the CY 2019 HH PPS final rule with comment, we also finalized in regulation at § 409.46(e) that the costs of remote patient monitoring are considered allowable administrative costs (operating expenses) if remote patient monitoring is used by the HHA to augment the care planning process (83 FR 56527).

With the declaration of the COVID–19 PHE in early 2020, the use of telecommunications technology has become more prominent in the delivery of healthcare in the United States. Anecdotally, many beneficiaries preferred to stay home than go to physician's offices and outpatient centers to seek care, while also limiting the number and frequency of care providers furnishing services inside their homes to avoid exposure to COVID–19. Accordingly, CMS implemented additional policies under the HH PPS to make providing and receiving services via telecommunications technology easier. In the first COVID–19 PHE interim final rule with comment period (IFC) (85 FR 19230), we changed the plan of care requirements at § 409.43(a) on an interim basis, for the purposes of Medicare payment, to state that the plan of care must include any provision of remote patient monitoring or other services furnished via a telecommunications system. The plan of care must also describe how the use of such technology is tied to the patient-specific needs as identified in the comprehensive assessment and will help to achieve the goals outlined on the plan of care. The amended plan of care requirements at § 409.43(a) also state that these services cannot substitute for a home visit ordered as part of the plan of care and cannot be considered a home visit for the purposes of patient eligibility or payment, in accordance with section 1895(e)(1)(A) and (B) of the Act. The CY 2021 HH PPS final rule with comment period (85 FR 70298) finalized these changes on a permanent basis, as well as amended § 409.46(e) to include not only remote patient monitoring, but other communication or monitoring services consistent with the plan of care for the individual, on the home health cost report as allowable administrative costs.

Sections 1895(e)(1)(A) and (B) of the Act specify that telecommunications services cannot substitute for in-person home health services ordered as part of the plan of care certified by a physician and are not considered a home health visit for purposes of eligibility or payment under Medicare. Though the use of telecommunications technology is not to be used as a substitute for in-person home health services, as ordered on the plan of care, and services provided through the use of telecommunications technology (rather than in-person) are not considered a home health visit, anecdotally we have heard that HHAs are using telecommunication services during the course of a 30-day period of care and as a result of the COVID–19 PHE, as described previously. In the first COVID–19 PHE IFC, we provided an example describing a situation where the use of technology is not a substitute for the provision of in-person visits as ordered on the plan of care, rather the plan of care is updated to reflect a change in the frequency of the in-person visits and to include ''virtual visits'' as part of the management of the home health patient (85 FR 19248).

Currently, the collection of data on the use of telecommunications technology is limited to overall cost data on a broad category of telecommunications services as a part of an HHA's administrative costs on line 5 of the HHA Medicare cost reports.[18] As we noted in the CY 2019 HH PPS proposed rule, these costs would then be factored into the costs per visit. Factoring the costs associated with telecommunications systems into the costs per visit has important implications for assessing home health costs relevant to payment, including HHA Medicare margin calculations (83 FR 32426). Data on the use of telecommunications technology during a 30-day period of care at the beneficiary level is not currently collected on the home health claim. While the provision of services furnished via a telecommunications system must be included on the patient's plan of care, CMS does not routinely review plans of care to determine the extent to which these services are actually being furnished.

Collecting data on the use of telecommunications technology on home health claims would allow CMS to analyze the characteristics of the beneficiaries utilizing services furnished remotely, and will give us a broader understanding of the social determinants that affect who benefits most from these services, including what barriers may potentially exist for certain subsets of beneficiaries. Furthermore, in their March 2022 Report to the Congress: Medicare's Payment Policy, MedPAC recommended tracking the use of telehealth in the home health care benefit on home health claims in order to improve payment accuracy.[19] As such, to collect

[18] Found in Ch47 of the Provider Reimbursement Manual at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021935.*

[19] Medicare Payment Advisory Commission (MedPAC), Report to the Congress: Medicare Payment Policy. March 2022, P. 271. found at *https://www.medpac.gov/wp-content/uploads/*

more complete data on the use of telecommunications technology in the provision of home health services, we are soliciting comments on the collection of such data on home health claims, which we aim to begin collecting by January 1, 2023 on a voluntary basis by HHAs, and will begin to require this information be reported on claims by July of 2023. Specifically, we are soliciting comments on the use of three new G-codes identifying when home health services are furnished using synchronous telemedicine rendered via a real-time two-way audio and video telecommunications system; synchronous telemedicine rendered via telephone or other real-time interactive audio-only telecommunications system; and the collection of physiologic data digitally stored and/or transmitted by the patient to the home health agency, that is, remote patient monitoring. We would capture the utilization of remote patient monitoring through the inclusion of the start date of the remote patient monitoring and the number of units indicated on the claim. This may help us understand in general how long remote monitoring is used for individual patients and for which conditions. Although we plan to begin collecting this information beginning with these three G-codes on January 1, 2023, we are interested in comments on whether there are other common uses of telecommunications technology under the home health benefit that would warrant additional G-codes that would be helpful in tracking the use of such technology in the provision of care.

In accordance with section 40.2 in Chapter 10 of the Medicare Claims Processing Manual (Pub. 100–04), we plan to issue instructions that these forthcoming G-codes are to be used to report services in line item detail and each service must be reported as a separate line under the appropriate revenue code (04x—Physical Therapy, 043x—Occupational Therapy, 044x—Speech-Language Pathology, 055x—Skilled Nursing, 056x—Medical Social Services, or 057x—Home Health Aide). While we do not plan on limiting the use of these G-codes to any particular discipline, we would not anticipate use of such technology would be reported under certain revenue codes such as 027x or 0623—Medical Supplies, or revenue code 057x—Home Health Aide. We are interested in comments from the public on our belief that, due to the hands-on nature of home health aide services, the use of telecommunications technology would generally not be appropriate for such services. We remind interested parties that if there is a service that cannot be provided through telecommunications technology (for example, wound care that requires in-person, hands-on care from a skilled nurse), the HHA must make an in-person visit to furnish such services (85 FR 39428). We are also requesting comments regarding the appropriateness of such technology for particular services in order to more clearly delineate when the use of such technology is appropriate. This may help inform how we use this analysis, for instance, connecting how such technology is impacting the provision of care to certain beneficiaries, costs, quality, and outcomes, and determine if further requirements surrounding the use of telecommunications technology are needed.

We are also soliciting comments on future refinement of these G-codes beginning July 1, 2023. Specifically whether the codes should differentiate the type of clinician performing the service via telecommunications technology, such as a therapist versus therapist assistant; and whether new G-codes should differentiate the type of service being performed through the use of telecommunications technology, such as: skilled nursing services performed for care plan oversight (for example, management and evaluation or observation and assessment) versus teaching; or physical therapy services performed for the establishment or performance of a maintenance program versus other restorative physical therapy services.

We will issue program instruction outlining the use of new codes for the purposes of tracking the use of telecommunications technology under the home health benefit with sufficient notice to enable HHAs to make the necessary changes in their electronic health records and billing systems. As stated previously, we will begin collecting this information on home health claims by January 1, 2023, on a voluntary basis by HHAs, and will require this information be reported on home health claims beginning in July, 2023. We would issue further program instruction prior to July 1, 2023, if the G-code description changes between January 1, 2023, and July 1, 2023, based on comments in this proposed rule. However, we reiterate that the collection of information on the use of telecommunications technology does not mean that such services are considered ''visits'' for purposes of eligibility or payment. In accordance with section 1895(e)(1)(A) and (B) of the Act, such data will not be used or factored into case-mix weights, or count towards outlier payments or the LUPA threshold per payment period.

## III. Home Health Quality Reporting Program (HH QRP)

### *A. Background and Statutory Authority*

The HH QRP is authorized by section 1895(b)(3)(B)(v) of the Act. Section 1895(b)(3)(B)(v)(II) of the Act requires that, for 2007 and subsequent years, each home health agency (HHA) submit to the Secretary in a form and manner, and at a time, specified by the Secretary, such data that the Secretary determines are appropriate for the measurement of health care quality. To the extent that an HHA does not submit data in accordance with this clause, the Secretary shall reduce the home health market basket percentage increase applicable to the HHA for such year by 2 percentage points. As provided at section 1895(b)(3)(B)(vi) of the Act, depending on the market basket percentage increase applicable for a particular year, as further reduced by the productivity adjustment (except in 2018 and 2020) described in section 1886(b)(3)(B)(xi)(II) of the Act, the reduction of that increase by 2 percentage points for failure to comply with the requirements of the HH QRP may result in the home health market basket percentage increase being less than 0.0 percent for a year, and may result in payment rates under the Home Health PPS for a year being less than payment rates for the preceding year. The HH QRP regulations can be found at 42 CFR 484.245 and 484.250.

### *B. General Considerations Used for the Selection of Quality Measures for the HH QRP*

For a detailed discussion of the considerations we historically use for measure selection for the HH QRP quality, resource use, and other measures, we refer readers to the CY 2016 HH PPS final rule (80 FR 68695 through 68696). In the CY 2019 HH PPS final rule with comment period (83 FR 56548 through 56550), we finalized the factors we consider for removing previously adopted HH QRP measures.

### *C. Quality Measures Currently Adopted for the CY 2023 HH QRP*

The HH QRP currently includes 20 measures for the CY 2023 program year, as described in Table C1.

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## TABLE C1: MEASURES CURRENTLY ADOPTED FOR THE CY 2023 HH QRP

| Short Name | Measure Name & Data Source |
|---|---|
| **QM Name** | **OASIS-based** |
| Ambulation | Improvement in Ambulation/Locomotion (NQF #0167). |
| Application of Falls | Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long Stay) (NQF #0674). |
| Application of Functional Assessment | Application of Percent of Long-Term Care Hospital (LTCH) Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631). |
| Bathing | Improvement in Bathing (NQF #0174). |
| Bed Transferring | Improvement in Bed Transferring (NQF # 0175). |
| DRR | Drug Regimen Review Conducted With Follow-Up for Identified Issues- Post Acute Care (PAC) HH QRP. |
| Dyspnea | Improvement in Dyspnea. |
| Influenza | Influenza Immunization Received for Current Flu Season |
| Oral Medications | Improvement in Management of Oral Medications (NQF #0176). |
| Pressure Ulcer/Injury | Changes in Skin Integrity Post-Acute Care |
| Timely Care | Timely Initiation Of Care (NQF #0526). |
| TOH - Provider | Transfer of Health Information to Provider-Post-Acute Care[1] |
| TOH - Patient | Transfer of Health Information to Patient-Post-Acute Care[1] |
| **QM Name** | **Claims-based** |
| ACH | Acute Care Hospitalization During the First 60 Days of HH (NQF #0171). |
| DTC | Discharge to Community-Post Acute Care (PAC) Home Health (HH) Quality Reporting Program (QRP) (NQF #3477) |
| ED Use | Emergency Department Use without Hospitalization During the First 60 Days of HH (NQF #0173). |
| MSPB | Total Estimated Medicare Spending Per Beneficiary (MSPB)—Post Acute Care (PAC) HH QRP. |

| Short Name | Measure Name & Data Source |
|---|---|
| PPR | Potentially Preventable 30-Day Post-Discharge Readmission Measure for HH Quality Reporting Program. |
| PPH | Home Health Within Stay Potentially Preventable Hospitalization |
| **QM Name** | **HHCAHPS-based** |
| CAHPS Home Health Survey | CAHPS® Home Health Care Survey (experience with care) (NQF #0517)[2]<br>- How often the HH team gave care in a professional way.<br>- How well did the HH team communicate with patients.<br>- Did the HH team discuss medicines, pain, and home safety with patients.<br>- How do patients rate the overall care from the HHA.<br>- Will patients recommend the HHA to friends and family. |

**NOTES:**

1 Data collection delayed due to the COVID-19 public health emergency for the TOH-Patient and TOH-Provider.

2 The HHCAHPS has five components that together are used to represent one NQF-endorsed measure.

BILLING CODE 4120–01–C

*D. Proposal To End the Suspension of OASIS Data Collection on Non-Medicare/Medicaid HHA Patients To Require HHAs To Submit All-Payer OASIS Data for Purposes of the HH QRP, Beginning With the CY 2025 Program Year*

In 1987, Congress added a new section 1891(d) to the Act (section 4021(b) of Pub. L. 100–203 (December 22, 1987)). The statute required the Secretary to develop a comprehensive assessment for Medicare-participating HHAs. In 1993, CMS (then known as HCFA) developed an assessment instrument that identified each patient's need for home care and that meets the patient's medical, nursing, rehabilitative, social and discharge planning needs. As part of this assessment, Medicare-certified HHAs were required to use a standard core assessment data set, the ''Outcome and Assessment Information Set'' (''OASIS''). Section 1891(d) of the Act requires, as part of the home health assessment, a survey of the quality of care and services furnished by the agency as measured by indicators of medical, nursing, and rehabilitative care provided by the HHA. OASIS is the designated assessment instrument (or instruments) for use by an HHA in complying with the requirement. In the January 25, 1999, final rule titled, ''Medicare and Medicaid Programs: Comprehensive Assessment and Use of the OASIS as Part of the Conditions of Participation for Home Health Agencies,'' we also required HHAs to submit the data collected by the OASIS assessment to HCFA as an HHA condition of participation (64 FR 3772).

Early on, privacy concerns were raised by HHAs around the collection of all-payer data and the release of personal health information. As we indicated in the study, any new collection requirements such as this raise concerns and this was no exception. In response to the privacy concerns, CMS took steps to mask the personal health information before the data was transmitted to the Quality Improvement and Evaluation System (QIES). In the study, we collected information from HHAs and the industry including the surveying of Agencies by one of the trade organizations and note that the privacy concerns initially raised were not raised as an ongoing concern. Based upon this feedback, we conclude that the privacy issues raised initially are no longer a concern.

Subsequently, Congress enacted section 704 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), which suspended the legal authority of the Secretary to require HHAs to report OASIS information on non-Medicare/non-Medicaid patients until at least 2 months after the Secretary published final regulations on CMS's collection and use of those data following the submission of a report to Congress on the study required under section 704(c) of the MMA. This study required the Secretary to examine the use of non-Medicare/non-Medicaid OASIS data by large HHAs, including whether there were unique benefits from the analysis of that information that CMS could not obtain from other sources, and the value of collecting such data by small HHAs versus the administrative burden of collection. In conducting the study, the Secretary was also required to obtain recommendations from quality assessment experts on the use of such information and the necessity of HHAs collecting such information.[20]

The Secretary conducted the study required under section 704 of the MMA in 2004 to 2005 and submitted it to Congress in December 2006 (*https://www.cms.gov/files/document/cms-oasis-study-all-payer-data-submission-2006.pdf*). The study made the following key findings:

- There are significant differences between private pay and Medicare/Medicaid patients in terms of diagnosis, patient characteristics, and patient outcomes. Within-agency correlation between Medicare/Medicaid and private pay patient outcomes was low, indicating that outcomes based on Medicare/Medicaid patient data cannot be generalized to serve as a proxy for private pay patients.
- Risk adjustment models at the time did not account for all of the sources of variation in outcomes across different payer groups and as a result, measures could produce misleading information.
- Requiring OASIS data collection on private pay patients at Medicare-certified HHAs could increase staff and patient burden and would require CMS to develop a mechanism for these agencies to receive reports from CMS on their private pay patients.
- A change to all-payer assessment data collection would strengthen CMS's ability to assess and report indicators of the quality of care furnished by HHAs to their entire patient population.

After considering the study's findings, the Secretary noted that the suspension of OASIS collection from non-Medicare patients would continue because ''it would be unfair to burden the providers with the collection of OASIS at this time since the case mix and outcomes reports are not designed to include private pay patients.'' The Secretary also noted that it would be inappropriate for CMS to collect the private pay OASIS data and not use it. The Secretary further stated that ''if funding for the development of HHA patient outcome and case mix reports for private pay patients is identified as a priority function, CMS would not hesitate to call for the removal of the suspension of OASIS for private pay patients.''

In the November 9, 2006, final rule, ''Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2007 and Deficit Reduction Act of 2005 Changes to Medicare Payment for Oxygen Equipment and Capped Rental Durable Medical Equipment'', we finalized our policy that the agency would continue to suspend collection of OASIS all payer data (71 FR 65883 and 65889).

Since 2006, CMS has laid the groundwork for the resumption of all-payer data submission because we want to represent overall care being provided to all patients in an HHA. CMS implemented the QIES and iQIES provider data reporting systems to securely transfer and manage assessment data across QRPs, including HH. These systems can now support an extensive range of provider reports, including case-mix reports for private pay patients. The HH QRP program expanded quality domains to include patient reported outcome measures and new assessment and claims-based quality measures. We sought and received public comment on several occasions regarding data reporting on all HHA patients, regardless of payer type. In February 2012, the NQF-convened MAP also issued a report that encouraged establishing a data collection and transmission infrastructure for all payers that would work across PAC settings.[21] In the July 28, 2017, and November 7, 2017, ''Home Health Prospective Payment System Rate Update and CY 2018 Case-Mix Adjustment Methodology Refinements; Home Health Value-Based Purchasing Model; and Home Health Quality Reporting Requirements'' proposed and final rules (at 82 FR 35372 through 35373 and 82 FR 51736 through 51737, respectively) and in the July 18, 2019,

[20] *https://www.govinfo.gov/content/pkg/PLAW-108publ173/pdf/PLAW-108publ173.pdf.*

[21] National Quality Forum. MAP Coordination Strategy for Post-Acute Care and Long-Term Care Performance Measurement. February 2012. Available at *https://www.qualityforum.org/Publications/2012/02/MAP_Coordination_Strategy_for_Post-Acute_Care_and_Long-Term_Care_Performance_Measurement.aspx.* Accessed March 21, 2022.

and November 8, 2019, ''Medicare and Medicaid Programs; CY 2020 Home Health Prospective Payment System Rate Update'' proposed and final rules (at 84 FR 34686 and 84 FR 60478, respectively), we sought and responded to input on whether we should require quality data reporting on all HHA patients, regardless of payer source, to ensure representation of the quality of the services provided to the entire HHA population. In the ''CY 2018 Home Health Prospective Payment System Rate Update and CY 2019 Case-Mix Adjustment Methodology Refinements; Home Health Value-Based Purchasing Model; and Home Health Quality Reporting Requirements'' final rule, some commenters shared that there would be increased burden from requiring all-payer data submissions (82 FR 51676). A few commenters also raised the issue of whether it would be appropriate to collect and report private pay data, given that private payors may have different care pathways, approval, and authorization processes. In the CY 2020 HH PPS proposed rule, we also sought input on whether collection of quality data used in the HH QRP should include all HHA patients, regardless of their payer source (84 FR 60478). Several commenters supported expanding the HH QRP to include collection of data on all patients regardless of payer. Several commenters noted that this expanded data collection would not be overly burdensome because the majority of HHAs already complete the OASIS on all patients, regardless of payer status. Commenters were concerned that the usefulness of all-payer data collection to CMS's health policy development would not outweigh the additional reporting burden. Several commenters supporting all-payer data collection stated that expansion of the data collection would align the HH QRP's data collection policy with that of Hospices and Long-Term Care Hospitals (LTCHs), as well as the data collection policy under the Merit-based Incentive Payment System. Other reasons cited by commenters who supported the expanded data collection included more accurate representation of the quality of care furnished by HHAs to the entire HH population, the ability of such data to better guide quality improvement activities, and the reduction of current administrative efforts made by HHAs to ensure that only OASIS data for Medicare and Medicaid patients are reported to CMS.

We believe that collecting OASIS data on all HHA patients, regardless of payer, would align our data collection requirements under the HH QRP with the data collection requirements for the LTCH QRP and Hospice QRP. We also believe that the most accurate representation of the quality of care furnished by HHAs is best captured by calculating the assessment-based measures rates using OASIS data submitted on all HHA patients, regardless of payer. New risk adjustment models with all-payer data would better represent the full spectrum of patients receiving skilled care in HHAs. The submission of all-payer OASIS data would also enable us to meaningfully compare performance on quality measures across PAC settings. For example, Changes in Skin Integrity Post-Acute Care is currently reported by different PAC payers on different denominators of payer populations, which greatly inhibits our ability to compare performance on this measure across PAC settings. Standardizing the denominator for cross setting PAC measures to include all patients will enable us to make these comparisons, which we believe will realize our goal of establishing consistent measures of quality across PAC settings.

The concerns raised surrounding privacy outlined above have been mitigated. We take the privacy and security of individually identifiable health information of all patients very seriously. CMS data systems conform to all applicable Federal laws, regulations and standards on information security and data privacy. The systems limit data access to authorized users and monitor such users to help protect against unauthorized data access or disclosures. CMS anticipates updating the current provider data reporting system in iQIES to address the addition of private payer patients.

For these reasons, we are proposing to end the suspension of non-Medicare/Medicaid OASIS data collection and to require HHAs to submit all-payer OASIS data for purposes of the HH QRP beginning with the CY 2025 HH QRP program year. We would use the OASIS data to calculate all measures for which OASIS is a data source. Although the 2006 report recommended that the suspension continue, the subsequent passage of the IMPACT Act (Pub. L. 113–185) in 2014, requiring us to create a uniform quality measurement system which would allow us to compare outcomes across post-acute care providers, requires us to revisit the policy. We have indeed established such a uniform quality measurement system, based on standardized patient assessment data leading us to propose OASIS data collection on Non-Medicare/Non-Medicaid patients. There are now cross-setting quality measures in place that should have consistent reporting parameters but currently do not have consistent reporting parameters because they currently have only Medicare and Medicaid populations. The goal of CMS is to have these measures reported for all patients for all payer sources. The iQIES system utilized by providers is robust enough to make feasible the generation of outcome and case mix reports for private pay patients whereas the 2006 QIES system lacked this functionality. The HH QRP program also has a more robust measure set, including patient reported outcomes, a criteria of importance for CMS to move forward with all-payer collection. We believe that the maturation of the HH QRP as described previously argues for the collection of OASIS all-payer data. It will improve the HH QRP program's ability to assess HHA quality and allow the HH QRP to foster better quality care for patients regardless of payer source. It will also support CMS's ability to compare standardized outcome measures across PAC settings.

Consistent with the two-quarter phase-in that we typically use when adopting new reporting requirements for the HHAs, we are proposing that for the CY 2025 HH QRP, the expanded reporting would be required for patients discharged between January 1, 2024, and June 30, 2024. Beginning with the CY 2026 HH QRP, HHAs would be required to report assessment based quality measure data and standardized patient assessment data on all patients, regardless of payer, for the applicable 12 month performance period (which for the CY 2026 program, would be patients discharged between July 1, 2024, and June 30, 2025).

While we appreciate that submitting OASIS data on all HHA patients regardless of payer source may create additional burden for HHAs, we also note that the current practice of separating and submitting OASIS data on only Medicare beneficiaries has clinical and workflow implications with an associated burden. As noted previously, we also understand that it is common practice for HHAs to collect OASIS data on all patients, regardless of payer source. Requiring HHAs to report OASIS data on all patients will provide CMS with the most robust, accurate reflection of the quality of care delivered to Medicare beneficiaries as compared with non-Medicare patients.

*E. Proposed Technical Changes*

We are proposing to amend the regulation text in § 484.245(b)(1) as a technical change to consolidate the statutory references to data submission

to § 484.245(b)(1)(i) and § 484.245(b)(1)(ii). We are also proposing to modify § 484.245(b)(1)(iii) to describe additional requirements specific to HHCAHPS to make it clear that A through E only apply to HHCAHPS.

In this technical change we specifically propose moving quality data required under section 1895(b)(3)(B)(v)(II) from § 484.245(b)(1)(iii) to § 484.245(b)(1)(i).[22] Specifically, the proposed § 484.245(b)(1)(i) would state, ''Data on measures specified under sections 1895(b)(3)(B)(v)(II), 1899B(c)(1), and 1899B(d)(1) of the Act.'' The proposed § 484.245(b)(1)(iii) would state, ''For the purposes of this HHCAHPS survey data submission, the following additional requirements apply:''.

We invite public comments on this proposal.

*F. Proposed Codification of the HH QRP Measure Removal Factors*

In the CY 2019 HH PPS final rule with comment period (83 FR 56548 through 56550), we adopted eight measure removal factors that we consider when determining whether to remove measures from the HH QRP measure set:

- Factor 1. Measure performance among HHAs is so high and unvarying that meaningful distinctions in improvements in performance can no longer be made.
- Factor 2. Performance or improvement on a measure does not result in better patient outcomes.
- Factor 3. A measure does not align with current clinical guidelines or practice.
- Factor 4. A more broadly applicable measure (across settings, populations, or conditions) for the particular topic is available.
- Factor 5. A measure that is more proximal in time to desired patient outcomes for the particular topic is available.
- Factor 6. A measure that is more strongly associated with desired patient outcomes for the particular topic is available.
- Factor 7. Collection or public reporting of a measure leads to negative unintended consequences other than patient harm.
- Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program. To align the HH QRP with similar quality reporting programs (that is SNF QRP, IRF QRP, and LTCH QRP) we are proposing to amend 42 CFR 484.245 to add eight HH QRP measure removal factors in a new paragraph (b)(3). We welcome comments on this proposal.

*G. Request for Information: Health Equity in the HH QRP*

CMS defines health equity as the attainment of the highest level of health for all people, where everyone has a fair and just opportunity to attain their optimal health regardless of race, ethnicity, disability, sexual orientation, gender identity, socioeconomic status, geography, preferred language, or other factors that affect access to care and health outcomes.[23] CMS is working to advance health equity by designing, implementing, and operationalizing policies and programs that support health for all the people served by our programs, eliminating avoidable differences in health outcomes experienced by people who are underserved, and providing the care and support that our enrollees need to thrive.[24] CMS' goals are in line with Executive Order 13985, on the advancement of racial equity and support for the underserved communities, which can be found at 86 FR 7009 (January 25, 2021) (*https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/*).

Belonging to an underserved community is often associated with worse health outcomes.[25 26 27 28 29 30 31 32 33] Such disparities in health outcomes are the result of multiple factors. Although not the sole determinants, poor access to care and provision of lower quality health care are important contributors to health disparities notable for CMS programs. Prior research has shown that home health agencies serving higher proportions of Black and low-income older adults furnish lower quality care than those with lower proportions of such patients.[34] It is unclear why this relationship exists, but some evidence suggests that these outcomes are the result of reduced access to home health agencies with the highest scores for quality and health outcomes measures reported (subsequently referred to as high-quality HHAs).[35] Research in long term care access has shown that neighborhoods with larger proportions of Black, Hispanic, and low-income residents have lower access to a range of high-quality care including hospitals, primary care physicians, nursing homes, and community-based long-term services.[36 37 38] A recent study found that Black and Hispanic home health patients were less likely to use high quality home health agencies than White patients who lived in the same neighborhoods.[39] This difference in use of high quality HHAs persisted even after adjusting for patient health status, suggesting disparity in access to higher-quality home health agency was present. Disparities exist within neighborhoods, where Black, Hispanic, and lower-income home health patients that live in a neighborhood with higher-quality home health agencies still have less access to these HHAs.[40] Disparities also persist across neighborhoods where the researchers found that 40–77 percent of disparities in high-quality agency use was attributable to neighborhood-level

[22] Section 1895(b)(3)(B)(v)(II) requires data submission for HHCAHPS.

[23] *https://www.cms.gov/pillar/health-equity.*

[24] CMS Framework for Health Equity 2022–2032.

[25] Joynt KE, Orav E, Jha AK. Thirty-Day Readmission Rates for Medicare Beneficiaries by Race and Site of Care. JAMA. 2011; 305(7):675–681.

[26] Lindenauer PK, Lagu T, Rothberg MB, et al. Income Inequality and 30 Day Outcomes After Acute Myocardial Infarction, Heart Failure, and Pneumonia: Retrospective Cohort Study. British Medical Journal. 2013; 346.

[27] Trivedi AN, Nsa W, Hausmann LRM, et al. Quality and Equity of Care in U.S. Hospitals. New England Journal of Medicine. 2014; 371(24):2298–2308.

[28] Polyakova, M., et al. Racial Disparities In Excess All-Cause Mortality During The Early COVID–19 Pandemic Varied Substantially Across States. Health Affairs. 2021; 40(2): 307–316.

[29] Rural Health Research Gateway. Rural Communities: Age, Income, and Health Status. Rural Health Research Recap. November 2018.

[30] *https://www.minorityhealth.hhs.gov/assets/PDF/Update_HHS_Disparities_Dept-FY2020.pdf.*

[31] *www.cdc.gov/mmwr/volumes/70/wr/mm7005a1.htm.*

[32] Poteat TC, Reisner SL, Miller M, Wirtz AL. COVID–19 Vulnerability of Transgender Women With and Without HIV Infection in the Eastern and Southern U.S. Preprint. medRxiv. 2020;2020.07.21.20159327. Published 2020 Jul 24. doi:10.1101/2020.07.21.20159327.

[33] Milkie Vu et al. Predictors of Delayed Healthcare Seeking Among American Muslim Women, Journal of Women's Health 26(6) (2016) at 58; S.B. Nadimpalli, et al., The Association between Discrimination and the Health of Sikh Asian Indians Health Psychol. 2016 Apr; 35(4): 351–355.

[34] Joynt Maddox KE, Chen LM, Zuckerman R, Epstein AM. Association between race, neighborhood, and Medicaid enrollment and outcomes in Medicare home health care. J Am Geriatr Soc. 2018;66(2):239–46.

[35] IBID.

[36] Smith DB, Feng Z, Fennell ML, Zinn J, Mor V. Racial disparities in access to long-term care: the illusive pursuit of equity. J Health Polit Policy Law. 2008;33(5):861–81.

[37] Gaskin DJ, Dinwiddie GY, Chan KS, McCleary R. Residential segregation and disparities in health care services utilization. Med Care Res Rev. 2012;69(2):158–75.

[38] Rahman M, Foster AD. Racial segregation and quality of care disparity in U.S. nursing homes. J Health Econ. 2015;39:1–16.

[39] Fashaw-Walters, SA. Rahman, M., Gee, G. et al. Out Of Reach: Inequities In The Use Of High-Quality Home Health Agencies. Health Affairs 2022 41(2):247–255.

[40] IBID.

factors.[41] The issue of disparity in access is especially critical to address currently with the COVID–19 public health emergency (PHE). The PHE has increased demand for home health services instead of nursing home care for many patients seeking post-acute care.[42] Factors outside of neighborhood effects that could affect inequities in home health care and access to care may include a provider's selection of patients with higher socioeconomic status (SES) who are perceived to have a lower likelihood of reducing provider quality ratings [43] or a provider's biased perception of a patient's risk behavior and adherence to care plans.[44] These findings suggest the need to address issues related to care and access when striving to improve health equity.

We are committed to achieving equity in health care outcomes for beneficiaries by supporting providers in quality improvement activities to reduce health disparities, enabling beneficiaries to make more informed decisions, and promoting provider accountability for health care disparities.[45] [46] CMS is committed to closing the equity gap in CMS quality programs.

We thank commenters for previous input to our request for information on closing the health equity gap in home health care in the CY 2022 HH PPS final rule (86 FR 62240). Many commenters shared that relevant data collection and appropriate stratification are very important in addressing any health equity gaps. These commenters noted that CMS should consider potential stratification of health outcomes. Stakeholders, including providers, also shared their strategies for addressing health disparities, noting that this was an important commitment for many health provider organizations. Commenters also shared recommendations for additional social determinants of health (SDOH) data elements that could strengthen their assessment of disparities and issues of health equity. SDOH are the conditions in the environments where people are born, live, learn, work, play, worship, and age that affect a wide range of health, functioning, and quality-of-life outcomes and risks.[47] Many commenters suggested capturing information related to food insecurity, income, education, transportation, and housing. We will continue to take all comments and suggestions into account as we work to develop policies on this important topic. We appreciate home health agencies and other stakeholders sharing their support and commitment to addressing health disparities and offering meaningful comments for consideration. As we continue to consider health equity within the HH QRP, we are soliciting public comment on the following questions:

- What efforts does your HHA employ to recruit staff, volunteers, and board members from diverse populations to represent and serve underserved populations? How does your HHA attempt to bridge any cultural gaps between your personnel and beneficiaries/clients? How does your HHA measure whether this has an impact on health equity?
- How does your HHA currently identify barriers to access to care in your community or service area?
- What are the barriers to collecting data related to disparities, SDOH, and equity? What steps does your HHA take to address these barriers?
- How does your HHA collect self-reported demographic information such as information on race and ethnicity, disability, sexual orientation, gender identity, veteran status, socioeconomic status, and language preference?
- How is your HHA using collected information such as housing, food security, access to interpreter services, caregiving status, and marital status to inform its health equity initiatives?

In addition, we are considering the adoption of a structural composite measure for the HH QRP, which could include organizational activities to address access to and quality of home health care for underserved populations. The composite structural measure concept could include HHA reported data on HHA activities to address underserved populations' access to home health care. An HHA could receive a point (for a total of three points for the three domains) for each domain where data are submitted to a CMS portal, regardless of the action in that domain.

HHAs could submit information such as documentation, examples, or narratives to qualify for the measure numerator. The domains under consideration for the measure, as well as how an HHA could satisfy each of those domains and earn a point for that domain, are the following:

*Domain 1:* HHAs' commitment to reducing disparities is strengthened when equity is a key organizational priority. Candidate domain 1 could be satisfied if an HHA submits data on actions it is taking with respect to health equity and community engagement in their strategic plan. HHAs could report data in the reporting year about their actions in each of the following areas, and submission of data for all elements could be required to qualify for the measure numerator.

- HHAs attest to whether their strategic plan includes approaches to address health equity in the reporting year.
- HHAs report community engagement and key stakeholder activities in the reporting year.
- HHAs report on any attempts to measure input they solicit from patients and caregivers about care disparities they may experience as well as recommendations or suggestions for improvement.

*Domain 2:* Training HHA board members, HHA leaders, and other HHA staff in culturally and linguistically appropriate services (CLAS),[48] health equity, and implicit bias is an important step the HHA can take to provide quality care to diverse populations. Candidate domain 2 could focus on HHAs' diversity, equity, inclusion training for board members and staff by capturing the following reported actions in the reporting year. Submission of relevant data for all elements could be required to qualify for the measure numerator.

- HHAs attest as to whether their employed staff were trained in culturally sensitive care mindful of (SDOH in the reporting year and report data relevant to this training, such as documentation of specific training programs or training requirements.
- HHAs attest as to whether they provided resources to staff about health equity, SDOH, and equity initiatives in the reporting year and report data such

[41] Fashaw-Walters, SA. Rahman, M., Gee, G. et al. Out Of Reach: Inequities In The Use Of High-Quality Home Health Agencies. Health Affairs 2022 41(2):247–255.

[42] Werner RM, Bressman E. Trends in post-acute care utilization during the COVID–19 pandemic. J Am Med Dir Assoc. 2021;22(12):2496–9.

[43] Werner RM, Asch DA. The unintended consequences of publicly reporting quality information. JAMA. 2005;293(10):1239–44.

[44] Davitt JK, Bourjolly J, Frasso R. Understanding inequities in home health care outcomes: staff views on agency and system factors. Res Gerontol Nurs. 2015;8(3):119–29.

[45] *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/Downloads/CMS-Quality-Strategy.pdf.*

[46] Report to Congress: Improving Medicare PostAcute Care Transformation (IMPACT) Act of 2014 Strategic Plan for Accessing Race and Ethnicity Data. January 5, 2017. Available at *https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/Research-Reports-2017-Report-to-Congress-IMPACT-ACT-of-2014.pdf.*

[47] Healthy People 2030, U.S. Department of Health and Human Services, Office of Disease Prevention and Health Promotion. Retrieved 06/09/22.

[48] *https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/CLAS-Toolkit-12-7-16.pdf.*

as the materials provided or other documentation of the learning opportunities.

Domain 3: HHA leaders and staff can improve their capacity to address health disparities by demonstrating routine and thorough attention to equity and setting an organizational culture of equity. This candidate domain could capture activities related to organizational inclusion initiatives and capacity to promote health equity. Examples of equity-focused factors include proficiency in languages other than English, experience working with diverse populations in the service area, and experience working with individuals with disabilities. Submission of relevant data for all elements could be required to qualify for the measure numerator.

- HHAs attest as to whether they considered equity-focused factors in the hiring of HHA senior leadership, including chief executives and board of trustees, in the applicable reporting year.
- HHAs attest as to whether equity-focused factors were included in the hiring of direct patient care staff (for example, therapists, nurses, social workers, physicians, or aides) in the applicable reporting year.
- HHAs attest as to whether equity focused factors were included in the hiring of indirect care or support staff (for example, administrative, clerical, or human resources) in the applicable reporting year.

We are interested in developing health equity measures based on information collected by HHAs not currently available on claims, assessments, or other publicly available data sources to support development of future quality measures. We are soliciting public comment on the conceptual domains and quality measures described in this section. Furthermore, we are soliciting public comments on publicly reporting a composite structural health equity quality measure; displaying descriptive information on Care Compare from the data HHAs provide to support health equity measures; and the impact of the domains and quality measure concepts on organizational culture change.

### *G. Advancing Health Information Exchange*

The Department of Health and Human Services (HHS) has a number of initiatives designed to encourage and support the adoption of interoperable health information technology and to promote nationwide health information exchange to improve health care and patient access to their digital health information.

To further interoperability in post-acute care settings, CMS and the Office of the National Coordinator for Health Information Technology (ONC) participate in the Post-Acute Care Interoperability Workgroup (PACIO) to facilitate collaboration with industry stakeholders to develop Health Level Seven International® (HL7) Fast Healthcare Interoperability Resources® (FHIR) standards.[49] These standards could support the exchange and reuse of patient assessment data derived from the Minimum Data Set (MDS), Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI), LTCH Continuity Assessment Record and Evaluation (CARE) Data Set (LCDS), Outcome and Assessment Information Set (OASIS), and other sources. The PACIO Project has focused on HL7 FHIR implementation guides for functional status, cognitive status and new use cases on advance directives, re-assessment timepoints, and Speech, Language, Swallowing, Cognitive communication and Hearing (SPLASCH) pathology. We encourage PAC provider and health IT vendor participation as the efforts advance.

The CMS Data Element Library (DEL) continues to be updated and serves as a resource for PAC assessment data elements and their associated mappings to health IT standards, such as Logical Observation Identifiers Names and Codes (LOINC) and Systematized Nomenclature of Medicine Clinical Terms (SNOMED). The DEL furthers CMS' goal of data standardization and interoperability. Standards in the DEL (*https://www.del.cms.gov/DELWeb/pubHome)* can be referenced on the CMS website and in the ONC Interoperability Standards Advisory (ISA). The 2022 ISA is available at *https://www.healthit.gov/isa.*

The 21st Century Cures Act (Cures Act) (Pub. L. 114–255, enacted December 13, 2016) required HHS and ONC to take steps to further interoperability for providers in settings across the care continuum. Section 4003(b) of the Cures Act required ONC to take steps to advance interoperability through the development of a trusted exchange framework and common agreement aimed at establishing a universal floor of interoperability across the country. On January 18, 2022, ONC announced a significant milestone by releasing the Trusted Exchange Framework[50] and Common Agreement Version 1.[51] The Trusted Exchange Framework is a set of non-binding principles for health information exchange, and the Common Agreement is a contract that advances those principles. The Common Agreement and the Qualified Health Information Network Technical Framework Version 1[52] (incorporated by reference into the Common Agreement) establish the technical infrastructure model and governing approach for different health information networks and their users to securely share clinical information with each other—all under commonly agreed to terms. The technical and policy architecture of how exchange occurs under the Trusted Exchange Framework and the Common Agreement follows a network-of-networks structure, which allows for connections at different levels and is inclusive of many different types of entities at those different levels, such as health information networks, healthcare practices, hospitals, public health agencies, and Individual Access Services (IAS) Providers.[53] For more information, we refer readers to *https://www.healthit.gov/topic/interoperability/trusted-exchange-framework-and-common-agreement.*

We invite readers to learn more about these important developments and how they are likely to affect HHAs.

## IV. Expanded Home Health Value-Based Purchasing (HHVBP) Model

### *A. Background*

As authorized by section 1115A of the Act and finalized in the CY 2016 HH PPS final rule (80 FR 68624), the Center for Medicare and Medicaid Innovation (Innovation Center) implemented the

[49] *http://www.pacioproject.org/.*

[50] The Trusted Exchange Framework (TEF): Principles for Trusted Exchange (Jan. 2022), *https://www.healthit.gov/sites/default/files/page/2022-01/Trusted_Exchange_Framework_0122.pdf.*

[51] Common Agreement for Nationwide Health Information Interoperability Version 1 (Jan. 2022), *https://www.healthit.gov/sites/default/files/page/2022-01/Common_Agreement_for_Nationwide_Health_Information_Interoperability_Version_1.pdf.*

[52] Qualified Health Information Network (QHIN) Technical Framework (QTF) Version 1.0 (Jan. 2022),*https://www.rce.sequoiaproject.org/wp-content/uploads/2022/01/QTF_0122.pdf.*

[53] The Common Agreement defines Individual Access Services (IAS) as ''with respect to the Exchange Purposes definition, the services provided utilizing the Connectivity Services, to the extent consistent with Applicable Law, to an Individual with whom the QHIN, Participant, or Subparticipant has a Direct Relationship to satisfy that Individual's ability to access, inspect, or obtain a copy of that Individual's Required Information that is then maintained by or for any QHIN, Participant, or Subparticipant.'' The Common Agreement defines ''IAS Provider'' as: ''Each QHIN, Participant, and Subparticipant that offers Individual Access Services.'' *See* Common Agreement for Nationwide Health Information Interoperability Version 1, at 7 (Jan. 2022), *https://www.healthit.gov/sites/default/files/page/2022-01/Common_Agreement_for_Nationwide_Health_Information_Interoperability_Version_1.pdf.*

Home Health Value-Based Purchasing (HHVBP) Model (''original Model'') in nine states on January 1, 2016. The design of the original HHVBP Model leveraged the successes and lessons learned from other CMS value-based purchasing programs and demonstrations to shift from volume-based payments to a model designed to promote the delivery of higher quality care to Medicare beneficiaries. The specific goals of the original HHVBP Model were to—

- Provide incentives for better quality care with greater efficiency;
- Study new potential quality and efficiency measures for appropriateness in the home health setting; and,
- Enhance the current public reporting process.

The original HHVBP Model resulted in an average 4.6 percent improvement in HHAs' total performance scores (TPS) and an average annual savings of $141 million to Medicare without evidence of adverse risks.[54] The evaluation of the original model also found reductions in unplanned acute care hospitalizations and skilled nursing facility (SNF) stays, resulting in reductions in inpatient and SNF spending. The U.S. Secretary of Health and Human Services determined that expansion of the original HHVBP Model would further reduce Medicare spending and improve the quality of care. In October 2020, the CMS Chief Actuary certified that expansion of the HHVBP Model would produce Medicare savings if expanded to all states.[55]

On January 8, 2021, CMS announced the certification of the HHVBP Model for expansion nationwide, as well as the intent to expand the Model through notice and comment rulemaking.[56]

In the CY 2022 HH PPS final rule (86 FR 62292 through 62336) and codified at 42 CFR part 484, subpart F, we finalized the decision to expand the HHVBP Model to all Medicare certified HHAs in the 50 States, territories, and District of Columbia beginning January 1, 2022. We finalized that the expanded Model will generally use benchmarks, achievement thresholds, and improvement thresholds based on CY 2019 data to assess achievement or improvement of HHA performance on applicable quality measures and that HHAs will compete nationally in their applicable size cohort, smaller-volume HHAs or larger-volume HHAs, as defined by the number of complete unique beneficiary episodes for each HHA in the year prior to the performance year. All HHAs certified to participate in the Medicare program prior to January 1, 2022, will be required to participate and will be eligible to receive an annual Total Performance Score based on their CY 2023 performance.

We finalized the quality measure set for the expanded Model, as well as policies related to the removal, modification, and suspension of applicable measures, and the addition of new measures and the form, manner and timing of the OASIS-based, Home Health Consumer Assessment of Healthcare Providers and Systems (HHCAHPS) survey-based, and claims-based measures submission in the applicable measure set beginning CY 2022 and subsequent years. We also finalized an appeals process, an extraordinary circumstances exception policy, and public reporting of annual performance data under the expanded Model.

Additionally, in the CY 2022 HH PPS proposed rule (86 FR 35929) we solicited comments on the challenges unique to value-based purchasing frameworks in terms of health equity and ways in which we could incorporate health equity goals into the expanded HHVBP Model. We received comments related to the use of stabilization measures to promote access to care for individuals with chronic illness or limited ability to improve; collection of patient level demographic information for existing measures; and stratification of outcome measures by various patient populations to determine how they are affected by social determinants of health (SDOH). In the CY 2022 HHPPS final rule (86 FR 62312) we summarized and responded to these comments received.

In this proposed rule, we are proposing to replace the term *baseline year* with the terms *HHA baseline year* and *Model baseline year* and to change the calendar years associated with each of those baseline years, and soliciting comment on future approaches to health equity in the expanded HHVBP Model.

*B. Proposed Changes to the Baseline Years and New Definitions*

1. Definitions

a. Background

Benchmarks, achievement thresholds, and improvement thresholds are used to assess achievement or improvement of HHA performance on applicable quality measures. As codified at § 484.345, *baseline year* means the year against which measure performance in a performance year will be compared. As discussed in the CY 2022 HH PPS final rule (86 FR 62300), we finalized our proposal to use CY 2019 (January 1, 2019, through December 31, 2019) as the baseline year for the expanded HHVBP Model. In that rule, we also codified at § 484.350(b), that for a new HHA that is certified by Medicare on or after January 1, 2019, the baseline year is the first full calendar year of services beginning after the date of Medicare certification, with the exception of HHAs certified on January 1, 2019, through December 31, 2019, for which the baseline year is calendar year (CY) 2021, and the first performance year is the first full calendar year (beginning with CY 2023) following the baseline year.

b. Proposals To Amend Definitions

Since that final rule, it has come to our attention that there could be some confusion and we would like to explain our terminology more clearly by proposing to differentiate between two types of baseline years used in the expanded HHVBP Model. The Model baseline year is used to determine the benchmark and achievement threshold for each measure for all HHAs. For example, as finalized, CY 2019 data is used in the calculation of the achievement thresholds and benchmarks for all applicable measures for both the small cohort and for the large cohort. The HHA baseline year is used to determine the HHA improvement threshold for each measure for each individual competing HHA. For example, if an HHA is certified in CY 2021, CY 2022 data would be used in the calculation of the improvement thresholds for all applicable measures for that HHA.

Therefore, we are proposing to amend § 484.345 to remove the existing *baseline year* definition: means the year against which measure performance in a performance year will be compared. In its place, we are proposing to define: (1) *HHA baseline year* as the calendar year used to determine the improvement threshold for each measure for each individual competing HHA, and (2) *Model baseline year* as the calendar year used to determine the benchmark and achievement threshold for each measure for all competing HHAs. In line with these proposed definitions, we are proposing to make conforming revisions toto the definitions of *achievement threshold* and *benchmark* to indicate that they are calculated using the Model baseline year, and the definition of *improvement threshold* to indicate that it is calculated using the HHA baseline

[54] *https://innovation.cms.gov/data-and-reports/2020/hhvbp-thirdann-rpt.*

[55] *https://www.cms.gov/files/document/certificationhome-health-value-based-purchasing-hhvbpmodel.pdf.*

[56] *https://www.cms.gov/newsroom/press-releases/cms-takes-action-improve-home-health-care-seniors-announces-intent-expand-home-health-value-based.*

year. Additionally, we are proposing to amend paragraph (a) of § 484.370 to remove the phrase ''for the baseline year'' because the calculation of the TPS using the applicable benchmarks and achievement thresholds (determined usingusing the Model baseline year) and improvement thresholds (determined using the HHA baseline year) is described at § 484.360.

We invite public comments on these proposals.

2. Proposed Change of HHA Baseline Years

a. Background—New and Existing HHAs Baseline Years

As previously discussed, in the CY 2022 HH PPS final rule (86 FR 62300), we finalized our proposal to use CY 2019 as the baseline year for the expanded HHVBP Model. Our intent was that the Model baseline year used to determine achievement thresholds and benchmarks is CY 2019 for all HHAs and the HHA baseline year used to determine an individual HHA's improvement threshold is 2019 for HHAs certified prior to January 1, 2019. As discussed in the section IV.B.1.b. of this rule, we are proposing to replace the term *baseline year* with the terms *Model baseline year* and *HHA baseline year* to differentiate between two types of baseline years used in the expanded HHVBP Model.

As mentioned earlier, in that same rule (86 FR 62423), we codified at § 484.350(b), that for a new HHA that is certified by Medicare on or after January 1, 2019, the baseline year is the first full calendar year of services beginning after the date of Medicare certification, with the exception of HHAs certified on January 1, 2019, through December 31, 2019, for which the baseline year is calendar year (CY) 2021, and the first performance year is the first full calendar year (beginning with CY 2023) following the baseline year. Table D1 depicts what was finalized in the CY 2022 HH PPS final rule.

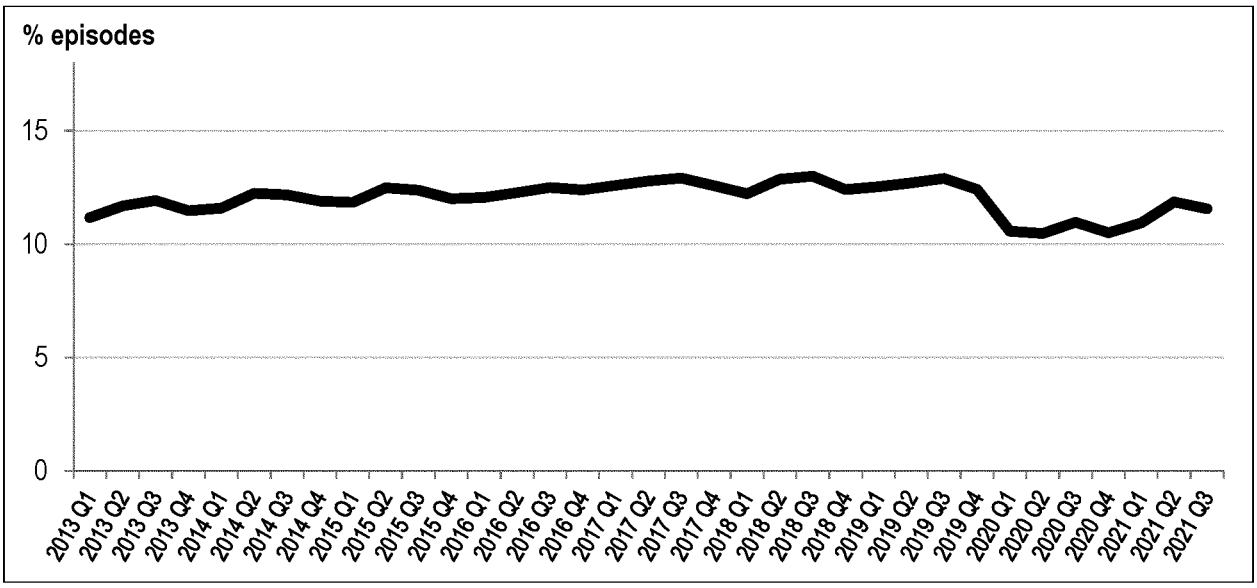
**TABLE D1: NEW AND EXISTING HHAs BASELINE YEARS AS FINALIZED AND ILLUSTRATED IN TABLE 23 OF THE CY 2022 HH PPS FINAL RULE (86 FR 62301)**

| Medicare-certification Date | Baseline Year | Performance Year | Payment Year |
|---|---|---|---|
| Prior to January 1, 2019 | 2019 | 2023 | 2025 |
| On January 1, 2019 – December 31, 2019 | 2021 | 2023 | 2025 |
| On January 1, 2020 – December 31, 2020 | 2021 | 2023 | 2025 |
| On January 1, 2021 – December 31, 2021 | 2022 | 2023 | 2025 |

b. Proposals To Change the HHA Baseline Year for New and Existing HHAs

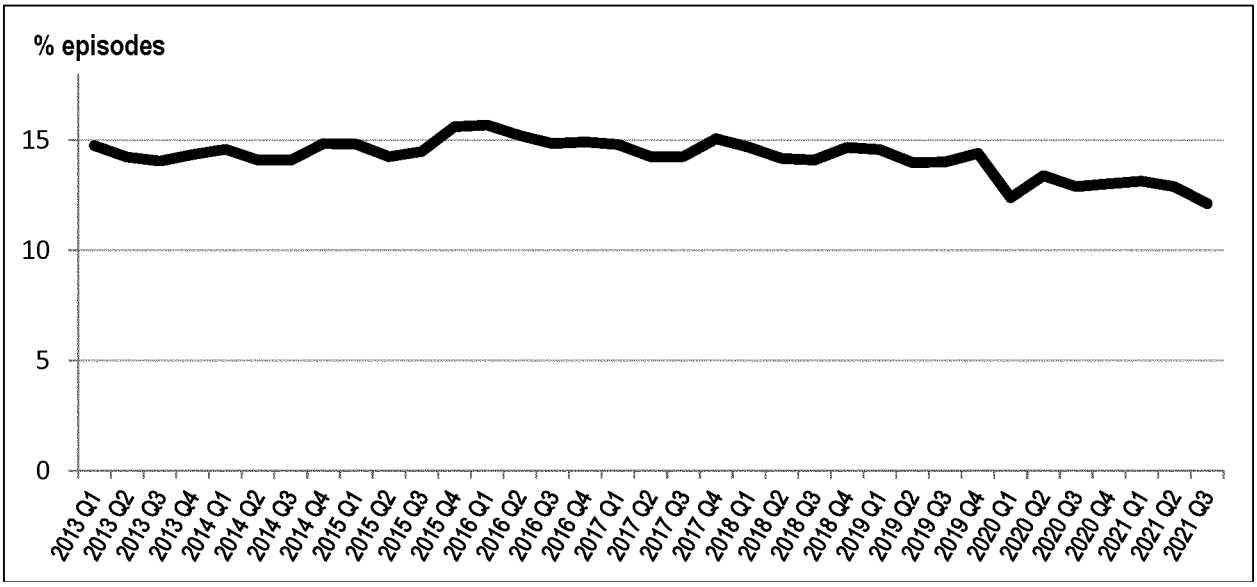
As discussed in the CY 2022 final rule, we stated that we may conduct analyses of the impact of using various baseline periods and consider any changes for future rulemaking (86 FR 62300). Due to the continuing effects of the COVID–19 public health emergency (PHE), we conducted a measure-by-measure comparison of performance for CY 2019 to CY 2021 for the expanded HHVBP Model's measure set relative to the historical trends of those measures. We found that, while performance scores on the five applicable HHCAHPS measures and the OASIS-based ''Discharged to Community'' remained stable from CY 2019 to CY 2021, there was a general trend upwards following historical trends for four of the five applicable OASIS-based measures. These trends were consistent with the historical national data that CMS used to monitor the original HHVBP Model beginning 2015.

**Figure D1: Emergency Department (ED) Use without Hospitalization During the First 60 Days of Home Health, Nationally, 2013-2021**




**Notes:** This figure shows observed rates of ED Use without Hospitalization During the First 60 Days of Home Health, without risk adjustment. HHAs with fewer than 20 episodes for the claims-based measures within a given calendar year were excluded from analysis for year. For 2021, episodes from 2020 Q4 – 2021 Q3 were used to determine whether HHAs had at least 20 episodes, because 2021 Q4 data was not available at the time the analysis was conducted.

**Figure D2: Acute Care Hospitalization During the First 60 Days of Home Health Use, Nationally, 2013-2021**




**Notes:** This figure shows observed rates of Acute Care Hospitalization During the First 60 Days of Home Health Use, without risk adjustment. HHAs with fewer than 20 episodes for the claims-based measures within a given calendar year were excluded from analysis for year. For 2021, episodes from 2020 Q4 – 2021 Q3 were used to determine whether HHAs had at least 20 episodes, because 2021 Q4 data was not available at the time the analysis was conducted.

In contrast, Figures D1 and D2 that were derived from the archived HH quality data from *CMS.data.gov*[57] illustrate the trend of average national performance on the Acute Care Hospitalization During the First 60 Days of Home Health Use measure and the Emergency Department Use without Hospitalization During the First 60 Days of Home Health measure deviated significantly, with a drop of 9 percent and 15 percent in CY 2020, respectively, relative to CY 2019 (Table D2) and remained lower in CY 2021 as compared to historic trends that occurred prior to the pandemic. In the five years prior to 2020, both measures demonstrated stable trends, varying +/−5 percent from year to year, which highlights the significance of the change from CY 2019 to CY 2020 compared to CY 2015 to CY 2019.

**TABLE D2: AVERAGE NATIONAL PERFORMANCE ON APPLICABLE MEASURES CY 2019 – CY 2021**

| Measures | 2019 | 2020 | 2021 |
|---|---|---|---|
| **OASIS-Based Measures** | | | |
| Improvement in Dyspnea | 73.9 | 76.8 | 79.0 |
| Improvement in Oral Meds | 82.7 | 83.8 | 85.2 |
| Discharged to Community (OASIS) | 72.8 | 72.7 | 72.9 |
| Total Normalized Composite Change in Self-Care | 0.69 | 0.73 | 0.76 |
| Total Normalized Composite Change in Mobility | 1.89 | 2.04 | 2.12 |
| **Claims-Based Measures [a]** | | | |
| Acute Care Hospitalization During the First 60 Days of Home Health Use | 15.5 | 14.1 | 14.1 |
| ED Use without Hospitalization During the First 60 Days of Home Health | 13.1 | 11.2 | 11.8 |
| **HHCAHPS Survey-based Measures [b]** | | | |
| Care of Patients | 88.3 | 88.3 | 88.1 |
| Communications between Providers and Patients | 85.7 | 85.6 | 85.3 |
| Specific Care Issues | 82.8 | 81.6 | 80.9 |
| Overall Rating of Home Health Care | 84.3 | 84.5 | 84.2 |
| Willingness to Recommend the Agency | 78.8 | 78.8 | 78.4 |

**Notes:** All measures are risk-adjusted and presented as average HHA-level performance, weighted by the number of OASIS episodes for each HHA.
Includes HHAs indicated as active (not terminated) at the beginning of each year in the December 2021 Provider of Services file with at least one Start of Care (SOC)/Resumption of Care (ROC)/End of Care (EOC) assessment submitted during the year and reportable measures for at least five of the 12 measures.
[a] Medicare FFS claims-based measures for 2021 used data from October 1, 2020, through September 30, 2021, due to data availability.
[b] HHCAHPS-based measures for 2021 used data from July 1, 2020, through June 30, 2021, due to data availability.

We note that for HHAs with sufficient data on each of the 12 applicable measures, performance on the two claims-based measures (Acute Care Hospitalization During the First 60 Days of Home Health Use and Emergency Department Use without Hospitalization During the First 60 Days of Home Health) makes up 35 percent of the total performance score used to determine payment adjustments under the Model. While average national performance on these measures in CY 2021 was similar to average national performance in CY 2020, CY 2022 is the first year where the vast majority of beneficiaries are vaccinated; as of January 27, 2022, 95 percent of Americans ages 65 years or older had received at least one dose of vaccine and 88.3 percent were fully vaccinated.[58] In addition, there were viable treatments available and healthcare providers had nearly 2 years of experience managing COVID–19 patients. We believe that more recent data from the CY 2022 time period is more likely to be aligned with performance years' data under the expanded Model, and provide a more appropriate baseline for assessing HHA improvement for all measures under the Model as compared to both the pre-PHE CY 2019 data, as previously finalized for existing HHAs, and the CY 2021 data, as previously finalized for new HHAs certified between January 1, 2019 and December 31, 2020. Use of CY 2022 data for the HHA baseline year for all measures under the expanded Model would also allow all HHAs certified by Medicare prior to CY 2022 to have the same baseline period, based on the most recent available data, beginning with the CY 2023 performance year. Accordingly, we are proposing to change the HHA baseline year for HHAs certified prior to January 1, 2019, and for HHAs certified during January 1, 2019–December 31, 2021 for all applicable measures used in the expanded Model, from CY 2019 and 2021 respectively, to CY 2022 beginning with the CY 2023 performance year. Additionally, we are also proposing that for any new HHA certified on or after January 1, 2022, the HHA baseline year is the first full calendar year of services beginning after the date of Medicare certification and the first performance year is the first full calendar year following the HHA baseline year.

As discussed in the CY 2022 HH PPS final rule, we understand that HHAs want to have time to examine their baseline data as soon as possible, and we stated that we anticipated making available baseline reports using the CY

[57] Derived from data at *https://data.cms.gov/provider-data/archived-data/home-health-services.*

[58] *https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/01282022.html.*

2019 baseline year data in advance of the first performance year under the expanded Model (CY 2023). If we were to finalize this proposal to instead use CY 2022 data for the HHA baseline year, we would intend to continue to make these baseline data available as soon as administratively possible, and would anticipate providing HHAs with their final individual improvement thresholds in the summer of CY 2023. We note that this would be consistent with the original HHVBP Model, for which improvement thresholds using CY 2015 data were made available HHAs in the first interim performance report (IPR) in the summer of the first performance year (CY 2016).

This proposal is made in conjunction with our proposal to add the definition of the term HHA baseline year discussed previously. We believe that this proposal would allow all eligible HHAs, starting with the CY 2023 performance year, to compete on a level playing field with all HHA baseline data being after the peak of the pandemic. Accordingly, we are proposing to amend § 484.350(b) to reflect that for a new HHA, specifically an HHA that is certified by Medicare on or after January 1, 2022, the HHA baseline year is the first full calendar year of services beginning after the date of Medicare certification, and to add § 484.350(c) to reflect that for an existing HHA, specifically an HHA that is certified by Medicare before January 1, 2022, the HHA baseline year is CY 2022. Table D3 depicts these proposals.

**TABLE D3: EXAMPLE: PROPOSED HHA BASELINE YEARS, PERFORMANCE YEAR AND PAYMENT YEAR FOR HHAs CERTIFIED THROUGH DECEMBER 31, 2023**

| Medicare-certification Date | HHA Baseline Year | Performance Year | Payment Year |
|---|---|---|---|
| Prior to January 1, 2019 | 2022 | 2023 | 2025 |
| January 1, 2019 – December 31, 2021 | 2022 | 2023 | 2025 |
| January 1, 2022 – December 31, 2022 | 2023 | 2024 | 2026 |
| January 1, 2023 – December 31, 2023 | 2024 | 2025 | 2027 |

In developing this proposal, we considered changing the HHA baseline year to CY 2021 for all HHAs for all of the applicable measures or, alternatively, not changing the HHA baseline year for any of the applicable measures. We decided against those alternatives for the reasons explained previously in support of our proposal to change the HHA baseline year to CY 2022. We also considered changing the HHA baseline for only some of the applicable measures. For example, we considered changing the HHA baseline to CY 2022 only for the claims-based measures and using the HHA baseline of CY 2019 or CY 2021 (see Table D1) for applicable HHAs for the OASIS-based and HHCAHPS-based measures. However, for the reasons previously discussed, we are instead proposing to change the HHA baseline year to CY 2022 for all applicable measures used in the expanded HHVBP Model, which would allow all HHAs certified by Medicare prior to CY 2022 to have the same baseline period for all measures, using the most recent available data, for the performance year beginning CY 2023.

We invite public comments on these proposals.

3. Proposal to Change the Model Baseline Year

As mentioned earlier, under the policy finalized in the CY 2022 HH PPS final rule (86 FR 62300), we previously adopted CY 2019 as the Model baseline year for the expanded HHVBP Model for all HHAs. This baseline year is used to determine the benchmarks and achievement threshold for each measure for all HHAs.

Consistent with our proposal to update the HHA baseline year to CY 2022 for all HHAs that are certified by Medicare before January 1, 2022, and in conjunction with our proposal to more clearly define the Model baseline year in previous section IV.B.1.b., we are also proposing to change the Model baseline year from CY 2019 to CY 2022 for the CY 2023 performance year and subsequent years. This would enable us to measure competing HHAs' performance using benchmarks and achievement thresholds that are based on the most recent data available. This would also allow the benchmarks and achievement thresholds to be set using data from after the most acute phase of the COVID–19 PHE, which we believe would provide a more appropriate basis for assessing performance under the expanded Model than the CY 2019 pre-PHE period. As previously discussed, CY 2022 is the first year where the vast majority of beneficiaries are vaccinated, there are viable treatments available and healthcare providers had nearly two years of experience managing COVID–19 patients. We anticipate that this more recent data from the CY 2022 time period would more likely be aligned with performance years' data under the expanded Model. As discussed in connection with our proposal to use CY 2022 data for the HHA baseline year, if we were to finalize this proposal to use CY 2022 rather than CY 2019 data for the Model baseline year, we would anticipate providing HHAs with the final achievement thresholds and benchmarks in the July 2023 IPR in the summer of CY 2023. This would be consistent with the rollout of the original HHVBP Model in which benchmarks and achievement thresholds using 2015 data were made available to HHAs during the summer of the first performance year (CY 2016).

We invite public comments on this proposal.

*C. Request for Comment on a Future Approach to Health Equity in the Expanded HHVBP Model*

Significant and persistent inequities in healthcare outcomes exist in the United States. Belonging to a racial or ethnic minority group; living with a disability; being a member of the lesbian, gay, bisexual, transgender, and queer (LGBTQ+) community; living in a rural area; being a member of a religious minority; or being near or below the poverty level, is often associated with worse health

outcomes.[59 60 61 62 63 64 65 66 67] In line with Executive Order 13985 of January 20, 2021, ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government'',[68] CMS defines health equity as the attainment of the highest level of health for all people, where everyone has a fair and just opportunity to attain their optimal health regardless of race, ethnicity, disability, sexual orientation, gender identity, socioeconomic status, geography, preferred language, or other factors that affect access to care and health outcomes.[69] We are working to advance health equity by designing, implementing, and operationalizing policies and programs that support health for all the people served by our programs, eliminating avoidable differences in health outcomes experienced by people who are disadvantaged or underserved, and providing the care and support that our enrollees need to thrive. Over the past decade we have established a suite of programs and policies aimed at reducing health care disparities including the CMS Mapping Medicare Disparities Tool,[70] the CMS Innovation Center's Accountable Health Communities Model,[71] the CMS Disparity Methods stratified reporting program,[72] and efforts to expand social risk factor data collection, such as the collection of Standardized Patient Assessment Data Elements in the post-acute care setting,[73] and the CMS Framework for Health Equity 2022–2023.[74]

As we continue to leverage our value-based purchasing initiatives to improve the quality of care furnished across healthcare settings, we are interested in exploring the role of health equity in creating better health outcomes for all populations in our programs and models. As the March 2020 Assistant Secretary for Planning and Evaluation (ASPE) Report to Congress on Social Risk Factors and Performance in Medicare's Value-Based Purchasing Program notes, it is important to implement strategies that cut across all programs and health care settings to create aligned incentives that drive providers to improve health outcomes for all beneficiaries.[75] We are interested in stakeholder feedback on specific actions the expanded HHVBP Model can take to address healthcare disparities and advance health equity.

As we continue to develop policies for the expanded HHVBP Model, we are requesting public comments on policy changes that we should consider on the topic of health equity. We specifically request comments on whether we should consider incorporating adjustments into the expanded HHVBP Model to reflect the varied patient populations that HHAs serve around the country and tie health equity outcomes to the payment adjustments we make based on HHA performance under the Model. These adjustments could be made at the measure level in forms such as stratification (for example, based on dual status or other metrics), or we could propose to adopt new measures of social determinants of health (SDOH). These adjustments could also be incorporated at the scoring level in forms such as modified benchmarks, points adjustments, or modified payment adjustment percentages (for example, peer comparison groups based on whether the HHA includes a high proportion of dual eligible beneficiaries or other metrics). We request commenters' views on which of these adjustments, if any, would be most effective for the expanded HHVBP Model.

## V. Home Infusion Therapy Services: Annual Payment Updates for CY 2023

In accordance with section 1834(u)(3) of the Act and 42 CFR 414.1550, our national home infusion therapy (HIT) services payment rates for the initial and subsequent visits in each of the home infusion therapy payment categories for CY 2023 are required to be the CY 2022 rate adjusted by the percentage increase in the Consumer Price Index (CPI) for all urban consumers (United States city average) for the 12 month period ending with June of the preceding year reduced by a productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act as the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity. Section 1834(u)(3) of the Act further states that the application of the productivity adjustment may result in a percentage being less than 0.0 for a given year, and may result in payment being less than such payment rates for the preceding year. We note that § 414.1550(d) does not permit any exercise of discretion by the Secretary. The single payment amounts are also adjusted for geographic area wage differences using the geographic adjustment factor (GAF). We remind stakeholders that the GAFs are a weighted composite of each Physician Fee Schedule (PFS) localities work, practice expense (PE) and malpractice (MP) expense geographic practice cost indices (GPCIs). The periodic review and adjustment of the GPCIs is mandated by section 1848(e)(1)(C) of the Act. At each update, the proposed GPCIs are published in the PFS proposed rule to provide an opportunity for public comment and further revisions in response to comments prior to implementation. The GPCIs and the GAFs are updated triennially with a 2 year phase in and were last updated in the CY 2020 PFS final rule

[59] Joynt KE, Orav E, Jha AK. (2011). Thirty-day readmission rates for Medicare beneficiaries by race and site of care. JAMA, 305(7):675–681.

[60] Lindenauer PK, Lagu T, Rothberg MB, et al. (2013). Income inequality and 30 day outcomes after acute myocardial infarction, heart failure, and pneumonia: Retrospective cohort study. *British Medical Journal,* 346.

[61] Trivedi AN, Nsa W, Hausmann LRM, et al. (2014). Quality and equity of care in U.S. hospitals. *New England Journal of Medicine,* 371(24):2298–2308.

[62] Polyakova, M., et al. (2021). Racial disparities in excess all-cause mortality during the early COVID–19 pandemic varied substantially across states. *Health Affairs,* 40(2): 307–316.

[63] Rural Health Research Gateway. (2018). Rural communities: age, income, and health status. *Rural Health Research Recap. https://www.ruralhealthresearch.org/assets/2200-8536/rural-communities-age-incomehealth-status-recap.pdf.*

[64] *https://www.minorityhealth.hhs.gov/assets/PDF/Update_HHS_Disparities_Dept-FY2020.pdf.*

[65] *www.cdc.gov/mmwr/volumes/70/wr/mm7005a1.htm.*

[66] Milkie Vu et al. Predictors of Delayed Healthcare Seeking Among American Muslim Women, Journal of Women's Health 26(6) (2016) at 58; S.B. Nadimpalli, et al., The Association between Discrimination and the Health of Sikh Asian Indians Health Psychol. 2016 Apr; 35(4): 351–355.

[67] Poteat TC, Reisner SL, Miller M, Wirtz AL. (2020). COVID–19 vulnerability of transgender women with and without HIV infection in the Eastern and Southern U.S. preprint. *medRxiv.* 2020;2020.07.21. 20159327. doi:10.1101/2020.07.21.20159327.

[68] 86 FR 7009 (January 25, 2021); *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.*

[69] *https://www.cms.gov/pillar/health-equity.*

[70] *https://www.cms.gov/About-CMS/Agency-Information/OMH/OMH-Mapping-Medicare-Disparities.*

[71] *https://innovation.cms.gov/innovation-models/ahcm.*

[72] *https://qualitynet.cms.gov/inpatient/measures/disparity-methods.*

[73] *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014/-IMPACT-Act-Standardized-Patient-Assessment-Data-Elements.*

[74] *https://www.cms.gov/sites/default/files/2022-04/CMS%20Framework%20for%20Health%20Equity_2022%2004%2006.pdf.*

[75] Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health & Human Services. Second Report to Congress on Social Risk Factors and Performance in Medicare's Value-Based Purchasing Program. 2020. *https://aspe.hhs.gov/social-risk-factors-and-medicares-value-basedpurchasing-programs.*

(84 FR 62568). The next full update to the GPCIs and the GAFs will be proposed in the CY 2023 PFS proposed rule. The CY 2023 PFS proposed rule and the CY 2023 proposed GAFs will be available on the PFS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/PhysicianFeeSched* after publication in the **Federal Register**.

The updated GAFs, national home infusion therapy payment rates, and locality-adjusted home infusion therapy payment rates will be posted on CMS' Home Infusion Therapy Services web page [76] once these rates are finalized. In the future, we will no longer include a section in the HH PPS rule on home infusion therapy if no changes are being proposed to the payment methodology. Instead, the rates will be updated each year in a Change Request and posted on the website. For more in-depth information regarding the finalized policies associated with the scope of the home infusion therapy services benefit and conditions for payment, we refer readers to the CY 2020 HH PPS final rule with comment period (84 FR 60544).

## VI. Collection of Information Requirements

### *A. Statutory Requirement for Solicitation of Comments*

Under the Paperwork Reduction Act of 1995, we are required to provide a 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

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

In this proposed rule, we are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs).

### *B. Collection of Information Requirement*

1. ICRs for HH QRP

In section III. of this proposed rule, we are proposing to end the suspension of the collection of OASIS data on non-Medicare and non-Medicaid patients and to require HHAs to submit all-payer OASIS data for purposes of the HH QRP, beginning with the CY 2025 program year. We believe that the burden associated with this proposal is the time and effort associated with the submission of non-Medicare and non-Medicaid OASIS data. The submission of OASIS data on HH patients regardless of payor source will ensure that CMS can appropriately assess the quality of care provided to all patients receiving skilled care by all Medicare-certified HHAs that participate in the HH QRP. As of January 1, 2022, there are approximately 11,354 HHAs reporting OASIS data to CMS under the HH QRP.

The OASIS is completed by RNs or PTs, or very occasionally by occupational therapists (OT) or speech language pathologists (SLP/ST). Data from 2020 show that the SOC/ROC OASIS is completed by RNs (approximately 76.50 percent of the time), PTs (approximately 20.78 percent of the time), and other therapists, including OTs and SLP/STs (approximately 2.72 percent of the time). Based on this analysis, we estimated a weighted clinician average hourly wage of $79.41, inclusive of fringe benefits, using the hourly wage data in Table F1. Individual providers determine the staffing resources necessary.

For purposes of calculating the costs associated with the information collection requirements, we obtained mean hourly wages for these from the U.S. Bureau of Labor Statistics' May 2020 National Occupational Employment and Wage Estimates (*https://www.bls.gov/oes/current/oes_nat.htm*). To account for overhead and fringe benefits (100 percent), we have doubled the hourly wage. These amounts are detailed in Table F1.

**TABLE F1: U.S. BUREAU OF LABOR STATISTICS' MAY 2020 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES**

| Occupation Title | Occupation Code | Mean Hourly Wage ($/hr) | Fringe Benefit (100%) ($/hr) | Adjusted Hourly Wage ($/hr) |
|---|---|---|---|---|
| Registered Nurse (RN) | 29-1141 | $38.47 | $38.47 | $76.94 |
| Physical therapists HHAs | 29-1123 | $44.08 | $44.08 | $88.16 |
| Speech-Language Pathologists (SLP) | 29-1127 | $40.02 | $40.02 | $80.04 |
| Occupational Therapists (OT) | 29-1122 | $42.06 | $42.06 | $84.12 |
| Medical Dosimetrists, Medical Records Specialists, and Health Technologists and Technicians | 29-2098 | $23.21 | $23.21 | $46.42 |

We estimate that this proposed new requirement would result in HHAs having to increase by 30 percent the number of assessments they complete at each timepoint, with a corresponding 30 percent increase in their estimated hourly burden and estimated clinical cost.[77] For purposes of estimating burden, we utilize item-level burden estimates for OASIS–E that will be released January 1, 2023.

Table F2 shows the total number of OASIS assessments that HHAs actually completed in CY 2020, as well as how those numbers would have increased if non-Medicare and non-Medicaid OASIS assessments had been required at that time.

[76] Home Infusion Therapy Services Billing and Rates. *https://www.cms.gov/medicare/home-infusion-therapy-services/billing-and-rates.*

[77] As estimated by CMS analysis of payor source indicators in CY20 HH Cost report data compared to the CY20 HH OASIS data file.

## TABLE F2. CY 2020 OASIS SUBMISSIONS BY TIME POINT

| Time Point | CY 2020 Assessments Completed | CY 2020 Assessments Completed for Non-Medicare/Medicaid Patients | CY 2020 Assessments Completed for all Payer Sources |
|---|---|---|---|
| Start of Care | 6,393,366 | 1,918,009 | 8,311,375 |
| Resumption of Care | 930,910 | 279,273 | 1,210,183 |
| Follow-up | 3,652,940 | 1,095,882 | 4,748,822 |
| Transfer to an inpatient facility | 1,796,827 | 539,048 | 2,335,875 |
| Death at Home | 50,493 | 15,147 | 65,640 |
| Discharge from agency | 5,206,230 | 1,561,869 | 6,768,099 |
| TOTAL | 18,030,766 | 5,409,228 | 23,439,994 |

Table F3 summarizes the estimated clinician hourly burden for Medicare only, non Medicare, and all-payer patients receiving HH care for each OASIS assessment type using CY 2020 assessment totals.

## TABLE F3. SUMMARY OF ESTIMATED CLINICIAN HOURLY BURDEN

| OASIS Assessment Type | Clinician Estimated Hourly Burden – Medicare/Medicaid Only | Clinician Estimated Hourly Burden – Non-Medicare/Medicaid | Clinician Estimated Hourly Burden – All Payer |
|---|---|---|---|
| SOC | 6,105,664 | 1,831,699 | 7,937,363 |
| ROC | 744,728 | 223,418 | 968,146 |
| FU (Follow Up) | 675,793 | 202,739 | 878,532 |
| TOC (Transfer of Care) | 197,650 | 59,291 | 256,946 |
| DAH (Death at Home) | 2,272 | 681 | 2,953 |
| DC (Discharge) | 3,488,174 | 1,046,452 | 4,534,626 |
| TOTAL | 11,214,281 | 3,364,285 | 14,578,566 |

The calculations we used to estimate the total all-payer hourly burden with CY 2020 assessment totals and OASIS-E data elements at each time point of OASIS data collection are as follows:

**Start of Care**

*Estimated Time Spent per Each OASIS-E SOC Assessment/Patient = 57.3 Clinician Minutes*

203 data elements × 0.15 − 0.3 minutes per data element = 57.3 minutes of clinical time spent to complete data entry for the OASIS-E SOC assessment.

- 21 DE counted as 0.15 minutes/DE (3.15)
- 9 DE counted as 0.25 minutes/DE (2.25)
- 173 DE counted as 0.30 minutes/DE (51.9)

*Clinician Estimated Hourly Burden for All HHAs (11,354) for OASIS-E SOC Assessments = 7,937,363 Hours*

57.3 clinician minutes per SOC assessment × 8,311,375 assessments = 476,241,787 minutes/60 minutes per hour = 7,937,363 hours for all HHAs

**Resumption of Care**

*Estimated Time Spent per Each OASIS-D ROC Assessment/Patient = 48 Minutes*

172 data elements × 0.15 − 0.3 minutes per data element = 48 minutes of clinical time spent to complete data entry for the OASIS-D ROC assessment

- 21 DE counted as 0.15 minute/DE (3.15)
- 9 DE counted as 0.25 minute/DE (2.25)
- 142 DE counted as 0.30 minute/DE (42.6)

*Clinician Estimated Hourly Burden for All HHAs for OASIS-E ROC Assessments = 968,146 Hours*

48 clinician minutes per ROC assessment × 1,210,183 ROC assessments = 58,088,784 minutes/60 minutes = 968,146 hours for all HHAs

**Follow Up**

*Estimated Time Spent per Each OASIS-E FU Assessment/Patient = 11.1 Minutes*

37 data elements × 0.3 minutes per data element = 11.1 minutes of clinical time spent to complete data entry for the OASIS-D FU assessment.

- 37 DE counted as 0.30 minutes/DE

*Clinician Estimate Hourly Burden for All HHAs for OASIS-E FU Assessments = 878,532 Hours*

11.1 clinician minutes for OASIS-E FU assessments × 4,748,822 FU assessments = 52,711,924 minutes/60 minutes = 878,532 hours for all HHAs

**Transfer of Care**

*Estimated Time Spent per Each OASIS-E TOC Assessment/Patient = 6.6 Minutes*

22 data elements × 0.15 − 0.3 minutes per data element = 6.6 minutes of clinical time spent to complete data entry for the OASIS-D TOC assessment

- 22 DE counted as 0.30 minutes/DE

*Clinician Estimated Hourly Burden for All HHAs for OASIS-E TOC Assessments = 256,946 Hours*

6.6 clinician minutes × 2,335,875 TOC assessments = 15,416,775 minutes/60 minutes = 256,946 hours

**Death at Home**

*Estimated Time Spent per Each OASIS-E DAH Assessment/Patient = 2.7 Minutes*

9 data elements × 0.15 − 0.3 minutes per data element = 2.7 minutes of clinical time spent to complete data entry for the OASIS-E DAH assessment.

- 9 DE counted as 0.30 minutes/DE

*Clinician Estimated Hourly Burden for All HHAs for OASIS-E DAH Assessments = 2,953 Hours*

2.7 clinician minutes × 65,640 DAH assessments = 177,228 minutes/60 minutes = 2,954 hours

**Discharge**

*Estimated Time Spent per Each OASIS-E DC Assessment/Patient = 40.2 Minutes*

146 data elements × 0.15 − 0.3 minutes per data element = 40.2 minutes of clinical time spent to complete data entry for the OASIS-E DC assessment.

- 21 DE counted as 0.15 minutes/DE
- 9 DE counted as 0.25 minutes/DE
- 116 DE counted as 0.30 minutes/DE

*Clinician Estimated Hourly Burden for All HHAs for OASIS-E DC Assessments = 4,534,626 Hours*

40.2 clinician minutes × 6,768,099 DC assessments = 272,077,580 minutes/60 minutes = 4,534,626 hours

Table F4 summarizes the estimated clinician costs for the completion of the OASIS-E assessment tool for Medicare only, Non-Medicare, and All-Payer patients receiving HH care for each OASIS assessment type using CY2020 assessment and cost data.

**TABLE F4. SUMMARY OF ESTIMATED CLINICIAN COSTS**

| OASIS Assessment Type | Clinician Estimated Cost – Medicare/Medicaid Only | Clinician Estimated Cost– Non-Medicare/Medicaid | Clinician Estimated Cost – All Payer |
|---|---|---|---|
| SOC | $484,850,778.24 | 145,455,217.59 | $630,305,995.83 |
| ROC | $59,138,850.48 | $17,741,623.38 | $76,880,473.86 |
| FU | 53,664,793.6 | 16,099,432.5 | $69,764,226.1 |
| TOC | $15,695,483.53 | $4,708,598.33 | $20,404,081.86 |
| DAH | $180,434.61 | $54,063.12 | $234,497.73 |
| DC | $276,995,905.28 | $83,098,745.38 | $360,094,650.66 |
| TOTAL | $837,526,245.74 | $267,157,680.3 | $1,104,683,926.04 |

Outlined later are the calculation for estimates used to derive total all-payer costs with OASIS E data elements for each OASIS assessment type using CY2020 assessment and cost data:

**Start of Care**

*Estimated Cost for All HHAs for OASIS-E SOC Assessments = $630,305,995.83 for All HHAs*

$79.41/hour × 7,937,363 hours for all HHAs = $630,305,995.83 for all HHAs

**Resumption of Care**

*Estimated Cost for All HHAs for OASIS-E ROC Assessments = $76,880,473.86 for All HHAs*

$79.41/hour × 968,146 hours = $76,880,473.86 for all HHAs

**Follow Up**

*Estimated Costs for All HHAs for OASIS-E FU Assessments = $82,962,803.4 for All HHAs*

$79.41/hour × 878,532hours = $69,764,226 for all HHAs

**Transfer of Care**

*Estimated costs for All HHAs for All OASIS-E TOC Assessments = $20,404,081.86 for All HHAs*

*$79.41/hour × 256,946 hours = $20,404,081.86 for All HHAs*

**Death at Home**

*Estimated Costs for all HHAs for OASIS-E DAH Assessments = $234,497.73 for All HHAs*

$79.41 × 2,953 hours = $234,497.73 for all HHAs

**Discharge**

*Estimated costs for All HHAs for OASIS-E DC Assessments = $360,094,650.66 for all HHAs*

$79.41/hour × 4,534,626 hours = $360,094,650.66 for all HHAs

Based on the data in Tables F1 to F3 for the 11,354 active Medicare-certified HHAs, we estimate the total increase in costs associated with the changes in the HH QRP to be approximately 23,529.82 per HHA annually or $267,157,680.3 all HHAs. This corresponds to an estimated increase in clinician burden associated with the changes to the HH QRP of approximately 296.3 hours per HHA or approximately 3,364,285 hours for all HHAs. This additional burden would begin with January 1, 2024 HHA discharges. We have also included a request for information (RFI) related to potentially applying health equity to the expanded HHVBP Model in the future. Section 1115A(d)(3) of the Act exempts Innovation Center model tests and expansions, which include the expanded HHVBP Model, from the provisions of the PRA. Specifically, this section provides that the provisions of the PRA do not apply to the testing and evaluation of Innovation Center models or to the expansion of such models.

*C. Submission of PRA-Related Comments*

We have submitted a copy of this proposed rule to OMB for its review of the rule's information collection requirements. The requirements are not effective until they have been approved by OMB.

We invite public comments on these information collection requirements. If you wish to comment, please identify the rule (CMS–1766–P) and, where applicable, the preamble section, and the ICR section. See this rule's **DATES** and **ADDRESSES** sections for the

comment due date and for additional instructions.

## VII. Regulatory Impact Analysis

### *A. Statement of Need*

#### 1. HH PPS

Section 1895(b)(1) of the Act requires the Secretary to establish a HH PPS for all costs of home health services paid under Medicare. In addition, section 1895(b) of the Act requires: (1) the computation of a standard prospective payment amount include all costs for home health services covered and paid for on a reasonable cost basis and that such amounts be initially based on the most recent audited cost report data available to the Secretary; (2) the prospective payment amount under the HH PPS to be an appropriate unit of service based on the number, type, and duration of visits provided within that unit; and (3) the standardized prospective payment amount be adjusted to account for the effects of case-mix and wage levels among HHAs. Section 1895(b)(3)(B) of the Act addresses the annual update to the standard prospective payment amounts by the home health applicable percentage increase. Section 1895(b)(4) of the Act governs the payment computation. Sections 1895(b)(4)(A)(i) and (b)(4)(A)(ii) of the Act requires the standard prospective payment amount be adjusted for case-mix and geographic differences in wage levels. Section 1895(b)(4)(B) of the Act requires the establishment of appropriate case-mix adjustment factors for significant variation in costs among different units of services. Lastly, section 1895(b)(4)(C) of the Act requires the establishment of wage adjustment factors that reflect the relative level of wages, and wage-related costs applicable to home health services furnished in a geographic area compared to the applicable national average level.

Section 1895(b)(3)(B)(iv) of the Act provides the Secretary with the authority to implement adjustments to the standard prospective payment amount (or amounts) for subsequent years to eliminate the effect of changes in aggregate payments during a previous year or years that were the result of changes in the coding or classification of different units of services that do not reflect real changes in case-mix. Section 1895(b)(5) of the Act provides the Secretary with the option to make changes to the payment amount otherwise paid in the case of outliers because of unusual variations in the type or amount of medically necessary care. Section 1895(b)(3)(B)(v) of the Act requires HHAs to submit data for purposes of measuring health care quality, and links the quality data submission to the annual applicable percentage increase. Section 50208 of the BBA of 2018 (Pub. L. 115–123) requires the Secretary to implement a new methodology used to determine rural add-on payments for CYs 2019 through 2022.

Sections 1895(b)(2) and 1895(b)(3)(A) of the Act, as amended by section 51001(a)(1) and 51001(a)(2) of the BBA of 2018 respectively, required the Secretary to implement a 30-day unit of service, for 30-day periods beginning on and after January 1, 2020. The HH PPS wage index utilizes the wage adjustment factors used by the Secretary for purposes of sections 1895(b)(4)(A)(ii) and (b)(4)(C) of the Act for hospital wage adjustments.

#### 2. HH QRP

Section 1895(b)(3)(B)(v) of the Act authorizes the HH QRP, which requires HHAs to submit data in accordance with the requirements specified by CMS. Failure to submit data required under section 1895(b)(3)(B)(v) of the Act with respect to a program year will result in the reduction of the annual home health market basket percentage increase otherwise applicable to an HHA for the corresponding calendar year by 2 percentage points.

#### 3. Expanded HHVBP Model

In the CY 2022 HH PPS final rule (86 FR 62292 through 62336) and codified at 42 CFR part 484, subpart F, we finalized our policy to expand the HHVBP Model to all Medicare certified HHAs in the 50 States, territories, and District of Columbia beginning January 1, 2022. CY 2022 was designated as a pre-implementation year during which CMS will provide HHAs with resources and training. This pre-implementation year as intended to allow HHAs time to prepare and learn about the expectations and requirements of the expanded HHVBP Model without risk to payments.

We also finalized that the expanded Model will use a baseline year to establish the benchmarks and achievement thresholds for each cohort on each measure for HHAs. The baseline year is currently 2019. In this rule, we are proposing to establish a separate HHA baseline year to determine HHA improvement thresholds by measure for each individual agency to assess achievement or improvement of HHA performance on applicable quality measures. As codified at § 484.350(b), for an HHA that is certified by Medicare on or after January 1, 2019, the baseline year is the first full calendar year of services beginning after the date of Medicare certification, with the exception of HHAs certified on January 1, 2019, through December 31, 2019, for which the baseline year is calendar year (CY) 2021, and the first performance year is the first full calendar year (beginning with CY 2023) following the baseline year. As discussed in that final rule, we stated that we may conduct analyses of the impact of using various baseline periods and consider any changes for future rulemaking.

Due to the continuation of the COVID–19 PHE through CY 2021 and its effects on the quality measures in the expanded HHVBP Model used to determine payment adjustments for eligible HHAs (as described in section IV.B.2.b. of this proposed rule), we believe an HHA's baseline year that would be CY 2021 should be adjusted to CY 2022. This policy aligns with similar proposals in the Hospital VBP and SNF VBP Programs to account for the continued effects of the PHE on measures in 2021. Additionally, amending the HHA baseline year (and defining this term) for HHAs certified prior to 2022 starting in the CY 2023 performance year as well as changing the Model baseline year (and defining this term) to CY 2022 starting in the CY 2023 performance year allows eligible HHAs to be scored on measure data that is more current and is intended to compare HHAs to a base year that is 2 years after the peak of the pandemic.

#### 4. Medicare Coverage of Home Infusion Therapy

Section 1834(u)(1) of the Act, as added by section 5012 of the 21st Century Cures Act, requires the Secretary to establish a home infusion therapy services payment system under Medicare. This payment system requires a single payment to be made to a qualified home infusion therapy supplier for items and services furnished by a qualified home infusion therapy supplier in coordination with the furnishing of home infusion drugs. Section 1834(u)(1)(A)(ii) of the Act states that a unit of single payment is for each infusion drug administration calendar day in the individual's home. The Secretary shall, as appropriate, establish single payment amounts for types of infusion therapy, including to consider variation in utilization of nursing services by therapy type. Section 1834(u)(1)(A)(iii) of the Act provides a limitation to the single payment amount, requiring that it shall not exceed the amount determined under the Physician Fee Schedule (under section 1848 of the Act) for infusion therapy services furnished in a

calendar day if furnished in a physician office setting, except such single payment shall not reflect more than 5 hours of infusion for a particular therapy in a calendar day. Section 1834(u)(1)(B)(i) of the Act requires that the single payment amount be adjusted by a geographic wage index. Finally, section 1834(u)(1)(C) of the Act allows for discretionary adjustments which may include outlier payments and other factors as deemed appropriate by the Secretary, and are required to be made in a budget neutral manner. Section 1834(u)(3) of the Act specifies that annual updates to the single payment are required to be made beginning January 1, 2022, by increasing the single payment amount by the percentage increase in the CPI-U for all urban consumers for the 12 month period ending with June of the preceding year, reduced by the productivity adjustment. The unit of single payment for each infusion drug administration calendar day, including the required adjustments and the annual update, cannot exceed the amount determined under the fee schedule under section 1848 of the Act for infusion therapy services if furnished in a physician's office, and the single payment amount cannot reflect more than 5 hours of infusion for a particular therapy per calendar day. Finally, Division N, section 101 of CAA 2021 amended section 1848(t)(1) of the Act and modified the CY 2021 PFS rates by providing a 3.75 percent increase in PFS payments only for CY 2021.

*B. Overall Impact*

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96 354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2))

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. Therefore, we estimate that this rule is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a Regulatory Impact Analysis that presents our best estimate of the costs and benefits of this rule.

*C. Detailed Economic Analysis*

This rule proposes updates to Medicare payments under the HH PPS for CY 2023. The net transfer impact related to the changes in payments under the HH PPS for CY 2023 is estimated to be −$810 million (−4.2 percent). The $810 million decrease in estimated payments for CY 2023 reflects the effects of the proposed CY 2023 home health payment update percentage of 2.9 percent ($560 million increase), an estimated 6.9 percent decrease that reflects the effects of the permanent behavioral adjustment ($1.33 billion decrease) and an estimated 0.2 percent decrease that reflects the effects of an updated FDL ($40 million decrease).

We use the latest data and analysis available, however, we do not adjust for future changes in such variables as number of visits or case-mix. This analysis incorporates the latest estimates of growth in service use and payments under the Medicare home health benefit, based primarily on Medicare claims data for periods that ended on or before December 31, 2021. We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to errors resulting from other changes in the impact time period assessed. Some examples of such possible events are newly-legislated general Medicare program funding changes made by the Congress or changes specifically related to HHAs. In addition, changes to the Medicare program may continue to be made as a result of new statutory provisions. Although these changes may not be specific to the HH PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon HHAs.

Table F5 represents how HHA revenues are likely to be affected by the finalized policy changes for CY 2023. For this analysis, we used an analytic file with linked CY 2021 OASIS assessments and home health claims data for dates of service that ended on or before December 31, 2021. The first column of Table F5 classifies HHAs according to a number of characteristics including provider type, geographic region, and urban and rural locations. The second column shows the number of facilities in the impact analysis. The third column shows the payment effects of the permanent behavioral adjustment on all payments. The fourth column shows the payment effects of the recalibration of the case-mix weights offset by the case-mix weights budget neutrality factor. The fifth column shows the payment effects of updating to the CY 2023 wage index with a 5-percent cap on wage index decreases. The sixth column shows the payment effects of the final CY 2023 home health payment update percentage. The seventh column shows the payment effects of the new FDL, and the last column shows the combined effects of all the finalized provisions.

Overall, it is projected that aggregate payments in CY 2023 would decrease by 4.2 percent which reflects the 6.9 percent decrease from the permanent behavioral adjustment, the 2.9 payment update percentage increase, and the 0.2 percent decrease from increasing the FDL. As illustrated in Table F5, the combined effects of all of the changes vary by specific types of providers and by location. We note that some individual HHAs within the same group may experience different impacts on payments than others due to the distributional impact of the CY 2023 wage index, the percentage of total HH PPS payments that were subject to the LUPA or paid as outlier payments, and the degree of Medicare utilization.

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## TABLE F5: ESTIMATED HHA IMPACTS BY FACILITY TYPE AND AREA OF THE COUNTRY, CY 2023

| | Number of Agencies | Permanent BA Adjustment[1] | CY 2023 Case-Mix Weights Recalibration Neutrality Factor | CY 2023 Updated Wage Index with 5-Percent Cap | CY 2023 Proposed HH Payment Update[2] Percentage | Fixed-Dollar Loss (FDL) Update | Total |
|---|---|---|---|---|---|---|---|
| **All Agencies** | **9,461** | **-6.9%** | **0.0%** | **0.0%** | **2.9%** | **-0.2%** | **-4.2%** |
| **Facility Type and Control** | | | | | | | |
| Freestanding/Other Vol/NP | 928 | -6.7% | 0.1% | -0.5% | 2.9% | -0.2% | -4.5% |
| Freestanding/Other Proprietary | 7,703 | -7.0% | -0.1% | 0.2% | 2.9% | -0.2% | -4.2% |
| Freestanding/Other Government | 172 | -6.8% | 0.3% | 0.1% | 2.9% | -0.2% | -3.7% |
| Facility-Based Vol/NP | 466 | -6.5% | 0.2% | -0.4% | 2.9% | -0.3% | -4.1% |
| Facility-Based Proprietary | 48 | -6.9% | 0.1% | -0.2% | 2.9% | -0.2% | -4.3% |
| Facility-Based Government | 144 | -6.8% | 0.2% | 0.1% | 2.9% | -0.2% | -3.8% |
| Subtotal: Freestanding | 8,803 | -7.0% | 0.0% | 0.1% | 2.9% | -0.2% | -4.1% |
| Subtotal: Facility-based | 658 | -6.6% | 0.2% | -0.3% | 2.9% | -0.3% | -4.1% |
| Subtotal: Vol/NP | 1,394 | -6.7% | 0.2% | -0.4% | 2.9% | -0.3% | -4.2% |
| Subtotal: Proprietary | 7,751 | -7.0% | -0.1% | 0.2% | 2.9% | -0.2% | -4.2% |
| Subtotal: Government | 316 | -6.8% | 0.2% | 0.1% | 2.9% | -0.2% | -3.8% |
| **Facility Type and Control: Rural** | | | | | | | |
| Freestanding/Other Vol/NP | 221 | -6.8% | 0.2% | -0.4% | 2.9% | -0.2% | -4.3% |
| Freestanding/Other Proprietary | 785 | -7.2% | 0.0% | 1.3% | 2.9% | -0.1% | -3.1% |
| Freestanding/Other Government | 118 | -6.7% | 0.3% | 0.3% | 2.9% | -0.3% | -3.4% |
| Facility-Based Vol/NP | 204 | -6.6% | 0.3% | -0.3% | 2.9% | -0.3% | -4.0% |
| Facility-Based Proprietary | 16 | -7.3% | 0.2% | 0.4% | 2.9% | -0.1% | -3.9% |
| Facility-Based Government | 107 | -6.7% | 0.4% | 0.6% | 2.9% | -0.3% | -3.1% |
| **Facility Type and Control: Urban** | | | | | | | |
| Freestanding/Other Vol/NP | 707 | -6.7% | 0.1% | -0.5% | 2.9% | -0.2% | -4.5% |
| Free-Standing/Other Proprietary | 6,918 | -7.0% | -0.1% | 0.0% | 2.9% | -0.2% | -4.4% |
| Free-Standing/Other Government | 54 | -6.9% | 0.3% | -0.1% | 2.9% | -0.2% | -4.0% |
| Facility-Based Vol/NP | 262 | -6.5% | 0.2% | -0.4% | 2.9% | -0.3% | -4.1% |
| Facility-Based Proprietary | 32 | -6.8% | 0.1% | -0.3% | 2.9% | -0.2% | -4.3% |
| Facility-Based Government | 37 | -6.9% | 0.0% | -0.2% | 2.9% | -0.2% | -4.4% |
| **Facility Location: Urban or Rural** | | | | | | | |
| Rural | 1,451 | -7.0% | 0.1% | 0.8% | 2.9% | -0.2% | -3.4% |
| Urban | 8,010 | -6.9% | 0.0% | -0.1% | 2.9% | -0.2% | -4.3% |
| **Facility Location: Region of the Country (Census Region)** | | | | | | | |
| New England | 327 | -6.7% | 0.1% | -1.0% | 2.9% | -0.3% | -5.0% |
| Mid Atlantic | 413 | -6.8% | 0.2% | -0.4% | 2.9% | -0.2% | -4.3% |
| East North Central | 1,553 | -6.9% | -0.1% | -0.5% | 2.9% | -0.2% | -4.8% |
| West North Central | 610 | -6.7% | -0.1% | -0.6% | 2.9% | -0.3% | -4.7% |
| South Atlantic | 1,568 | -7.0% | 0.0% | -0.5% | 2.9% | -0.2% | -4.8% |
| East South Central | 363 | -7.2% | 0.0% | 1.1% | 2.9% | -0.1% | -3.3% |
| West South Central | 2,128 | -7.0% | 0.0% | 1.2% | 2.9% | -0.2% | -3.1% |
| Mountain | 693 | -6.8% | -0.1% | -0.3% | 2.9% | -0.2% | -4.6% |
| Pacific | 1,763 | -6.9% | 0.0% | 0.5% | 2.9% | -0.2% | -3.7% |
| Outlying | 43 | -7.0% | 1.1% | -0.5% | 2.9% | -0.2% | -3.7% |
| **Facility Size (Number of 30-day Periods)** | | | | | | | |
| < 100 periods | 2,016 | -6.9% | 0.2% | -0.1% | 2.9% | -0.2% | -4.1% |
| 100 to 249 | 1,380 | -6.9% | 0.2% | 0.1% | 2.9% | -0.2% | -3.9% |
| 250 to 499 | 1,671 | -6.9% | 0.0% | 0.2% | 2.9% | -0.2% | -4.0% |
| 500 to 999 | 1,912 | -6.9% | -0.1% | 0.2% | 2.9% | -0.2% | -4.1% |
| 1,000 or More | 2,482 | -6.9% | 0.0% | 0.0% | 2.9% | -0.2% | -4.2% |

**Source:** CY 2021 Medicare claims data for periods with matched OASIS records ending in CY2021 (as of March 21, 2022).
Notes:

1.The permanent BA adjustment impact reflected in column 3 does not equal the proposed 7.69% permanent BA adjustment. The 6.9% reflected in column 3 includes all payments while the proposed 7.69% BA adjustment only applies to the national, standardized 30-Day period payments and does not impact payments for 30-day periods which are LUPAs.

2.The CY 2023 home health payment update percentage reflects the home health productivity adjusted market basket update of 2.9 percent as described in section II.B.3.a of this proposed rule.

**REGION KEY:**
**New England**=Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont
**Middle Atlantic**=Pennsylvania, New Jersey, New York
**South Atlantic**=Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia
**East North Central**=Illinois, Indiana, Michigan, Ohio, Wisconsin
**East South Central**-Alabama, Kentucky, Mississippi, Tennessee
**West North Central**=Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
**West South Central**=Arkansas, Louisiana, Oklahoma, Texas
**Mountain**=Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming
**Pacific**=Alaska, California, Hawaii, Oregon, Washington
**Other**=Guam, Puerto Rico, Virgin Islands

**BILLING CODE 4120–01–C**

2. Impacts for the HH QRP for CY 2023

Failure to submit HH QRP data required under section 1895(b)(3)(B)(v) of the Act with respect to a program year will result in the reduction of the annual home health market basket percentage increase otherwise applicable to an HHA for the corresponding calendar year by 2 percentage points. For the CY 2022 program year, 1,169 of the 11,128 active Medicare-certified HHAs, or approximately 10.4 percent, did not receive the full annual percentage increase because they did not meet assessment submission requirements. The 1,169 HHAs that did not satisfy the reporting requirements of the HH QRP for the CY 2022 program year represent $437 million in home health claims payment dollars during the reporting period out of a total $17.3 billion for all HHAs.

As discussed in section III. of this proposed rule, we are proposing to end the temporary suspension of non-Medicare/Medicaid data under section 704 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 and, in accordance with section 1895(b)(3)(B)(v) of the Act, to require HHAs to report all-payer OASIS data for purposes of the HH QRP, beginning with the CY 2025 program year.

Section III. of this proposed rule provides a detailed description of the net increase in burdens associated with these proposed changes. We are proposing that HHAs would be required to begin reporting all-payer OASIS data beginning with January 1, 2024, discharges. The cost impact of this proposal is estimated to be a net increase of $267,157,680.3 in annualized cost to HHAs, discounted at 7 percent relative to year 2020, over a perpetual time horizon beginning in CY 2025. We described the estimated burden and cost reductions for these measures in section V1V1.B.1. of this proposed rule. In summary, the submission of data on non-Medicare/Medicaid patients for the HH QRP is estimated to increase the burden on HHAs to $23,529.82 per HHA annually, or $267,157,680.3 for all HHAs annually.

3. Impacts for the Expanded HHVBP Model

In the CY 2022 HHPPS final rule (86 FR 62402 through 62410), we estimated that the expanded HHVBP Model would generate a total projected 5-year gross FFS savings, CYs 2023 through 2027, of $3,376,000,000. The proposed changes to the baseline years in this proposed rule will not change those estimates because they do not change the number of HHAs in the Model or the payment methodology.

4. Impact of the CY 2023 Payment for Home Infusion Therapy Services

There are no new proposals in this rule related to payments for home infusion therapy services in CY 2023. The CY 2023 home infusion therapy service payments will be updated by the CPI-U reduced by the productivity adjustment and geographically adjusted in a budget neutral manner using the GAF standardization factor. The CY 2023 final GAF values (and the CPI-U as of June 2022) were not available at the time of rulemaking, therefore, we are unable to estimate the impact of these adjustments on the CY 2023 HIT service payment amounts compared to the CY 2022 HIT service payment amounts.

*D. Regulatory Review Cost Estimation*

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this proposed or final rule, we should estimate the cost associated with regulatory review. Due to the uncertainty involved with accurately quantifying the number of entities that will review the rule, we assume that the total number of unique commenters on last year's proposed rule will be the number of reviewers of this proposed rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this rule. It is possible that not all commenters reviewed last year's rule in detail, and it is also possible that some reviewers chose not to comment on the proposed rule. For these reasons we thought that the number of past commenters would be a fair estimate of the number of reviewers of this rule. We seek comments on the approach used in estimating the number of entities reviewing this proposed rule.

We also recognize that different types of entities are in many cases affected by mutually exclusive sections of this proposed rule, and therefore for the purposes of our estimate we assume that each reviewer reads approximately 50 percent of the rule. We seek comments on this assumption. Using the wage information from the BLS for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this rule is $115.22 per hour, including overhead and fringe benefits *https://www.bls.gov/oes/current/oes_nat.htm.* Assuming an average reading speed, we estimate that it would take approximately 2.32 hours for the staff to review half of this proposed rule. For each entity that reviews the rule, the estimated cost is $267 (2.32 hours × $115.22). Therefore, we estimate that the total cost of reviewing this regulation is $ 55,269 ($267 × 207) [207

is the number of estimated reviewers, which is based on the total number of unique commenters from last year's proposed rule].

*E. Alternatives Considered*

1. HH PPS

For the CY 2023 HH PPS proposed rule, we considered alternatives to the provisions articulated in section II.B.2. of this proposed rule. Specifically, we considered other potential methodologies to determine the difference between assumed versus actual behavior change on estimated aggregate expenditures in response to the comment solicitation in the CY 2022 HH PPS proposed rule (86 FR 35892). However, most of the alternate methodologies controlled for certain actual behavior changes (for example, the reduction in therapy visits) and this is not in alignment with what the statute requires at section 1895(b)(3)(D)(i) of the Act where we must examine actual behavior change. Therefore, any method that would control for an actual behavior change would be counter to what is required by law. Additionally, we considered alternative approaches to the implementation of the permanent and temporary behavior assumption adjustments. As described in section II.B.2. of this rule, to help prevent future over or underpayments, we calculated a permanent prospective adjustment by determining what the 30-day base payment amount should have been in CYs 2020 and 2021 in order to achieve the same estimated aggregate expenditures as obtained from the simulated 60-day episodes. One alternative to the proposed −7.69 percent permanent payment adjustment included a phase-in approach, where we could reduce the permanent adjustment, by spreading out the adjustment over a period of a few years. Another alternative would be to delay the permanent adjustment to a future year. However, we believe that a phase-in approach or delay for the permanent adjustment would not be appropriate, as phasing in or delaying the permanent adjustment would further impact budget neutrality and likely lead to a compounding effect creating the need for a larger reduction to the payment rate in future years.

Finally, we considered proposing to implement the one-time temporary adjustment to reconcile retrospective overpayments in CYs 2020 and 2021. We note that MedPAC's March 2022 Report to Congress [78] has found that in 2020, the aggregate Medicare margin for freestanding HHAs was 20.2 percent, a nearly 5 percentage point increase from the previous year. However, as stated previously in this rule, we believe that implementing both the permanent and temporary adjustments to the CY 2023 payment rate may adversely affect HHAs. Likewise, section 1895(b)(3)(D)(iii) of the Act gives CMS the authority to make any temporary adjustment in a time and manner appropriate though notice and comment rulemaking. Therefore, we believe it is best to propose only the implementation of the permanent decrease of 7.69 percent to the CY 2023 base payment rate, while soliciting comments on the best approach to implement the temporary adjustment for overpayments to HHAs for CYs 2020 and 2021.

2. HHQRP

We did not consider any alternatives in this proposed rule.

3. Expanded HHVBP Model

We discuss the alternative we considered to the proposed change to the HHA baseline year for each applicable measure in the expanded HHVBP Model in section IV.B.2.b. of this proposed rule.

4. Home Infusion Therapy

We did not consider any alternatives in this proposed rule.

*F. Accounting Statements and Tables*

1. HH PPS

As required by OMB Circular A–4 (available at *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf*), in Table F7, we have prepared an accounting statement showing the classification of the transfers and benefits associated with the CY 2023 HH PPS provisions of this rule.

**TABLE F7: ACCOUNTING STATEMENT: HH PPS CLASSIFICATION OF ESTIMATED TRANSFERS AND BENEFITS, FROM CY 2022 TO 2023**

| Category | Transfers |
|---|---|
| Annualized Monetized Transfers | -$810 million |
| From Whom to Whom? | Federal Government to HHAs |

2. HHQRP

As required by OMB Circular A–4 (available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf*), in Table F8, we have prepared an accounting statement showing the classification of the expenditures associated with this proposed rule as they relate to HHAs. Table F8 provides our best estimate of the increase in burden for OASIS submission.

**TABLE F8: ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED COSTS OF OASIS ITEM COLLECTION, FROM CY 2022 TO CY 2023**

| Category | Costs |
|---|---|
| Annualized Net Monetary Burden for HHAs' Submission of the OASIS | $267,157,680.3 |

[78] Home Health Services. MedPAC Report to Congress- 2022. *https://www.medpac.gov/wp-content/uploads/2022/03/Mar22_MedPAC_ReportToCongress_Ch8_SEC.pdf.*

3. Expanded HHVBP Model

As required by OMB Circular A–4 (available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf*), in Table F9, we have prepared an accounting statement Table F9 provides our best estimate of the decrease in Medicare payments under the expanded HHVBP Model.

**TABLE F9: ACCOUNTING STATEMENT: EXPANDED HHVBP MODEL CLASSIFICATION OF ESTIMATED TRANSFERS FOR CYs 2023 – 2027**

| Category | Transfers | Discount Rate | Period Covered |
|---|---|---|---|
| Annualized Monetized Transfers | -$662.4 Million | 7% | CYs 2023-2027 |
| Annualized Monetized Transfers | -$669.7 Million | 3% | CYs 2023-2027 |
| From Whom to Whom? | Federal Government to Hospitals and SNFs | | |

*G. Regulatory Flexibility Act (RFA)*

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. In addition, HHAs and home infusion therapy suppliers are small entities, as that is the term used in the RFA. Individuals and States are not included in the definition of a small entity.

The North American Industry Classification System (NAICS) was adopted in 1997 and is the current standard used by the Federal statistical agencies related to the U.S. business economy. We utilized the NAICS U.S. industry title ''Home Health Care Services'' and corresponding NAICS code 621610 in determining impacts for small entities. The NAICS code 621610 has a size standard of $16.5 million [79] and approximately 96 percent of HHAs and home infusion therapy suppliers are considered small entities. Table F10 shows the number of firms, revenue, and estimated impact per home health care service category.

**TABLE F10: NUMBER OF FIRMS, REVENUE, AND ESTIMATED IMPACT OF HOME HEALTH CARE SERVICES BY NAICS CODE 621610**

| NAICS Code | NAICS Description | Enterprise Size | Number of Firms | Receipts ($1,000) | Estimated Impact ($1,000) per Enterprise Size |
|---|---|---|---|---|---|
| 621610 | Home Health Care Services | <100 | 5,861 | 210,697 | $35.95 |
| 621610 | Home Health Care Services | 100-499 | 5,687 | 1,504,668 | $264.58 |
| 621610 | Home Health Care Services | 500-999 | 3,342 | 2,430,807 | $727.35 |
| 621610 | Home Health Care Services | 1,000-2,499 | 4,434 | 7,040,174 | $1,587.77 |
| 621610 | Home Health Care Services | 2,500-4,999 | 1,951 | 6,657,387 | $3,412.29 |
| 621610 | Home Health Care Services | 5,000-7,499 | 672 | 3,912,082 | $5,821.55 |
| 621610 | Home Health Care Services | 7,500-9,999 | 356 | 2,910,943 | $8,176.81 |
| 621610 | Home Health Care Services | 10,000-14,999 | 346 | 3,767,710 | $10,889.34 |
| 621610 | Home Health Care Services | 15,000-19,999 | 191 | 2,750,180 | $14,398.85 |
| 621610 | Home Health Care Services | ≥20,000 | 961 | 51,776,636 | $53,877.87 |
| 621610 | Home Health Care Services | Total | 23,801 | 82,961,284 | $3,485.62 |

**Source**: Data obtained from United States Census Bureau table "us_6digitnaics_rcptsize_2017" (SOURCE: 2017 County Business Patterns and Economic Census) Release Date: 5/28/2021: https://www2.census.gov/programs-surveys/susb/tables/2017/
**Notes**: Estimated impact is calculated as Receipts ($1,000)/Number of firms.

The economic impact assessment is based on estimated Medicare payments (revenues) and HHS's practice in interpreting the RFA is to consider effects economically ''significant'' only if greater than 5 percent of providers reach a threshold of 3 to 5 percent or more of total revenue or total costs. The majority of HHAs' visits are Medicare paid visits and therefore the majority of HHAs' revenue consists of Medicare payments. Based on our analysis, we conclude that the policies proposed in this rule would result in an estimated total impact of 3 to 5 percent or more on Medicare revenue for greater than 5 percent of HHAs. Therefore, the Secretary has determined that this HH PPS proposed rule would have significant economic impact on a substantial number of small entities. We estimate that the net impact of the policies in this rule is approximately $810 million in decreased payments to HHAs in CY 2023. The $810 million in decreased payments is reflected in the last column of the first row in Table F5 as a 4.2 percent decrease in expenditures when comparing CY 2023 payments to estimated CY 2022 payments. The 4.2 percent decrease is mostly driven by the impact of the permanent behavior assumption adjustment reflected in the third column of Table F5. Further detail is presented in Table F5, by HHA type and location.

With regards to options for regulatory relief, we note that section

[79] *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.*

1895(b)(3)(D)(i) of the Act requires CMS to annually determine the impact of differences between the assumed behavior changes finalized in the CY 2019 HH PPS final rule (83 FR 56455) and actual behavior changes on estimated aggregate expenditures under the HH PPS with respect to years beginning with 2020 and ending with 2026. Additionally, section 1895(b)(3)(D)(ii) and (iii) of the Act requires that CMS make permanent and temporary adjustments to the payment rate to offset for such increases or decreases in estimated aggregate expenditures through notice and comment rulemaking. Since the permanent and temporary adjustments are mandated by statute, we cannot offer HHAs relief from these adjustments. While we are not proposing to implement the temporary payment adjustments in CY 2023, we believe that the −7.69 percent permanent payment adjustment, described in section II.B.2.c. of this proposed rule, is necessary to offset the increase in estimated aggregate expenditures for CYs 2020 and 2021 based on the impact of the differences between assumed behavior changes and actual behavior changes. In the alternatives considered previously, we noted that we considered a phase-in approach to the permanent adjustment. However, we believe that a phase-in of the permanent adjustment is not appropriate for CY 2023 because it would further impact budget neutrality and likely lead to a compounding effect creating the need for a larger reduction to the payment rate in future years. As mentioned previously, we recognize that implementing both the permanent and temporary adjustments to the CY 2023 payment rate may adversely affect HHAs, including small entities. Therefore, we are soliciting comments on the best approach to collect the temporary payment adjustment of $2.0 billion for CYs 2020 and 2021. We solicit comments on the overall HH PPS RFA analysis.

Guidance issued by HHS interpreting the Regulatory Flexibility Act considers the effects economically 'significant' only if greater than 5 percent of providers reach a threshold of 3- to 5-percent or more of total revenue or total costs. Among the over 7,500 HHAs that are estimated to qualify to compete in the expanded HHVBP Model, we estimate that the percent payment adjustment resulting from this rule would be larger than 3 percent, in magnitude, for about 28 percent of competing HHAs (estimated by applying the proposed 5-percent maximum payment adjustment under the expanded Model to CY 2019 data). As a result, more than the RFA threshold of 5-percent of HHA providers nationally would be significantly impacted. We refer readers to Tables 43 and 44 in the CY 2022 HH PPS final rule (86 FR 62407 through 62410) for our analysis of payment adjustment distributions by State, HHA characteristics, HHA size and percentiles.

Thus, the Secretary has certified that this proposed rule would have a significant economic impact on a substantial number of small entities. Though the RFA requires consideration of alternatives to avoid economic impacts on small entities, the intent of the rule, itself, is to encourage quality improvement by HHAs through the use of economic incentives. As a result, alternatives to mitigate the payment reductions would be contrary to the intent of the rule, which is to test the effect on quality and costs of care of applying payment adjustments based on HHAs' performance on quality measures.

In addition, section 1102(b) of the Act requires us to prepare a Regulatory Impact Analysis (RIA) if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This rule is not applicable to hospitals. Therefore, the Secretary has certified that this proposed rule would not have a significant economic impact on the operations of small rural hospitals.

*I. Unfunded Mandates Reform Act (UMRA)*

Section 202 of UMRA of 1995 UMRA also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2022, that threshold is approximately $165 million. This proposed rule would not impose a mandate that will result in the expenditure by State, local, and Tribal Governments, in the aggregate, or by the private sector, of more than $165 million in any one year.

*J. Federalism*

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. We have reviewed this proposed rule under these criteria of Executive Order 13132, and have determined that it would not impose substantial direct costs on State or local governments.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on June 10, 2022.

**List of Subjects in 42 CFR Part 484**

Health facilities, Health professions, Medicare, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as follows:

## PART 484—HOME HEALTH SERVICES

■ 1. The authority citation for part 484 continues to read as follows:

**Authority:** 42 U.S.C. 1302 and 1395hh.

■ 2. Section 484.220 is amended by adding paragraph (c) to read as follows:

**§ 484.220 Calculation of the case-mix and wage area adjusted prospective payment rates.**

* * * * *

(c) Beginning on January 1, 2023, CMS applies a cap on decreases to the home health wage index such that the wage index applied to a geographic area is not less than 95 percent of the wage index applied to that geographic area in the prior calendar year. The 5-percent cap on negative wage index changes is implemented in a budget neutral manner through the use of wage index budget neutrality factors.

■ 3. Section 484.245 is amended—

■ a. In paragraph (b)(1)(i) by removing the reference ''sections 1899B(c)(1) and 1899B(d)(1) of the Act'' and adding in its place the reference ''sections 1895(b)(3)(B)(v)(II), 1899B(c)(1), and 1899B(d)(1) of the Act'';

■ b. In paragraph (b)(1)(iii) by removing the first sentence; and

■ c. By adding paragraph (b)(3).

The addition reads as follows:

**§ 484.245 Requirements under the Home Health Quality Reporting Program (HH QRP).**

* * * * *

(b) * * *

(3) CMS may remove a quality measure from the HH QRP based on one or more of the following factors:

(i) Measure performance among HHAs is so high and unvarying that meaningful distinctions in improvements in performance can no longer be made.

(ii) Performance or improvement on a measure does not result in better patient outcomes.

(iii) A measure does not align with current clinical guidelines or practice.

(iv) The availability of a more broadly applicable (across settings, populations, or conditions) measure for the particular topic.

(v) The availability of a measure that is more proximal in time to desired patient outcomes for the particular topic.

(vi) The availability of a measure that is more strongly associated with desired patient outcomes for the particular topic.

(vii) Collection or public reporting of a measure leads to negative unintended consequences other than patient harm.

(viii) The costs associated with a measure outweigh the benefit of its continued use in the program.

* * * * *

■ 4. Section 484.345 is amended—

■ a. In the definition of ''Achievement threshold'' by removing the phrase ''during a baseline year'' and adding in its place the phrase ''during a Model baseline year'';

■ b. By removing the definition of ''Baseline year'';

■ c. In the definition of ''Benchmark'' by removing the phrase ''during the baseline year'' and adding in its place the phrase ''during the Model baseline year'';

■ d. By adding the definition of ''HHA baseline year'' in alphabetical order;

■ e. In the definition of ''Improvement threshold'' by removing the phrase ''during the baseline year'' and adding in its place the phrase ''during the HHA baseline year''; and

■ f. By adding the definition of ''Model baseline year'' in alphabetical order.

The additions read as follows:

**§ 484.345 Definitions.**

* * * * *

*HHA baseline year* means the calendar year used to determine the improvement threshold for each measure for each individual competing HHA.

* * * * *

*Model baseline year* means the calendar year used to determine the benchmark and achievement threshold for each measure for all competing HHAs.

* * * * *

■ 5. Section 484.350 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

* * * * *

(b) *New HHAs.* A new HHA is certified by Medicare on or after January 1, 2022. For new HHAs, the following apply:

(1) The HHA baseline year is the first full calendar year of services beginning after the date of Medicare certification.

(2) The first performance year is the first full calendar year following the HHA baseline year.

(c) *Existing HHAs.* An existing HHA is certified by Medicare before January 1, 2022 and the HHA baseline year is calendar year (CY) 2022.

**§ 484.370 [Amended]**

■ 6. Section 484.370 is amended in paragraph (a) by removing the phrase ''Model for the baseline year, and CMS'' and adding in its place the phrase ''Model, and CMS''.

Dated: June 16, 2022.

**Xavier Becerra,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2022–13376 Filed 6–17–22; 4:15 pm]

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