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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0172; Project Identifier AD–2023–00265–E; Amendment 39–22355; AD 2023–04–08]

RIN 2120–AA64

Airworthiness Directives; Continental Aerospace Technologies, Inc. Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Continental Aerospace Technologies, Inc. (Continental) GTSIO–520–C, –D, –H, –K, –L, –M, –N, and –S; IO–360–A, –AB, –AF, –C, –CB, –D, –DB, –E, –ES, –G, –GB, –H, –HB, –J, –JB, –K, and –KB; IO–470–D, –E, –G, –H, –J, –K, –L, –M, –N, –P, –R, –S, –T, –U, –V, and –VO; IO–520–A, –B, –BA, –BB, –C, –CB, –D, –E, –F, –J, –K, –L, –M, and –MB; IO–550–A, –B, –C, –D, –E, –F, –G, –L, –N, –P, and –R; LTSIO–360–E, –EB, –KB, and –RB; LTSIO–520–AE; O–470–A, –B, –E, –G, –H, –J, –K, –L, –M, –N, –R, –S, –T, and –U; TSIO–360–A, –AB, –B, –BB, –C, –CB, –D, –DB, –E, –EB, –G, –GB, –H, –HB, –JB, –KB, –LB, –MB, –RB, and –SB; TSIO–520–A, –AE, –AF, –B, –BB, –BE, –C, –CE, –D, –DB, –E, –EB, –G, –H, –J, –JB, –K, –KB, –L, –LB, –M, –NB, –P, –R, –T, –UB, –VB, and –WB; TSIO–550–A, –B, –C, –E, –G, –K, and –N; TSIOF–550–K; and TSIOL–550–A, –B, and –C model reciprocating engines. This AD was prompted by a report of a quality escape involving improper installation of counterweight retaining rings in the engine crankshaft counterweight groove during manufacture. This AD requires inspection of the crankshaft assembly for proper installation of the counterweight retaining rings in the counterweight groove, and corrective actions if improper installation is found. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 23, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 23, 2023.

The FAA must receive comments on this AD by April 10, 2023.

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

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–0172; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For Continental service information identified in this final rule, contact Continental Aerospace Technologies, Inc., 2039 South Broad Street, Mobile, AL 36615; phone: (251) 308–9100; email: *MSB23Support@continental.aero;* website: *continental.aero.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* by searching for and locating Docket No. FAA–2023–0172.

FOR FURTHER INFORMATION CONTACT: Nicholas Reid, Aviation Safety Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (404) 474–5650; email: *nicholas.j.reid@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA received a report of a quality escape involving improper installation and inspection of counterweight retaining rings in the engine crankshaft counterweight groove during manufacture. The FAA has also received reports of two ground engine seizures and one in-flight loss of engine oil pressure due to improper installation of the counterweight retaining rings during manufacture. The counterweight retaining rings are part of the engine crankshaft counterweight assembly retention system. Loosening of a counterweight retaining ring may result in the loss of retention of the counterweight. This condition, if not addressed, could result in loss of engine oil pressure, catastrophic engine damage, and possible engine seizure. The FAA is issuing this AD to address the unsafe condition on these products.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Continental Mandatory Service Bulletin MSB23–01, Revision A, dated February 16, 2023 (MSB23–01A). This service information specifies procedures for inspection of the crankshaft assembly for improper installation of the counterweight retaining rings in the counterweight, and corrective actions if improper installation is found. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

AD Requirements

This AD requires accomplishing the actions specified in paragraph III, Action Required, of MSB23–01A, except as discussed in ''Exception to the Service Information.''

Differences Between This AD and the Service Information

The service information specifies compliance for engines with less than 200 operating hours, while this AD

requires compliance for all affected engines, regardless of the operating hours. The FAA has determined that this unsafe condition, of improperly installed counterweight retaining rings, is likely to exist on affected engines. While the manufacturer's service information excludes engines accumulating 200 or more operating hours, the FAA has not, as of yet, been provided with adequate data to support that exclusion. In the event the FAA receives data to support the exclusion of engines with more than 200 operating hours, or make other changes to this AD, the FAA may consider further rulemaking.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies foregoing notice and comment prior to adoption of this rule. The manufacturer discovered an assembly error for the affected engines. It is possible that one or more counterweight retaining rings were not properly seated in the crankshaft counterweight groove of the engine. This condition could allow the counterweight to depart from the crankshaft during engine operation. Because of the urgency of the unsafe condition, this AD requires inspection of any affected crankshaft assembly before further flight. The manufacturing quality escape has resulted in ground engine seizures and an in-flight loss of engine oil pressure, which could lead to catastrophic engine damage, engine seizure, and consequent loss of the aircraft. Due to the low operational hours on the known crankshaft assembly failures, the short-term risk to the fleet is such that expeditious action must be taken and therefore this AD is effective upon publication. The FAA is issuing this AD to address the unsafe condition on these products. As the affected crankshaft assembly must be inspected before further flight after the effective date of this AD, the compliance time for the required actions is shorter than the time necessary to allow for public comment and for the FAA to publish a final rule. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forego notice and comment.

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0172; Project Identifier AD–2023–00265–E'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, 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 final rule 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 *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

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 AD 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 AD, 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 AD. Submissions containing CBI should be sent to Nicholas Reid, Aviation Safety Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, GA 30337. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because FAA has determined that it has good cause to adopt this rule without prior notice and comment, RFA analysis is not required.

Costs of Compliance

The manufacturer has notified the FAA that 2,176 crankshaft assemblies are subject to the unsafe condition. The FAA estimates that of those 2,176 crankshaft assemblies, 1,632 are installed on aircraft of U.S. registry. The FAA estimates that 544 engines will need to remove one cylinder, 544 engines will need to remove two cylinders, and 544 engines will need to remove three cylinders for compliance with this AD.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Remove one cylinder	10 work-hours × $85 per hour = $850	$0	$850	$462,400
Remove two cylinders	18 work-hours × $85 per hour = 1,530	0	1,530	832,320
Remove three cylinders	22 work-hours × $85 per hour = $1,870	0	1,870	1,017,280
Inspect crankshaft counterweight retaining rings	0.75 work-hours × $85 per hour = $64	0	64	104,448
Reposition, repeat, or remove/install counterweight assemblies.	1.5 work-hours × $85 per hour = $127.50	0	127.50	201,080

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–04–08 Continental Aerospace Technologies, Inc.: Amendment 39–22355; Docket No. FAA–2023–0172; Project Identifier AD–2023–00265–E.

(a) Effective Date

This airworthiness directive (AD) is effective February 23, 2023.

(b) Affected ADs

None.

(c) Applicability

Continental Aerospace Technologies, Inc. (Continental) GTSIO–520–C, –D, –H, –K, –L, –M, –N, and –S; IO–360–A, –AB, –AF, –C, –CB, –D, –DB, –E, –ES, –G, –GB, –H, –HB, –J, –JB, –K, and –KB; IO–470–D, –E, –G, –H, –J, –K, –L, –M, –N, –P, –R, –S, –T, –U, –V, and –VO; IO–520–A, –B, –BA, –BB, –C, –CB, –D, –E, –F, –J, –K, –L, –M, and –MB; IO–550–A, –B, –C, –D, –E, –F, –G, –L, –N, –P, and –R; LTSIO–360–E, –EB, –KB, and –RB; LTSIO–520–AE; O–470–A, –B, –E, –G, –H, –J, –K, –L, –M, –N, –R, –S, –T, and –U; TSIO–360–A, –AB, –B, –BB, –C, –CB, –D, –DB, –E, –EB, –G, –GB, –H, –HB, –JB, –KB, –LB, –MB, –RB, and –SB; TSIO–520–A, –AE, –AF, –B, –BB, –BE, –C, –CE, –D, –DB, –E, –EB, –G, –H, –J, –JB, –K, –KB, –L, –LB, –M, –NB, –P, –R, –T, –UB, –VB, and –WB; TSIO–550–A, –B, –C, –E, –G, –K, and –N; TSIOF–550–K; and TSIOL–550–A, –B, and –C model reciprocating engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 8520, Reciprocating Engine Power Section.

(e) Unsafe Condition

This AD was prompted by a report of a quality escape involving improper installation of counterweight retaining rings in the counterweight groove during manufacture. The FAA is issuing this AD to prevent departure of counterweight and retaining hardware from the crankshaft assembly. The unsafe condition, if not addressed, could result in loss of engine oil pressure, catastrophic engine damage, engine seizure, and consequent loss of the aircraft.

(f) Compliance

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

(g) Required Action

For affected engines with an installed crankshaft assembly identified in paragraphs (g)(1) or (2) of this AD, before further flight, do the actions identified in, and in accordance with paragraph III, Action Required, of Continental Mandatory Service Bulletin MSB23–01, Revision A, dated February 16, 2023 (MSB23–01A).

(1) Crankshaft assembly having a crankshaft serial number listed in Appendix 1 of MSB23–01A; or

(2) Crankshaft assembly that was repaired or installed on or after June 1, 2021, having a part number and crankshaft serial number listed in Appendix 2 of MSB23–01A.

(h) Exception to the Service Information

Where paragraph III.1.a. of MSB23–01A specifies actions for spare crankshaft assemblies, this AD does not require those actions.

(i) Parts Installation Prohibition

After the effective date of this AD, do not install on any engine a crankshaft assembly having a crankshaft serial number identified in Appendix 1 or Appendix 2 of MSB23–01A, unless the actions required by paragraph (g) of this AD have first been accomplished for that crankshaft assembly.

(j) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Continental Mandatory Service Bulletin MSB23–01, dated February 13, 2023.

(k) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to permit a one-time, non-revenue ferry flight to operate the aircraft to a location where the maintenance actions can be performed, provided that:

(1) The engine oil filter pleats or screen are first inspected and there is no evidence of metal contamination; or

(2) An oil change has been done within the previous 5 flight hours, and there was no evidence of metal contamination in the oil filter pleats or screen.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (m) of this AD.

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

(m) Related Information

For more information about this AD, contact Nicholas Reid, Aviation Safety Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (404) 474–5650; email: *nicholas.j.reid@faa.gov*.

(n) Material Incorporated by Reference

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

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

(i) Continental Aerospace Technologies, Inc. Mandatory Service Bulletin MSB23–01, Revision A, dated February 16, 2023.

(ii) Reserved.

(3) For Continental service information identified in this AD, contact Continental Aerospace Technologies, Inc., 2039 South Broad Street, Mobile, AL 36615; phone: (251) 308–9100; email: *MSB23Support@continental.aero;* website: *continental.aero.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on February 16, 2023.

Christina Underwood,

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

[FR Doc. 2023–03796 Filed 2–17–23; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–0922; Airspace Docket No. 22–ASO–15]

RIN 2120–AA66

Establishment of Class D Airspace and Amendment of Class E Airspace; Selma, AL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; delay of the effective date.

SUMMARY: This action changes the effective date of a final rule published in the **Federal Register** on January 12, 2023 for Airspace Docket No. 22–ASO–15. In that rule, the effective date was inadvertently published as February 23, 2023. This action delays the effective date to April 20, 2023.

DATES: The effective date of the final rule published January 12, 2023 (88 FR 1987), is delayed to April 20, 2023.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule in the **Federal Register** (88 FR 1987, January 12, 2023) for Docket No. FAA–2022–0922 to establish Class D airspace and amend Class E airspace extending upward from 700 feet above the surface at Craig Field Airport, Selma, AL. In that rule, the effective date was inadvertently published as February 23, 2023. This action delays the effective date to April 20, 2023.

Delay of Effective Date

Accordingly, pursuant to the authority delegated to me, the effective date for Airspace Docket No. 22–ASO–15, as published in the **Federal Register** on January 12, 2023 (88 FR 1987), Airspace Docket No. 22–ASO–15, is hereby delayed from February 23, 2023, to April 20, 2023.

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389

Issued in College Park, Georgia, on February 15, 2023.

Andreese C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–03586 Filed 2–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 12

[CBP Dec. 23–02]

RIN 1515–AE78

Extension of Import Restrictions Imposed on Certain Archaeological Material of Belize

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension of import restrictions on certain archaeological material of Belize. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State (Department of State), has determined that conditions continue to warrant the imposition of import restrictions and that no cause for suspension exists. The restrictions, originally imposed by CBP Dec. 13–05, will be extended for an additional five-year period through February 23, 2028, and the CBP regulations are being amended to reflect this extension. CBP Dec. 13–05 contains the Designated List of archaeological materials from Belize to which the restrictions apply.

DATES: Effective on February 23, 2023.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ototrrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (Convention), the United States may enter into an international agreement with another State Party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under CPIA and the applicable U.S. Customs and Border Protection (CBP) regulations, found in section 12.104 of title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)).

On February 27, 2013, the United States entered into a memorandum of understanding with the Government of Belize (Belize), concerning the imposition of import restrictions on certain categories of archaeological material of Belize (2013 MOU). On March 5, 2013, CBP published a final rule, CBP Dec. 13–05, in the **Federal Register** (78 FR 14183), amending 19 CFR 12.104g(a) to reflect the imposition of restrictions on this material, including a list designating the types of

archaeological material covered by the restrictions. Consistent with the requirements of 19 U.S.C. 2602(b) and 19 CFR 12.104g, these restrictions were effective for a period of five years, through February 27, 2018.

The import restrictions were subsequently extended once in accordance with 19 U.S.C. 2602(e) and 19 CFR 12.104g(a)). On February 23, 2018, the United States entered into a memorandum of understanding with Belize to extend the import restrictions (2018 MOU). Accordingly, CBP published a final rule, CBP Dec. 18–02, in the **Federal Register** (83 FR 8354) reflecting the agreement to extend the import restrictions for an additional five-year period.

On June 21, 2022, the United States Department of State (Department of State) proposed in the **Federal Register** (87 FR 36910) to extend the MOU between the United States and Belize concerning the import restrictions on certain categories of archaeological material from Belize. On December 9, 2022, after considering the views and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, Department of State, determined that the cultural heritage of Belize continues to be in jeopardy from pillage of certain archeological material, and that the import restrictions should be extended for an additional five years, in accordance with 19 U.S.C. 2602(e). Through the exchange of diplomatic notes, the Department of State and the Ministry of Foreign Affairs of the Government of Belize have agreed to extend the 2018 MOU for an additional five-year period.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions. The restrictions on the importation of archaeological material are to extend through February 23, 2028. Importation of such material from Belize continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions* by selecting the material for ''Belize.''

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12866

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the Secretary of the Treasury's authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Acting Commissioner of CBP, having reviewed and approved this document, has delegated the authority to electronically sign this document to Robert F. Altneu, the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural exchange programs, Cultural property, Foreign relations, Freight, Imports, Prohibited or restricted importations, Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12) is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

■ 2. In § 12.104g, amend the table in paragraph (a) by revising the entry for Belize to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
*	* * * * * * *	
Belize	Archaeological material, representing Belize's cultural heritage that is at least 250 years old, dating from the Pre-Ceramic (from approximately 9000 B.C.), Pre-Classic, Classic, and Post-Classic Periods of the Pre-Columbian era through the Early and Late Colonial Periods.	CBP Dec. 13–05 extended by CBP Dec. 23–02.
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* * * * *

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade U.S. Customs and Border Protection.

Approved:

Thomas C. West, Jr.,
Deputy Assistant Secretary of the Treasury for Tax Policy.

[FR Doc. 2023–03729 Filed 2–22–23; 8:45 am]
BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 12

[CBP Dec. 23–03]

RIN 1515–AE79

Extension of Import Restrictions on Archaeological and Ethnological Materials of Libya

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension of import restrictions on certain categories of archaeological and ethnological materials of Libya. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending the import restrictions and no cause for suspension exists. The restrictions, originally imposed by CBP Decision (CBP Dec.) 18–07, will be extended for an additional five-year period, through February 23, 2028, and the CBP regulations are being amended to reflect this extension. The Designated List of archaeological and ethnological material of Libya to which the restrictions apply is reproduced below with a statement clarifying that ethnological material on the Designated List excludes Jewish ceremonial and ritual objects.

DATES: Effective on February 23, 2023.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *otrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (Convention), the United States may enter into international agreements with another State Party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under the CPIA and the applicable U.S. Customs and Border Protection (CBP) regulations, found in section 12.104 of Title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)). In certain limited circumstances, the CPIA authorizes the imposition of restrictions on an emergency basis (19 U.S.C. 2603). The emergency restrictions are effective for no more than five years from the date of the State Party's request and may be extended for three years where it is determined that the emergency condition continues to apply with respect to the covered material (19 U.S.C. 2603(c)(3)). These restrictions may also be continued pursuant to an agreement concluded within the meaning of the Act (19 U.S.C. 2603(c)(4)).

On December 5, 2017, CBP published a final rule, CBP Dec. 17–19 (82 FR 57346), amending 19 CFR 12.104g(b) to reflect the imposition of emergency restrictions on the importation of certain categories of archaeological and ethnological materials of Libya, pursuant to 19 U.S.C. 2603(c). On February 23, 2018, the United States entered into a memorandum of understanding (2018 MOU) with the Government of Libya (Libya), concerning the imposition of import restrictions on archaeological and ethnological material of Libya. The 2018 MOU covered the same archaeological and ethnological materials subject to the emergency restrictions.

On July 9, 2018, CBP published a final rule, CBP Dec. 18–07, in the **Federal Register** (83 FR 31654) amending 19 CFR 12.104g(a) to reflect the imposition of restrictions pursuant to the 2018 MOU. CBP Dec. 18–07 extended the import restrictions implemented in 19 CFR 12.104g(b) by CBP Dec. 17–19 for a five-year period, through February 23, 2023.

On June 21, 2022, the United States Department of State proposed in the **Federal Register** (87 FR 36911) to extend the MOU between the United States and Libya concerning the import restrictions on certain categories of archaeological and ethnological material from Libya. On December 14, 2022, after considering the views and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, determined that the cultural heritage of Libya continues to be in jeopardy from pillage of certain archeological and ethnological materials, and that the import restrictions should be extended for an additional five years, pursuant to 19 U.S.C. 2602(e). Following the exchange of diplomatic notes, the United States Department of State and the Ministry of Foreign Affairs of the Government of Libya have agreed to extend the 2018 MOU for an additional five-year period.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions through February 23, 2028, and is adding a statement to the Designated List clarifying that Jewish ceremonial and ritual objects are not covered by import restrictions on ethnological material. Importation of designated material from Libya continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions* by selecting the material for ''Libya.'' The designated list is included below with the addition of the clarifying statement on Jewish ceremonial and ritual objects.

Designated List

The bilateral agreement between Libya and the United States covers the material set forth below in a Designated List of Archaeological and Ethnological Material of Libya. Importation of material on this list is restricted unless the material is accompanied by documentation certifying that the material left Libya legally and not in violation of the export laws of Libya. In order to clarify certain provisions of the Designated List contained CBP Dec. 18–07, the Designated List has been updated in this document with minor

revisions clarifying that Jewish ceremonial and ritual objects are not covered by import restrictions on ethnological material.

The Designated List covers archaeological material of Libya and Ottoman ethnological material of Libya (as defined in section 302 of the Convention on Cultural Property Implementation Act (19 U.S.C. 2601)), including, but not limited to, the following types of material. The archaeological material represents the following periods and cultures: Paleolithic, Neolithic, Punic, Greek, Roman, Byzantine, Islamic and Ottoman dating approximately 12,000 B.C. to 1750 A.D. The ethnological material represents categories of Ottoman objects derived from sites of Islamic cultural importance, made by a nonindustrial society (Ottoman Libya), and important to the knowledge of the history of Islamic Ottoman society in Libya from 1551 A.D. through 1911 A.D. This would exclude Jewish ceremonial and ritual objects.

The Designated List set forth below is representative only. Any dimensions are approximate.

I. Archaeological Material

A. Stone

1. *Sculpture*

a. *Architectural Elements*—In marble, limestone, sandstone, and gypsum, in addition to porphyry and granite. From temples, forts, palaces, mosques, synagogues, churches, shrines, tombs, monuments, public buildings, and domestic dwellings, including doors, door frames, window fittings, columns, capitals, bases, lintels, jambs, friezes, pilasters, engaged columns, altars, mihrabs (prayer niches), screens, fountains, mosaics, inlays, and blocks from walls, floors, and ceilings. May be plain, molded, or carved. Often decorated with motifs and inscriptions. Approximate date: 1st millennium B.C. to 1750 A.D.

b. *Architectural and Non-architectural Relief Sculpture*—In marble, limestone, sandstone, and other stone. Types include carved slabs with figural, vegetative, floral, geometric, or other decorative motifs, carved relief vases, stelae, and plaques, sometimes inscribed in Greek, Punic, Latin, or Arabic. Used for architectural decoration, funerary, votive, or commemorative monuments. Approximate date: 1st millennium B.C. to 1750 A.D.

c. *Monuments*—In marble, limestone, and other kinds of stone. Types include votive statues, funerary and votive stelae, and bases and base revetments. These may be painted, carved with relief sculpture, decorated with moldings, and/or carry dedicatory or funerary inscriptions in Greek, Punic, Latin, or Arabic. Approximate date: 1st millennium B.C. to 1750 A.D.

d. *Statuary*—Primarily in marble, but also in limestone and sandstone. Large- and small-scale, including deities, human, animal, and hybrid figures, as well as groups of figures in the round. Common types are large-scale and free-standing statuary from approximately 3 to 8 ft. in height, life-sized portrait or funerary busts (head and shoulders of an individual), waist-length female busts that are either faceless (aniconic) and/or veiled (head or face), and statuettes typically 1 to 3 ft. in height. Includes fragments of statues. Approximate date: 1st millennium B.C. to 1750 A.D.

e. *Sepulchers*—In marble, limestone, and other kinds of stone. Types of burial containers include sarcophagi, caskets, and chest urns. May be plain or have figural, geometric, or floral motifs painted on them, be carved in relief, and/or have decorative moldings. Approximate date: 1st millennium B.C. to 1750 A.D.

2. *Vessels and Containers*—In marble and other stone. Vessels may belong to conventional shapes such as bowls, cups, jars, jugs, lamps, and flasks, and also include smaller funerary urns. Funerary urns can be egg-shaped vases with button-topped covers and may have sculpted portraits, painted geometric motifs, inscriptions, scroll-like handles and/or be ribbed.

3. *Furniture*—In marble and other stone. Types include thrones, tables, and beds. May be funerary, but do not have to be. Approximate date: 1st millennium B.C. to 15th century A.D.

4. *Inscriptions*—Primarily in marble and limestone. Inscribed stone material date from the late 7th century B.C. to 5th century A.D. May include funerary stelae, votive plaques, tombstones, mosaic floors, and building plaques in Greek, Punic, Latin, or Arabic. Approximate date: 1st millennium B.C. to 1750 A.D.

5. *Tools and Weapons*—In flint, chert, obsidian, and other hard stones. Prehistoric and Protohistoric microliths (small stone tools). Chipped stone types include blades, borers, scrapers, sickles, cores, and arrow heads. Ground stone types include grinders (*e.g.,* mortars, pestles, millstones, whetstones), choppers, axes, hammers, and mace heads. Approximate date: 12,000 B.C. to 1,400 B.C.

6. *Jewelry, Seals, and Beads*—In marble, limestone, and various semi-precious stones, including rock crystal, amethyst, jasper, agate, steatite, and carnelian. Approximate date: 1st millennium B.C. to 12th century A.D.

B. Metal

1. *Sculpture*

a. *Statuary*—Primarily in bronze, iron, silver, or gold, including fragments of statues. Large- and small-scale, including deities, human, and animal figures, as well as groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 3 to 8 ft. in height and life-size busts (head and shoulders of an individual) and statuettes typically 1 to 3 ft. in height. Approximate date: 1st millennium B.C. to 324 A.D.

b. *Reliefs*—Relief sculpture, including plaques, appliques, stelae, and masks. Often in bronze. May include Greek, Punic, Latin, and Arabic inscriptions. Approximate date: 1st millennium B.C. to 324 A.D.

c. *Inscribed or Decorated Sheet*—In bronze or lead. Engraved inscriptions, ''curse tablets,'' and thin metal sheets with engraved or impressed designs often used as attachments to furniture. Approximate date: 1st millennium B.C. to 15th century A.D.

2. *Vessels and Containers*—In bronze, silver, and gold. These may belong to conventional shapes such as bowls, cups, jars, jugs, strainers, cauldrons, and oil lamps, or may occur in the shape of an animal or part of an animal. Also include scroll and manuscript containers for manuscripts. All can portray deities, humans or animals, as well as floral motifs in relief. Islamic Period objects may be inscribed in Arabic. Approximate date: 1st millennium B.C. to 15th century A.D.

3. *Jewelry and Other Items for Personal Adornment*—In iron, bronze, silver, and gold. Metal can be inlaid (with items such as red coral, colored stones, and glass). Types include necklaces, chokers, pectorals, rings, beads, pendants, belts, belt buckles, earrings, diadems, straight pins and fibulae, bracelets, anklets, girdles, belts, mirrors, wreaths and crowns, make-up accessories and tools, metal strigils (scrapers), crosses, and lamp-holders. Approximate date: 1st millennium B.C. to 15th century A.D.

4. *Seals*—In lead, tin, copper, bronze, silver, and gold. Types include rings, amulets, and seals with shank. Approximate date: 1st millennium B.C. to 15th century A.D.

5. *Tools*—In copper, bronze and iron. Types include hooks, weights, axes, scrapers, trowels, keys and the tools of crafts persons such as carpenters, masons and metal smiths. Approximate

date: 1st millennium B.C. to 15th century A.D.

6. *Weapons and Armor*—Body armor, including helmets, cuirasses, shin guards, and shields, and horse armor often decorated with elaborate engraved, embossed, or perforated designs. Both launching weapons (spears and javelins) and weapons for hand to hand combat (swords, daggers, etc.). Approximate date: 8th century B.C. to 4th century A.D.

7. *Coins*

a. *General*—Examples of many of the coins found in ancient Libya may be found in: A. Burnett and others, *Roman Provincial Coinage,* multiple volumes (British Museum Press and the Bibliothèque Nationale de France, 1992–), R. S. Poole and others, *Catalogue of Greek Coins in the British Museum,* volumes 1–29 (British Museum Trustees 1873–1927) and H. Mattingly and others, *Coins of the Roman Empire in the British Museum,* volumes 1–6 (British Museum Trustees 1923–62). For Byzantine coins, *see* Grierson, Philip, *Byzantine Coins,* London, 1982. For publication of examples of coins circulating in archaeological sites, *see La moneta di Cirene e della Cirenaica nel Mediterraneo. Problemi e Prospettive,* Atti del V Congresso Internazionale di Numismatica e di Storia Monetaria, Padova, 17–19 marzo 2016, Padova 2016 (Numismatica Patavina, 13).

b. *Greek Bronze Coins*—Struck by city-states of the Pentapolis, Carthage and the Ptolemaic kingdom that operated in territory of the Cyrenaica in eastern Libya. Approximate date: 4th century B.C. to late 1st century B.C.

c. *Greek Silver and Gold Coins*—This category includes coins of the city-states of the Pentapolis in the Cyrenaica and the Ptolemaic Kingdom. Coins from the city-state of Cyrene often bear an image of the silphium plant. Such coins date from the late 6th century B.C. to late 1st century B.C.

d. *Roman Coins*—In silver and bronze, struck at Roman and Roman provincial mints including Apollonia, Barca, Balagrae, Berenice, Cyrene, Ptolemais, Leptis Magna, Oea, and Sabratha. Approximate date: late 3rd century B.C. to 1st century A.D.

e. *Byzantine Coins*—In bronze, silver, and gold by Byzantine emperors. Struck in Constantinople and other mints. From 4th century A.D. through 1396 A.D.

f. *Islamic Coins*—In bronze, silver, and gold. Dinars with Arabic inscriptions inside a circle or square, may be surrounded with symbols. Struck at mints in Libya (Barqa) and adjacent regions. From 642 A.D. to 15th century A.D.

g. *Ottoman*—Struck at mints in Istanbul and Libya's neighboring regions. Approximate date: 1551 A.D. through 1750 A.D.

C. Ceramic and Clay

1. *Sculpture*

a. *Architectural Elements*—Baked clay (terracotta) elements used to decorate buildings. Elements include acroteria, antefixes, painted and relief plaques, revetments. Approximate date: 1st millennium B.C. to 30 B.C.

b. *Architectural Decorations*—Including carved and molded brick, and tile wall ornaments and panels.

c. *Statuary*—Large- and small-scale. Subject matter is varied and includes deities, human and animal figures, human body parts, and groups of figures in the round. May be brightly colored. These range from approximately 4 to 40 in. in height. Approximate date: 1st millennium B.C. to 3rd century A.D.

d. *Terracotta Figurines*—Terracotta statues and statuettes, including deities, human, and animal figures, as well as groups of figures in the round. Late 7th century B.C. to 3rd century A.D.

2. *Vessels*

a. *Neolithic Pottery*—Handmade, often decorated with a lustrous burnish, decorated with applique´ and/or incision, sometimes with added paint. These come in a variety of shapes from simple bowls and vases to large storage jars. Approximate date: 10th millennium B.C. to 3rd millennium B.C.

b. *Greek Pottery*—Includes both local and imported fine and coarse wares and amphorae. Also imported Attic Black Figure, Red Figure and White Ground Pottery—these are made in a specific set of shapes (*e.g.,* amphorae, kraters, hydriae, oinochoi, kylikes) decorated with black painted figures on a clear clay ground (Black Figure), decorative elements in reserve with background fired black (Red Figure), and multi-colored figures painted on a white ground (White Ground). Corinthian Pottery—Imported painted pottery made in Corinth in a specific range of shapes for perfume and unguents and for drinking or pouring liquids. The very characteristic painted and incised designs depict human and animal figural scenes, rows of animals, and floral decoration. Approximate date: 8th century B.C. to 6th century B.C.

c. *Punic and Roman Pottery*—Includes fine and coarse wares, including terra sigillata and other red gloss wares, and cooking wares and mortaria, storage and shipping amphorae.

d. *Byzantine Pottery*—Includes undecorated plain wares, lamps, utilitarian, tableware, serving and storage jars, amphorae, special shapes such as pilgrim flasks. Can be matte painted or glazed, including incised ''sgraffitto'' and stamped with elaborate polychrome decorations using floral, geometric, human, and animal motifs. Approximate date: 324 A.D. to 15th century A.D.

e. *Islamic and Ottoman Pottery*—Includes plain or utilitarian wares as well as painted wares.

f. *Oil Lamps and Molds*—Rounded bodies with a hole on the top and in the nozzle, handles or lugs and figural motifs (beading, rosette, silphium). Include glazed ceramic mosque lamps, which may have a straight or round bulbous body with flared top, and several branches. Approximate date: 1st millennium B.C. to 15th century A.D.

3. *Objects of Daily Use*—Including game pieces, loom weights, toys, and lamps.

D. Glass, Faience, and Semi-Precious Stone

1. *Architectural Elements*—Mosaics and glass windows.

2. *Vessels*—Shapes include small jars, bowls, animal shaped, goblet, spherical, candle holders, perfume jars (unguentaria), and mosque lamps. Those from prehistory and ancient history may be engraved and/or colorless or blue, green or orange, while those from the Islamic Period may include animal, floral, and/or geometric motifs. Approximate date: 1st millennium B.C. to 15th century A.D.

3. *Beads*—Globular and relief beads. Approximate date: 1st millennium B.C. to 15th century A.D.

4. *Mosque Lamps*—May have a straight or round bulbous body with flared top, and several branches. Approximate date: 642 A.D. to 1750 A.D.

E. Mosaic

1. *Floor Mosaics*—Including landscapes, scenes of deities, humans, or animals, and activities such as hunting and fishing. There may also be vegetative, floral, or geometric motifs and imitations of stone. Often have religious imagery. They are made from stone cut into small bits (tesserae) and laid into a plaster matrix. Approximate date: 5th century B.C. to 4th century A.D.

2. *Wall and Ceiling Mosaics*—Generally portray similar motifs as seen in floor mosaics. Similar technique to floor mosaics, but may include tesserae of both stone and glass. Approximate

date: 5th century B.C. to 4th century A.D.

F. Painting

1. *Rock Art*—Painted and incised drawings on natural rock surfaces. There may be human, animal, geometric and/or floral motifs. Include fragments. Approximate date: 12,000 B.C. to 100 A.D.

2. *Wall Painting*—With figurative (deities, humans, animals), floral, and/or geometric motifs, as well as funerary scenes. These are painted on stone, mud plaster, lime plaster (wet—buon fresco—and dry—secco fresco), sometimes to imitate marble. May be on domestic or public walls as well as in tombs. Approximate date: 1st millennium B.C. to 1551 A.D.

G. Plaster

Stucco reliefs, plaques, stelae, and inlays or other architectural decoration in stucco.

H. Textiles, Basketry, and Rope

1. *Textiles*—Linen cloth was used in Greco-Roman times for mummy wrapping, shrouds, garments, and sails. Islamic textiles in linen and wool, including garments and hangings.

2. *Basketry*—Plant fibers were used to make baskets and containers in a variety of shapes and sizes, as well as sandals and mats.

3. *Rope*—Rope and string were used for a great variety of purposes, including binding, lifting water for irrigation, fishing nets, measuring, and stringing beads for jewelry and garments.

I. Bone, Ivory, Shell, and Other Organics

1. *Small Statuary and Figurines*—Subject matter includes human, animal, and hybrid figures, and parts thereof as well as groups of figures in the round. These range from approximately 4 to 40 in. in height. Approximate date: 1st millennium B.C. to 15th century A.D.

2. *Reliefs, Plaques, Stelae, and Inlays*—Carved and sculpted. May have figurative, floral and/or geometric motifs.

3. *Personal Ornaments and Objects of Daily Use*—In bone, ivory, and spondylus shell. Types include amulets, combs, pins, spoons, small containers, bracelets, buckles, and beads. Approximate date: 1st millennium B.C. to 15th century A.D.

4. *Seals and Stamps*—Small devices with at least one side engraved with a design for stamping or sealing; they can be discoid, cuboid, conoid, or in the shape of animals or fantastic creatures (*e.g.,* a scarab). Approximate date: 1st millennium B.C. to 2nd millennium B.C.

5. *Luxury Objects*—Ivory, bone, and shell were used either alone or as inlays in luxury objects including furniture, chests and boxes, writing and painting equipment, musical instruments, games, cosmetic containers, combs, jewelry, amulets, seals, and vessels made of ostrich egg shell.

J. Wood

Items such as tablets (tabulae), sometimes pierced with holes on the borders and with text written in ink on one or both faces, typically small in size (4 to 12 in. in length), recording sales of property (such as slaves, animals, grain) and other legal documents such as testaments. Approximate date: late 2nd to 4th centuries A.D.

II. Ottoman Ethnological Material

A. Stone

1. *Architectural Elements*—The most common stones are marble, limestone, and sandstone. From sites such as forts, palaces, mosques, shrines, tombs, and monuments, including doors, door frames, window fittings, columns, capitals, bases, lintels, jambs, friezes, pilasters, engaged columns, altars, mihrabs (prayer niches), screens, fountains, mosaics, inlays, and blocks from walls, floors, and ceilings. Often decorated in relief with religious motifs.

2. *Architectural and Non-architectural Relief Sculpture*—In marble, limestone, and sandstone. Types include carved slabs with religious, figural, floral, or geometric motifs, as well as plaques and stelae, sometimes inscribed.

3. *Statuary*—Primarily in marble, but also in limestone and sandstone. Large- and small-scale, such as human (including historical portraits or busts) and animal figures.

4. *Sepulchers*—In marble, limestone, and other kinds of stone. Types of burial containers include sarcophagi, caskets, coffins, and chest urns. May be plain or have figural, geometric, or floral motifs painted on them, be carved in relief, and/or have decorative moldings.

5. *Inscriptions, Memorial Stones, and Tombstones*—Primarily in marble, most frequently engraved with Arabic script.

6. *Vessels and Containers*—Include stone lamps and containers such as those used in religious services, as well as smaller funerary urns.

B. Metal

1. *Architectural Elements*—Primarily copper, brass, lead, and alloys. From sites such as forts, palaces, mosques, shrines, tombs, and monuments, including doors, door fixtures, other lathes, chandeliers, screens, and sheets to protect domes.

2. *Architectural and Non-architectural Relief Sculpture*—Primarily bronze and brass. Includes appliques, plaques, and stelae. Often with religious, figural, floral, or geometric motifs. May have inscriptions in Arabic.

3. *Vessels and Containers*—In brass, copper, silver, or gold, plain, engraved, or hammered. Types include jugs, pitchers, plates, cups, lamps, and containers used for religious services (like Qur'an boxes). Often engraved or otherwise decorated.

4. *Jewelry and Personal Adornments*—In a wide variety of metals such as iron, brass, copper, silver, and gold. Includes rings and ring seals, head ornaments, earrings, pendants, amulets, bracelets, talismans, and belt buckles. May be adorned with inlaid beads, gemstones, and leather.

5. *Weapons and Armor*—Often in iron or steel. Includes daggers, swords, saifs, scimitars, other blades, with or without sheaths, as well as spears, firearms, and cannons. Ottoman types may be inlaid with gemstones, embellished with silver or gold, or engraved with floral or geometric motifs and inscriptions. Grips or hilts may be made of metal, wood, or even semi-precious stones such as agate, and bound with leather. Armor consisting of small metal scales, originally sewn to a backing of cloth or leather, and augmented by helmets, body armor, shields, and horse armor.

6. *Ceremonial Paraphernalia*—Including boxes (such as Qur'an boxes), plaques, pendants, candelabra, stamp and seal rings.

7. *Musical Instruments*—In a wide variety of metals. Includes cymbals and trumpets.

C. Ceramic and Clay

1. *Architectural Decorations*—Including carved and molded brick, and engraved and/or painted tile wall ornaments and panels, sometimes with Arabic script. May be from forts, palaces, mosques, shrines, tombs, or monuments.

2. *Vessels and Containers*—Includes glazed, molded, and painted ceramics. Types include boxes, plates, lamps, jars, and flasks. May be plain or decorated with floral or geometric patterns, or Arabic script, primarily using blue, green, brown, black, or yellow colors.

D. Wood

1. *Architectural Elements*—From sites such as forts, palaces, mosques, shrines, tombs, monuments, and madrassas, including doors, door fixtures, panels, beams, balconies, stages, screens, ceilings, and tent posts. Types include doors, door frames, windows, window

frames, walls, panels, beams, ceilings, and balconies. May be decorated with religious, geometric or floral motifs or Arabic script.

2. *Architectural and Non-architectural Relief Sculpture*—Carved and inlaid wood panels, rooms, beams, balconies, stages, panels, ceilings, and doors, frequently decorated with religious, floral, or geometric motifs. May have script in Arabic or other languages.

3. *Qur'an Boxes*—May be carved and inlaid, with decorations in religious, floral, or geometric motifs, or Arabic script.

4. *Study Tablets*—Arabic inscribed training boards for teaching the Qur'an.

E. Bone and Ivory

1. *Ceremonial Paraphernalia*—Types include boxes, reliquaries (and their contents), plaques, pendants, candelabra, stamp and seal rings.

2. *Inlays*—For religious decorative and architectural elements.

F. Glass

Vessels and containers in glass from mosques, shrines, tombs, and monuments, including glass and enamel mosque lamps and ritual vessels.

G. Textiles

In linen, silk, and wool. Religious textiles and fragments from mosques, shrines, tombs, and monuments, including garments, hangings, prayer rugs, and shrine covers.

H. Leather and Parchment

1. *Books and Manuscripts*—Either as sheets or bound volumes. Text is often written on vellum or other parchment (cattle, sheep, goat, or camel) and then gathered in leather bindings. Paper may also be used. Types include the Qur'an and other Islamic books and manuscripts, often written in brown ink, and then further embellished with colorful floral or geometric motifs.

2. *Musical Instruments*—Leather drums of various sizes (*e.g.,* bendir drums used in Sufi rituals, wedding processions and Mal'uf performances).

I. Painting and Drawing

Ottoman Period paintings may depict courtly themes (*e.g.,* rulers, musicians, riders on horses) and city views, among other topics.

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12866

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the Secretary of the Treasury's authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Acting Commissioner of CBP, having reviewed and approved this document, has delegated the authority to electronically sign this document to Robert F. Altneu, the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural exchange programs, Cultural property, Foreign Relations, Freight, Imports, Prohibited or restricted importations, and Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12) is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

■ 2. In § 12.104g, amend the table in paragraph (a) by revising the entry for Libya to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
*	* * * * * *	
Libya	Archaeological material and ethnological material from Libya	CBP Dec. 23–03.
*	* * * * * *	

* * * * *

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade U.S. Customs and Border Protection.

Approved:

Thomas C. West, Jr.,
Deputy Assistant Secretary of the Treasury for Tax Policy.

[FR Doc. 2023–03727 Filed 2–22–23; 8:45 am]
BILLING CODE 9111–14–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9973]

RIN 1545–BQ51

Single-Entity Treatment of Consolidated Groups for Specific Purposes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that treat members of a consolidated group as a single United States shareholder in certain cases for purposes of section 951(a)(2)(B) of the Internal Revenue Code (the ''Code''). The document finalizes proposed regulations published on December 14, 2022. The final regulations affect consolidated groups that own stock of foreign corporations.

DATES:

Effective date: These regulations are effective on February 23, 2023.

Applicability date: These regulations apply to taxable years for which the original consolidated return is due (without extensions) after February 23, 2023.

FOR FURTHER INFORMATION CONTACT: Austin Diamond-Jones, (202) 317–5085 (Corporate) and Julie T. Wang, (202) 317–6975 (Corporate) regarding section 1502 and the amendments to § 1.1502–80, and Joshua P. Roffenbender, (202) 317–6934 (International) regarding sections 951, 951A, and 959.

SUPPLEMENTARY INFORMATION:

Background

On December 14, 2022, the Department of the Treasury (''Treasury Department'') and the IRS published a notice of proposed rulemaking (REG–113839–22) in the **Federal Register** (87 FR 76430) under sections 1502 and 7805(a) of the Code (the ''proposed regulations''). No comments were received from the public in response to the notice of proposed rulemaking. No public hearing was requested or held. This Treasury Decision adopts the proposed regulations as final regulations without modification.

Applicability Date

The final regulations apply to taxable years for which the original consolidated return is due (without extensions) after February 23, 2023. *See* section 1503(a).

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

These final regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

II. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these final regulations apply only to corporations that file consolidated Federal income tax returns, and that such corporations almost exclusively consist of larger businesses. Specifically, based on data available to the IRS, corporations that file consolidated Federal income tax returns represent only approximately two percent of all filers of Forms 1120 (U.S. Corporation Income Tax Return). However, these consolidated Federal income tax returns account for approximately 95 percent of the aggregate amount of receipts provided on all Forms 1120. Therefore, these final regulations would not create additional obligations for, or impose an economic impact on, small entities. Accordingly, the Secretary certifies that the final regulations will not have a significant economic impact on a substantial number of small entities.

III. Section 7805(f)

Pursuant to section 7805(f), the proposed regulations (REG–113839–22) preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. These final regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These final regulations do not have federalism implications and do not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

Drafting Information

The principal authors of these regulations are Joshua P. Roffenbender, Office of Associate Chief Counsel (International), and Jeremy Aron-Dine and Gregory J. Galvin, Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** In § 1.1502–80, reserved paragraph (i) and paragraph (j) are added to read as follows:

§ 1.1502–80 Applicability of other provisions of law.

* * * * *

(i) [Reserved]

(j) *Special rules for application of section 951(a)(2)(B) to distributions to which section 959(b) applies*—(1) *Single United States shareholder treatment.* In determining the amount described in section 951(a)(2)(B) that is attributable to distributions to which section 959(b)

applies, members of a group are treated as a single United States shareholder (within the meaning of section 951(b) (or section 953(c)(1)(A), if applicable)) for purposes of determining the part of the year during which such shareholder did not own (within the meaning of section 958(a)) the stock described in section 951(a)(2)(A). The purpose of this paragraph (j) is to facilitate the clear reflection of income of a consolidated group by ensuring that the location of ownership of stock of a foreign corporation within the group does not affect the amount of the group's income by reason of sections 951(a)(1)(A) and 951A(a).

(2) *Examples.* The following examples illustrate the application of paragraph (j)(1) of this section. For purposes of the examples in this paragraph (j)(2): M1 and M2 are members of a consolidated group of which P is the common parent (P group); each of CFC1, CFC2, and CFC3 is a controlled foreign corporation (within the meaning of section 957(a)) with the U.S. dollar as its functional currency (within the meaning of section 985); the taxable year of all entities is the calendar year for Federal income tax purposes; and a reference to stock owned means stock owned within the meaning of section 958(a). These examples do not address common law doctrines or other authorities that might apply to recast a transaction or to otherwise affect the tax treatment of a transaction.

(i) *Example 1: Intercompany transfer of stock of a controlled foreign corporation*—(A) *Facts.* Throughout Year 1, M1 directly owns all the stock of CFC1, which directly owns all the stock of CFC2. In Year 1, CFC2 has $100x of subpart F income (as defined in section 952). M1's pro rata share of CFC2's subpart F income for Year 1 is $100x, which M1 includes in its gross income under section 951(a)(1)(A). In Year 2, CFC2 has $80x of subpart F income and distributes $80x to CFC1 (the CFC2 Distribution). Section 959(b) applies to the entire CFC2 Distribution. On December 29, Year 2, M1 transfers all of its CFC1 stock to M2 in an exchange described in section 351(a). As a result, on December 31, Year 2 (the last day of Year 2 on which CFC2 is a controlled foreign corporation), M2 owns 100% of the stock of CFC1, which owns 100% of the stock of CFC2.

(B) *Analysis.* Under paragraph (j)(1) of this section, in determining the amount described in section 951(a)(2)(B) that is attributable to the CFC2 Distribution, all members of the P group are treated as a single United States shareholder for purposes of determining the part of Year 2 during which such shareholder did not own the stock of CFC2. Thus, the ratio of the number of days in Year 2 that such United States shareholder did not own the stock of CFC2 to the total number of days in Year 2 is 0/365. The amount described in section 951(a)(2)(B) is $0, M2's pro rata share of CFC2's subpart F income for Year 2 is $80x ($80x–$0), and M2 must include $80x in its gross income under section 951(a)(1)(A).

(ii) *Example 2: Transfer of stock of a controlled foreign corporation between controlled foreign corporations*—(A) *Facts.* The facts are the same as in paragraph (j)(2)(i)(A) of this section (the facts in *Example 1*), except that M1 does not transfer its CFC1 stock to M2. Additionally, throughout Year 1 and from January 1, Year 2, to December 29, Year 2, M2 directly owns all 90 shares of the only class of stock of CFC3. Further, on December 29, Year 2, CFC3 acquires all the CFC2 stock from CFC1 in exchange for 10 newly issued shares of the same class of CFC3 stock in a transaction described in section 368(a)(1)(B). As a result, on December 31, Year 2, M1 owns 10% of the stock of CFC2, and M2 owns 90% of the stock of CFC2.

(B) *Analysis.* Under paragraph (j)(1) of this section, in determining the amount described in section 951(a)(2)(B) that is attributable to the portion of the CFC2 Distribution with respect to each of the CFC2 stock that M1 owns on December 31, Year 2, and the CFC2 stock that M2 owns on that day, all members of the P group are treated as a single United States shareholder for purposes of determining the part of Year 2 during which such shareholder did not own such stock. In each case, the ratio of the number of days in Year 2 that such United States shareholder did not own such stock to the total number of days in Year 2 is 0/365, and the amount described in section 951(a)(2)(B) is $0. M1's and M2's pro rata shares of CFC2's subpart F income for Year 2 are $8x ($8x − $0) and $72x ($72x − $0), respectively, and M1 and M2 must include $8x and $72x in gross income under section 951(a)(1)(A), respectively.

(3) *Applicability date.* This paragraph (j) applies to taxable years for which the original consolidated Federal income tax return is due (without extensions) after February 23, 2023.

Melanie R. Krause,

Acting Deputy Commissioner for Services and Enforcement.

Approved: February 6, 2023.

Lily L. Batchelder,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2023–03457 Filed 2–22–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID: DoD–2023–OS–0010]

RIN 0790–AL11

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary of Defense, Department of Defense (DoD).

ACTION: Direct final rule with request for comments.

SUMMARY: The Department of Defense (DoD or Department) is giving concurrent notice of a new Department-wide system of records titled ''Privacy and Civil Liberties Complaints and Correspondence Records,'' DoD–0017, and this rulemaking, which is exempting portions of this system of records from certain provisions of the Privacy Act of 1974, as amended, because of national security requirements. This rule is being published as a direct final rule as the Department does not expect to receive any significant adverse comments. If such comments are received, this direct final rule will be cancelled and a proposed rule for comments will be published.

DATES: The rule will be effective on May 4, 2023, unless comments are received that would result in a contrary determination. Comments will be accepted on or before April 24, 2023.

ADDRESSES: You may submit comments, identified by docket number, Regulation Identifier Number (RIN), and title, by any of the following methods.

- *Federal Rulemaking Portal: https://www.regulations.gov.*

Follow the instructions for submitting comments.

- *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Rahwa Keleta, *OSD.DPCLTD@mail.mil,* (703) 571–0070.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, DoD is establishing a new Department-wide system of records titled ''Privacy and Civil Liberties Complaints and Correspondence Records,'' DoD–0017. This system of records covers DoD's maintenance of records about privacy or civil liberties-related complaints or correspondence submitted to DoD privacy and civil liberties offices. This system of records includes information provided by the individual authoring the correspondence or complaint.

II. Privacy Act Exemption

The Privacy Act permits Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including the provisions providing individuals with a right to request access to and amendment of their own records and accountings of disclosures of such records. If an agency intends to exempt a particular system of records, it must first go through the rulemaking process to provide public notice and an opportunity to comment on the exemption. The Office of the Secretary is amending 32 CFR part 310 to add a new Privacy Act exemption rule for this system of records. The DoD is claiming an exemption for this system of records because some of its records may contain classified national security information and providing notice, access, amendment, and disclosure of accounting of those records to an individual, as well as certain record-keeping requirements, may cause damage to national security. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), authorizes agencies to claim an exemption for systems of records that contain information properly classified pursuant to executive order. DoD is claiming an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and notice requirements, to prevent disclosure of any information properly classified pursuant to executive order, as implemented by DoD Instruction 5200.01 and DoD Manual 5200.01, Volumes 1 and 3.

III. Direct Final Rulemaking

This rule is being published as a direct final rule as the Department does not expect to receive any significant adverse comments. If such comments are received, this direct final rule will be cancelled and a proposed rule for comments will be published. If no such comments are received, this direct final rule will become effective ten days after the comment period expires.

For purposes of this rulemaking, a significant adverse comment is one that explains (1) why the rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the rule will be ineffective or unacceptable without a change. In determining whether a significant adverse comment necessitates withdrawal of this direct final rule, the Department will consider whether the comment raises an issue serious enough to warrant a substantive response had it been submitted in a standard notice-and-comment process. A comment recommending an addition to the rule will not be considered significant and adverse unless the comment explains how this direct final rule would be ineffective without the addition.

This direct final rule adds to the DoD's Privacy Act exemptions for Department-wide systems of records found in 32 CFR 310.13. Records in this system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record.

A notice of a new system of records for DoD–0017 is also published in this issue of the **Federal Register**.

Regulatory Analysis

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this rule is not a significant regulatory action under these executive orders.

Congressional Review Act (5 U.S.C. 804(2))

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. DoD will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule may take effect no earlier than 60 calendar days after Congress receives the rule report or the rule is published in the **Federal Register**, whichever is later. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates may result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, in any one year of $100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601 et seq.)

The Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency has certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule is concerned only with the administration of Privacy Act systems of records within the DoD. Therefore, the Regulatory Flexibility Act, as amended, does not require DoD to prepare a regulatory flexibility analysis.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. 3501 et seq.)

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*) was enacted to minimize the paperwork burden for individuals; small businesses; educational and nonprofit institutions;

Federal contractors; State, local, and tribal governments; and other persons resulting from the collection of information by or for the Federal Government. The Act requires agencies obtain approval from the Office of Management and Budget before using identical questions to collect information from ten or more persons. This rule does not impose reporting or recordkeeping requirements on the public.

Executive Order 13132, ''Federalism''

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This rule will not have a substantial effect on State and local governments.

Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments''

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or affects the distribution of power and responsibilities between the Federal Government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is amended as follows:

PART 310—PROTECTION OF PRIVACY AND ACCESS TO AND AMENDEMENT OF INDIVIDUAL RECORDS UNDER THE PRIVACY ACT OF 1974

■ 1. The authority citation for part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

■ 2. Section 310.13 is amended by adding paragraph (e)(13) to read as follows:

§ 310.13 Exemptions for DoD-wide systems.

* * * * *

(e) * * *

(13) *System identifier and name.* DoD–0017, ''Privacy and Civil Liberties Complaints and Correspondence.''

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3); (d)(1), (2), (3), and (4); (e)(1); (e)(4)(G), (H), and (I); and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections of the Privacy Act of 1974, as amended, pursuant to exemption (k)(1) is justified for the following reasons:

(A) *Subsections (c)(3), (d)(1), and (d)(2).* Records in this system of records may contain information concerning individuals that is properly classified pursuant to executive order. Application of exemption (k)(1) for such records may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records to an individual may cause damage to national security. Accordingly, application of exemption (k)(1) may be necessary.

(B) *Subsections (d)(3) and (4).* These subsections are inapplicable to the extent an exemption is claimed from (d)(1) and (d)(2).

(C) *Subsection (e)(1).* Records within this system may be properly classified pursuant to executive order. In the collection of information for privacy and civil liberties complaints or correspondence, it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of gathering information to respond to the correspondence or complaint. Additionally, disclosure of classified records to an individual may cause damage to national security. Accordingly, application of exemption (k)(1) may be necessary.

(D) *Subsections (e)(4)(G) and (H) and Subsection (f).* These subsections are inapplicable to the extent exemption is claimed from the access and amendment provisions of subsection (d). Because portions of this system are exempt from the individual access and amendment provisions of subsection (d) for the reasons noted above, DoD is not required to establish requirements, rules, or procedures with respect to such access or amendment provisions. Providing notice to individuals with respect to the existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access, view, and seek to amend records pertaining to themselves in the system would potentially undermine national security and the confidentiality of classified information. Accordingly, application of exemption (k)(1) may be necessary.

(E) *Subsection (e)(4)(I).* To the extent that this provision is construed to require more detailed disclosure than the broad information currently published in the system notice concerning categories of sources of records in the system, an exemption from this provision is necessary to protect national security and the confidentiality of sources and methods, and other classified information.

(iv) *Exempt records from other systems.* In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

Dated: February 17, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–03744 Filed 2–22–23; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

Approval and Promulgation of Implementation Plans

CFR Correction

This rule is being published by the Office of the Federal Register to correct an editorial or technical error that appeared in the most recent annual revision of the Code of Federal Regulations.

In Title 40 of the Code of Federal Regulations, part 52 (§ 52.2020 to the end of part 52), revised as of July 1, 2022, in § 52.2275, remove the first paragraph (m).

[FR Doc. 2023–03689 Filed 2–22–23; 8:45 am]

BILLING CODE 0099–10–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120404257–3325–02; RTID 0648–XC788]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; 2023 Commercial Longline Closure for Golden Tilefish in the South Atlantic

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements an accountability measure for the commercial longline component for golden tilefish in the exclusive economic zone (EEZ) of the South Atlantic. Commercial landings of golden tilefish harvested by longline gear are projected to reach the commercial quota for the longline component by February 26, 2023. Therefore, NMFS closes the commercial longline component of golden tilefish in the South Atlantic EEZ. This closure is necessary to protect the golden tilefish resource.

DATES: This temporary rule is effective from 12:01 a.m. eastern time on February 26, 2023, through December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes golden tilefish and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council (Council) and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The commercial sector for golden tilefish has two components, each with its own quota: the longline and hook-and-line components (50 CFR 622.190(a)(2)). The commercial annual catch limit (ACL) for golden tilefish is allocated 75 percent to the longline component and 25 percent to the hook-and-line component. The total commercial ACL, which is equivalent to the total commercial quota, is 331,740 lb (150,475 kg) in gutted weight. The longline component quota is 248,805 lb (112,856 kg) in gutted weight.

Under 50 CFR 622.193(a)(1)(ii), NMFS is required to close the commercial longline component for golden tilefish when its quota has been reached or is projected to be reached by filing a notification to that effect with the Office of the Federal Register. After this closure, golden tilefish may not be commercially fished or possessed by a vessel with a golden tilefish longline endorsement. NMFS has determined that the commercial quota for the golden tilefish longline component in the South Atlantic will be reached by February 26, 2023. Accordingly, the commercial longline component of South Atlantic golden tilefish is closed effective at 12:01 a.m. eastern time on February 26, 2023, and will remain closed until the start of the next fishing year on January 1, 2024.

During the commercial longline closure, golden tilefish may still be commercially harvested using hook-and-line gear on a vessel with a commercial South Atlantic unlimited snapper-grouper permit without a longline endorsement until the hook-and-line quota specified in 50 CFR 622.190(a)(2)(ii) is reached. A vessel with a golden tilefish longline endorsement is not eligible to fish for or possess golden tilefish using hook-and-line gear under the hook-and-line commercial trip limit, as specified in 50 CFR 622.191(a)(2)(ii). During the commercial longline closure, the recreational bag and possession limits specified in 50 CFR 622.187(b)(2)(iii) and (c)(1), respectively, apply to all harvest or possession of golden tilefish in or from the South Atlantic EEZ by a vessel with a golden tilefish longline endorsement.

The sale or purchase of longline-caught golden tilefish taken from the South Atlantic EEZ is prohibited during the commercial longline closure. The operator of a vessel with a valid Federal commercial vessel permit for South Atlantic snapper-grouper and a valid commercial longline endorsement for golden tilefish with golden tilefish on board must have landed and bartered, traded, or sold such golden tilefish before February 26, 2023. The prohibition on sale or purchase does not apply to the sale or purchase of longline-caught golden tilefish that were harvested, landed ashore, and sold before February 26, 2023, and were held in cold storage by a dealer or processor. Additionally, the recreational bag and possession limits and the sale and purchase prohibitions under the commercial closure apply to a person on board a vessel with a golden tilefish longline endorsement, regardless of whether the golden tilefish are harvested in state or Federal waters, as specified in 50 CFR 622.190(c)(1).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 622.193(a)(1)(ii), issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment is unnecessary and contrary to the public interest. Such procedures are unnecessary because the regulations associated with the commercial closure of the golden tilefish longline component have already been subject to notice and public comment, and all that remains is to notify the public of the commercial longline component closure. Prior notice and opportunity for public comment on this action is contrary to the public interest because of the need to immediately implement the commercial component closure to protect the South Atlantic golden tilefish resource. The capacity of the longline fishing fleet allows for rapid harvest of the commercial longline component quota, and any delay in the commercial closure could result in the commercial longline component quota being exceeded. Prior notice and opportunity for public comment would require time and would potentially result in a harvest that exceeds the commercial quota.

For the reasons stated earlier, the Assistant Administrator for Fisheries also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 17, 2023.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–03755 Filed 2–17–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 36
Thursday, February 23, 2023

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.

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 210

[Docket No. 2023–2]

Fees for Late Royalty Payments Under the Music Modernization Act

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notification of inquiry.

SUMMARY: The U.S. Copyright Office is issuing a notification of inquiry soliciting public comments regarding when fees for late royalty payments should be assessed in connection with reporting by digital music providers under the Music Modernization Act's blanket license.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on April 10, 2023. Written reply comments must be received no later than 11:59 p.m. Eastern Time on May 9, 2023.

ADDRESSES: For reasons of governmental efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office's website at *https://copyright.gov/rulemaking/mma-late-fees/.* If electronic submission of comments is not feasible due to lack of access to a computer or the internet, please contact the Copyright Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at *meft@copyright.gov* or telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (the ''MMA'') substantially modified the compulsory ''mechanical'' license for reproducing and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.[1] It did so by switching from a song-by-song licensing system to a blanket licensing regime that became available on January 1, 2021 (the ''license availability date''),[2] administered by a mechanical licensing collective (the ''MLC'') designated by the Copyright Office (the ''Office'').[3] Digital music providers (''DMPs'') are able to obtain this new statutory mechanical blanket license (the ''blanket license'') to make digital phonorecord deliveries of nondramatic musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as ''covered activity'' where such activity qualifies for a blanket license), subject to various requirements, including reporting obligations.[4] DMPs also have the option to engage in these activities, in whole or in part, through voluntary licenses with copyright owners.

A. The Copyright Royalty Judges' Late Fee Regulations

Under section 115, the Copyright Royalty Judges (''CRJs'') are responsible for setting the blanket license's rates and terms of royalty payments. As part of this ratesetting authority, the CRJs' determinations ''may include terms with respect to late payment[s]'' (''late fees'').[5] The Office has a corresponding responsibility to oversee the administration of the blanket license, including promulgating regulations governing reporting and payment requirements for DMPs. The MMA added a new provision to section 115 to address the new blanket license, stating that ''[l]ate fees for past due royalty payments shall accrue from the due date for payment until payment is received by the [MLC].'' [6]

The currently operative late fee provision was adopted by the CRJs as part of an approved settlement in the *Phonorecords IV* proceeding, which covers the time period 2023 through 2027.[7] The provision states that ''[a] Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) [8] or 17 U.S.C. 115(d)(4)(A)(i),[9] as applicable and detailed in part 210 [10] of this title.'' [11] It further provides that ''[l]ate fees shall accrue from the due date until the Copyright Owner receives payment.'' [12] In adopting the parties' settlement, the CRJs found that the late fee provision was ''not unreasonable.'' [13]

[1] Public Law 115–264, 132 Stat. 3676 (2018).

[2] 17 U.S.C. 115(e)(15).

[3] As permitted under the MMA, the Office also designated a digital licensee coordinator (the ''DLC'') to represent licensees in proceedings before the Copyright Royalty Judges and the Office, to serve as a non-voting member of the MLC, and to carry out other functions. 84 FR 32274 (July 8, 2019).

[4] 17 U.S.C. 115(d).

[5] *Id.* at 803(c)(7).

[6] *Id.* at 115(d)(8)(B)(i).

[7] 87 FR 80448 (Dec. 30, 2022).

[8] Section 115(c)(2)(I) states that, except as provided in section 115(d)(4)(A)(i), ''royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding.''

[9] Section 115(d)(4)(A)(i) states that ''[a] digital music provider shall report and pay royalties to the [MLC] under the blanket license on a monthly basis in accordance with . . . subsection (c)(2)(I), except that the monthly reporting shall be due on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period.''

[10] ''Part 210'' refers to the Office's regulations governing reporting and payments under section 115.

[11] 37 CFR 385.3.

[12] *Id.* Parties in the most recent section 115 ratesetting proceeding recognized that this language ''does not acknowledge that the [MLC] has responsibility for collecting payment under the blanket license for digital uses'' and moved to add the following language to the end of the quoted language: ''except that where payment is due to the mechanical licensing collective under 17 U.S.C. 115(d)(4)(A)(i), late fees shall accrue from the due date until the mechanical licensing collective receives payment.'' Mot. to Req. Issuance of Amendment to Determination at 1–2, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), Copyright Royalty Bd., No. 21–CRB–0001–PR (2023–2027) (Jan. 10, 2023), *https://app.crb.gov/document/download/27417.* The current provision is similar to the CRJs' pre-MMA late fee regulations for the section 115 license. *See, e.g.,* 37 CFR 385.4 (2018) (''A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in [sec.] 210.16(g)(1) of this title. Late fees shall accrue from the due date until payment is received by the Copyright Owner.'').

[13] 87 FR 80448, 80452 n.20.

B. The Office's September 2020 Rule and Adjustments

On September 17, 2020, the Office issued an interim rule adopting regulations concerning reporting and payment requirements under the blanket license (the ''September 2020 Rule'').[14] The September 2020 Rule addressed the ability of DMPs to make adjustments to monthly and annual reports and related royalty payments, including to correct errors and replace estimated royalty calculation inputs (*e.g.,* the amount of applicable public performance royalties) with finally determined figures.[15] The interim regulations permit DMPs to make adjustments in other situations as well, such as in exceptional circumstances, following an audit, or in response to a change in the applicable statutory rates or terms adopted by the CRJs.[16]

With respect to the timing of the DMPs' reports and payments, their monthly reports of usage and related royalty payments must be delivered to the MLC no later than 45 days after the end of the monthly reporting period.[17] Reports of adjustment adjusting monthly reports of usage must either be combined with the annual report of usage covering the relevant monthly report or delivered to the MLC before such annual report.[18] Annual reports of usage must be delivered to the MLC no later than the 20th day of the sixth month following the end of the DMP's fiscal year covered by the annual report.[19] Reports of adjustment adjusting annual reports of usage must be delivered to the MLC no later than 6 months after the occurrence of a relevant triggering event.[20] Any underpayment of royalties associated with a report of adjustment must be paid to the MLC contemporaneously with delivery of the report of adjustment or promptly after receiving an invoice from the MLC.[21]

During the course of the rulemaking proceeding that culminated in the September 2020 Rule, interested parties, including the MLC and DLC, raised opposing views about whether late fees adopted by the CRJs apply to royalty payments made in connection with reports of adjustment.[22] The DLC proposed that the Office adopt regulations to clarify that adjustments to estimates are not a basis for assessing late fees where a DMP makes its estimates and adjustments in accordance with the Office's regulations, including applicable reporting deadlines.[23] In support of its proposal, the DLC said that ''the late fee is meant to ensure that digital music providers are following the regulations,'' and ''[i]f a service is following the regulations by making a reasonable estimate of an input it does not know the value of, it should not be penalized with a late fee even if it so happens that the estimate is too low.'' [24] The MLC and others disagreed with the DLC's position, and the MLC proposed regulatory text providing that no estimate shall change or affect the due date for royalty payments or the applicability of late fees to any underpayment resulting from an estimate.[25] In support of its proposal, the MLC stated that the relevant due date is the monthly due date set by statute regardless of any adjustment, and that ''[t]o permit DMPs to estimate inputs in a manner that results in underpayment to songwriters and copyright owners, without the penalty of late fees, encourages DMPs to underpay, to the detriment of songwriters and copyright owners.'' [26]

After reviewing the relevant comments, the Office explained that it ''appreciates the need for relevant regulations to avoid unfairly penalizing DMPs who make good faith estimates from incurring late fees due to subsequent finalization of those inputs outside the DMPs' control, and also to avoid incentivizing DMPs from applying estimates in a manner that results in an initial underpayment that delays royalty payments to copyright owners and other songwriters.'' [27] The Office, however, declined to adopt a rule addressing the interplay between the CRJs' late fee regulation and the Office's provisions for adjustments because it was not clear at the time of the September 2020 Rule that doing so would be the best course, ''particularly where the CRJs may wish themselves to take the occasion of [the *Phonorecords III*] remand or otherwise update their operative regulation in light of the [September 2020 Rule].'' [28] At the time, the Office said it would instead ''monitor the operation of this aspect of the [September 2020 Rule], and as appropriate in consultation with the CRJs.'' [29]

C. Current Status

Since the September 2020 Rule, however, the CRJs have not taken any action on the late fee issue and have not indicated that they plan to do so. During this same time period, the MLC and DLC submitted comments in response to a May 2022 amendment to the September 2020 Rule that again raised the issue of late fees and confirmed their continued disagreement on the subject.[30] Both the MLC and DLC requested the Office to provide guidance.[31] The DLC requested that the Office ''specify that when both the initial estimated payments and the later

[14] 85 FR 58114 (Sept. 17, 2020). That proceeding involved multiple rounds of public comments through a notification of inquiry (''NOI''), 84 FR 49966 (Sept. 24, 2019), a notice of proposed rulemaking (''NPRM''), 85 FR 22518 (Apr. 22, 2020), and an *ex parte* communications process. Guidelines for *ex parte* communications, along with records of such communications, including those referenced herein, are available at *https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html.* All Office rulemaking activity, including public comments, as well as educational material regarding the MMA, can currently be accessed via navigation from *https://www.copyright.gov/music-modernization.* References to public comments in the Office's proceedings are either cited in full or are by party name (abbreviated where appropriate), followed by ''NOI Initial Comments,'' ''NOI Reply Comments,'' ''NPRM Comments'' or ''*Ex Parte* Letter,'' as appropriate.

[15] 37 CFR 210.27(d)(2)(i), (f), (g)(3)–(4), (k).

[16] *Id.* at 210.27(k)(6).

[17] *Id.* at 210.27(g)(1); *see* 17 U.S.C. 115(d)(4)(A)(i).

[18] 37 CFR 210.27(g)(4)(i), (k)(1).

[19] *Id.* at 210.27(g)(3).

[20] *Id.* at 210.27(g)(4)(ii).

[21] *Id.* at 210.27(k)(4).

[22] 85 FR 58114, 58136–37; 85 FR 22518, 22530.

[23] DLC NOI Reply Comments at 16–17, Add. A–8; DLC NPRM Comments at 14.

[24] DLC NOI Reply Comments at 16–17 (further asserting that ''if the rule were otherwise, PROs could delay finalizing agreements (while still being paid interim royalties) with the purpose of causing digital service providers to have to pay late fees to publishers as a result''); *see also* DLC NPRM Comments at 14 (''Although the CRJs set the *amount* of the late fee, the Office is responsible for establishing *due dates* for adjusted payments. It is those due dates that establish whether or not a late fee is owed.'').

[25] MLC NPRM Comments at 36–37, App. C at xiv; MLC *Ex Parte* Letter at 7–8 (Feb. 26, 2020); *see also* AIMP NPRM Comments at 4–5 (''[L]ate royalty payments have been a significant problem for copyright owners, and the implementation of a late fee for any royalty amounts paid late was a significant step forward. The regulations as proposed, should remove any doubt that might interfere with those late fee payments.''); Peermusic NPRM Comments at 5 (''[W]e appreciate the Copyright Office's rejection of the DLC request that underpayments, when tied to 'estimates,' should not be subject to the late fee provision of the CRJ regulations governing royalties payable under Section 115, and we would request that the regulations be clear on this point.'').

[26] MLC NPRM Comments at 36–37; *see also* AIMP NPRM Comments at 4–5 (''[E]xpanded use of estimates, and the result of retroactive adjustment of royalty payments, does create increased risk and additional burden to copyright owners.'').

[27] 85 FR 58114, 58137.

[28] *Id.*

[29] *Id.*

[30] MLC *Ex Parte* Letter at 8 (Oct. 17, 2022); MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022); DLC Comments to Supplemental Interim Rule at 3, Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, U.S. Copyright Office, No. 2020–5 (July 8, 2022), *https://www.regulations.gov/comment/COLC-2020-0005-0029* (''DLC July 2022 Comments'').

[31] *See* 85 FR at 58136–37; MLC *Ex Parte* Letter at 8 (Oct. 17, 2022); MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022); DLC July 2022 Comments at 3.

adjustment of such payments to account for the updated and finalized information are made according to the timelines established in the regulations, such payments are proper and have been made by the 'due date for payment' as set forth in 17 U.S.C. [sec.] 115(d)(8)(B)(i).'' [32] The MLC opposed the DLC's position [33] and instead proposed regulatory language providing that nothing in the adjustment provisions ''shall change a blanket licensee's liability for late fees, where applicable.'' [34]

The Office typically does not offer interpretations of the CRJs' regulations. However, it is squarely within the Office's authority to interpret the meaning of ''due date'' as used in the statute.[35] Moreover, Congress expressly authorized the Office to issue regulations establishing the adjustment reporting and payment regime.[36] Thus, the Office is publishing this notification to facilitate a full airing of all relevant issues and to expand the public record to better inform what action the Office should take to address this matter.

II. Subjects of Inquiry

The Office invites written comments on the following subjects:

1. Please provide your views regarding whether a DMP is obligated to pay late fees when it makes an adjustment that reveals an underpayment of royalties. For example, should late fees apply to all adjustments, should they apply to no adjustments, or should they apply only to certain types of adjustments? Should it matter whether a DMP acted reasonably and in good faith and complied with all applicable regulations when it made the reporting or payment that later needed to be adjusted? Common scenarios, such as adjustments to fix errors in prior reporting as well as the scenarios referenced in 37 CFR 210.27(k)(6), should be discussed. Proposals with specific regulatory language are encouraged.

2. Please provide detailed legal arguments supporting your views about the application of late fees in the context of adjustments, including an analysis of section 115's text and the legislative history and intent behind any relevant statutory provisions. In particular, commenters should discuss 17 U.S.C. 115(d)(8)(B)(i) and how that provision should be read in connection with the statutory reporting and payment due date provisions in 17 U.S.C. 115(c)(2)(I) and (d)(4)(A)(i) as well as the Office's regulatory due date provisions for adjustments in 37 CFR 210.27(g)(3), (g)(4), and (k)(1). Commenters should also address how their position is consistent with other provisions referring to due dates, such as 17 U.S.C. 115(c)(2)(J), (d)(3)(G)(i)(I), and (d)(4)(E).

3. Please discuss your understanding of the history and purpose of the CRJs' authority under 17 U.S.C. 803(c)(7), as adjusted by 17 U.S.C. 115(d)(8)(B), to adopt late fees and of the actual late fee provisions adopted by the CRJs, including in contexts outside of section 115 if relevant.[37]

4. What is the appropriate division of the Office's and CRJs' respective regulatory authority in this area? For example, can the Office or CRJs adopt a rule pursuant to which late fees may or may not apply depending on the type of adjustment at issue (*e.g.,* where the effect of a hypothetical rule might be that late fees apply to adjustments to estimates, but not to adjustments responding to royalty rate changes adopted by the CRJs)? Is the Office's authority more limited in relation to the CRJs' authority (*e.g.,* to determining the applicable due date after which a payment is deemed late)?

5. Please discuss any relevant music industry practices surrounding late fees and adjustments. For example:

a. Did DMPs typically pay late fees to copyright owners in connection with adjustments under section 115 prior to the MMA's new blanket licensing regime? If not, did copyright owners make any demands for late fees or otherwise respond to the failure to pay late fees?

b. How do voluntary licenses involving covered activity operate in the context of late fees and adjustments? Do such voluntary licenses typically contain late fee provisions? Are they analogous to the one adopted by the CRJs in 37 CFR 385.3? How are they applied to adjustments?

c. Does the nature of a payment—as a royalty payment, late fee payment, interest payment, or some other kind of payment—received by a musical work copyright owner (whether from the MLC or directly from a licensee) typically affect how the payment is accounted and paid through to the copyright owner's songwriters for mechanical uses of their works made by DMPs or other licensees? If so, please discuss the general industry practice.[38]

d. Are any of the terms of late fee settlements between publishers and record companies who use the section 115 license instructive for the Office to consider in the context of this proceeding?[39]

6. Under 37 CFR 210.27(d)(2)(i), there are several requirements that DMPs must comply with to make use of an estimate, including that the estimate must be reasonable and determined in accordance with generally accepted accounting principles (''GAAP''), and the DMP's reporting must explain the basis for the estimate and why it was necessary. Aside from assessing late fees, could concerns about DMPs potentially abusing the adjustment process be mitigated by enhancing these requirements? Could such concerns be addressed through other additional regulations surrounding estimates or adjustments that could assist the MLC in identifying any DMP noncompliance?

a. Should the Office consider adopting a rule providing that if a DMP's estimate results in an underpayment of more than a certain amount or percentage, the estimate is *per se* unreasonable and, thus, not in compliance with the Office's regulations?[40]

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[32] DLC July 2022 Comments at 3.

[33] MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022).

[34] MLC *Ex Parte* Letter at 8 (Oct. 17, 2022).

[35] *See* 17 U.S.C. 115(d)(8)(B)(i) (''Late fees for past due royalty payments shall accrue from the due date for payment until payment is received by the mechanical licensing collective.'').

[36] *Id.* at 115(d)(4)(A)(iv)(II) (''The Register of Copyrights shall adopt regulations . . . regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods.''); *see id.* at 115(d)(12)(A).

[37] *See, e.g.,* 37 CFR 380.2(d), 380.6(g), 380.22(f), 382.3(e), 382.7(g), 383.4(a), 384.4(e), 385.3. For example, in the section 114 webcasting context, the CRJs have stated that ''[i]nconsequential good-faith omissions or errors should not warrant imposition of the late fee,'' 72 FR 24084, 24108 (May 1, 2007), and have adopted a late fee provision allowing SoundExchange (the designated collective under the section 114 license) to ''waive or lower late fees for immaterial or inadvertent failures of a Licensee to make a timely payment or submit a timely Statement of Account.'' 37 CFR 380.2(d)(1).

[38] *See* Comments of Helienne Lindvall, David Lowery, and Blake Morgan on Proposed Regulations for Subparts A, C and D at 12, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), Copyright Royalty Bd., No. 21–CRB–0001–PR (2023–2027) (Dec. 7, 2022), *https://app.crb.gov/document/download/27356* (asking the CRJs to adopt ''clarifying language that would require the applicable Copyright Owner to treat any late fee payment so received as an additional royalty payment under any publishing agreement'' because, otherwise, ''a late fee might be treated as a catalog-wide penalty that a Copyright Owner collecting the late fee could argue should be retained for its own account'').

[39] *See, e.g., NMPA Late Fee Program, http://www.nmpalatefeesettlement.com* (last visited Feb. 2, 2023).

[40] *Cf.* 17 U.S.C. 115(d)(4)(D)(i)(VI) (requiring a DMP to bear the costs of the MLC's audit if the auditor ''determines that there was an underpayment by the [DMP] of not less than 10 percent''); Dep't of the Treas., Internal Revenue Serv., Instructions for Form 2210, Underpayment of Estimated Tax by Individuals, Estates, and Trusts at 1–2 (2021), *https://www.irs.gov/pub/irs-pdf/*

7. If the Office concludes that late fees do not apply to certain types of adjustments, could the Office consider adopting regulations requiring DMPs to pay interest on such adjustments to make copyright owners whole for any lost time value of money? [41] If so, what should such regulations look like? What is an appropriate interest rate? Should such regulations be similar to the Office's current regulations assessing interest on royalties paid with late or amended statements of account under the section 111 and section 119 statutory licenses? [42] Are there any relevant music industry practices related to assessing interest on adjusted royalties?

8. Please provide any additional pertinent information not referenced above that the Office should consider in this proceeding.

Dated: February 17, 2023.

Suzanne V. Wilson,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2023–03738 Filed 2–22–23; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2023–0069; FRL–10579–01–OCSPP]

Receipt of a Pesticide Petition Filed for Residues of Pesticide Chemicals in or on Various Commodities January 2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of filing of petition and request for comment.

SUMMARY: This document announces the Agency's receipt of an initial filing of a pesticide petition requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before March 27, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0069, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (BPPD) (7511M), main telephone number: (202) 566–1400, email address: *BPPDFRNotices@epa.gov;* or Dan Rosenblatt, Registration Division (RD) (7505T), main telephone number: (202) 566–2875, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

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

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

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the Agency taking?

EPA is announcing receipt of a pesticide petition filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the request before responding to the petitioner. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petition described in this document contains data or information prescribed in FFDCA section 408(d)(2), 21 U.S.C. 346a(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition that is the subject of this document, prepared by the petitioner, is included in a docket EPA has created for this rulemaking.

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i2210.pdf (discussing thresholds for the penalty for underpaying estimated tax).

[41] *See* SONA & NSAI *Ex Parte* Letter at 2 (July 7, 2022) (asking the Office to ''consider whether it has the authority to require interest to be paid'' by DMPs if there is a delay in payment).

[42] *See* 37 CFR 201.11(i), 201.17(k)(4); 54 FR 14217, 14220 (Apr. 10, 1989) (adopting rule for section 111 and explaining that ''[t]he Copyright Office does not wish to penalize cable systems for late and amended filings, but rather wishes to compensate copyright owners for the present value loss of royalties which should have been deposited on a timely basis''); 54 FR 27873, 27874–75 (July 3, 1989) (adopting rule for section 119); 57 FR 61832 (Dec. 29, 1992) (amending the applicable interest rate).

The docket for this petition is available at *https://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

A. Notice of Filing—Amend Tolerances for Non-Inerts

1. *PP 2E9030.* EPA–HQ–OPP–2022–0887. Interregional Research Project Number 4 (IR–4), IR–4 Project Headquarters, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests to amend 40 CFR 180.677 by removing established tolerances for residues of the insecticide, cyflumetofen: (2-methoxyethyl α-cyano-α-[4-(1,1-dimethylethyl)phenyl]-β-oxo-2-(trifluoromethyl)benzenepropanoate), including its metabolites and degradates, in or on the following raw agricultural commodities: Cucumber at 0.3 parts per million (ppm); grape at 0.60 ppm; and strawberry at 0.6 ppm. *Contact:* RD.

2. *PP 2E9032.* EPA–HQ–OPP–2022–0958. FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104, requests to amend the tolerance in 40 CFR 180.672 for residues of the cyantraniliprole, in or on olive at 3.0 ppm. The Adequate analytical methodology, high-pressure liquid chromatography with ESI-MS/MS detection, is available for enforcement purposes is used to measure and evaluate the chemical, cyantraniliprole. *Contact:* RD.

B. New Tolerances for Non-Inerts

1. *PP 2E9030.* EPA–HQ–OPP–2022–0887. IR–4, IR–4 Project Headquarters, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests to establish tolerances in 40 CFR 180.677 for residues of the insecticide, cyflumetofen: (2-methoxyethyl α-cyano-α-[4-(1,1-dimethylethyl)phenyl]-β-oxo-2-(trifluoromethyl)benzenepropanoate), including its metabolites and degradates, in or on the following raw agricultural commodities: Berry, low growing, subgroup 13–07G at 0.6 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.6 ppm; and vegetable, cucurbit, group 9 at 2 ppm. Analytical method LC–MS/MS was used to measure and evaluate the chemical. *Contact:* RD.

2. *PP 2E9032.* EPA–HQ–OPP–2022–0958. FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide, cyantraniliprole, in or on grape, table at 2.0 ppm; avocado at 0.4 ppm; and mango at 0.7 ppm. The adequate analytical methodology, high-pressure liquid chromatography with ESI–MS/MS detection, is available for enforcement purposes is used to measure and evaluate the chemical, cyantraniliprole. *Contact:* RD.

C. Amended Tolerance Exemptions for Non-Inerts (Except PIPS)

1. *PP 1E8975.* EPA–HQ–OPP–2022–0797. IR–4, North Carolina State University, 1730 Varsity Drive, Suite 210, Venture IV, Raleigh, NC 27606, on behalf of Texas Corn Producers Board, 4205 N. Interstate 27, Lubbock, Texas 79403, requests to amend an exemption from the requirement of a tolerance in 40 CFR part 180.1338 for residues of the fungicides *Aspergillus flavus* strains TC16F, TC35C, TC38B, and TC46G in or on all food and feed commodities of field corn, popcorn, and sweet corn. The petitioner believes no analytical method is needed because it is expected that, when used as proposed, *Aspergillus flavus* strains TC16F, TC35C, TC38B, and TC46G will not result in residues that are of toxicological concern. *Contac*t: BPPD.

D. New Tolerance Exemptions for Inerts (Except PIPS)

1. *PP IN–11713.* EPA–HQ–OPP–2023–0039. Delta Analytical Corporation, 12510 Prosperity Drive Suite 160, Silver Spring, Maryland 20904, on behalf of Borchers Americas, Inc., 811 Sharon Drive, Westlake, OH 44145 requests to establish an exemption from the requirement of a tolerance for residues of oxirane, 2-methyl-, polymer with oxirane, ether with D-glucitol (6:1), (CAS Reg. No. 56449–05–9), with a minimum average molecular weight (in amu) of 10,145 when used as a pesticide inert ingredient in pesticide formulations under 40 CFR 180.960. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

2. *PP IN–11716.* EPA–HQ–OPP–2023–0003. Spring Regulatory Sciences (6620 Cypresswood Dr., Suite 250 S pring, TX 77379) on behalf of Evonik Corporation (P.O. Box 34628, Richmond, Virginia 23234), requests to establish an exemption from the requirement of a tolerance for residues of oxirane, methyl-, polymer with oxirane, monobutyl ether (CAS Reg. No. 9038–95–3) minimum number average molecular weight 800 g/mol and oxirane, 2-methyl-, polymer with oxirane, monomethyl ether (CAS Reg. No. 9063–06–3) minimum number average molecular weight 800 g/mol when used as a pesticide inert ingredient (adjuvant, carrier, diluent, or solvent) in pesticide formulations applied pre- and post-harvest under 40 CFR 180.910 and in/on animals under 180.930. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

E. New Tolerance Exemptions for PIPS

1. *PP 2F29001.* EPA–HQ–OPP–2022–0988. Pioneer Hi-Bred International, Inc., 8325 NW 62nd Avenue Johnston, IA 50131, USA, requests to establish an exemption from the requirement of a tolerance in 40 CFR part 174 for residues of the plant-incorporated protectant (PIP) *Bacillus thuringiensis* Cry1B.34 protein in or on maize. The analytical method a validated ELISA was used to determine the concentration of Cry1Da2 protein in maize tissues, including grain and forage is available to EPA for the detection and measurement of the pesticide residues. *Contact:* BPPD.

2. *PP 2F9003.* EPA–HQ–OPP–2023–0022. Pioneer Hi-Bred International, Inc., 7100 NW 62nd Avenue, P.O. Box 1000, Johnston, Iowa 50131, requests to establish an exemption from the requirement of a tolerance in 40 CFR part 174 for residues of the plant-incorporated protectant (PIP) *Bacillus thuringiensis* Cry1Da2 protein in or on maize. The analytical method a validated ELISA was used to determine the concentration of Cry1Da2 protein in maize tissues, including grain and forage is available to EPA for the detection and measurement of the pesticide residues. *Contact:* BPPD.

Authority: 21 U.S.C. 346a.

Dated: February 13, 2023.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2023–03676 Filed 2–22–23; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 88, No. 36
Thursday, February 23, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Privacy Act; Proposed New System of Records

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, and Office of Management and Budget (OMB) Circular No. A–108, notice is given that the Food and Nutrition Service (FNS) of the U.S. Department of Agriculture (USDA) is proposing to add a new system of records, entitled USDA/FNS–14, National Accuracy Clearinghouse (NAC) System to Detect Duplicate Participation. The NAC will enhance program integrity in the Supplemental Nutrition Assistance Program (SNAP) by providing a secure method for State agencies that administer SNAP (State agencies) to share information to prevent and detect duplicate participation.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11) this notice is effective upon publication, subject to a 30-day notice and comment period in which to comment on the routine uses described in the routine uses section of this system of records notice. Please submit any comments by March 27, 2023.

ADDRESSES: Interested parties may submit written comments by one of the following methods:

- *Preferred:* Federal eRulemaking Portal at *http://www.regulations.gov* provides the ability to type short comments directly into the comment field on this web page or attach a file for lengthier comments. Follow the online instructions at that site for submitting comments.
- *By email:* FNS, SNAP, State Administration Branch (SAB) at *SM.FN.SNAPSAB@usda.gov*.
- *By mail:* Maribelle Balbes, Branch Chief, SAB, SNAP, FNS, 1320 Braddock Place, Alexandria, VA 22314.
- *Instructions:* All comment submissions must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions, please contact the above individual, Maribelle Balbes, Branch Chief, SAB, SNAP, FNS at *Maribelle.Balbes@usda.gov* or 703–605–4272.

For Privacy Act questions concerning this system of records notice, please contact Mr. Michael Bjorkman, Privacy Officer, USDA, FNS, Information Management Branch, Braddock Metro Center II, 1320 Braddock Place, Alexandria, VA 22314; (703) 305–1627.

For general USDA Privacy Act questions, please contact the USDA Chief Privacy Officer, Information Security Center, Office of Chief Information Officer, USDA, Jamie L. Whitten Building, 1400 Independence Ave. SW, Washington, DC 20250; email: *USDAPrivacy@ocio.usda.gov.*

SUPPLEMENTARY INFORMATION:

Statutory Basis

The Agriculture Improvement Act of 2018 (Pub. L. 115–334, ''the 2018 Farm Bill''), amended Section 11 of the Food and Nutrition Act of 2008 (7 U.S.C. 2020, ''the Act'') to require FNS to establish an interstate data system to be known as the National Accuracy Clearinghouse (NAC) and to promulgate regulations to set requirements for use of the NAC. The Act requires State agencies to participate in the NAC matching program as both providers of data to the NAC and users of the information in the NAC that has been provided by the other State agencies to prevent individuals from receiving SNAP benefits in more than one State agency simultaneously, commonly referred to as duplicate participation.

Background

FNS is promulgating regulations to codify the NAC implementation requirements pursuant to the amendments to the Act and to ensure compliance and alignment with existing statutory and regulatory requirements, including the Privacy Act (5 U.S.C. 552a) requirements for computer matching programs.

Under existing regulations, an individual may not receive SNAP benefits from more than one State agency in the same benefit month. However, States are limited in their ability to access timely information to enforce this requirement because State agencies maintain the records for SNAP participants in their own States. The NAC will assist State agencies in preventing and detecting duplicate participation by providing a secure method for sharing current information with each other for this purpose.

Each State agency will provide information about current SNAP participants to the NAC. State agencies will then conduct matches against the NAC to determine if someone is already receiving SNAP benefits in any other State as part of the process of determining an individual's eligibility for SNAP. The NAC will also compare information provided by State agencies to detect existing duplicate participation and will notify State agencies when such matches are found.

Privacy Act

The Privacy Act of 1974 (the Privacy Act), 5 U.S.C. 552a, embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a system of records (SOR). A SOR is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that

the agency maintains, the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals to more easily find such records within the agency. Below is the description of the NAC system of records.

In accordance with 5 U.S.C. 552a(r), USDA has provided a report of this new system to the Office of Management and Budget and to Congress.

SYSTEM NAME AND NUMBER:

USDA/FNS–14, Supplemental Nutrition Assistance Program (SNAP), National Accuracy Clearinghouse (NAC) System to Detect Duplicate Participation.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The NAC is maintained in the USDA Azure cloud infrastructure environment that is used only by Federal employees and contractors and State agency employees and contractors. The data is processed and stored solely within the continental United States. The agency, U.S. Department of Agriculture, address is 1400 Independence Ave. SW, Washington, DC 20250 and the address of the third-party service provider is Microsoft, 1 Microsoft Way, Redmond, Washington 98052–6399.

SYSTEM MANAGER(S):

Director, Portfolio Management Division, Office of Information Technology, Food and Nutrition Service, 1320 Braddock Road, Alexandria, Virginia 22314. Telephone: (703) 305–2504.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 11(x) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2020(x)).

PURPOSE(S) OF THE SYSTEM:

The NAC will improve program access and customer experience by facilitating state to state communication to help State agencies promptly and accurately process SNAP recipient moves from one state to another and to enhance program integrity by providing State agencies with a tool to screen for duplicate participation to allow timely action to reduce improper payments.

Disclosure of Information:

Data protection requirements in section 11 of the Act (7 U.S.C. 2020(x)(2)(C)) restrict the disclosure of information made available by State agencies to the NAC. The data in the NAC shall only be used for the purpose of preventing duplicate participation in SNAP, shall only be retained as long as necessary to meet that need, shall be used in a manner that protects the identity and location of vulnerable individuals, and is exempt from the disclosure requirements of section 552(a) of title 5 pursuant to section 552(b)(3) of title 5. Accordingly, the information shall only be disclosed to persons directly connected with the administration or enforcement of the provisions of the Act or SNAP regulations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system are individuals who are currently receiving SNAP benefits and applicants for SNAP benefits.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system contains the following categories of records: information on SNAP participants and applicants, SNAP case information, and match resolution information. SNAP participant and applicant names, social security numbers, and dates of birth are used by the State agencies to find a positive match. However, these identifiers are not uploaded directly to the NAC. In order to protect participant information, State agencies will use a privacy-preserving record linkage (PPRL) process to convert these data elements to a secure cryptographic hash before sharing the information to the NAC. The PPRL process allows the NAC to accurately match individuals, while preventing the collection and storage of the names, social security numbers, and dates of birth in the NAC system. A positive match is identified by the NAC when two or more hashes match. State agencies are also required to provide a participant ID to the NAC to allow the State agency to connect the match in the NAC to an individual in the State agency's system. In other words, the participant ID is used to help the State agency resolve a match. When a match is found, the NAC will create a match record with a unique system-generated match ID and notify the affected State agencies of the match. State agencies will use the participant ID they provided previously, now included in the match record, to find the matched individual in the State agency's eligibility system. Additionally, there is a vulnerable individual flag that must be used, if applicable, to denote an individual that needs their identity and location protected when resolving the match.

Furthermore, information about SNAP cases are provided to assist State agencies with communication in determining the appropriate actions to take in resolving a NAC match. This case information for communication may include case number, recent certification dates, and participant closing date. To enhance program integrity and provide program oversight, the system may also contain information about the resolution of NAC matches.

RECORD SOURCE CATEGORIES:

Information in this system is provided by State agencies that administer SNAP.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Records created in this system may be disclosed, as part of a computer matching program, to Federal and State agency personnel responsible for monitoring duplicate participation in SNAP, as required by section 11(x) of the FNA (7 U.S.C. 2020(x)). Disclosure of records in this system may also be made for the permitted routine uses outlined below as long as such uses are also authorized by section 11(x) of the FNA (7 U.S.C. 2020(x)).

Permitted routine uses include the following:

(1) To the Department of Justice when: (a) USDA/FNS or any component thereof; or (b) any employee of USDA in his or her official capacity, or any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (c) the United States Government, is a party to litigation or has an interest in such litigation, and USDA determines that the records are both relevant and necessary to the litigation and the use of such records by the Department of Justice is deemed by USDA to be for a purpose that is compatible with the purpose for which USDA collected the records.

(2) In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the USDA/FNS or other Agency representing the USDA, determines that the records are both relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant and necessary to the proceeding.

(3) To a congressional office in response to an inquiry from that congressional office made at the written request of the individual about whom the record pertains.

(4) To the National Archives and Records Administration or other Federal government agencies pursuant to records management activities being conducted under 44 U.S.C. 2904 and 2906.

(5) To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

(6) To another Federal agency or Federal entity, when USDA/FNS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in: (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

(7) To appropriate agencies, entities, and persons when: (1) USDA/FNS suspects or has confirmed that there has been a breach of the system of records; (2) USDA/FNS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, USDA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with USDA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

(8) To contractors and their agents, grantees, experts, consultants, and other performing or working on a contract, service, grant, cooperative agreement, or other assignment for the USDA/FNS, when necessary to accomplish an agency function related to this system of records.

(9) When a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, USDA/FNS may disclose the record to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating, or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto, if the information disclosed is relevant to any enforcement, regulatory, investigative or prosecutive responsibility of the receiving entity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The NAC will be hosted in the USDA Azure Cloud infrastructure environment, which is FedRAMP certified. These records are electronic.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

User permission levels provide users with access to only the features and data needed within their assigned role. State agency workers who are granted access to the NAC can conduct matches against the NAC through a real-time query from the State agency's eligibility system or from directly within the NAC. The individual's name, Social Security number, and date of birth are converted to a secure cryptographic hash before the information is compared against the NAC for interstate matching. When a positive match is found, based on matching hashes, the NAC creates a match record with a unique system-generated match ID. Match records in the NAC can be retrieved by the match ID. Both State agency users and FNS staff members who are granted access to the NAC will have access to the match records to perform program administration and oversight duties. FNS staff members will also have access to monitor system metrics. Only FNS staff members with system administrator-level access to maintain the NAC system will have the ability to access the secure cryptographic hashes.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

State agencies will generally provide SNAP participant records to the NAC daily and new submissions will replace prior submissions to ensure matching is conducted against the most current, accurate information possible. When positive matches are found, indicating potential or actual duplicate participation, the match records created by the NAC will be retained for up to three years for program administration, oversight, and audit purposes. Summary or aggregate data maintained for reporting and oversight purposes will be retained in the system indefinitely.

The NAC does not yet have a NARA-approved records schedule. The proposed schedule provided to NARA for review and approval, dictates that the different information sets will be retained for different periods of time, as described above. All NAC system records except the files provided daily by State agencies will be kept indefinitely until NARA has approved the proposed records schedule for the NAC.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Administrative Safeguards: USDA safeguards records in this system according to applicable rules and policies, including all applicable USDA automated systems security and access policies. USDA has imposed strict controls to minimize the risk of compromising information in the system. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

Technical Safeguards: The NAC will utilize a robust collection of technical safeguards to ensure the integrity of the platform. The NAC is designed to meet all technical safeguards required by its system categorization in NIST 800–53. The NAC will be hosted in a secure server environment that uses a firewall to prevent interference or access from outside intruders. When accessing the NAC, Secure Socket Layer (SSL) technology protects the user's information by using both server authentication and data encryption. The NAC administrators will have a suite of security tools that can be used to increase the security of the system.

To protect sensitive participant and applicant data, names, dates of birth, and social security numbers will go through a PPRL process. This process includes the data elements being combined and masked by a SHA–512 hash by States prior to sharing that data with the NAC. To mitigate against the risk of incoming participant data files being exfiltrated, the entire message will be encrypted before it is sent to the NAC. To mitigate against the risk of PII saved in the NAC databases being exfiltrated (*e.g.,* the State ID and the hash of name, date of birth, and SSN), that data will be additionally encrypted at the database column level.

Physical Safeguards: The servers that host the NAC are stored in a FedRAMP authorized data center with strict physical access control procedures in place to prevent unauthorized access.

RECORD ACCESS PROCEDURES:

Personal information contained in this system is provided by the State agency where the individual is a SNAP participant or applicant. Individuals may obtain information about records in the system pertaining to them by submitting a written request to the system manager listed above. The

envelope and the letter should be marked ''Privacy Act Request,'' and should include the name of the individual making the request, the name of the system of records, any other information specified in the system notice and a statement of whether the requester desires to be supplied with copies by mail or email. Individuals may also directly contact the applicable State agency or local SNAP office.

Requests to the system manager must also include sufficient data for FNS to verify your identity. If the sensitivity of the records warrants it, FNS may require that you submit a signed, notarized statement indicating that you are the individual to whom the records pertain and stipulating that you understand that knowingly or willfully seeking or obtaining access to records about another individual under false pretenses is a misdemeanor punishable by fine up to $5,000. No identification shall be required, unless the records are required by 5 U.S.C. 552 to be released. If FNS determines to grant the requested access, fees may be charged in accordance with 7 CFR part 1, subpart G, 1.120 before making the necessary copies. In place of a notarization, your signature may be submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information maintained in the system should direct their requests to the System Manager listed above or to the State agency that provided the data. The request should identify each record in question, state the amendment or correction desired, and state why the individual believes that the record is not accurate, relevant, timely, or complete. The individual may submit any documentation that would be helpful. Requests sent to the system manager will be shared to the State agency that provided the data for resolution. This request must follow the procedures set forth in 7 CFR part 1, subpart G, 1.116 (Request for correction or amendment to record).

FNS is not able to change information about individuals within the NAC. State agencies serve as the authoritative source for the information they provide and are accountable for providing accurate information from their system to the NAC.

NOTIFICATION PROCEDURES:

Any individual may request information regarding this system of records, or information as to whether the system contains records pertaining to the individual, from the System Manager listed above: See RECORD ACCESS PROCEDURES.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

Cynthia Long,

Administrator, Food and Nutrition Service.

[FR Doc. 2023–03706 Filed 2–22–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Request for Information on Implementation of the Distressed Area Recompete Pilot Program

AGENCY: Economic Development Administration, U.S. Department of Commerce.

ACTION: Request for information.

SUMMARY: The Department of Commerce, through the Economic Development Administration (EDA), is seeking information to inform the planning and design of the Distressed Area Recompete Pilot (Recompete Pilot) Program. Responses to this Request for Information (RFI) will inform planning for the implementation of the Recompete Pilot Program.

DATES: Comments must be received by 5 p.m. Eastern Time on March 27, 2023. Submissions received after that date may not be considered. Written comments in response to this RFI should be submitted in accordance with the instructions in the **ADDRESSES** and **SUPPLEMENTARY INFORMATION** sections below.

ADDRESSES: Interested persons are invited to submit written comments by mail to *recompete@eda.gov.* Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Mara Quintero Campbell, Senior Advisor, via email: *MCampbell@eda.gov* or via telephone: (202) 482–9055. Please reference ''Recompete RFI'' in the subject line of your correspondence.

SUPPLEMENTARY INFORMATION:

Background

Section 10621 of the Research and Development, Competition, and Innovation Act directs the Department of Commerce to establish a pilot program to award strategy development grants and strategy implementation grants to eligible recipients representing eligible local labor markets, tribes, or local communities to ''alleviate persistent economic distress and support long-term comprehensive economic development and job creation in eligible areas.'' (15 U.S.C. 3722b; Pub. L. 117–167, Division B, Title VI, Subtitle C, Sec. 10621(a)(2), 136 Stat. 1642). Of the $1 billion authorized for the Recompete Pilot Program from fiscal year 2022 through 2026, $200 million has been made available for the program as of the publication of this RFI.

The Recompete Pilot Program will invest in distressed communities across the country to create, and connect workers to, good jobs and support long-term comprehensive economic development. The Recompete Pilot Program specifically targets areas with lower than the U.S. average labor participation by prime-age (25 to 54 years of age) workers (*i.e.,* high prime-age employment gap) and strives to make targeted interventions to spark economic activity in such areas.

The program focuses on eligible geographic areas—Tribal lands, local labor markets, and local communities [1]—that are experiencing low labor force participation. Part of the goal of this RFI is to identify the different interventions and approaches capable of making a discernible impact on prime-age employment and related indicators of economic distress, such as low household or per capita income.

EDA intends to run a rigorous, fair, and evidence-driven competition informed by the experiences of all stakeholders, economic development practitioners, and relevant policy research to guide program design, structure, and evaluation, and to ensure program impacts are distributed inclusively and equitably. This RFI is meant to encourage the field of workforce and economic development to provide evidence-based guidance that will be used to plan the implementation of the $200 million Recompete Pilot Program.

Specific Request for Information: Recompete Characteristics

1. For those who live or work in areas with high prime-age employment gaps, what barriers should be addressed to increase job placement/retention and/or job creation? What unique challenges and opportunities do you see in your community?

2. How might EDA determine how large of an investment is necessary to meaningfully advance the economy of a

[1] Eligible geographic areas are defined at 15 U.S.C. 3722b(j)(1), (3), (4), and (8).

local labor market or community with a high prime-age employment gap? What data and information are important to that determination?

a. If implementation awards were limited to the statutory minimum of $20 million, what types of initial investments would most significantly increase employment rates?

3. What scale and types of economic development interventions would be most likely to advance the economy of a locality or region with a high prime-age employment gap? For example, should the program emphasize industry sectors or be sector agnostic?

a. Are there limitations due to what's currently allowable with EDA funding?

b. Given that each eligible community will bring its own unique set of challenges and opportunities, how should EDA evaluate whether any such investments, interventions, and/or policies would be most effective in an eligible community?

c. What features of existing block grant programs should EDA adopt or avoid to increase the likelihood of alleviating persistent economic distress and increasing employment? What about these features makes them effective or ineffective?

4. What economic development assets are most predictive of long-term success from a Recompete intervention?

5. What economic development assets does a local labor market and/or community need to have to take advantage of the Recompete Pilot Program?

6. What are best practices for building local public capacity that would prepare local labor markets and/or communities for Recompete implementation and other future funding?

7. What are the most significant distinctions in the interventions needed in smaller versus larger geographic areas, or local communities versus local labor markets as defined by the statute?

8. Please provide research and evidence of interventions that work in highly distressed labor markets and/or communities to create good jobs and/or connect un- or underemployed residents to good jobs.

Specific Request for Information: Recompete Pilot Program Design

9. Are there measures in addition to prime-age employment gap (for local labor markets) and prime-age employment gap and median household income (for local communities) recommended to reach areas that are either (a) most persistently distressed, or (b) most likely to show sustained economic development progress after intervention?

10. How can federal grants and cooperative agreements be structured to ensure the impacts of the Recompete Pilot Program are shared broadly and equitably?

11. The statute permits implementation investments only in areas with an approved Recompete Plan. What elements should Recompete Plans include, and against what criteria should EDA evaluate them?

12. How should EDA evaluate Tribal prime-age population given that data from the Department of the Treasury's Coronavirus State and Local Fiscal Recovery Fund programs under title VI of the Social Security Act (42 U.S.C. 802 *et seq.*) are unlikely to be available?

13. What should EDA consider in designing the program for its current funding level of $200 million given the $1 billion vision in the program's statutory authorization? How should those considerations affect EDA's design of the program now and potentially into future years?

14. What else should EDA consider when building this program?

Specific Request for Information: Recompete Pilot Program Administration

15. What types of administrative or technical assistance will help the recipients of Recompete funding to be more successful during implementation?

16. How should EDA measure the success of the Recompete Pilot Program?

a. What would be the indications of a successful implementation investment under the Recompete Pilot Program?

17. How can the Recompete Pilot Program best complement and leverage other Federal, State, and local economic development investments (*e.g.,* HUD's Community Development Block Grant program, American Rescue Plan Act, Bipartisan Infrastructure Law, Inflation Reduction Act, CHIPS and Science Act, etc.) so that persistent economic distress is alleviated successfully?

18. What is a realistic time period (*e.g.,* 5, 10, 15 years, other?) over which to evaluate the economic development impacts of the Recompete Pilot Program and why?

Date: February 17, 2023.

Susan Brehm,

Regional Director, Economic Development Administration Chicago Regional Office.

[FR Doc. 2023–03732 Filed 2–22–23; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC791]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Ecosystem-Based Fishery Management Committee (EBFM) and Advisory Panel Chairs to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This hybrid meeting will be held on Thursday, March 16, 2023, at 9 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/1891800344390226011.*

ADDRESSES: This meeting will be held at the Radisson Airport Hotel, 2081 Post Road, Warwick, RI 02886; phone: (401) 739–3000.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Ecosystem-Based Fishery Management (EBFM) Committee and Advisory Panel Chairs will meet to discuss when and how to conduct deep-dive public information workshops. They will continue development of the Prototype Management Strategy Evaluation (pMSE) and provide guidance to the project team, the topics include: (1) interactive catch management demonstration, (2) demonstration of pMSE model framework, and (3) initial testing of identified EBFM management procedures using the pMSE model framework and operating models. Discuss other business as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues

specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 17, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–03785 Filed 2–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC780]

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 77 HMS Hammerhead Sharks Assessment Webinar IX.

SUMMARY: The SEDAR 77 assessment of the Atlantic stock of hammerhead sharks will consist of a stock identification (ID) process, data webinars/workshop, a series of assessment webinars, and a review workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 77 HMS Hammerhead Sharks Assessment Webinar IX has been scheduled for Tuesday, March 21, 2023, from 11 a.m. to 3 p.m., Eastern Time. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Registration for the webinar is available by contacting the SEDAR coordinator via email at *Kathleen.Howington@safmc.net.*

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4371; email: *Kathleen.Howington@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the SEDAR 77 HMS Hammerhead Shark Assessment Webinar IX are as follows: discuss any leftover data issues that were not cleared up during the data process, answer any questions that the analysts have, and discuss model development and model setup. Finalize model discussions and decisions as possible.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the South Atlantic Fishery Management Council office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 17, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–03784 Filed 2–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC794]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a meeting of its Law Enforcement Technical Committee (LETC), in conjunction with the Gulf States Marine Fisheries Commission's Law Enforcement Committee (LEC).

DATES: The meeting will convene on Wednesday, March 15, 2023; beginning at 10 a.m. until 3 p.m., EDT. The

Committees will be in a closed session from 9 a.m. until 9:45 a.m.

ADDRESSES: The meeting will be held virtually. Please visit the Gulf Council website (*www.gulfcouncil.org*) for registration, agenda and meeting materials information.

Council address: Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Dr. Ava Lasseter, Anthropologist, Gulf of Mexico Fishery Management Council; *ava.lasseter@gulfcouncil.org,* telephone: (813) 348–1630, and Mr. Steve VanderKooy, Inter-jurisdictional Fisheries (IJF) Coordinator, Gulf States Marine Fisheries Commission; *svanderkooy@gsmfc.org,* telephone: (228) 875–5912.

SUPPLEMENTARY INFORMATION: The following items of discussion are on the agenda, though agenda items may be addressed out of order and any changes will be noted on the Council's website when possible.

Joint Gulf Council's Law Enforcement Technical Committee (LETC) and Gulf States Marine Fisheries Commission's (GSMFC) Law Enforcement Committee (LEC) Meeting Agenda, Wednesday, March 15, 2023; 9 a.m.–3 p.m., EDT

The joint meeting will begin in a *CLOSED SESSION* from 9 a.m.–9:45 a.m. with introductions, approval of minutes (October 2022—closed session) and Rank Nominations for the 2022 Law Enforcement Officer/Team of the Year Award.

General session will begin at approximately 10 a.m. with introductions and adoption of agenda, and approval of minutes from the Joint LEC/LETC October 2022 meeting.

The Gulf Council LETC will receive an update on the Southeast For-Hire Integrated Electronic Reporting (SEFHIER) Program, and Modification of For-Hire Vessel Trip Declaration Requirements. They will review and discuss potential changes to *Reef Fish* harvest restrictions: *Gray Triggerfish* Commercial Trip Limit, *Greater Amberjack* Management Measures, and *Gag Grouper* Recreational Fishing Season; and, receive an update on the Council's Statement of Organization Practices and Procedures (SOPPs) regarding fishing violations.

The GSMFC LEC will review the IJF Program Activity for the Mangrove Snapper Profile Preparations and Commission Pubs.

The Committee will present the State Report Highlights from Florida, Alabama, Mississippi, Louisiana, Texas, U.S. Coast Guard (USCG), NOAA Office of Law Enforcement (OLE), and U.S. Fish and Wildlife Service (USFWS); and will discuss any Other Business items.

Written state reports are requested in advance and only highlights will be presented for time purposes during state reporting item.

—Meeting Adjourns

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on *www.gulfcouncil.org.*

The Law Enforcement Technical Committee consists of principal law enforcement officers in each of the Gulf States, as well as the NOAA OLE, USFWS, the USCG, and the NOAA Office of General Counsel for Law Enforcement.

Although other non-emergency issues not on the agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 17, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–03786 Filed 2–22–23; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Date added to and deleted from the Procurement List:* March 25, 2023.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 315, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 785–6404, or email *CMTEFedReg@AbilityOne.gov*.

SUPPLEMENTARY INFORMATION:

Additions

On 10/28/2022, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the service(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the service(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the product(s) and service(s) to the Government.

2. The action will result in authorizing small entities to furnish the product(s) and service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) and service(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service(s) are added to the Procurement List:

Service(s)

Service Type: Custodial Service
Mandatory for: U.S. Railroad Retirement Board, U.S. Railroad Retirement Board Headquarters, Chicago, IL
Designated Source of Supply: Bona Fide Conglomerate, Inc., El Cajon, CA
Contracting Activity: RAILROAD RETIREMENT BOARD, RRB—ACQUISITION MGMT DIVISION

The Committee finds good cause to dispense with the 30-day delay in the

effective date normally required by the Administrative Procedure Act. See 5 U.S.C. 553(d). This addition to the Committee's Procurement List is effectuated because of the expiration of the Railroad Retirement Board Headquarters, Chicago, IL contract. The Federal customer contacted and has worked diligently with the AbilityOne Program to fulfill this service need under the AbilityOne Program. To avoid performance disruption, and the possibility that the Railroad Retirement Board will refer its business elsewhere, this addition must be effective on February 28, 2023, ensuring timely execution for a March 1, 2023 start date while still allowing 5 days for comment. The Committee also published a notice of proposed Procurement List addition in the **Federal Register** on October 28, 2022 and did not receive any comments from any interested persons. This addition will not create a public hardship and has limited effect on the public at large, but, rather, will create new jobs for other affected parties—people with significant disabilities in the AbilityOne program who otherwise face challenges locating employment. Moreover, this addition will enable Federal customer operations to continue without interruption.

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–03741 Filed 2–22–23; 8:45 am]

BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent To Extend Collection Number 3038–0049: Procedural Requirements for Requests for Interpretative, No-Action, and Exemptive Letters

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is announcing an opportunity for public comment on the proposed extension of a collection of certain information by the agency. Under the Paperwork Reduction Act (''PRA''), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment. This notice solicits comments on requirements related to requests for, and the issuance of, exemptive, no-action, and interpretative letters.

DATES: Comments must be submitted on or before April 24, 2023.

ADDRESSES: You may submit comments, identified by ''OMB Control Number 3038–0049,'' by any of the following methods:

- *The CFTC website,* at *https://comments.cftc.gov/.* Follow the instructions for submitting comments through the website.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail above.

Please submit your comments using only one method. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: Rebecca Mersand, Paralegal Specialist, Division of Market Oversight, (202) 941–8910, email: *rmersand@cftc.gov;* Jacob Chachkin, Associate Chief Counsel, Market Participants Division, (202) 418–5496, email: *jchachkin@cftc.gov;* or Steven A. Haidar, Assistant Chief Counsel, Division of Market Oversight, (202) 418–5611, email: *shaidar@cftc.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501 *et seq.,* Federal agencies must obtain approval from the Office of Management and Budget (''OMB'') for each collection of information they conduct or sponsor. ''Collection of Information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires a Federal agency to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information before submitting the collection to OMB for approval. 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 number.[1] To comply with these requirements, the CFTC is publishing notice of the proposed extension of the currently approved collection of information listed below.

Title: Procedural Requirements for Requests for Interpretative, No-Action, and Exemptive Letters (OMB Control No. 3038–0049). This is a request for an extension of a currently approved information collection.

Abstract: This collection covers the information requirements for voluntary requests for, and the issuance of, interpretative, no-action, and exemptive letters submitted to Commission staff pursuant to the provisions of section 140.99 of the Commission's regulations,[2] and related requests for confidential treatment pursuant to section 140.98(b) [3] of the Commission's regulations.

The collection requirements described herein are voluntary. They apply to parties that choose to request a benefit from Commission staff in the form of the regulatory action described in section 140.99. Such benefits may include, for example, relief from some or all of the burdens associated with other collections of information, relief from regulatory obligations that do not constitute collections of information, interpretations, or extensions of time for compliance with certain Commission regulations. It is likely that persons who would opt to request action under section 140.99 will have determined that the information collection burdens that they would assume by doing so will be outweighed substantially by the relief that they seek to receive.

This information collection is necessary, and would be used, to assist Commission staff in understanding the type of relief that is being requested and the basis for the request. It is also necessary, and would be used, to provide staff with a sufficient basis for determining whether: (1) granting the relief would be necessary or appropriate under the facts and circumstances presented by the requestor; (2) the relief provided should be conditional and/or time-limited; and (3) granting the relief would be consistent with staff responses to requests that have been presented under similar facts and circumstances. In some cases, the requested relief might be granted upon the condition that those who seek the benefits of that relief fulfill certain conditions that are necessary to ensure that the relief granted by Commission staff is appropriate. Once again, it is likely that those who would comply with these conditions will have determined that the burden of

[1] 44 U.S.C. 3512, 5 CFR 1320.5(b)(2)(i) and 1320.8 (b)(3)(vi).

[2] 17 CFR 140.99. An archive containing CFTC staff letters may be found at *http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm.*

[3] 17 CFR 140.98(b).

complying with the conditions is outweighed by the relief that they seek to receive. This information collection also is necessary to provide a mechanism whereby persons requesting interpretative, no-action, and exemptive letters may seek temporary confidential treatment of their request and the Commission staff response thereto and the grounds upon which such confidential treatment is sought.

With respect to the collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in section 145.9 of the Commission's regulations.[4]

The Commission reserves the right, but shall have no obligation to, review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the Information Collection Requirement will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Burden Statement: The Commission is revising its burden estimate for this information collection. The Commission has based its estimate of the annual number of respondents related to this information collection, in part, on the average number of interpretative, no-action, and exemptive letters issued by Commission staff in 2020, 2021, and 2022. The Commission generally estimates that each request was made by a unique respondent. To that number, the Commission is adding additional respondents that have incurred burden hours preparing requests for relief that did not generate a Commission staff letter in response.

This estimate includes the burden hours for preparing, filing, and updating such request letters as well as the burden of complying with any conditions that may be contained in any interpretative, no-action, or exemptive letters granting relief. It also includes burden hours required to prepare and submit related requests for confidential treatment. The burden hours associated with individual requests will vary widely, depending upon the type and complexity of relief requested, whether the request presents novel or complex issues, the relevant facts and circumstances, and the number of requestors or other affected entities.

The respondent burden is estimated to be as follows:

Estimated Number of Annual Respondents: 45.

Estimated Average Annual Burden Hours per Respondent: 40.

Estimated Total Annual Burden Hours: 1,800.

Frequency of Collection: Occasional.

Type of Respondents: Respondents include persons registered with the Commission (such as commodity pool operators, commodity trading advisors, derivatives clearing organizations, designated contract markets, futures commission merchants, introducing brokers, swap dealers, and swap execution facilities), persons seeking an exemption from registration, persons whose registration with the Commission is pending, trade associations and their members, eligible contract participants, and other persons seeking relief from discrete regulatory requirements.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: February 17, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023–03717 Filed 2–22–23; 8:45 am]

BILLING CODE 6351–01–P

[4] 17 CFR 145.9.

DEPARTMENT OF DEFENSE

Department of the Air Force

[22–RI–PLA–01]

Notice of Intent To Grant an Exclusive License With a Joint Ownership Agreement

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Notice of intent.

SUMMARY: Pursuant to the Bayh-Dole Act and implementing regulations, the Department of the Air Force hereby gives notice of its intent to grant an exclusive license with a joint ownership agreement to Traverse Operations Solutions, an LLC duly organized, validly existing, and in good standing in the State of North Carolina having a place of business at 132 Dragoon Court, Raeford, NC 28376.

DATES: Written objections must be filed no later than fifteen (15) calendar days after the date of publication of this Notice.

ADDRESSES: Submit written objections to Stephen Colenzo, AFRL/RI, 525 Brooks Road, Rome, New York 13441; or Email: *stephen.colenzo@us.af.mil.* Include Docket No. 22–RI–PLA–01 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Stephen Colenzo, AFRL/RI, 525 Brooks Road, Rome, New York 13441; or Email: *stephen.colenzo@us.af.mil.*

Abstract of Patent Application(s)

A device has a host port, a remote terminal (RT), an incoming line driver, an outgoing line driver, and at least one of an incoming message filter and an outgoing message filter. The host port communicatively couples to a shared host bus. The RT port communicatively couples to the RT. The incoming message filter receives an incoming host message from the host port and generates a filtered host message from the incoming host message employing at least one host message rule. The outgoing message filter receives an outgoing RT message from the RT port and generates a filtered RT message from the outgoing RT message employing at least one RT message rule. The incoming line driver communicates the filtered host message to the RT port. The outgoing line driver communicates the filtered RT message to the host port.

Intellectual Property

—LINDERMAN, U.S. Patent No. 10,581,632, issued on 03 March 2020, and entitled ''*Data Transfer Filter.*''

The Department of the Air Force may grant the prospective license unless a

timely objection is received that sufficiently shows the grant of the license would be inconsistent with the Bayh-Dole Act or implementing regulations. A competing application for a patent license agreement, completed in compliance with 37 CFR 404.8 and received by the Air Force within the period for timely objections, will be treated as an objection and may be considered as an alternative to the proposed license.

Authority: 35 U.S.C. 209; 37 CFR 404.

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–03787 Filed 2–22–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0011]

Privacy Act of 1974; System of Records

AGENCY: Department of Defense (DoD).

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the DoD is establishing a new Department-wide system of records titled, ''Privacy and Civil Liberties Complaints and Correspondence Records,'' DoD–0017. This system of records covers DoD's maintenance of records about privacy or civil liberties-related complaints or correspondence submitted to DoD privacy and civil liberties offices. This system of records includes information provided by the individual authoring the correspondence or complaint. Additionally, DoD is issuing a Direct Final Rule to exempt this system of records from certain provisions of the Privacy Act, elsewhere in today's issue of the **Federal Register**.

DATES: This system of records is effective upon publication; however, comments on the Routine Uses will be accepted on or before March 27, 2023. The Routine Uses are effective at the close of the comment period.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Rahwa Keleta, Defense Privacy and Civil Liberties Division, Directorate for Privacy, Civil Liberties, and Freedom of Information, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Department of Defense, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700; *OSD.DPCLTD@mail.mil;* (703) 571–0070.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is establishing the Privacy and Civil Liberties Complaints and Correspondence Records, DoD–0017, as a DoD-wide Privacy Act system of records. A DoD-wide system of records notice (SORN) supports multiple DoD paper or electronic recordkeeping systems operated by more than one DoD component that maintain the same kind of information about individuals for the same purpose. Establishment of DoD-wide SORNs helps DoD standardize the rules governing the collection, maintenance, use, and sharing of personal information in key areas across the enterprise. DoD-wide SORNs also reduce duplicative and overlapping SORNs published by separate DoD components. The creation of DoD-wide SORNs is expected to make locating relevant SORNs easier for DoD personnel and the public, and create efficiencies in the operation of the DoD privacy program.

This system of records supports the receipt, review, processing, tracking, and response to correspondence. The term ''correspondence'' includes records managed by a DoD Privacy and Civil Liberties Office that may include news, information, opinions, questions, concerns, issues, or general complaints, as well as any associated case files. The system consists of both electronic and paper records.

Additionally, DoD is issuing a Direct Final Rule elsewhere in today's issue of the **Federal Register** to exempt this system of records from certain provisions of the Privacy Act. DoD SORNs have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties, and Transparency Division website at *https://dpcld.defense.gov.*

II. Privacy Act

Under the Privacy Act, a ''system of records'' is a group of records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined as a U.S. citizen or lawful permanent resident.

In accordance with 5 U.S.C. 552a(r) and Office of Management and Budget (OMB) Circular No. A–108, DoD has provided a report of this system of records to the OMB and to Congress.

Dated: February 17, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER:

Privacy and Civil Liberties Complaints and Correspondence Records, DoD–0017.

SECURITY CLASSIFICATION:

Unclassified; Classified.

SYSTEM LOCATION:

Department of Defense (Department or DoD), located at 1000 Defense Pentagon, Washington, DC 20301–1000, and other Department installations, offices, or mission locations. Information may also be stored within a government-certified cloud, implemented and overseen by the Department's Chief Information Officer (CIO), 6000 Defense Pentagon, Washington, DC 20301–6000.

SYSTEM MANAGER(S):

A. Chief, Defense Privacy, Civil Liberties, and Transparency Division, Office of the Secretary of Defense, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700; *OSD.DPCLTD@mail.mil;* phone (703) 571–0070.

B. At DoD components, the system manager is the component privacy and civil liberties officer(s). The contact information for DoD component privacy and civil liberties offices is found at this website: *https://dpcld.defense.gov/Privacy/Privacy-Contacts/.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 113, Secretary of Defense; 42 U.S.C 2000ee–1, Privacy and Civil Liberties Officers; 32 CFR part 310, DoD

Privacy Program; DoD Instruction 5400.11, DoD Privacy and Civil Liberties Programs; and Executive Order 9397 (SSN), as amended.

PURPOSE(S) OF THE SYSTEM:

A. To manage general correspondence and privacy and civil liberties complaints received by or referred to DoD privacy and civil liberties offices, including those within DoD and Office of the Secretary of Defense (OSD) components.

B. To track and report data, conduct research and statistical analysis, and evaluate program effectiveness.

C. To maintain records for oversight and auditing purposes and to ensure appropriate handling and management as required by law or policy.

Note 1: Complaints received through the process for which established formal procedural avenues exist, such as those resulting in non-judicial punishments, military courts-martial, administrative separations, and Equal Employment Opportunity actions, are outside the scope of this SORN.

Note 2: Civil Liberties complaints may be referred to the DoD Office of Inspector General (DoDIG) for handling under the Inspector General Act of 1978, as amended. The OIG decides whether it will pursue the case, or decline to investigate it and refer it back to the component privacy and civil liberties office, for appropriate action. Any resulting DoDIG records are excluded from this system of records.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who submit correspondence or complaints to DoD privacy and civil liberties offices, either directly or by authorized representatives, or whose correspondence or complaints are referred to such offices.

CATEGORIES OF RECORDS IN THE SYSTEM:

A. Correspondence, to include records managed by a privacy and civil liberties office that may include news, information, opinions, questions, concerns, issues, or complaints, as well as any associated records received from individuals, either directly or through authorized representatives. These records may include data such as the individual's name, unique identifying numbers (such as the individual's DoD ID Number or Social Security Number), contact information (address, phone, email), other identifying information, detailed description of the issue or concern and how it pertains to DoD, dates, component, command and/or office, supporting materials, and any case or complaint number assigned by DoD. The records may also include information concerning those who are alleged to have violated an individual's privacy or civil liberties.

B. Records created or compiled in response to the correspondence, such as internal memorandums or email, internal records pertinent to the matter, witness statements, consultations with or referrals to other agencies within or external to DoD, and responses sent to the individual. The specific types of data in these records may vary widely depending on the nature of the individual's correspondence or complaint.

RECORD SOURCE CATEGORIES:

Records and information maintained in this system of records are obtained from the individuals or their authorized representatives, DoD privacy and civil liberties personnel, DoD investigators, any DoD personnel or recordkeeping system that may have information on the subject of the correspondence or complaint, and other government sources.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, all or a portion of the records or information contained herein may specifically be disclosed outside the DoD as a Routine Use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal government when necessary to accomplish an agency function related to this system of records.

B. To the appropriate Federal, State, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

C. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the record is pertinent.

D. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other Agency representing the DoD determines that the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

E. To the National Archives and Records Administration for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

F. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

G. To appropriate agencies, entities, and persons when (1) the DoD suspects or confirms a breach of the system of records; (2) the DoD determines as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

H. To another Federal agency or Federal entity, when the DoD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

I. To another Federal, State or local agency for the purpose of comparing to the agency's system of records or to non-Federal records, in coordination with an Office of Inspector General in conducting an audit, investigation, inspection, evaluation, or other review as authorized by the Inspector General Act of 1978, as amended.

J. To such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty.

K. To an authorized appeal or grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator, or other duly authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by an employee.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records may be stored electronically or on paper in secure facilities in a locked drawer behind a locked door. Electronic records may be stored locally on digital media; in agency-owned cloud environments; or in vendor Cloud Service Offerings certified under the Federal Risk and Authorization Management Program (FedRAMP).

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by name and case number, or combination of both.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Privacy complaint records are retained for three years after resolution or referral in accordance with National Archives and Records Administration General Records Schedule 4.2. The retention period for other records in this system may be obtained by contacting the system manager for the DoD component.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

DoD safeguards records in this system of records according to applicable rules, policies, and procedures, including all applicable DoD automated systems security and access policies. DoD policies require the use of controls to minimize the risk of compromise of personally identifiable information (PII) in paper and electronic form and to enforce access by those with a need to know and with appropriate clearances. Additionally, DoD has established security audit and accountability policies and procedures which support the safeguarding of PII and detection of potential PII incidents. DoD routinely employs safeguards such as the following to information systems and paper recordkeeping systems: Multifactor log-in authentication including Common Access Card (CAC) authentication and password; physical token as required; physical and technological access controls governing access to data; network encryption to protect data transmitted over the network; disk encryption securing disks storing data; key management services to safeguard encryption keys; masking of sensitive data as practicable; mandatory information assurance and privacy training for individuals who will have access; identification, marking, and safeguarding of PII; physical access safeguards including multifactor identification physical access controls, detection and electronic alert systems for access to servers and other network infrastructure; and electronic intrusion detection systems in DoD facilities.

RECORD ACCESS PROCEDURES:

Individuals seeking access to their records should follow the procedures in 32 CFR part 310. Individuals should address written inquiries to the DoD component with oversight of the records, as the component has Privacy Act responsibilities concerning access, amendment, and disclosure of the records within this system of records. The public may identify the contact information for the appropriate DoD office through the following website: *www.FOIA.gov.* Signed written requests should contain the name and number of this system of records notice along with the full name, current address, and email address of the individual. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the appropriate format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

Individuals seeking to amend or correct the content of records about them should follow the procedures in 32 CFR part 310.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system of records should follow the instructions for Records Access Procedures above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

The DoD has exempted records maintained in this system from 5 U.S.C. 552a(c)(3); (d)(1), (2), (3), and (4); (e)(1); (e)(4)(G), (H), and (I); and (f) pursuant to 5 U.S.C. 552a(k)(1). In addition, when exempt records received from other systems of records become part of this system, the DoD also claims the same exemptions for those records that are claimed for the original primary system(s) of records of which they were a part, and claims any additional exemptions set forth here. An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c), and published in 32 CFR part 310.

HISTORY:

None.

[FR Doc. 2023–03745 Filed 2–22–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Personnel Development To Improve Services and Results for Children With Disabilities Program—Associate Degree Preservice Program Improvement Grants To Support Personnel Working With Young Children With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2023 for Personnel Development to Improve Services and Results for Children with Disabilities Program—Associate Degree Preservice Program Improvement Grants to Support Personnel Working with Young Children with Disabilities, Assistance Listing Number 84.325N. This notice relates to the approved information collection under OMB control number 1820–0028.

DATES:

Applications Available: February 23, 2023.

Deadline for Transmittal of Applications: April 24, 2023.

Deadline for Intergovernmental Review: June 23, 2023.

Pre-Application Webinar Information: No later than February 28, 2023, OSERS will post pre-recorded informational webinars designed to provide technical assistance to interested applicants. The webinars may be found at *https://www2.ed.gov/fund/grant/apply/osep/new-osep-grants.html.*

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the

version published on December 27, 2021.

FOR FURTHER INFORMATION CONTACT: Julia Martin Eile, U.S. Department of Education, 400 Maryland Avenue SW, Room 5076 Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–7431. Email: *Julia.martin.eile@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.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of this program are to (1) help address State-identified needs for personnel preparation in special education, early intervention, related services, and regular education to work with children, including infants, toddlers, and youth with disabilities; and (2) ensure that those personnel have the necessary skills and knowledge, derived from practices that have been determined through scientifically based research, to be successful in serving those children.

Priority: This competition includes one absolute priority, which includes two competitive preference priorities within the absolute priority. In accordance with 34 CFR 75.105(b)(2)(v), the absolute priority is from allowable activities specified in the statute (see sections 662 and 681 of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1462 and 1481)).

Absolute Priority: For FY 2023 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Associate Degree Preservice Program Improvement Grants to Support Personnel Working with Young Children with Disabilities.

Background:

Creating and maintaining inclusive and equitable early childhood systems requires that all young children, including infants, toddlers, and preschool children (young children) with disabilities and their families, have equitable access to early childhood opportunities and resources. This is particularly important for racially, ethnically, and culturally diverse populations of young children with disabilities and their families, including those who are multilingual. Qualified and competent personnel are vital to support high-quality inclusion and equitable participation in early childhood programs. Early childhood program personnel with associate degrees play critical roles in supporting inclusive and equitable early childhood programs for young children with disabilities, including those within diverse populations, as child care providers, preschool teachers, assistant teachers, and paraprofessionals.

To effectively support full and equitable participation of young children in these programs, early childhood program personnel with associate degrees need competencies [1] in these roles in order to individualize instruction and accommodations to support the children's development and learning; implement culturally responsive practices in the learning environment; promote children's social, emotional, and behavioral development; collect data to monitor progress; communicate effectively with families; and collaborate with other professionals.

Preservice preparation provides a foundation to support the acquisition of specialized competencies needed to deliver effective and equitable practices that support high-quality inclusion for all young children with disabilities, including those who are multilingual and from racially, ethnically, and culturally diverse populations.

Studies have shown, however, that many associate degree programs do not adequately prepare personnel to provide supports and evidence-based practices (EBPs) to serve young children with disabilities and their families in inclusive early childhood programs (Catlett et al., 2014; Catlett et al., 2016; Chang et al., 2005; Maxwell et al., 2006). Programs of study are also not consistently equity-based (National Center on Early Childhood Development, Teaching, and Learning, 2018). Pedagogical practices in early childhood personnel preparation programs and professional development programs that are inclusive with regard to race, ethnicity, culture, language, and disability status would support personnel in being better prepared to create inclusive, supportive, equitable, unbiased, and identity-safe learning environments for children.

Ensuring that associate degree students have access to high-quality preparation programs is key to creating and maintaining inclusive and equitable early childhood programs. High-quality preparation programs provide associate degree–seeking students with the foundational competencies to provide equitable and effective supports and instruction to young children with disabilities, including those who are multilingual and from racially, ethnically, and culturally diverse populations. High-quality preparation programs also can provide an on-ramp to further educational attainment and facilitate articulation agreements [2] with 4-year programs, where core competencies align with course objectives in bachelor's degree programs. The early intervention and early childhood special education field has a workforce crisis because of shortages of personnel, particularly shortages of multilingual personnel and limited racial, ethnic, and cultural diversity within available personnel (Early Childhood Technical Assistance Center and the National Association of State Directors of Special Education, 2021; IDEA Infant and Toddler Coordinators Association, 2022). While Black and Hispanic students enroll in higher numbers in community colleges (Hanson, 2022), Black and Hispanic adults are less likely than White adults to have a college degree (National Education Statistics, 2022; Mora, 2022). Supporting career pathways from associate degrees to bachelor's degrees is critical for developing a diverse workforce that has the competencies to promote positive and equitable outcomes for young children with disabilities and their families in inclusive early childhood programs.

This priority also will advance the Secretary's Supplemental Priority related to supporting a diverse educator workforce and professional growth to strengthen student learning. See Secretary's Final Supplemental Priorities and Definitions for Discretionary Grants Programs, 86 FR 70612 (Dec. 10, 2021) (Supplemental Priorities) (Priority 3).

Priority:

The purpose of this priority is to fund Associate Degree Preservice Improvement Grants to Support Personnel Working with Young Children with Disabilities to achieve, at a minimum, the following expected outcomes:

(a) Increased capacity of community college faculty to design and deliver curriculum content that prepares associate degree students to work with young children with disabilities and

[1] For the purposes of this priority, ''competencies'' means what a person knows and can do—the knowledge, skills, and dispositions necessary to effectively function in a role (National Professional Development Center on Inclusion, 2011).

[2] An articulation agreement document is a formal commitment between two colleges or universities that lays out a transfer plan for coursework and credits to ensure students have a clear pathway to the next step in their education.

their families, including those who are multilingual and from racially, ethnically, and culturally diverse populations, and support their full and equitable participation, development, and learning in early childhood programs.

(b) Increased number of early childhood program personnel with associate degrees who have the competencies to work with young children with disabilities and their families, including those who are multilingual and from racially, ethnically, and culturally diverse populations, and support their full and equitable participation, development, and learning in early childhood programs.

(c) Increased collaboration between 4-year institutions of higher education (IHEs) and community colleges to support articulation agreements and career pathways in early intervention and early childhood special education, to increase the number of associate degree graduates who enter bachelor's degree programs.

In addition to these programmatic requirements, to be considered for funding under this priority, applicants must meet the application and administrative requirements in this priority, which are:

(a) Demonstrate, in the narrative section of the application under ''Significance,'' how the proposed project will—

(1) Address the need in the field for early childhood program personnel with associate degrees who have the competencies to serve young children with disabilities and their families, including those who are multilingual and from racially, ethnically, and culturally diverse populations, and support their full and equitable participation, development, and learning in early childhood programs; and

(2) Address the need for community college faculty to have the capacity to design and deliver content that will prepare associate degree students to serve young children with disabilities and their families, including those who are multilingual and from racially, ethnically, and culturally diverse populations, and support their full and equitable participation, development, and learning in early childhood programs.

(b) Demonstrate, in the narrative section of the application under ''Quality of project services,'' how the proposed project will—

(1) Develop or refine a process to effectively enhance and redesign associate degree programs to achieve the intended outcomes of the proposed project. To address this requirement, the applicant must describe—

(i) How it proposes to develop partnerships with a minimum of three community colleges to enhance and revise the associate degree curricula within these community colleges to prepare early intervention, early childhood special education, and early childhood education personnel to equitably serve children ages birth through five with disabilities and their families, including those who are multilingual and from racially, ethnically, and culturally diverse populations. (In States where the age range for certification of early childhood personnel is other than birth through age 5 (*e.g.,* birth through age 3, birth through age 5, ages 3 through 5), we defer to the age range in such State's certification); and

Note: If an applicant has been awarded an Associate Degree Preservice Program Improvement Grant to Support Personnel Working with Young Children with Disabilities (Assistance Listing Number 84.325N) grant previously, the applicant may not partner with the same community colleges and must propose different community college partners, to expand the number of community colleges with enhanced programs of study.

(ii) Its proposed approach to partner with community colleges to enhance or redesign the associate degree programs' curricula by incorporating evidence-based practices [3] into courses and by providing at least one practicum experience in a setting that serves young children with disabilities and their families, including young children and families who are multilingual and from racially, ethnically, and culturally diverse populations. The applicant must describe—

(A) The approach the proposed project will use to identify and incorporate current research and EBPs in the development and delivery of the curriculum enhancement and redesign;

(B) The knowledge and competencies students will acquire in the enhanced curriculum; and

(C) How coursework and practicum experiences will enable the students to acquire competencies to: support young children with disabilities, including children who are multilingual and from racially, ethnically, and culturally diverse populations, with their development and learning; implement culturally and linguistically responsive instruction and intervention practices; work collaboratively with other practitioners; engage and communicate effectively with families; and support children's full and equitable participation in inclusive early childhood programs;

(2) Provide professional development to faculty in the community colleges to develop their capacity to enhance or redesign their associate degree program and implement the new content to prepare associate degree students to work with young children with disabilities and their families, including those who are multilingual and from racially, ethnically, and culturally diverse populations; and

(3) Partner with community colleges to support the development of joint articulation agreements to create career pathways for associate degree students in early intervention and early childhood special education.

(c) Demonstrate, in the narrative section of the application under ''Quality of the project personnel and quality of management plan,'' how—

(1) The proposed project will encourage applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability, as appropriate;

(2) The project director and key project personnel have the qualifications and experience to carry out the proposed activities and achieve the project's intended outcomes;

(3) The project director and other key project personnel will manage the components of the project;

(4) The time commitments of the project director and other key project personnel are adequate to meet the objectives of the proposed project;

(5) The proposed management plan will ensure that the products and services provided are of high quality, relevant, and useful to recipients; and

(6) The proposed project will benefit from a diversity of perspectives, including students in the program, families of young children in early childhood programs, early childhood educators, faculty, and community partners, among others, in its development and operation.

(d) Demonstrate, in the narrative section of the application under ''Adequacy of resources,'' how—

(1) The applicant and any key partners have adequate resources to carry out the proposed activities; and

(2) The budget is adequate for meeting the project objectives.

[3] For the purposes of this priority, ''evidence-based'' means the proposed project component is supported by one or more of strong evidence, moderate evidence, promising evidence, or evidence that demonstrates a rationale (34 CFR 77.1).

(e) Demonstrate, in the narrative section of the application under ''Quality of the project evaluation,'' how the applicant will—

(1) Evaluate how well the goals or objectives of the proposed project have been met. To meet this requirement the applicant must describe—

(i) The relevant outcomes to be measured for the project, particularly the acquisition of faculty and scholars' competencies; and

(ii) The evaluation methodologies, data collection methods, and data analyses that will be used; and

(2) Collect, analyze, and use disaggregated data on scholars supported by the project to inform the proposed project on an ongoing basis.

(f) Address the following application requirements and assurances. The applicant must—

(1) Include, in appendix A, charts, tables, figures, graphs, screen shots and visuals that provide information directly relating to the application requirements for the narrative. Appendix A should not be used for supplementary information. Please note that charts, tables, figures, graphs, or screen shots, can be single-spaced when placed in appendix A;

(2) Include in appendix B any letters of commitment obtained from partner community colleges. Any letters of commitment should include information on the racial and ethnic demographics of students who attend the community college;

(3) Ensure that if the project maintains a website, it will be of high quality, with an easy-to-navigate design that meets government or industry-recognized standards for accessibility;

(4) Include, in the budget, attendance at a two- and one-half day project directors' conference in Washington, DC, or virtually, during each year of the project period; and

Note: The project must reallocate unused travel funds no later than the end of the third quarter of each budget period if the two- and one-half day project director's conference is conducted virtually.

(5) Provide an assurance that the project will submit the revised curriculum and syllabi for courses that are included in the enhanced associate degree programs if requested by the Office of Special Education Programs (OSEP).

Competitive Preference Priorities: Within this absolute priority, we give competitive preference to applications that address the following two priorities. Under 34 CFR 75.105(c)(2)(i), we award an additional 3 points to an application that meets Competitive Preference Priority 1 and an additional 3 points to an application that meets Competitive Preference Priority 2. Applicants should indicate in the abstract if one or both competitive preference priorities are addressed.

The priorities are:

Competitive Preference Priority 1—Applications from Historically Black Colleges and Universities (HBCUs),[4] *Tribally Controlled Colleges and Universities (TCUs),*[5] *and other Minority Serving Institutions (MSIs)*[6] *(0 or 3 points).*

Competitive Preference Priority 2—Partnership with HBCU Community Colleges, TCU Community Colleges, or other MSI Community Colleges (0 or 3 points).

Under Competitive Preference Priority 2, an applicant must have a letter of commitment that demonstrates at least one of its community college partners is an HBCU community college, TCU community college, or other MSI community college.

References:

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Catlett, C., Maude, S.P., & Skinner, M. (Oct. 2016). *The blueprint process for enhancing early childhood preservice programs and courses* [Unpublished manuscript]. *https://fpg.unc.edu/publications/blueprint-process-enhancing-early-childhood-preservice-programs-and-courses.*

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Hanson, Melanie. (July 26, 2022). *College Enrollment & Student Demographic Statistics.* Education Data Initiative. *https://educationdata.org/college-enrollment-statistics.*

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Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1462 and 1481.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on

[4] For purposes of this priority, ''Historically Black Colleges and Universities'' means colleges and universities that meet the criteria set out in 34 CFR 608.2.

[5] For purposes of this priority, ''Tribally Controlled Colleges and Universities'' has the meaning ascribed to it in section 316(b)(3) of the Higher Education Act of 1965, as amended (HEA).

[6] For purposes of this priority, ''Minority-Serving Institution'' means an institution that is eligible to receive assistance under sections 316 through 320 of part A of title III, under part B of title III, or under title V of the HEA. For purposes of this priority, the Department will use the FY 2022 Eligibility Matrix to determine MSI eligibility (see *https://www2.ed.gov/about/offices/list/ope/idues/eligibility.html*).

Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 304.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $2,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2024 from the list of unfunded applications from this competition.

Estimated Range of Awards: $190,000–$200,000.

Estimated Average Size of Awards: $195,000.

Maximum Award: We will not make an award exceeding $200,000 for a single budget period of 12 months.

Estimated Number of Awards: 10.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs and private nonprofit organizations.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses a training indirect cost rate of 8 percent. This limits indirect cost reimbursement to an entity's actual indirect costs, as determined in its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. For more information regarding training indirect cost rates, see 34 CFR 75.562. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *https://www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c) a grantee under this competition may award subgrants—to directly carry out project activities described in its application—to the following types of entities: IHEs, nonprofit organizations suitable to carry out the activities proposed in the application, and other public agencies. The grantee may award subgrants to entities it has identified in an approved application or that it selects through a competition under procedures established by the grantee.

4. *Other General Requirements:*

(a) Recipients of funding under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Applicants for, and recipients of, funding must, with respect to the aspects of their proposed project relating to the absolute priority, involve individuals with disabilities, or parents of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs,* which contain requirements and information on how to submit an application. Please note that these Common Instructions supersede the version published on December 27, 2021.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 40 pages and (2) use the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the recommended page limit does apply to all of the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed below:

(a) *Significance (10 points).*

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The extent to which the proposed project will prepare personnel for fields in which shortages have been demonstrated; and

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.

(b) *Quality of project services (45 points).*

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved

by the proposed project are clearly specified and measurable;

(ii) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice; and

(iii) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(c) *Quality of project personnel and quality of management plan (20 points).*

(1) The Secretary considers the quality of the personnel who will carry out the proposed project and the quality of the management plan for the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel;

(ii) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks;

(iii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project; and

(iv) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(d) *Adequacy of resources (10 points).*

(1) The Secretary considers the adequacy of resources for the proposed project.

(2) In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(1) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization; and

(2) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(e) *Quality of the project evaluation (15 points).*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project; and

(ii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications.

4. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions, and under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

5. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

6. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with:

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of

2019 (Pub. L. 115—232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also. If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works.

Additionally, a grantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* For the purposes of Department reporting under 34 CFR 75.110, the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Personnel Development to Improve Services and Results for Children with Disabilities program. These measures include (1) the percentage of preparation programs that incorporate scientifically based research or EBPs into their curricula; (2) the percentage of scholars completing the preparation program who are knowledgeable and skilled in EBPs that improve outcomes for children with disabilities; (3) the percentage of scholars who exit the preparation program prior to completion due to poor academic performance; and (4) the percentage of scholars completing the preparation program who are working in the area(s) in which they were prepared upon program completion.

The measures apply to projects funded under this competition, and grantees are required to submit data on these measures as directed by OSEP.

Grantees will be required to report information on their project's performance in annual and final performance reports to the Department (34 CFR 75.590).

The Department will also closely monitor the extent to which the products and services provided by the project meet needs identified by stakeholders and may require the project to report on such alignment in its annual and final performance reports.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package 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.

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. 2023–03707 Filed 2–22–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2023–SCC–0035]

Agency Information Collection Activities; Comment Request; Migrant Education Program Regulations and Certificate of Eligibility

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before April 24, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0035. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov*. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Jessenia Guerra, (202) 453–7051.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Migrant Education Program Regulations and Certificate of Eligibility.

OMB Control Number: 1810–0662.

Type of Review: Extension without change of a currently approved ICR.

Respondents/Affected Public: Individuals or Households; State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 108,458.

Total Estimated Number of Annual Burden Hours: 301,570.

Abstract: The U.S. Department of Education (the Department) requests an extension with an adjustment to the currently approved information collection OMB No. 1810–0662. This collection of information is necessary to collect information under the Title I, Part C Migrant Education Program (MEP). Sections 1301–1309 of Part C of Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA), authorizes MEP. One can find regulations for MEP at 34 CFR 200.81–200.89. This information collection covers regulations with information collection requirements. These requirements pertain to information that State educational agencies (SEAs) must collect in order to properly administer the MEP.

Dated: February 16, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–03702 Filed 2–22–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2022–SCC–0120]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Common Core of Data (CCD) School-Level Finance Survey (SLFS) 2022–2024

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before March 27, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, (202) 245–6347.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Common Core of Data (CCD) School-Level Finance Survey (SLFS) 2022–2024.

OMB Control Number: 1850–0930.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 331.

Total Estimated Number of Annual Burden Hours: 10,760.

Abstract: NCES annually publishes comprehensive data on the finances of public elementary/secondary schools through the Common Core of Data (CCD). For numerous years, these data have been released at the state level through the National Public Education Financial Survey (NPEFS) (OMB #1850–0067) and at the school district level through the Local Education Agency (School District) Finance Survey (F–33). (OMB #0607–0700). There is a significant demand for finance data at the school level. Policymakers, researchers, and the public have long voiced concerns about the equitable distribution of school funding within and across school districts. School-level finance data addresses the need for reliable and unbiased measures that can be utilized to compare how resources are distributed among schools within local districts. Education expenditure data are now available at the school level through the School-Level Finance Survey (SLFS).

The School-Level Finance Survey (SLFS) data collection is conducted annually by the National Center for Education Statistics (NCES), within the U.S. Department of Education (ED). In November of 2018, the Office of Management and Budget (OMB) approved changes to the SLFS wherein variables have been added to make the SLFS directly analogous to the F–33 Survey and to the Every Student Succeeds Act (ESSA) provisions on reporting expenditures per-pupil at the local education agency (LEA) and school-level. A previous package cleared in October 2021 approved data collection for FY 2021, 2022, and 2023 (OMB #1850–0930 v.3). This request includes considerable modifications to the previous package and will allow NCES to conduct in 2023 through 2025 the SLFS for fiscal years 2022 through 2024 (corresponding to school years 2021/22 through 2023/24) and to continue the collection of data that is analogous to the current ESSA expenditures per pupil provision. As an important new addition that is part of this request, the Department's Office of Civil Rights (OCR) proposes to engage NCES to assist OCR with collecting school level finance data as part of the Civil Rights Data Collection (CRDC). Pursuant to its authority under the Department of Education Organization Act (DEOA), as well as its regulations, OCR has determined that the CRDC is necessary to ascertain or ensure compliance with the civil rights laws within its jurisdiction, and therefore established it as a mandatory collection.

Parts A and B of this submission present the justification for the information collection and an explanation of the statistical methods employed. Part C describes the SLFS instrument, Appendix A provides the SEA communication materials that will be used to conduct the SLFS data collection, Appendix B provides the SLFS data collection form and instructions, and Appendix C provides the survey of SEA's school-level finances fiscal data plan.

Dated: February 17, 2023.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–03716 Filed 2–22–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Migrant Education Program Consortium Incentive Grant Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education is issuing a notice inviting applications for fiscal year (FY) 2023 for the Migrant Education Program (MEP) Consortium Incentive Grant (CIG) program, Assistance Listing Number 84.144F.

DATES:

Applications Available: February 27, 2023.

Deadline for Transmittal of Applications: April 24, 2023.

Deadline for Intergovernmental Review: June 23, 2023.

Pre-Application Webinar Information: The Department will hold a pre-application workshop via webinar for prospective applicants on March 7, 2023 at 11:00 a.m. Eastern Time.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the version published on December 27, 2021.

FOR FURTHER INFORMATION CONTACT: Michael Meltzer, U.S. Department of Education. Telephone: (202) 987–1657. Email: *Michael.Meltzer@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.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the MEP CIG program is to provide incentive grants to State educational agencies (SEAs) that participate in a consortium with one or more other SEAs or other appropriate entities to improve the delivery of services to migratory children whose education is interrupted. Through this program, the Department provides financial incentives to SEAs that receive Title I, Part C (MEP) funding to participate in high-quality consortia to improve the intrastate and interstate coordination of migrant education programs by addressing key needs of migratory children whose education is interrupted.

Background: On March 3, 2004, the Department published in the **Federal Register** a notice of final requirements for the CIG program (69 FR 10109) (2004 CIG Notice of Final Requirements (NFR)). In the 2004 CIG NFR, the Department established seven absolute priorities that promote key national objectives of the MEP. The Department added an eighth absolute priority when it published in the **Federal Register** a notice of final priority on March 12, 2008 (73 FR 13217) (2008 CIG Notice of Final Priority (NFP)).

For FY 2023, the Department is focusing the CIG competition on four of the eight absolute priorities. These absolute priorities were selected because they closely align with the Administration's priorities. Specifically, the FY 2023 competition will focus on improving the proper and timely identification and recruitment of eligible migratory children, improving the school readiness of preschool-aged migratory children, strengthening the involvement of migratory parents in the education of migratory students, and

improving the education attainment of out-of-school migratory youth.

The FY 2023 competition also includes three competitive preference priorities from the Department's Notice of Final Priorities and Definitions—Secretary's Supplemental Priorities and Definitions for Discretionary Grant Programs (Supplemental Priorities), published in the **Federal Register** on December 10, 2021 (86 FR 70612) (*https://www.federalregister.gov/d/2021-26615*).

Through these absolute and competitive preference priorities, we encourage applicants to consider projects that are best addressed by an interstate or intrastate solution. For example, a project could facilitate interstate collaboration to provide continuous access to instructional technology that supports migratory children; another project could help educators of migratory children select appropriate and evidence-based digital tools that will accelerate learning recovery after COVID–19 and get needed services to migratory children as expeditiously as possible.

In addition, we encourage applications that propose projects to strengthen the involvement of migratory parents in the education of their children. For example, applicants may propose to identify and utilize existing evidence-based resources to build capacity of migratory parents to engage in the community and to access community resources, as well as connect them to organizations such as parent advocacy groups. Another project may support the implementation of education-related family engagement action plans created by consortium States to inform the implementation of MEP parent involvement and family engagement activities and services.

Applicants are also encouraged to propose projects that build relationships with organizations and agencies serving migratory children and their families to identify, recruit, serve, or assess the education and health-related needs of migratory children and out-of-school migratory youth. For example, applicants could propose to develop formal partnerships with Migrant and Seasonal Head Start; Migrant Health; the High School Equivalency Program (HEP); the College Assistance Migrant Program (CAMP); local farm associations and agribusinesses; the Department of Labor; or other Federal, State, or local entities.

Priorities: This competition includes four absolute priorities and three competitive preference priorities. Absolute Priorities 1, 2, and 3 are from the 2004 CIG NFR. Absolute Priority 4 is from the 2008 CIG NFP. In Absolute Priorities 2, 3, and 4, the term ''scientifically based'' has been replaced with ''evidence-based,'' as explained in the *Waiver of Proposed Rulemaking* section of this notice.

The competitive preference priorities are from the Supplemental Priorities.

Absolute Priorities: For FY 2023, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet one or more of these priorities.

The applicant must clearly indicate in the abstract section of its application to which absolute priority it is applying. If an applicant is interested in proposing separate projects (*e.g.,* one that addresses Absolute Priority 1 and another that addresses Absolute Priority 2), the applicant must submit separate applications. The Department intends to create four funding slates for CIG applications—one for applications that meet Absolute Priority 1, a separate slate for applications that meet Absolute Priority 2, a separate slate for applications that meet Absolute Priority 3, and a fourth slate for applications that meet Absolute Priority 4. As a result, the Department may fund applications out of the overall rank order. The Department anticipates making at least one award on each slate, provided applications of sufficient quality are submitted, but the Department is not bound by these estimates.

These priorities are:

Absolute Priority 1: Services designed to improve the proper and timely identification and recruitment of eligible migratory children whose education is interrupted.

Absolute Priority 2: Services designed (based on a review of evidence-based research) to improve the school readiness of preschool-aged migratory children whose education is interrupted.

Absolute Priority 3: Services designed (based on a review of evidence-based research) to strengthen the involvement of migratory parents in the education of migratory students whose education is interrupted.

Absolute Priority 4: Services designed (based on a review of evidence-based research) to improve the educational attainment of out-of-school migratory youth whose education is interrupted.

Competitive Preference Priorities: For FY 2023, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award up to an additional 10 points to an application, depending on how well the application meets one of the competitive preference priorities. Applicants may receive points for only one competitive preference priority. The applicant must indicate in the abstract section of its application which competitive preference priority, if any, it is addressing. While applicants are encouraged to address only one competitive preference priority, if an applicant chooses to address more than one competitive preference priority, the Department will instruct reviewers to score only the first competitive preference priority mentioned in the abstract.

The priorities are:

Competitive Preference Priority 1: Addressing the Impact of COVID–19 on Students, Educators, and Faculty (Up to 10 points).

Projects that are designed to address the impacts of the COVID–19 pandemic, including impacts that extend beyond the duration of the pandemic itself, on the students most impacted by the pandemic, with a focus on underserved students and the educators who serve them, through projects addressing students' social, emotional, mental health, and academic needs through approaches that are inclusive with regard to race, ethnicity, culture, language, and disability status.

Competitive Preference Priority 2: Promoting Equity in Student Access to Educational Resources and Opportunities (Up to 10 points).

Projects that are designed to promote education equity and adequacy in resources and opportunity for underserved students—

(a) In one of the following settings:

(1) Early learning programs.

(2) Career and technical education programs.

(3) Out-of-school-time settings.

(4) Adult learning;

(b) That examine the sources of inequity and inadequacy and implement responses and that may include establishing, expanding, or improving the engagement of underserved community members (including underserved students and families) in informing and making decisions that influence policy and practice at the school, district, or State level by elevating their voices, through their participation and their perspectives and providing them with access to opportunities for leadership (*e.g.,* establishing partnerships between civic student government programs and parent and caregiver leadership initiatives).

Competitive Preference Priority 3: Strengthening Cross-Agency Coordination and Community Engagement to Advance Systemic Change (Up to 10 points).

Projects that are designed to take a systemic evidence-based approach to improving outcomes for underserved students through establishing cross-agency partnerships, or community-based partnerships with local nonprofit organizations, businesses, philanthropic organizations, or others, to meet family well-being needs.

Definitions: The following definitions apply to this competition. The definitions of ''demonstrates a rationale,'' ''evidence-based,'' ''logic model,'' ''project component,'' and ''relevant outcome'' are from 34 CFR 77.1(c). The definitions of ''early learning,'' ''educator,'' and ''underserved student'' are from the Supplemental Priorities.

Demonstrates a rationale means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

Early learning means any (a) State-licensed or State-regulated program or provider, regardless of setting or funding source, that provides early care and education for children from birth to kindergarten entry, including, but not limited to, any program operated by a child care center or in a family child care home; (b) program funded by the Federal Government or State or local educational agencies (including any IDEA-funded program); (c) Early Head Start and Head Start program; (d) non-relative child care provider who is not otherwise regulated by the State and who regularly cares for two or more unrelated children for a fee in a provider setting; and (e) other program that may deliver early learning and development services in a child's home, such as the Maternal, Infant, and Early Childhood Home Visiting Program; Early Head Start; and Part C of IDEA.

Educator means an individual who is an early learning educator, teacher, principal or other school leader, specialized instructional support personnel (*e.g.,* school psychologist, counselor, school social worker, early intervention service personnel), paraprofessional, or faculty.

Evidence-based means the proposed project component is supported by evidence that demonstrates a rationale.

Logic model (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

Project component means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

Relevant outcome means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program.

Underserved student means a migrant student (which may include children in early learning environments and students in K–12 programs).

Waiver of Proposed Rulemaking: The term ''scientifically based'' has been replaced with the term ''evidence-based,'' as defined in 34 CFR 77.1(c). Under the Administrative Procedure Act (5 U.S.C. 553) (APA) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the APA provides that an agency is not required to conduct notice-and-comment rulemaking when the agency, for good cause, finds that the requirement is impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b)(B) and (d)(3)). There is good cause to waive rulemaking in this case because the term ''scientifically based'' and its definition are no longer in statute. Therefore, under 5 U.S.C. 553(b)(B), the Secretary has determined that obtaining public comment on the removal of the term ''scientifically based'' and the adoption of the term ''evidence-based'' is unnecessary and contrary to the public interest.

The APA also generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d)(3)). Because this final regulatory action merely updates outdated regulations, the Secretary also has good cause to waive the 30-day delay in the effective date of these regulatory changes under 5 U.S.C. 553(d)(3).

Program Authority: 20 U.S.C. 6398(d).

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75 (except 75.232), 76, 77, 79, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The 2004 CIG NFR. (e) The 2008 CIG NFP. (f) The notice of final requirement published in the **Federal Register** on December 31, 2013 (78 FR 79613). (g) The MEP regulations in 34 CFR 200.81–200.89. (h) The Supplemental Priorities.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Formula grants.

Estimated Available Funds: $3,000,000.

Estimated Range of Awards: $50,000–$150,000.

The actual size of an SEA's award will depend on the number of SEAs that participate in high-quality consortia and the size of those SEAs' MEP formula grant allocations.

Estimated Average Size of Awards: $100,000.

Maximum Award: An SEA cannot receive an incentive award that exceeds its MEP Basic State Formula Grant allocation or $250,000, whichever is less, for a single budget period of 12 months.

Estimated Number of Awards: 30 SEA awards. An SEA that participates in a consortium may receive only one incentive grant award regardless of the number of consortia in which it participates.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* SEAs receiving MEP Basic State Formula Grants, in a consortium with one or more other SEAs or other appropriate entities. An application for an incentive grant must be submitted by an SEA that will act as the ''lead SEA'' for the proposed consortium.

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This program involves supplement-not-supplant funding requirements. Pursuant to the 2004 CIG NFR, the supplement-not-supplant provisions in sections 1118(b) and 1304(c)(2) of the ESEA are applicable to this program.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c) a grantee under this competition may award subgrants. Pursuant to ESEA section 1302, the Secretary makes grants to SEAs, or combinations of such agencies, to

establish or improve, directly or through local operating agencies, programs of education for migratory children.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs,* which contain requirements and information on how to submit an application. Please note that these Common Instructions supersede the version published on December 27, 2021.

Note: Applicants are not required to submit Budget information (ED 524). Please see the application package for a complete list of application requirements.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 25 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

5. *Use of CIG Funds:* SEAs in consortia receiving awards must implement the activities described in their project applications as a condition of their receipt of funds. CIG awards are treated as additional funds available to an SEA under the MEP Basic State Formula Grant program. Moreover, general requirements governing the use and reporting of awarded funds would be governed by provisions of 34 CFR part 76, which govern State-administered formula grant programs, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR part 75.210 and are as follows:

(a) *Significance* (10 points). The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers:

(1) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population. (Up to 5 points)

(2) The extent to which the results of the proposed project are to be disseminated in ways that will enable others to use the information or strategies. (Up to 5 points)

(b) *Quality of the project design* (30 points). The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable. (Up to 10 points)

(2) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs. (Up to 7 points)

(3) The extent to which the proposed project will establish linkages with other appropriate agencies and organizations providing services to the target population. (Up to 5 points)

(4) The extent to which the proposed project demonstrates a rationale (as defined in this notice). (Up to 8 points)

(c) *Quality of project services* (30 points). The Secretary considers the quality of the services to be provided by the proposed project.

(1) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, sex, age, or disability. (Up to 3 points)

(2) In addition, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services. (Up to 7 points)

(ii) The likely impact of the services to be provided by the proposed project on the intended recipients of those services. (Up to 10 points)

(iii) The extent to which the technical assistance services to be provided by the proposed project involve the use of efficient strategies, including the use of technology, as appropriate, and the leveraging of non-project resources. (Up to 5 points)

(iv) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services. (Up to 5 points)

(d) *Quality of the management plan* (10 points). The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(1) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project. (Up to 2 points)

(2) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project. (Up to 3 points)

(3) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project. (Up to 5 points)

(e) *Quality of the project evaluation* (20 points). The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the project evaluation, the Secretary considers:

(1) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project. (Up to 10 points)

(2) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes. (Up to 10 points)

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the

past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this program the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2), we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with:

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We also may notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* Consortium grantees are required to report on their project's effectiveness based on the project objectives, performance measures, and scheduled activities outlined in the consortium's application.

In addition, all grantees are required, under 2 CFR 200.329, to report on program performance indicators as part of their Consolidated State Performance Report. The program performance indicators established by the Department for the MEP, of which the Consortium Incentive Grants are a component, are—

(a) The percentage of MEP students that scored at or above proficient on their State's annual reading/language arts assessments in grades 3–8;

(b) The percentage of MEP students that scored at or above proficient on their State's annual mathematics assessments in grades 3–8;

(c) The percentage of MEP students who were enrolled in grades 7–12, and graduated or were promoted to the next grade level; and

(d) The percentage of MEP students who entered 11th grade that had received full credit for Algebra I or a higher mathematics course.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF), text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site, you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

James F. Lane,

Senior Advisor, Office of the Secretary, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary for the Office Elementary and Secondary Education.

[FR Doc. 2023–03731 Filed 2–22–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–444–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: Negotiated Rates—NJN 910185 Clean-up to be effective 3/18/2023.
Filed Date: 2/16/23.
Accession Number: 20230216–5067.
Comment Date: 5 p.m. ET 2/28/23.

Docket Numbers: RP23–445–000.
Applicants: Vector Pipeline L.P.
Description: Annual Report of Operational Purchases and Sales of Vector Pipeline L.P.
Filed Date: 2/16/23.
Accession Number: 20230216–5094.
Comment Date: 5 p.m. ET 2/28/23.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 16, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–03736 Filed 2–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–1120–000]

Nevada Cogeneration Associates #1; Supplemental Notice That Initial Market-Based Rate Filing Includes Request For Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Nevada Cogeneration Associates #1's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 8, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link.

Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: February 16, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–03733 Filed 2–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5867–054]

Alice Falls Hydro, LLC; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 5867–054.

c. *Date filed:* September 29, 2021.

d. *Applicant:* Alice Falls Hydro, LLC (Alice Falls Hydro).

e. *Name of Project:* Alice Falls Hydroelectric Project.

f. *Location:* The existing project is located on the Ausable River in the Town of Chesterfield, Clinton and Essex counties, New York. The project does not occupy federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Jody Smet, Vice President, Regulatory Affairs, Eagle Creek Renewable Energy, LLC, 7315 Wisconsin Avenue, Suite 1100W, Bethesda, Maryland 20814; (804) 739–0654 or *jody.smet@eaglecreekre.com.*

i. *FERC Contact:* Chris Millard at (202) 502–8256, or email at *christopher.millard@ferc.gov.*

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions: 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Alice Falls Hydroelectric Project P–5867–054.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted and is now ready for environmental analysis.

The Council on Environmental Quality (CEQ) issued a final rule on April 20, 2022, revising the regulations under 40 CFR parts 1502, 1507, and 1508 that federal agencies use to implement the National Environmental Policy Act (NEPA) (see National Environmental Policy Act Implementing Regulations Revisions, 87 FR 23,453–70). The final rule became effective on May 20, 2022. Commission staff intends to conduct its NEPA review in accordance with CEQ's new regulations.

l. The project consists of: (1) a stone masonry dam, 88 feet long and 63 feet high; (2) a 110-foot-long section of rock ledge adjacent to the dam with 2.5-foot-high pipe-supported flashboards; (3) a reservoir with a surface area of 4.8 acres at the normal water surface elevation of 350 feet;[1] (4) a 110-foot-wide, 150-foot-long intake structure with a 41-foot-wide by 14-foot-high trash rack opening and fitted with a trash rack with 1-inch clear bar spacing; (5) a divided, 45-foot-long, reinforced concrete penstock, where the Unit 1 penstock is 18 feet wide by 12 feet high and the Unit 2 penstock is 10 feet wide by 12 feet high; (6) a powerhouse, approximately 34 feet wide and 26 feet long, containing two turbine-generator units of 1.5 megawatts (Unit 1) and 0.6 megawatt (Unit 2); (7) a substation, 51 feet wide and 88 feet long; (8) a 745-foot-long, 5-kilovolt (kV) buried generator lead and a 700-foot-long, 46-kV buried transmission line; and (9) appurtenant facilities.

Alice Falls Hydro currently operates the project in a run-of-river mode and releases a year-round minimum flow over the spillway of 25 cubic feet per second (cfs) for the protection of aquatic resources and a 125-cfs minimum flow from May 20 to September 8 for the enhancement of aesthetic resources. A 20-cfs conveyance flow is released through the fish bypass facility from April 1 through November 30.

Alice Falls Hydro proposes to continue to operate the project in a run-of-river mode and provide a year-round, continuous minimum flow of 25 cfs; however, it would discontinue providing a 125-cfs aesthetic flow. Alice Falls Hydro would also shorten the duration of the operation of the fish bypass facility and temporarily increase conveyance flows, providing 42 cfs, or inflow, whichever is less, from April 15 through May 31 and 20 cfs or inflow, whichever is less, from June 1 through November 15.

m. A copy of the application can be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at FERCOnline *Support@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

All filings must (1) bear in all capital letters the title ''COMMENTS,'' ''REPLY COMMENTS,''
''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or

[1] Elevation data are presented using the National Geodetic Vertical Datum of 1929.

''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. The applicant must file no later than 60 days following the date of issuance of this notice: (1) a copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification. Please note that the certification request must comply with 40 CFR 121.5(b), including documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request. Please also note that the certification request must be sent to the certifying authority and to the Commission concurrently.

o. *Procedural schedule:* The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Filing of Comments, Recommendations, Terms and Conditions, and Fishway Prescriptions	April 2023.
Filing of Reply Comments	June 2023.

Dated: February 16, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03722 Filed 2–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–2232–858]

Duke Energy Carolinas, LLC; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Amendment of license to construct debris gate at the Rhodhiss development.

b. *Project No.:* 2232–858.

c. *Date Filed:* January 19, 2023.

d. *Applicant:* Duke Energy Carolinas, LLC.

e. *Name of Project:* Catawba-Wateree Hydroelectric Project.

f. *Location:* The project is located on the Catawba-Wateree River in Burke, McDowell, Caldwell, Catawba, Alexander, Iredell, Mecklenburg, Lincoln, and Gaston counties, North Carolina, and York, Lancaster, Chester, Fairfield, and Kershaw counties South Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r)

h. *Applicant Contact:* Mr. Jeffrey G. Lineberger, Director of Water Strategy and Hydro Licensing, Duke Energy, Mail Code EC–12Q, 526 South Church Street, Charlotte, NC 28202, (704) 382–5942.

i. *FERC Contact:* Mr. Steven Sachs, (202) 502–8666, *Steven.Sachs@ferc.gov.*

j. Deadline for filing comments, motions to intervene, and protests is 30 days from the issuance of this notice by the Commission. The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/doc-sfiling/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. The first page of any filing should include docket number P–2232–858.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The applicant requests an amendment of license to construct a 20-foot-long, 5.5-foot-high pneumatic crest gate that would be used to pass debris at the Rhodhiss development. The gate would be located at the left end of the spillway adjacent to the powerhouse. The applicant estimates gate installation would take place between September 2023 and August 2024 and does not anticipate requiring a reservoir drawdown below the normal minimum elevation (6 feet below full pond) during construction, but may require a brief deviation below the normal target elevation (3 feet below full pond) lasting less than 2 weeks. Following completion of construction, the applicant does not propose any changes to required water levels, flows, or operations as part of its request.

l. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should

so indicate by writing to the Secretary of the Commission.

n. *Comments, Motions to Intervene, or Protests:* Anyone may submit comments, a motion to intervene, or a protest in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, motions to intervene, or protests must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''MOTION TO INTERVENE'', or ''PROTEST'' as applicable; (2) set forth in the heading the name of the applicant and the project number(s) of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person intervening or protesting; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: February 16, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03723 Filed 2–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD22–9–000]

New England Winter Gas-Electric Forum; Notice of Second New England Winter Gas-Electric Forum

Take notice that the Federal Energy Regulatory Commission (Commission) will convene a forum on Tuesday, June 20, 2023, from approximately 8 a.m. to 5 p.m. Eastern Time. The forum will be held in Portland, Maine and will be open to the public.

The purpose of this forum is to continue discussions from the September 8, 2022 forum regarding the electricity and natural gas challenges facing the New England Region. The objective of the forum is to shift from defining electric and natural gas system challenges in the New England Region to discussing potential solutions, including both infrastructure and market-based solutions.

Registration for in-person attendance will be required and there is no fee for attendance. The forum will also be available on webcast. A supplemental notice will be issued with further details regarding the forum agenda, as well as any updates on timing and logistics, including registration for members of the public and the nomination process for panelists. Information will also be posted on the Calendar of Events on the Commission's website, *www.ferc.gov,* prior to the event. The forum will be transcribed.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov,* call toll-free (866) 208–3372 (voice) or (202) 208–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

For more information about this forum, please contact *NewEnglandForum@ferc.gov* for technical or logistical questions.

Dated: February 16, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–03734 Filed 2–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2322–069, 2322–071, 2325–100, 2574–092, 2611–091]

Brookfield White Pine Hydro, LLC, Merimil Limited Partnership, Hydro-Kennebec, LLC; Revised Procedural Schedule for Environmental Impact Statement for the Proposed Project Relicense, Interim Species Protection Plan, and Final Species Protection Plan

On January 31, 2020, Brookfield White Pine Hydro, LLC filed an application for a new license to continue to operate and maintain the 8.65-megawatt (MW) Shawmut Hydroelectric Project No. 2322 (Shawmut Project). On June 1, 2021, in a separate compliance proceeding for the Shawmut Project, Brookfield White Pine Hydro, LLC filed an Interim Species Protection Plan (Interim Plan) for Atlantic salmon and requested Commission approval to amend the current Shawmut license to incorporate the Interim Plan. The Interim Plan includes measures to protect endangered Atlantic salmon until the Commission issues a decision on the relicense application for the Shawmut Project.

Also on June 1, 2021, Brookfield Power US Asset Management, LLC (Brookfield), on behalf of the affiliated licensees for the 6.915–MW Lockwood Hydroelectric Project No. 2574, 15.433–MW Hydro-Kennebec Hydroelectric Project No. 2611, and 15.98–MW Weston Hydroelectric Project No. 2325, filed a Final Species Protection Plan (Final Plan) for Atlantic salmon, Atlantic sturgeon, and shortnose sturgeon and requested Commission approval to amend the three project licenses to incorporate the Final Plan. All four projects are located on the Kennebec River, in Kennebec and Somerset Counties, Maine.

On November 23, 2021, Commission staff issued a notice of intent to prepare a draft and final Environmental Impact Statement (EIS) to evaluate the effects of relicensing the Shawmut Project and amending the licenses of all four projects to incorporate the measures in the Interim and Final Plans. The notice of intent included a schedule for preparing a draft and final EIS.

On September 21, 2022, Brookfield filed supplemental information for the Final Plan, Interim Plan, and License Application. The filing includes a delayed mortality analysis for salmon smolts and additional measures that are intended to improve the downstream survival of juvenile and adult Atlantic salmon at the four projects. On October 5, 2022, Commission staff noticed the filing and solicited comments. Numerous comments were filed by stakeholders. The EIS will consider Brookfield's additional measures and the comments filed in response to the notice.

Therefore, by this notice, Commission staff is updating the procedural schedule for completing a draft and final EIS. The revised schedule is shown below. Further revisions to the schedule may be made as appropriate.

Milestone	Target date
Issue Draft EIS	August 2023.
Issue Final EIS	March 2024.

Any questions regarding this notice may be directed to Matt Cutlip at (503)

552–2762, or by email at *matt.cutlip@ferc.gov*.

Dated: February 15, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03687 Filed 2–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–56–000]

Eastern Gas Transmission and Storage, Inc.; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that February 8, 2023, Eastern Gas Transmission and Storage, Inc. (EGTS) filed a prior notice request for authorization, in accordance with section 7 of the Natural Gas Act, and Part 157 Sections 157.205(b) and 157.216(b) of the Federal Energy Regulatory Commission's (Commission) regulations under the Natural Gas Act and EGTS's blanket certificate issued in Docket No. CP82–537–000 to abandon one transmission compressor station (CS); known as Helvetia CS, along with associated pipeline LN–1423/1 in Clearfield County, Pennsylvania, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application should be directed to James Scribner, Regulatory and Certificates Analyst, 6603 West Broad Street, Richmond, VA 23230 at 804–397–5113; or email at *James.Scribner@bhegts.com*

Pursuant to Section 157.9 of the Commission's Rules of Practice and Procedure,[1] within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on April 17, 2023. How to file protests, motions to intervene, and comments is explained below.

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[2] any person [3] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[4] and must be submitted by the protest deadline, which is April 17, 2023. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [5] and the regulations under the NGA [6] by the intervention deadline for the project, which is April 17, 2023. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/how-guides.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before April 17, 2023. The filing of a comment alone will not serve to make the filer a party to the

[1] 18 CFR (Code of Federal Regulations) 157.9.

[2] 18 CFR 157.205.

[3] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[4] 18 CFR 157.205(e).

[5] 18 CFR 385.214.

[6] 18 CFR 157.10.

proceeding. To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP23–56–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing''; or [7]

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP23–56–000.

To mail via USPS, use the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

To send via any other courier, use the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FERCOnlineSupport@ferc.gov*.

Protests and motions to intervene must be served to the applicant by mail to: James Scribner, Regulatory and Certificates Analyst, 6603 West Broad Street, Richmond, Virginia 23230 or by email (with a link to the document) at *James.Scribner@bhegts.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *https://www.ferc.gov/ferc-online/overview*.

Dated: February 16, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03724 Filed 2–22–23; 8:45 am]

BILLING CODE 6717–01–P

[7] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5944–024]

Moretown Hydroelectric LLC; Notice of Intent To Prepare an Environmental Assessment

On November 30, 2020, Moretown Hydroelectric LLC filed an application for a subsequent license to continue operating the existing 1,200-kilowatt Moretown No. 8 Hydroelectric Project No. 5944 (Moretown Project or project). The project is located on the Mad River in Washington County, Vermont. The project does not occupy Federal land.

In accordance with the Commission's regulations, on November 8, 2022, Commission staff issued a notice that the project was ready for environmental analysis (REA notice). Based on the information in the record, including comments filed on the REA notice, staff does not anticipate that licensing the project would constitute a major Federal action significantly affecting the quality of the human environment. Therefore, staff intends to prepare a draft and final Environmental Assessment (EA) on the application to license the Moretown Project.

The EA will be issued and circulated for review by all interested parties. All comments filed on the EA will be analyzed by staff and considered in the Commission's final licensing decision.

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues Draft EA.	June 2023.
Comments on Draft EA	July 2023.
Commission issues Final EA.	October 2023.[1]

[1] The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) require that EAs be completed within 1 year of the Federal action agency's decision to prepare an EA. This notice establishes the Commission's intent to prepare an EA for the Moretown Project. Therefore, in accordance with CEQ's regulations, the Final EA must be issued within 1 year of the issuance date of this notice.

Any questions regarding this notice may be directed to Maryam Zavareh at (202) 502–8474 or *maryam.zavareh@ferc.gov.*

Dated: February 15, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03685 Filed 2–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC23–45–000.

Applicants: St. Paul Cogeneration, LLC.

Description: St. Paul Cogeneration, LLC submits Supplement to Application under Federal Power Act Section 203.

Filed Date: 2/15/23.

Accession Number: 20230215–5163.

Comment Date: 5 p.m. ET 2/27/23.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–83–000.

Applicants: Braes Bayou II, LLC.

Description: Braes Bayou II, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 2/16/23.

Accession Number: 20230216–5071.

Comment Date: 5 p.m. ET 3/9/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21–2459–000.

Applicants: Tenaska Power Services Co.

Description: Refund Report of Tenaska Power Services Co.

Filed Date: 2/15/23.

Accession Number: 20230215–5201.

Comment Date: 5 p.m. ET 3/8/23.

Docket Numbers: ER23–636–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: Deficiency Response—Deficiency Payment Waiver Process to be effective 2/14/2023.
Filed Date: 2/16/23.
Accession Number: 20230216–5100.
Comment Date: 5 p.m. ET 3/9/23.
Docket Numbers: ER23–688–001.
Applicants: BP Energy Retail Company California LLC.
Description: Tariff Amendment: Amendment to Tariff Filing to be effective 12/22/2022.
Filed Date: 2/16/23.
Accession Number: 20230216–5186.
Comment Date: 5 p.m. ET 3/9/23.
Docket Numbers: ER23–689–001.
Applicants: BP Energy Retail Company LLC.
Description: Tariff Amendment: Amendment to Tariff Filing to be effective 12/22/2022.
Filed Date: 2/16/23.
Accession Number: 20230216–5185.
Comment Date: 5 p.m. ET 3/9/23.
Docket Numbers: ER23–1125–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc. Capital Budget Quarterly Filing for Fourth Quarter of 2022.
Filed Date: 2/10/23.
Accession Number: 20230210–5234.
Comment Date: 5 p.m. ET 3/3/23.
Docket Numbers: ER23–1126–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6239; Queue No. AE2–343 to be effective 4/17/2023.
Filed Date: 2/16/23.
Accession Number: 20230216–5019.
Comment Date: 5 p.m. ET 3/9/23.
Docket Numbers: ER23–1127–000.
Applicants: American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: American Electric Power Service Corporation submits tariff filing per 35.13(a)(2)(iii: AEP submits one Facilities Agreements, SA No. 1427 to be effective 4/18/2023.
Filed Date: 2/16/23.
Accession Number: 20230216–5046.
Comment Date: 5 p.m. ET 3/9/23.
Docket Numbers: ER23–1128–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6245; Queue No. AE2–221 to be effective 4/17/2023.
Filed Date: 2/16/23.
Accession Number: 20230216–5087.
Comment Date: 5 p.m. ET 3/9/23.
Docket Numbers: ER23–1129–000.
Applicants: Hecate Energy Highland LLC.
Description: § 205(d) Rate Filing: Cert of Concurrence to 1st Amended SFA w/ New Market Solar ProjectCo 2, LLC to be effective 2/17/2023.
Filed Date: 2/16/23.
Accession Number: 20230216–5097.
Comment Date: 5 p.m. ET 3/9/23.
Docket Numbers: ER23–1130–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original UCSA, Service Agreement No. 6787; Queue Position J857 to be effective 1/20/2023.
Filed Date: 2/16/23.
Accession Number: 20230216–5122.
Comment Date: 5 p.m. ET 3/9/23.

Take notice that the Commission received the following electric reliability filings

Docket Numbers: RD22–4–001.
Applicants: Registration of Inverter-based Resources.
Description: North American Electric Reliability Corporation submits Request for Approval of the Inverter Based Resources Work Plan and Request for Expedited Review.
Filed Date: 2/15/23.
Accession Number: 20230215–5191.
Comment Date: 5 p.m. ET 3/17/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 16, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–03735 Filed 2–22–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0070; FRL–10580–01–OCSPP]

Pesticide Product Registration; Receipt of Applications for New Active Ingredients January 2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before March 27, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0070, and the specific case number for the chemical substance related to your comment, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (BPPD) (7511M), main telephone number: (202) 566–1400, email address: *BPPDFRNotices@epa.gov;* Anita Pease, Antimicrobials Division (AD) (7510P), main telephone number: (202) 566–0736: email address: *ADFRNotices@epa.gov;* or Dan Rosenblatt, Registration Division (RD) (7505T), main telephone number: (202) 566–2875, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is

listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).

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

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

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

II. Registration Applications

EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications. For actions being evaluated under EPA's public participation process for registration actions, there will be an additional opportunity for public comment on the proposed decisions. Please see EPA's public participation website for additional information on this process (*https://www2.epa.gov/pesticide-registration/public-participation-process-registration-actions*).

Notice of Receipt—New Active Ingredients

File Symbols: 1021–EITE, 1021–EIAO, 1021–EIAI, 1021–EITR, 1021–EITN. *Docket ID number:* EPA–HQ–OPP–2022–0772. *Applicant:* McLaughlin Gormley King Company, d/b/a MGK, 7325 Aspen Lane N Minneapolis, MN 55428. *Product names:* Sabadilla 10% Alkaloid Extract; MGK Formula 31422 Aerosol; MGK Formula 31421 (RTU); MGK Formula 31731 (RTU); MGK Formula 3159 [10%, 0.1%, 0.1%, 0.1%, 4.2%]. *Active ingredient:* Cevadine Mixture with Veratridine. *Proposed classification/Use:* Outdoor, non-food use; spot, crack and crevice. *Contact:* RD.

File Symbol: 7001–TTIL. *Docket ID number:* EPA–HQ–OPP–2022–0642. *Applicant:* JR Simplot Company, 16777 Howland Road, Lathrop, CA 95330. *Product name:* No Mas™. *Active ingredient:* Herbicide—ferrous sulfate heptahydrate at 100%. *Proposed use:* Non-food use for moss control on turf, lawns, and base of tree trunks. *Contact:* BPPD.

File Symbol: 29964–GE. *Docket ID number:* EPA–HQ–OPP–2022–0989. *Applicant:* Pioneer Hi-Bred International 8325 NW 62nd Avenue Johnston, IA 50131, USA. *Product name:* DP910521 Maize Insect Protected, Herbicide-Tolerant Corn. *Active ingredient:* Insecticide—Bacillus *thuringiensis* Cry1B.34 protein and the genetic material necessary (PHP79620 T–DNA) for its production in corn event DP-91Ø521–2 at 0.04%. *Proposed use:* Plant-Incorporated-Protectant (PIP) for use in maize. *Contact:* BPPD.

File Symbol: 29964–GG. *Docket ID number:* EPA–HQ–OPP–2023–0018. *Applicant:* Pioneer Hi-Bred International, Inc., 7100 NW 62nd Avenue, P.O. Box 1000, Johnston, Iowa, 50131. *Product name:* DAS1131 Maize Insect Protected, Herbicide-Tolerant Corn. *Active ingredient:* Insecticide—*Bacillus thuringiensis* Cry1Da2 protein and the genetic material necessary (PHP88492 T–DNA) for its production in corn event DAS-Ø1131–3. *Proposed use:* Plant-Incorporated-Protectant (PIP) for use in maize. *Contact:* BPPD.

File Symbol: 91163–E. *Docket ID number:* EPA–HQ–OPP–2022–0849. *Applicant:* Texas Corn Producers Board, 4205 N Interstate 27, Lubbock, Texas 79403. *Product name:* FourSure. *Active ingredients:* Fungicides—*Aspergillus flavus* strains TC16F, TC35C, TC38B, and TC46G at 0.00024% each. *Proposed use:* For application to corn to displace aflatoxin-producing strains of *Aspergillus flavus. Contact:* BPPD.

File Symbol: 97144–G. *Docket ID Number:* EPA–HQ–OPP–2023–0002. *Application:* Reliox Corporation, 8475 Western Way, Suite 155, Jacksonville, FL 32256. *Product Name:* Whiff! (with ReliOx Resin). *Active Ingredient:* Antimicrobial—Styrene divinylbenzene and ethylstyrene copolymer, chloromethyl trimethylamine functionalized in the tribromide form (Reliox resin) at 100% nominal concentration. *Proposed Use:* Disinfectant and sanitizer on hard, non-porous surfaces in commercial settings. *Contact:* Michael Varco, AD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: February 16, 2023.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2023–03748 Filed 2–22–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0103; FRL–10689–01–OCSPP]

Modernizing the Approach to the Environmental Protection Agency (EPA) and Food and Drug Administration (FDA) Oversight of Certain Products; Notice of Public Meeting and Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA)'s Office of Chemical Safety and Pollution Prevention (OCSPP) is co-hosting a virtual public meeting with the U.S. Food and Drug Administration (FDA)'s Center of Veterinary Medicine (CVM) on March 22, 2023. Additionally, EPA has opened a docket for the agencies to receive public comment on their current approach to the oversight of various products regulated as either pesticides by EPA or new animal drugs by FDA, with a focus on parasite treatment products applied topically to animals and in genetically engineered pest animals for use as pest control tools. The agencies are also announcing the availability of and soliciting comment on a document entitled, ''WHITEPAPER: A Modern Approach to EPA and FDA Product Oversight'' that describes the current challenges and

highlights the potential benefits of a modernized approach for oversight of these products. EPA and FDA are considering how best to update their respective oversight responsibilities for specific products in an efficient and transparent manner and in alignment with each agency's expertise, with the goal of improving protection of human, animal, and environmental health. The purpose of the public comment period and virtual public meeting is to obtain feedback from stakeholders on the whitepaper and ideas for modernizing EPA and FDA's approach to product oversight.

DATES:

Virtual Public Meeting: March 22, 2023, from 1:00 p.m. to 4:00 p.m. (EDT). Registration to attend the virtual public meeting is required on or before March 15, 2023. See the additional details and instructions for registration that appear in Unit III.

Written Comments: Submit your comments on or before April 24, 2023. As described in Unit III., you may also register to make oral comments during the virtual public meeting.

Special accommodations: Requests for special accommodations should be submitted as instructed under **ADDRESSES** on or before March 15, 2023, to allow EPA and FDA time to process these requests.

ADDRESSES:

Virtual Public Meeting: You must register online to receive the webcast meeting link and audio teleconference information on or before the date set in the **DATES** section. Please follow the registration instructions that is available through a link on the Office of Pesticide Programs (OPP) website available at: *https://www.epa.gov/pesticides.* For additional instructions, see Unit III.

Written Comments: Submit written comments, identified by docket identification (ID) No. EPA–HQ–OPP–2023–0103, through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not electronically submit any information you consider Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional information on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

Special accommodations: For information on access or services for individuals with disabilities, and to request accommodation for a disability, please contact Paul Di Salvo, listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Paul Di Salvo, Office of Chemical Safety and Pollution Prevention, Registration Division (7505T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2597; email address: *disalvo.paul@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

This notice is directed to the general public and may be of specific interest to persons (*e.g.,* industry, non-governmental organizations (NGOs), animal owners, veterinarians, and academia) who are or may be interested in regulation of parasite treatment products applied topically to animals or in genetically engineered pest animals for use as pest control tools. Because other entities may also be interested in this notice, the agencies have not attempted to describe all entities that may be interested in this subject.

B. Where can I access information about this meeting?

Information about this meeting is available through a link on the OPP website available at: *https://www.epa.gov/pesticides.* Supporting materials are available in the docket for this meeting, identified by docket ID No. EPA–HQ–OPP–2023–0103, at *https://www.regulations.gov.*

C. What should I consider as I prepare my comments?

1. *Submitting CBI.* Do not submit CBI information through *https://www.regulations.gov* or email. If your comments contain any information that you consider to be CBI or otherwise protected, please contact the individual listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see Tips for Effective Comments at *https://www.epa.gov/dockets.*

II. Background

A. Why are EPA and FDA hosting this public meeting and soliciting public comment?

Currently, EPA and FDA determine regulatory oversight of pesticides and new animal drugs based on the rationale described in a Memorandum of Understanding (MOU) between the agencies signed in 1971 and revised in 1973. Since that time, pesticide and animal drug technologies—and both agencies' understanding of these technologies—have evolved.

For example, parasite treatment products applied topically to animals generally are regulated by EPA if they remain on the skin to control only external parasites (*e.g.,* fleas, ticks) and by FDA if they are absorbed systemically into the bloodstream to control internal parasites (*e.g.,* intestinal worms). The agencies now understand that many of the topically administered products currently regulated by EPA do not remain on the skin and are actually absorbed into the bloodstream, highlighting challenges with the current approach and raising different safety concerns than originally anticipated.

Additionally, genetically engineered (''GE'') pest animals, which are gaining interest as a pest control tool, were not envisioned 50 years ago when the original regulatory approach was developed. As agreed in the 2016 National Strategy for Modernizing the Regulatory System for Biotechnology Products, EPA and FDA have considered how to update their respective responsibilities with the goal of developing an efficient, transparent, and predictable approach for overseeing GE insects. Recently, Executive Order 14081, issued September 12, 2022, has further directed the agencies to improve the clarity and efficiency of the regulatory process for biotechnology products, underscoring the need for continued coordination between the agencies on biotechnology.

The agencies' current approach to determining whether EPA or FDA is the appropriate regulator of certain products does not effectively reflect or accommodate scientific advancement, and it has become clear in some cases that the current approach has resulted in misalignment between product characteristics and the agency better equipped to regulate the product. A modernized approach would ensure that the oversight of these products better aligns with each agency's expertise, accounts for scientific advancement, avoids redundancy, better protects animal health and safety, and improves regulatory clarity for regulated entities, animal owners, veterinarians, and other stakeholders.

Additional information on each of these key areas is provided in the whitepaper in the docket.

B. What feedback do EPA and FDA hope to gain from the public meeting and comments?

The virtual public meeting will focus on the whitepaper and the following

questions. We are not seeking input or comments about any specific products, other federal agencies' product oversight, or other topics outside the scope of the whitepaper and the questions below. We are particularly interested in receiving comments from the public on the following:

1. What do you perceive as the strengths and weaknesses of each agency in regulating these types of products?
2. Are there additional or different challenges that EPA and FDA did not identify in the whitepaper?
3. How can EPA and FDA communicate with their stakeholders about the regulation of these products in a clearer and more transparent manner?
4. For regulated entities, how have you historically determined which agency to approach first to bring your product to market?
5. For consumers, do you know who is regulating the products you use on your animal(s)? If you have a concern or complaint about a specific product, do you know which agency to contact?
6. How should EPA and FDA modify product oversight to better align with each agency's mission and expertise?
7. What difficulties would you envision if EPA and FDA were to modify product oversight to better align with each agency's mission and expertise, and how could they be mitigated?

C. How are EPA and FDA seeking public comments?

EPA and FDA are seeking public comments through several planned activities including:

- Through this **Federal Register** document, EPA is announcing that it is co-hosting a virtual public meeting with FDA on the date identified in **DATES** to seek input from stakeholders on the agencies' current approaches to the oversight of various products regulated as either pesticides by EPA or new animal drugs by FDA. The agenda and instructions for registration for this meeting are available through a link on the OPP website available at: *https://www.epa.gov/pesticides.*
- EPA and FDA are announcing the availability of and are soliciting comment on the whitepaper and the questions posed in Unit II.B.
- Following the public meeting and the close of the comment period, EPA and FDA will consider comments received in determining next steps.

D. How can I access the documents?

The whitepaper is available in the docket at *https://www.regulations.gov;* identified as docket ID No. EPA–HQ–OPP–2023–0103. In addition, EPA and FDA may include additional background documents in the docket as the materials become available.

III. Public Participation Instructions

To participate in the virtual public meeting, please follow the instructions in this unit.

A. How can I provide comments?

To ensure proper receipt of comments, it is imperative that you identify docket ID No. EPA–HQ–OPP–2023–0103 in the subject line on the first page of your comments.

1. *Written comments.* You are encouraged to provide written comments that are submitted using the instructions in **ADDRESSES** and Unit I.B. and C., on or before the date set in the **DATES** section.

2. *Oral comments.* If you want to make brief oral comments during the virtual public meeting, please indicate this interest during registration for the virtual public meeting on or before March 15, 2023. Please follow the registration instructions available through a link on the OPP website available at: *https://www.epa.gov/pesticides.*

After the agencies receive all registrations for oral comments, they will determine the amount of time to allot to each commenter and email that information to all commenters.

B. How can I participate in the virtual public meeting?

This meeting is virtual and will occur via webcast. For information on how to register and then view the webcast, please refer to the registration instructions available through a link on the OPP website available at: *https://www.epa.gov/pesticides.*

Authority: 7 U.S.C. 136 *et seq.*

Dated: February 17, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemicals Safety and Pollution Prevention.

[FR Doc. 2023–03739 Filed 2–22–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0067; FRL–10578–01–OCSPP]

Pesticide Product Registration; Receipt of Applications for New Uses January 2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before March 27, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0067, and the specific case number for the chemical substance related to your comment, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Anita Pease, Antimicrobials Division (AD) (7510P), main telephone number: (202) 566–0736: email address: *ADFRNotices@epa.gov;* or Dan Rosenblatt, Registration Division (RD) (7505T), main telephone number: (202) 566–2875, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).

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

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

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

II. Registration Applications

EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

Notice of Receipt—New Uses

EPA Registration Number: 100–739, 100–740. *Docket ID number:* EPA–HQ–OPP–2022–0856. *Applicant:* Syngenta Crop Protection, LLC 410 Swing Road Greensboro, NC 27419 *Active ingredient:* Difenoconazole. *Product type:* Fungicide. *Proposed use:* Dried Shelled Pea and Bean (except Soybean) Crop Subgroup 6C (Seed treatment). *Contact:* RD.

EPA Registration Numbers: 5905–580, 62719–87, and 62719–533. *Docket ID number:* EPA–HQ–OPP–2022–0890. *Applicant:* Interregional Research Project Number 4 (IR–4), North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606. *Active ingredient:* Triclopyr. *Product type:* Herbicide. *Proposed use:* Sugarcane. *Contact:* RD.

File Symbol: 69132–L. *Docket ID number:* EPA–HQ–OPP–2023–0016. *Applicant:* Purac America, Inc., 7905 Quivira Rd., Lexena, KS 66215. *Active ingredient:* L-lactic acid. *Product type:* In-can preservative. *Proposed use:* In-can preservative for controlling microorganisms (bacteria and fungi) that cause spoilage and/or fouling in industrial, commercial and consumer (household) products, such as liquid detergents, laundry products, fabric softeners, soaps, liquid cleaners, all-purpose cleaners, disinfectants and sanitizers, furniture and floor care, cleaning wipes, shampoos (carpet, upholstery, animal, industrial), leather care, shower gels, inks, adhesives, silicone emulsions, and surfactants. *Contact:* AD.

EPA Registration Numbers: 7969–335 and 7969–336. *Docket ID number:* EPA–HQ–OPP–2022–0887. *Applicant:* BASF Corporation 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709–3528. *Active ingredient:* Cyflumetofen. *Product type:* Insecticide. *Proposed uses:* Cucurbit crop group 9; crop group expansions for berry, low growing, subgroup 13–07G and fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F; and new field use on pepper/eggplant, subgroup 8–10B. *Contact:* RD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: February 13, 2023.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2023–03743 Filed 2–22–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0889; FRL–10683–01–OCSPP]

Sulfoxaflor; Pesticide Product Registration; Notice of Receipt and Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA received applications to register new uses for pesticide products containing sulfoxaflor, a currently registered active ingredient. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on the application.

DATES: Comments must be received on or before March 27, 2023.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number EPA–HQ–OPP–2010–0889, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. For the latest status information on EPA/DC services and access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Registration Division (RD) (Mail Code 7505T); Daniel Rosenblatt; main telephone number: (202) 566–1030; email address: *RDFRNotices@epa.gov;* Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

This action provides information that is directed to the public in general.

B. What action is the Agency taking?

EPA is hereby providing notice of receipt and opportunity to comment on applications to register new uses for pesticide products containing sulfoxaflor, a currently registered active ingredient. Notice of receipt of the applications does not imply a decision by the Agency on these applications. For actions being evaluated under EPA's public participation process for registration actions, there will be an additional opportunity for public comment on the proposed decisions. Please see EPA's public participation website for additional information on this process (*https://www.epa.gov/pesticide-registration/public-participation-process-registration-actions*).

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

EPA is taking this action pursuant to FIFRA section 3(c)(4), 7 U.S.C. 136a(c)(4), and 40 CFR 152.102.

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

1. *Submitting CBI.* Do not submit this information to EPA through *https://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as

CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

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

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Applications to Register New Uses

In July 2019, EPA's Office of Pesticide Program granted a number of amendments to add new uses and make other labeling changes to three existing sulfoxaflor products registered for use under FIFRA. Those amendments were challenged in the Ninth Circuit Court of Appeals. *Center for Food Safety* v. *Reagan*, 56 F.4th 648 (9th Cir. 2022). Petitioners in that case contended that EPA failed to provide notice and opportunity for comment under FIFRA section 3(c)(4) on the 2010 application for use of sulfoxaflor on citrus, cotton, cucurbits, soybean, and strawberry crops and, for uses registered in 2016, removal of restrictions limiting use to post-bloom applications on berries, canola, okra, ornamentals, pome fruit, potato, stone fruit, fruiting vegetables, nuts, succulent and dry beans; prohibiting use on crops grown for seed; prohibiting tank mixing; and removing a 12' on-field aerial buffer. The Court agreed with the Petitioners on this issue, requiring EPA to issue a new FIFRA section 3(c)(4) notice with an opportunity for comment on those uses. This notice is intended to address that part of the Court's mandate.

This unit provides the following information about the applications received and on which comments are being sought: The EPA File Symbol or Registration number(s) and EPA docket ID number for the application; The name and address of the applicant; The name of the active ingredient, product type and proposed uses; and the division to contact for that application. Additional information about the application may also be available in the docket.

- *EPA File Symbol:* 62719–631, 62719–623, 62719–625. *Docket ID Number:* EPA–HQ–OPP–2010–0889. *Applicant:* Corteva Agriscience, 9330 Zionsville Rd., Indianapolis, IN 46268. *Active Ingredient:* Sulfoxaflor. *Product Type:* Insecticide. *Proposed Use:* After conducting an extensive risk analysis, including review of one of the agency's largest datasets on the effects of a pesticide on bees, the Agency restored the 2015 vacated uses in 2019 on: citrus, cotton, cucurbits, soybeans, strawberry. The Agency also removed the following 2016 mitigations in 2019: A 12 foot on-field aerial buffer; prohibition for use on crops grown for seed; removal of the tank mix restriction; removal of restrictions limiting use to post-bloom applications on berries, canola, okra, ornamentals, pome fruit, potato, stone fruit, fruiting vegetables, nuts, succulent and dry beans. *Contact:* RD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: February 16, 2023.

Daniel Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2023–03715 Filed 2–22–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1256; FR ID 128220]

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 (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 April 24, 2023. 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: 3060–1256.

Title: Application for Connect America Fund Phase II and Rural Digital Opportunity Fund Auction Support.

Form Number: FCC Form 683.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, Not-for-profit institutions, and State, Local or Tribal governments.

Number of Respondents and Responses: 530 respondents and 930 responses.

Estimated Time per Response: 2–12 hours (on average).

Frequency of Response: Annual reporting requirements, on occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection *47 U.S.C. 154, 214, 254* and *303(r)* of the Communications Act of 1934, as amended.

Total Annual Burden: 5,860 hours.

Total Annual Cost: No cost.

Nature and Extent of Confidentiality: Although most information collected in FCC Form 683 will be made available for public inspection, the Commission will withhold certain information collected in FCC Form 683 from routine public inspection. Specifically, the

Commission will treat certain financial and technical information submitted in FCC Form 683 as confidential. In addition, an applicant may use the abbreviated process under *47 CFR 0.459(a)(4)* to request confidential treatment of the audited financial statements that are submitted during the post-selection review process. However, if a request for public inspection for this technical or financial information is made under *47 CFR 0.461,* and the applicant has any objections to disclosure, the applicant will be notified and will be required to justify continued confidential treatment. To the extent that an applicant seeks to have other information collected in FCC Form 683 or during the post-selection review process withheld from public inspection, the applicant may request confidential treatment pursuant to *47 CFR 0.459.*

Privacy Act Impact Assessment: No impact(s).

Needs and Uses:

Connect America Fund Phase II Auction

The Commission is requesting the Office of Management and Budget (OMB) approval for this revised information collection. On November 18, 2011, the Commission released the *USF/ICC Transformation Order and Further Notice of Proposed Rulemaking,* WC Docket No. 10–90 et al., FCC 11–161 (*USF/ICC Transformation Order and/or FNPRM*), which comprehensively reformed and modernized the high-cost program within the universal service fund to focus support on networks capable of providing voice and broadband services. Among other things, the Commission created the Connect America Fund (CAF) and concluded that support in price cap areas would be provided through a combination of ''a new forward-looking model of the cost of constructing modern multi-purpose networks'' and a competitive bidding process (CAF Phase II auction or Auction 903). The Commission also sought comment in the accompanying *USF/ICC Transformation FNPRM* on proposed rules governing the CAF Phase II auction, including basic auction design and the application process.

In the CAF Phase II auction, service providers competed to receive support of up to $1.98 billion over 10 years to offer voice and broadband service in unserved high-cost areas. The information collection requirements reported under this collection are the result of several Commission decisions to implement the reform adopted in the *USF/ICC Transformation Order* and move forward with conducting the CAF Phase II auction. In the *April 2014 Connect America Order,* WC Docket No. 10–90 et al., FCC 14–54, the Commission adopted various rules regarding participation in the CAF Phase II auction, the term of support, and the eligible telecommunications carrier (ETC) designation process. In the *Phase II Auction Order,* WC Docket No. 10–90 et al., FCC 16–64, the Commission adopted rules to govern the CAF Phase II auction, including the adoption of a two-stage application process, which includes a pre-auction short-form application to be submitted by parties interested in bidding in the CAF Phase II auction and a post-auction long-form application that must be submitted by winning bidders seeking to become authorized to receive CAF Phase II auction support. The Commission concluded, based on its experience with auctions and consistent with the record, that this two-stage application process balances the need to collect information essential to conducting a successful auction and authorizing CAF Phase II support with administrative efficiency.

On January 30, 2018, the Commission adopted a public notice that established the final procedures for the CAF Phase II auction, including the long-form application disclosure and certification requirements for winning bidders seeking to become authorized to receive CAF Phase II auction support. *See Phase II Auction Procedures Public Notice,* WC Docket No. 17–182 et al., FCC 18–6. The Commission also adopted the *Phase II Auction Order on Reconsideration,* WC Docket No. 10–90 et al., FCC 18–5, which modified the Commission's letter of credit rules to provide some additional relief for CAF Phase II auction support recipients by reducing the costs of maintaining a letter of credit. On January 19, 2023, WCB released a public notice announcing that the Commission had concluded its review of CAF Phase II auction long-form applications. *See WCB Concludes CAF II Application Review, Long-Forms Made Public,* AU Docket No. 17–182 et al., DA 23–49.

The Commission proposes to eliminate the information collection requirements related to the CAF Phase II auction FCC Form 683 now that the Commission's review of CAF Phase II auction long-form applications has concluded. All other information collection requirements remain unchanged.

Rural Digital Opportunity Fund Auction

On February 7, 2020 the Commission released the *Rural Digital Opportunity Fund Order,* WC Docket Nos. 19–126, 10–90, FCC 20–5 which will commit up to $20.4 billion over the next decade to support up to gigabit speed broadband networks in rural America. The funding was allocated through a multi-round, reverse, descending clock auction that favored faster services with lower latency and encouraged intermodal competition in order to ensure that the greatest possible number of Americans will be connected to the best possible networks, all at a competitive cost.

To implement the Rural Digital Opportunity Fund auction (or Auction 904), the Commission adopted new rules for the Rural Digital Opportunity Fund auction, including the adoption of a two-stage application process. Like with the CAF Phase II auction, this process includes a pre-auction short-form application to be submitted by parties interested in bidding in the Rural Digital Opportunity Fund auction (FCC Form 183) and a post-auction long-form application that must be submitted by winning bidders (or their designees) seeking to become authorized to receive Rural Digital Opportunity Fund support (FCC Form 683). The Commission received approval for the short-form application (FCC Form 183) in a separate collection under the OMB control number 3060–1252.

This information collection includes the disclosures and certifications adopted by the Commission that must be made by winning bidders seeking to become authorized for Rural Digital Opportunity Fund support and the requirement that Rural Digital Opportunity Fund support recipients maintain a letter of credit. Any additional revisions or new collections for OMB review that address other reforms adopted in the Order will be submitted at a later date.

The Commission therefore proposes to revise this information collection to maintain these Rural Digital Opportunity Fund requirements.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–03763 Filed 2–22–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–XXXX; FR ID 128022]

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 (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 April 24, 2023. 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–XXXX.

Title: Freedom of Information/Privacy Act Request.

Form Number: N/A.

Type of Review: New information collection.

Respondents: Individuals or Households, Business or other for-profit, and Not-for-profit institutions, Federal Government, State, Local or Tribal Government.

Number of Respondents and Responses: 770 respondents; 770 responses.

Estimated Time per Response: 0.08 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary. The statutory authority for this collection of information is contained in 5 U.S.C. 552 and 552a.

Total Annual Burden: 62 hours.

Total Annual Cost: $5,124.00.

Privacy Act Impact Assessment: Yes. The online form is used to collect information necessary to process a proper FOIA/Privacy Act (PA) request relating to a subject matter provided by the requester. This form includes a link to a Privacy Act Statement which outlines the statutory authority for the information collection, the purpose of the collection, and the routine uses under which the information may be disclosed outside of the FCC, as described in the FCC System of Records Notice, FCC/OMD–17—Freedom of Information Act (FOIA) and Privacy Act Requests.

Nature and Extent of Confidentiality: FOIA confidential and proprietary information is protected in accordance with FCC regulations at 47 CFR 0.457(d). When a request for confidential or proprietary information is submitted, it is handled in accordance with 47 CFR 0.457(d).

Privacy Act requests are made available only to the individual who is the subject of the record, who has provided proof or affirmation of identity, and is not made publicly available.

A description of how this information is collected, maintained, and disclosed is provided in the FCC System of Records Notice, FCC/OMD–17—Freedom of Information Act (FOIA) and Privacy Act Requests and in the Privacy Act Statement linked in the online form.

Needs and Uses: The online form is used to collect information necessary to process a proper FOIA request relating to a subject matter provided by the requester. Freedom of Information Act, 5 U.S.C. 552, details what makes a proper FOIA request. A proper request must include: (1) a reasonable description of the record and (2) is made in accordance with published agency rules stating time, place, fees (if any) and procedures to be followed.

Respondents can request records at any time. The request must describe each requested record in sufficient detail to enable the FCC staff to locate the record. The online form is used to collect requester's information (address, contact information, etc.) and a detailed description of the records sought. The FOIA requester is asked to provide information that would assist the FCC in locating responsive records (if they exist). This information is essential to the accurate search and retrieval of records responsive to FOIA/PA requests. Additionally, the requester may include information, if applicable, about fee categories, fee waivers, and expedited processing.

This form will enhance the quality, utility, and clarity of the information to be collected; and minimize the burden of the collection of information on those responding.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–03760 Filed 2–22–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID 127522]

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 April 24, 2023.

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: MICHAEL RADIO COMPANY, LLC, KLLM(FM), FAC. ID NO. 762455, FROM: WHEATLAND, WY, TO: WEST LARAMIE, WY, FCC FILE NO. 0000205045; GRACE COMMUNITY CHURCH OF AMARILLO, KRGK(FM), FAC. ID NO. 766480, FROM: BIG SPRING, TX, TO: SWEETWATER, TX, FCC FILE NO. 0000207569; SOLID ROCK FOUNDATION, KVWD(FM), FAC. ID NO. 766506, FROM: SWEETWATER, OK, TO: MERRITT, OK, FCC FILE NO. 0000207441;

CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC., WCYZ(FM), FAC. ID NO. 191546, FROM: SILVER SPRINGS SHORE, FL, TO: OCALA, FL, FCC FILE NO. 0000204932; CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC., WHGV(FM), FAC. ID NO. 76433, FROM: LA CROSSE, FL, TO: GAINESVILLE, FL, FCC FILE NO. 0000206026; ALLIANCE RADIO, LLC, WPNA–FM, FAC. ID NO. 74177, FROM: HIGHLAND PARK, IL, TO: NILES, IL, FCC FILE NO. 0000210663; and BRADLEY GOEHL, KKBW, FAC. ID NO. 762409, FROM: MULLIN, TX, TO: LAKE BROWNWOOD, TX, FCC FILE NO. 0000210602. 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. 2023–03690 Filed 2–22–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0844; FR ID 128210]

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 of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before April 24, 2023. 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 Number: 3060–0844.

Title: Carriage of the Transmissions of Television Broadcast Stations: Section 76.56(a), Carriage of qualified noncommercial educational stations; Section 76.57, Channel positioning; Section 76.61(a)(1)–(2), Disputes concerning carriage; Section 76.64, Retransmission consent.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 370 respondents and 2,550 responses.

Estimated Time per Response: 0.5 to 5 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this action is contained in Sections 1, 4(i) and (j), 325, 338, 614, 615, 631, 632, and 653 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (j), 325, 338, 534, 535, 551, 552, and 573.

Total Annual Burden: 2,220 hours.

Total Annual Cost: No cost.

Needs and Uses: Under Section 614 of the Communications Act and the implementing rules adopted by the Commission, commercial TV broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's television market. Under Section 325(b) of the Communications Act, commercial TV broadcast stations are entitled to negotiate with local cable systems for carriage of their signal pursuant to retransmission consent agreements in lieu of asserting must carry rights. This system is therefore referred to as ''Must-Carry and Retransmission Consent.'' Under Section 615 of the Communications Act, noncommercial educational (NCE) stations are also entitled to assert mandatory carriage rights on cable systems located within the station's market; however, noncommercial TV broadcast stations *16939 are not entitled to retransmission consent.

In 2019, the Commission adopted new rules governing the delivery and form of carriage election notices. Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative, MB Docket Nos. 17–105, 17–317, Report and Order and Further Notice of Proposed Rulemaking, FCC 19–69, 34 FCC Rcd 5922(2019) (2019 Report and Order). That decision modernized the carriage election notice rules by moving the process online for most broadcasters and multichannel video programming distributors (MVPDs), but the Commission sought comment on how to apply these updated rules to certain small broadcast stations and MVPDs.

In 2020, the Commission adopted a Report and Order that resolved the remaining issues regarding carriage election notice rules for small broadcast stations and MVPDs. Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative, MB Docket Nos. 17–105, 17–317, Report and Order, FCC 20–14, 2020 WL 948697 (rel. Feb. 25, 2020) (2020 Report and Order). Pursuant to that decision, the obligations of certain small broadcasters and MVPDs were slightly modified.

This information collection is being revised to reflect the changes to 47 CFR 76.64(h) as well as other new obligations adopted in the 2020 Report and Order, which require review and approval from the Office of Management and Budget (OMB).

47 CFR 76.64(h)(5) is amended to require low power television stations and non-commercial educational translator stations that are qualified under 47 CFR 76.55 and retransmitted by an MVPD to, beginning no later than July 31, 2020, respond as soon as is reasonably possible to messages or calls from MVPDs that are received via the email address or phone number the station provides in the Commission's Licensing and Management System (LMS) database.

A qualified Low Power Television (LPTV) station that changes its carriage election must send an election change notice to each affected MVPD's carriage election-specific email address by the carriage election deadline. Such change notices must include, with respect to each station covered by the notice: The station's call sign, the station's community of license, the DMA where the station is located, the specific change being made in election status, and an email address and phone number for carriage-related questions. LPTV notices to cable operators need to identify specific cable systems for which a carriage election applies only if the broadcaster changes its election for some systems of the cable operator but not all. In addition, the broadcaster must carbon copy *ElectionNotices@FCC.gov,* the Commission's election notice verification email inbox, when sending its carriage elections to MVPDs.

All qualified LPTV stations, whether being carried pursuant to must carry or retransmission consent, must send an email notice to all MVPDs that are or will be carrying the station no later than the next carriage election deadline of October 1, 2020. Qualified LPTVs must do so even if they are not changing their carriage status from the current election cycle. These notifications must be sent to an MVPD's carriage election-specific email address, must be copied to *ElectionNotices@FCC.gov,* and must include the same information required for a change notification except that the notification may simply confirm the existing carriage status rather than a change in status.

All qualified NCE translator stations must provide email notice to all MVPDs that are or will be carrying the translator no later than the next carriage election deadline of October 1, 2020. Similar to qualified LPTVs, these notifications must be sent to an MVPD's carriage election-specific email address, must be copied to *ElectionNotices@FCC.gov,* and must include the station's call sign, the

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–03762 Filed 2–22–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0400; FR ID 128205]

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 (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 April 24, 2023. 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: 3060–0400.

Title: Part 61, Tariff Review Plan (TRP).

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 2,747 respondents; 4,148 responses.

Estimated Time per Response: 0.5–53 hours.

Frequency of Response: One-time, on occasion, annual or biennial reporting requirements, and certification requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory Authority for this information collection is contained in 47 U.S.C. 201, 202, 203, and 251(b)(5) of the Communications Act of 1934, as amended. See 47 U.S.C. 201, 202 and 203, and 251(b)(5).

Total Annual Burden: 60,576 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: Respondents are not being asked to submit confidential information to the Commission. If the Commission requests respondents to submit information which respondents believe are confidential, respondents may request confidential treatment of such information under *47 CFR 0.459* of the Commission's rules.

Needs and Uses: The Commission has developed standardized Tariff Review Plans (TRPs) that set forth the summary material that incumbent LECs (ILECs) file to support revisions to the rates in their interstate access service tariffs. The TRPs display basic data on rate development in a consistent manner, thereby facilitating review of the ILEC rate revisions by the Commission and interested parties. The TRPs have served this purpose effectively in past years.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–03761 Filed 2–22–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or

the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than March 27, 2023.

A. Federal Reserve Bank of St. Louis (Holly A. Rieser, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *HNB Bancorp, Inc., Hannibal, Missouri;* to merge with Northeast Missouri Bancshares, Inc., and thereby indirectly acquire The Mercantile Bank of Louisiana, Missouri, both of Louisiana, Missouri.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–03754 Filed 2–22–23; 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 March 10, 2023.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198.

1. *Charles McGinn, Anselmo, Nebraska;* to acquire voting shares of CFSB Holding Co., and thereby indirectly acquire voting shares of Custer Federal State Bank, both of Broken Bow, Nebraska.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–03752 Filed 2–22–23; 8:45 am]

BILLING CODE 6210–01–P

OFFICE OF GOVERNMENT ETHICS

Agency Information Collection Activities; Submission for OMB Review; Proposed Collection; Comment Request for a Modified OGE Form 201 Request an Individual's Ethics Documents

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice of request for agency and public comments.

SUMMARY: After this second round notice and public comment period, the U.S. Office of Government Ethics (OGE) plans to submit a proposed modified OGE Form 201, Request an Individual's Ethics Documents (OGE Form 201) to the Office of Management and Budget (OMB) for review and approval of a three-year extension under the Paperwork Reduction Act of 1995. The OGE Form 201 is used by persons requesting access to executive branch public financial disclosure reports and other covered records.

DATES: Written comments by the public and agencies on this proposed extension are invited and must be received by April 24, 2023.

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

FOR FURTHER INFORMATION CONTACT: McEvan Baum at the U.S. Office of Government Ethics; telephone: 202–482–9287; TTY: 800–877–8339; Email: *usoge@oge.gov.* An electronic copy of the OGE Form 201 version used to manually submit access requests to OGE or other executive branch agencies by mail or FAX is available in the Forms Library section of OGE's website at *http://www.oge.gov.* A paper copy may also be obtained, without charge, by contacting Mr. Baum.

SUPPLEMENTARY INFORMATION:

Title: OGE Form 201 Request an Individual's Ethics Documents.

Agency Form Number: OGE Form 201.

OMB Control Number: 3209–0002.

Type of Information Collection: Extension with modifications of a currently approved collection.

Type of Review Request: Regular.

Respondents: Individuals requesting access to executive branch public financial disclosure reports and other covered records.

Estimated Annual Number of Respondents: 19,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden: 3,167 hours.

Abstract: The OGE Form 201 collects information from, and provides certain information to, persons who seek access to OGE Form 278 Public Financial Disclosure Reports, including OGE Form 278–T Periodic Transaction Reports, and other covered records. The form reflects the requirements of the Ethics in Government Act, subsequent amendments pursuant to the STOCK Act, and OGE's implementing regulations that must be met by a person before access can be granted. These requirements include the address of the requester, as well as any other person on whose behalf a record is sought, and acknowledgement that the applicant is aware of the prohibited uses of executive branch public disclosure financial reports. See 5 U.S.C. 13107(b) and (c) and 13122(b)(1) and 5 CFR 2634.603(c) and (f). Executive branch departments and agencies are

encouraged to utilize the OGE Form 201 for individuals seeking access to public financial disclosure reports and other covered documents. OGE permits departments and agencies to use or develop their own forms as long as the forms collect and provide all of the required information.

OGE currently has OMB approval for two versions of the form, a PDF version and OGE's online application. The online version enables the applicant to electronically fill out, submit, and receive access to copies of the public financial disclosure reports certified by the U.S. Office of Government Ethics.

OGE is proposing several changes to OGE Form 201, with the goals of (1) making the form more appropriate for use throughout the executive branch, and (2) providing applicants with clarifying information about the use of the form. The changes were developed with feedback from agency ethics officials across the executive branch, through a listening session and written comments. To the extent appropriate, the comments and feedback from agency ethics officials have been incorporated into the proposed revised form. The proposed changes are summarized below.

OGE recently made nonsubstantive changes to the electronic version of the Form 201, simplifying the name from ''Request to Inspect or Receive Copies of Executive Branch Personnel Public Financial Disclosure Reports or Other Covered Records'' to ''Request an Individual's Ethics Documents.'' OGE now proposes to apply the new name to the PDF version as well, so that all versions of the form will have the same name.

OGE proposes adding approximately two pages of supplemental information to the PDF version of the form in order to provide guidance to applicants regarding the use of the form. Specifically, the supplemental information provides guidance on which documents can be obtained by request via the form (including a description of such documents), which documents can be obtained from OGE as opposed to an individual's employing agency, and when and how to submit a request using the PDF version of the form. The changes avoid the use of the term ''other covered records,'' which was a point of confusion for applicants in the past. Instead, the supplemental information simply describes all documents available through use of the form, including a chart. OGE proposes to remove section III because that information will now be found more easily in the supplemental information.

OGE proposes to make a number of changes to the PDF version of the form to align the form with plain language principles and to improve user experience. These changes include: adding the title to the face of the PDF version of the form; removing OGE's name, address, telephone number and fax number from the top of the form; adding ''Your'' in front of the name, mailing address, occupation, and telephone number fields; adding parentheticals containing the word ''required'' next to required fields; grouping fields 3 and 3a in section I together; and reformatting section I in order to make it easier for applicants to specify the type of report and time period in field 5, if applicable, and provide examples to the applicants in the instructions. OGE also proposes to add a continuation page to allow more space for fields 5 and 5a.

OGE proposes moving the ''Agency Use Only'' box on the PDF version of the form to the end of section II (''Notice of Action''), marking it ''optional,'' and expanding it. Moving it to the end of section II will group together all portions of the form to be completed by the applicant, thereby minimizing the potential for missing information or omitting a signature that would delay processing. The proposed additions add space for information on requests that are not filled and additional notes in order to provide more information to applicants about why a document was or was not released. Likewise, OGE proposes to remove the checkbox in section II indicating that ''Copies of the report(s) or other covered record(s) you requested are enclosed'' as duplicative of the information in the revised ''Agency Use Only'' box.

OGE proposes changing the applicant choices on all versions of the form by changing ''private citizen'' to ''member of the public;'' combining ''law firm'' and ''other private organization'' into simply ''private organization;'' and adding an option for ''other.'' The purpose of these changes is to modernize the language and make selecting a choice easier for the applicant.

In the applicant signature section on all versions of the form, OGE proposes to broaden language to address all potential requested records. The revised language would read: ''I am aware that in completing this official government form that any intentionally false or misleading statement, certification, or response provided in this form is a violation of law punishable by a fine or imprisonment, or both, under 18 U.S.C. 1001.''

Finally, on the PDF version of the form, OGE proposes adding the option for applicants to provide an email address in lieu of a mailing address, while also removing the ''Pick-up'' option. These changes are based on agency feedback that almost every request is filled using email and that few agencies allow for applicants to pick up documents. Use of email also helps with record keeping and cuts down significantly on processing time, allowing applicants to receive their documents quickly. OGE also proposes to remove the checkbox for the ''Picked up by'' from section II, as that option would be eliminated. The online application currently requires applicants to provide an email address and applicants who use the online application may only receive a response via email. OGE now proposes to remove the unnecessary street address field from the online application, to reduce the information burden on applicants.

A **Federal Register** Notice with a 60-day comment period soliciting comments on this information collection was published on November 2, 2022 (87 FR 66188). OGE did not receive any comments in response. However, after further review OGE proposes to make additional nonsubstantive changes to both versions of the form designed to improve user experience and readability. The additional changes are as follows:

- Nonmaterial wording changes to field descriptions and instructions to improve readability and consistency throughout the form (PDF version only)
- Nonmaterial changes in punctuation and capitalization to improve readability and consistency throughout the form (PDF version only)
- Update to the Public Burden Information section to accurately reflect the location of the OMB control number
- Changes to buttons and other aspects of the user interface to make navigation easier (PDF version only)
- Updates to the Ethics in Government Act of 1978 citations to accurately reflect the recent recodification of that statute
- Update to the penalty amount in the applicant signature section based on a recent statutory update

Request for Comments: Agency and public comment is invited specifically on the need for and practical utility of this information collection, the accuracy of OGE's burden estimate, the enhancement of quality, utility and clarity of the information collected, and

the minimization of burden (including the use of information technology). Comments received in response to this notice will be summarized for and included with the OGE request for extension of OMB paperwork approval. The comments will also become a matter of public record.

Specifically, OGE seeks public comment on the following:

- What problems do you have using the form?
- Are there sections of the form or instructions that are unclear?
- Is there information provided that is confusing?
- What additional information would be helpful?

Approved: February 16, 2023.

Emory Rounds,

Director, U.S. Office of Government Ethics.

[FR Doc. 2023–03713 Filed 2–22–23; 8:45 am]

BILLING CODE 6345–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children & Families

Privacy Act of 1974; Matching Program

AGENCY: Administration for Children & Families, Department of Health and Human Services.

ACTION: Notice of a new matching program.

SUMMARY: In accordance with subsection (e)(12) of the Privacy Act of 1974, as amended, the Department of Health and Human Services, Administration for Children & Families, Office of the Chief Technology Officer (HHS/ACF/OCTO), is providing notice of a re-established matching program between the Department of Veterans Affairs (VA) and State Public Assistance Agencies (SPAAs) participating in the Public Assistance Reporting System (PARIS) Program. The matching program provides the SPAAs with VA's compensation and pension data on a periodic basis to use in determining public assistance applicants' and recipients' eligibility for certain public assistance benefits. HHS/ACF/OPRE facilitates the matching program, and the Department of Defense, Defense Manpower Data Center (DoD/DMDC) conducts the matches of SPAA and VA data and provides associated support.

DATES: The deadline for comments on this notice is March 27, 2023. The re-established matching program will commence not sooner than 30 days after publication of this notice, provided no comments are received that warrant a change to this notice. The matching program will be conducted for an initial term of 18 months (from approximately March 2023 through September 2024), and within three months of expiration may be renewed for one additional year if the parties make no change to the matching program and certify that the program has been conducted in compliance with the matching agreement.

ADDRESSES: Interested parties may submit written comments on this notice by mail or email to the Chief Technology Officer, HHS/ACF Tech, 330 C Street SW, Washington, DC 20024, *paris@acf.hhs.gov.*

FOR FURTHER INFORMATION CONTACT: General questions about the matching program may be submitted to Kevin Duvall, Chief Technology Officer, ACF Tech, 330 C Street SW, Washington, DC 20024, 202–401–5680, or *paris@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974, as amended (5 U.S.C. 552a), provides certain protections for individuals applying for and receiving Federal benefits. The law governs the use of computer matching by Federal agencies when records in a system of records (meaning, Federal agency records about individuals retrieved by name or other personal identifier) are matched with records of other Federal or non-Federal agencies. The Privacy Act requires agencies involved in a matching program to the following:

1. Obtain approval of a Computer Matching Agreement, prepared in accordance with the Privacy Act, by the Data Integrity Board of each Federal agency that is a source, or recipient of data used in the matching program. 5 U.S.C. 522a(o)(1), (u)(3)(A) and (u)(4).
2. Provide adequate advance notice of the matching program, including a copy of the agreement, to Congress and the Office of Management and Budget (OMB). 5 U.S.C. 552a(o)(2)(A)(i) and (r).
3. Publish advance notice of the matching program in the **Federal Register**. 5 U.S.C. 552a(e)(12).
4. Make the Computer Matching Agreement available to the public. 5 U.S.C. 552a(o)(2)(A)(ii).
5. Notify the individuals whose information will be used in the matching program that the information they provide is subject to verification through matching, as required by 5 U.S.C. 552a(o)(1)(D).
6. Verify match findings before suspending, terminating, reducing, or making a final denial of an individual's benefits or payments, or taking other adverse action against the individual, as required by 5 U.S.C. 552a(p).
7. Provide an annual report of the matching program activities to Congress and OMB, and make the report available to the public. 5 U.S.C. 552a(u)(3)(D).

This matching program meets these requirements.

Kevin M. Duvall,

Chief Technology Officer, ACF.

Participating Agencies

The Department of Veterans Affairs (VA) is the source agency, and State Public Assistance Agencies (SPAAs) are non-Federal agencies.

Authority for Conducting the Matching Program

Sections 402, 1137, and 1903(r) of the Social Security Act (42 U.S.C. secs. 602(a), 1320b–7, and 1396b(r)).

Purpose(s)

The matching program will provide participating SPAAs with VA's compensation and pension data on a periodic basis to use in determining public assistance applicants' and recipients' eligibility for benefits under the Medicaid, Temporary Assistance to Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP), and general assistance programs, and to use in helping relevant veterans to better understand similar benefits available through the VA that may be better alternatives. The matching program helps ensure fair and equitable treatment in the delivery of benefits attributable to funds provided by the Federal Government.

Categories of Individuals

The categories of individuals involved in the matching program are the following:

- Individuals applying for or receiving Medicaid, TANF, SNAP, and/or general assistance benefits (public assistance clients); and
- Individuals receiving VA pay or pension benefits.

Categories of Records

The categories of records used in the matching program are identifying information, compensation, and pension data.

On an approximately quarterly basis, VA will provide DoD/DMDC with a file containing VA benefit record data for most VA benefit and compensation recipients. SPAAs will also provide DoD/DMDC with a non-Federal file containing identifying information, including Social Security Numbers (SSNs), about public assistance clients. DoD/DMDC will compare the SSNs in

each SPAA file to the VA file and will provide the SPAA with match results containing the following data elements (as applicable) about each public assistance client whose SSN matches the SSN of an individual receiving VA compensation or pension benefits:

VA File Number; Veteran/Beneficiary/Apportionee SSN and SSN Verification Indicator; Payee Type Code; Award Type, Award Line Type, and Award Status Codes; Gender Code; Last Name/First Name/Middle Name; Beneficiary Birth Date; Veteran/Spouse Aid and Attendance Code; Station Number; Spouse; Minor Child; School Child; Helpless Child; Parent; Combined Degree; Entitlement Type Code; Change Reason; Suspense Reason; Last Paid Date; Effective Date; Gross Amount; Net Award Amount; Payment Amount; Frequency Pay Type Code; Income for VA Purposes Amount; Beneficiary/Spouse Annual Amounts (for Wages, Insurance, Interest, Social Security, Civil Service Retirement, Military, Railroad Retirement Board, Black Lung, and Rest); Beneficiary/Spouse Rest of Exclusion Amount; Medical Expense/Education Expense/Last Expense/Hardship Amounts; Receivable/Receivable Amount; Monthly Deductions/Deduction Amount; Proceeds/Proceeds Amount; Address Type Indicator; Address Name/Fiduciary; Address Fiduciary Type; Address Name Beneficiary; Corporate Format Address (Address Lines One, Two, and Three, City Name, State Name, ZIP Code Prefix and Suffix, Country Type Name, Foreign Postal Code, Province Name, Territory Name, Military Postal Type, Military Post Office); and, Benefits Delivery Network Treasury Address and ZIP Code Prefix.

System(s) of Records

The VA data used in this matching program will be disclosed from the following system of records, as authorized by routine use 35: ''Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records—VA (58VA21/22/28),'' 86 FR 61858 (Nov. 8, 2021).

[FR Doc. 2023–03704 Filed 2–17–23; 4:15 pm]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; of the Evaluation of the National Paralysis Resource Center (NPRC) and Performance Management Support OMB Control Number 0985–New

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under the Paperwork Reduction Act of 1995. This 30-day notice collects comments on the information collection requirements related to the Evaluation of the National Paralysis Resource Center (NPRC) and Performance Management Support.

DATES: Submit written comments on the collection of information by March 27, 2023.

ADDRESSES: Submit written comments and recommendations for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. By mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Amanda Cash, 202–795–7369 or *evaluation@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, ACL has submitted the following proposed collection of information to OMB for review and clearance. The Administration for Community Living (ACL) is requesting approval to collect data for the National Paralysis Resource Center (NPRC) to understand how and to what extent the NPRC is meeting its goals. The NPRC provides resources to people living with paralysis, their caregivers, and their support network. ACL is responsible for oversight of the NPRC, which has been administered by the Christopher and Dana Reeve Foundation since its authorization in 2009. This data collection effort will be focused on evaluating specific major activities of the NPRC: (a) the Quality of Life (QOL) Grants Program; (b) the Peer and Family Support Program (PFSP); and (c) the Promotional Activities, Outreach, and Collaboration program.

This evaluation seeks to identify barriers and challenges to operating the NPRC, document best practices for other Resource Centers, and recommend areas for improvement.

Specifically, this IC will help ACL to understand *how* each major NPRC activity aims to achieve the following goals, and *to what extent* the activities affect related outcomes:

a. Improving the health and quality of life of individuals living with paralysis of all ages, their families, and their support network;

b. Raising awareness of members of the target populations about paralysis;

c. Increasing access of members of the target populations to services relevant to individuals with paralysis;

d. Increasing the empowerment, confidence, and independence of individuals living with paralysis;

e. Strengthening support networks for individuals living with paralysis; and

f. Improving and increasing opportunities for community living for individuals living with paralysis and their caretakers.

To gain an in-depth understanding of the perspectives of mentors and peers participating in the PFSP, QOL program subgrantees, and people who serve as regional champions in the Promotional Activities, Outreach, and Collaboration program, eight focus groups will be conducted with no more than eight people per focus group. Additionally, a web-based survey will be administered to a maximum of 400 PFSP peers, 180 PFSP mentors, and 300 people served by QOL subgrantees to understand respondents' experiences with the NPRC.

This data will contribute to documenting how each of the NPRC's major activities are delivered and the extent to which they improve the quality of life of people living with paralysis, their caregivers, and their support networks.

Findings can inform practice for the NPRC and other Resource Centers. This evaluation will also help to identify how the NPRC can better meet the stated goals of the Department of Health and Human Services (HHS) to, ''protect and strengthen equitable access to high quality and affordable healthcare,'' and to, ''strengthen social well-being, equity, and economic resilience.'' [1]

[1] *FY 2023 Evaluation Plan* (p. 3). (2022). U.S. Department of Health & Human Services. *https://aspe.hhs.gov/reports/fy-2023-hhs-evaluation-plan.*

Comments in Response to the 60-Day Federal Register Notice

A notice published in the **Federal Register** Vol. 87, No. 207 pages 65068–65069 on October 27, 2022. No public comments were received during the 60-day FRN.

Estimated Program Burden: ACL estimates the burden of this collection of information as follows:

The eight focus groups together will include no more than 64 total individuals representing three major activities of the NPRC: the QOL Grants Program; the PFSP; and the Promotional Activities, Outreach, and Collaboration program. The burden for their participation is estimated at 1.5 hours per participant, for a total of 96 hours.

A maximum of 180 PFSP mentors, 400 PFSP peers, and 300 people served by QOL subgrantee programs are expected to respond to the web-based survey, for a total of 880 respondents. The approximate burden for survey completion is 15 minutes for the peer mentor survey, and 10 minutes for the peer survey and QOL end-user survey per respondent. In addition, an estimated 5 minute non-response survey will be administered to the PFSP mentors and PFSP peers who did not respond to the web-based survey.

This results in a total survey burden estimate of 14,050 minutes (234.17 hours). The estimated survey completion burden includes time to review the instructions, read the questions, and complete responses.

Data collection form	Respondent type	Number of respondents	Responses per respondent	Hours per response	Annual burden hours *	Cost per hour	Annual burden cost
Focus group—Quality of Life organizational representatives.	Private sector—business, non-profit, or local government.	24	1	1.50	36	[1] $45.01	$1,620.36
Focus group—Peer Mentors.	Individual	16	1	1.50	24	[2] 28.01	672.24
Focus group—Peer Mentees.	Individual	16	1	1.50	24	[2] 28.01	672.24
Focus group—Regional Champions.	Individual	8	1	1.50	12	[2] 28.01	336.12
Survey—Peer Mentor	Individual	180	1	0.25	45	[2] 28.01	1,260.45
Survey—Peers	Individual	400	1	0.17	68	[2] 28.01	1,904.68
Survey—Quality of Life End-User.	Individual	300	1	0.17	51	[2] 28.01	1,428.51
Survey—Non-response follow-up (Peer Mentor).	Individual	85	1	0.08	6.8	[2] 28.01	190.47
Survey—Non-response follow-up (Peers).	Individual	230	1	0.08	18.4	[2] 28.01	515.38
Total		1,259		.23 (weighted mean)	285.2		8,600.45

* This is maximum number of hours for year one of data collection which is the largest year for data collection.

[1] Bureau of Labor Statistics, Mean hourly wage for Social and Community Service Managers, May 2021 National Occupational Employment and Wage Estimates by ownership, Local government, including schools and hospitals, *https://www.bls.gov/oes/current/999301.htm#21-0000.*

[2] Bureau of Labor Statistics, Mean hourly wage for All Occupations, May 2021 National Occupational Employment and Wage Estimates, United States, *https://www.bls.gov/oes/current/oes_nat.htm#00-0000.*

** Annual burden hours were calculated from total minutes for each activity divided by sixty.*

Dated: February 17, 2023.

Alison Barkoff,

Acting Administrator and Assistant Secretary for Aging.

[FR Doc. 2023–03740 Filed 2–22–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0363]

Patient-Focused Drug Development for Long COVID; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing the following public meeting entitled ''Patient-Focused Drug Development for Long COVID.'' The purpose of the public meeting is to allow FDA to obtain patient perspectives on the impact of Long COVID on daily life, patient views on treatment approaches, and decision factors considered when selecting a treatment.

DATES: The public meeting will be held virtually on April 25, 2023, from 10 a.m. to 4 p.m. Eastern Time. Submit either electronic or written comments on this public meeting by June 26, 2023. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public meeting will be hosted via a live webcast.

Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of June 26, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–N–0363 for ''Patient-Focused Drug Development for Long COVID; Public Meeting; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Shannon Sparklin, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6306, Silver Spring, MD 20993–0002, 301–796–9208, *PatientFocused@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

This meeting will provide FDA with the opportunity to hear directly from patients and patient representatives about their experiences with Long COVID, including how Long COVID affects their daily life, the symptoms that matter most to them, their current approaches to treating Long COVID, and what they consider when determining whether or not to participate in a clinical trial. Long COVID, also known as post-COVID syndrome, post-acute sequalae of severe acute respiratory syndrome 2 coronavirus (SARS–CoV–2), long-haul COVID, or post-acute COVID–19 syndrome, is defined as persistence of COVID–19 symptoms 4 weeks beyond SARS–CoV–2 infection. Literature has reported two categories of Long COVID known as subacute or ongoing COVID–19 symptoms (4–12 weeks of persistent symptoms post-infection), and chronic or post-COVID syndrome (12 weeks or more of persistent symptoms post-infection). SARS–CoV–2 may cause cell damage to multiple organs in an infected person. The most commonly reported symptoms include fatigue, brain fog, pain, palpitations, shortness of breath, cough, insomnia, anxiety, depression, constipation, and nausea. Since Long COVID was recently recognized, there is currently no standardized framework for diagnosis and treatment. While no medicines have been approved to treat Long COVID, symptoms may be treated with medication, exercise, diet modification, and meditation. FDA is interested in adult and pediatric patients' perspectives on the following topics: (1) health effects and daily impacts; (2) current approaches to treatment; and (3) clinical trial participation.

For each topic, a brief discussion by a patient panel will begin the dialogue. This discussion will be followed by a facilitated discussion where FDA will invite patients and patient representatives from the viewing audience to provide comments by calling into the meeting via phone, or by submitting through the meeting platform live comments which may be read during the meeting by the meeting facilitator.

In addition to input generated through this public meeting, FDA is interested in receiving patient and patient representative input through written comments, which can be submitted to the public docket (see **ADDRESSES**). FDA's questions will be available on the meeting website and as part of the information provided in the public docket. When submitting comments, if you are commenting on behalf of a patient, please indicate that you are doing so, and answer the questions as much as possible from the patient's perspective.

FDA will post the agenda and other meeting materials approximately 5 days before the meeting at: *https://www.fda.gov/drugs/news-events-human-drugs/public-meeting-patient-focused-drug-development-long-covid-04252023.*

II. Topics for Discussion at the Public Meeting

On April 25, 2023, FDA is conducting a public meeting on Patient-Focused Drug Development for Long COVID. FDA is interested in obtaining patient perspectives on the impact of Long COVID on daily life and patient views on treatment approaches, as well as clinical trial participation.

III. Participating in the Public Meeting

Registration: To register for the public meeting, visit *https://www.surveymonkey.com/r/LongCOVIDPFDD.* Persons without access to the internet can call 301–796–9208 to register.

If you need special accommodations due to a disability, please contact Shannon Sparklin (see **FOR FURTHER INFORMATION CONTACT**) no later than April 18, 2023.

Panelist Selection: Patients or patient representatives who are interested in presenting comments as part of the initial panel discussions will be asked to indicate in their registration which topic(s) they wish to address. These patients or patient representatives also will be asked to send *PatientFocused@fda.hhs.gov* a brief summary of responses to the topic questions by April 4, 2023. Panelists will be notified of their selection approximately 7 days before the public meeting. We will try to accommodate all patients and patient stakeholders who wish to speak, either through the panel discussion or audience participation; however, the

duration of comments may be limited by time constraints.

Streaming Webcast of the Public Meeting: This public meeting will be streamed via a webcast in both English and Spanish languages. Please register for the webcast by visiting *https://www.surveymonkey.com/r/LongCOVIDPFDD.*

The English-language webcast can be accessed via: *https://fda.yorkcast.com/webcast/Play/4eba453a2412474e98fff1fabcc63ac51d.* The Spanish-language webcast can be accessed via: *https://fda.yorkcast.com/webcast/Play/0385884d5655420fabd3a55a237926691d.* Simply click on the link and hit the ''play'' button and it will start. A test signal will be playing 30 minutes prior to the event, so you can click on the link at any point during that time to start. You will hear music playing during the test period and then the event will begin at 10 a.m. ET. If you would like to check your system now, you can click on the link and the page will open with a ''waiting'' statement showing.

Transcripts: Please be advised that as soon as a transcript of the public meeting is available, it will be accessible on the meeting website at *https://www.fda.gov/drugs/news-events-human-drugs/public-meeting-patient-focused-drug-development-long-covid-04252023.*

Dated: February 16, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03714 Filed 2–22–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–0451]

Labeling of Plant-Based Milk Alternatives and Voluntary Nutrient Statements; Draft Guidance for Industry; Availability; Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a draft guidance for industry entitled ''Labeling of Plant-based Milk Alternatives and Voluntary Nutrient Statements: Guidance for Industry.'' The draft guidance, when finalized, will provide industry with our view on the naming of plant-based food products that are marketed and sold as alternatives to milk (plant-based milk alternatives) and our recommendations on the use of voluntary nutrient statements. Industry's use of these recommendations for labeling plant-based milk alternatives will provide consumers with additional nutrition information to help them understand certain nutritional differences between these products and milk and make informed dietary choices. This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by April 24, 2023 to ensure that FDA considers your comment on the draft guidance before it begins work on the final version of the guidance. Submit electronic or written comments on the proposed collection of information in the draft guidance by April 24, 2023.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–D–0451 for ''Labeling of Plant-based Milk Alternatives and Voluntary Nutrient Statements: Guidance for Industry; Agency Information Collection Activities; Proposed Collection; Comment Request.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' We will review this copy, including the claimed confidential information, in our consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Office of Nutrition and Food Labeling (HFS–800), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance.

FOR FURTHER INFORMATION CONTACT:

With regard to the draft guidance: Jeanmaire Hryshko, Center for Food Safety and Applied Nutrition, Office of Nutrition and Food Labeling (HFS–800), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2371; or Meadow Platt, Center for Food Safety and Applied Nutrition, Office of Regulations and Policy (HFS–024), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2378.

With regard to the proposed collection of information: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

An increase in purchase and consumption of plant-based milk alternatives has occurred over the last 10 years. Many products are labeled with names that include the term ''milk.'' Plant-based milk alternatives are made from liquid-based extracts of plant materials, such as tree nuts, legumes, seeds, or grains. FDA has established a standard of identity or compositional requirements for milk (see 21 CFR 131.110) but has not established standards of identity or compositional requirements for plant-based milk alternatives. The composition, including the nutrient profile, of these plant-based milk alternative products varies depending on the plant source(s), processing methods, and added ingredients.

We are committed to clear and transparent food labels that are truthful and not misleading. We are also committed to using our tools and authorities to empower consumers with information to quickly ascertain the types of products they are purchasing for themselves and their families and enhance their ability to make informed choices about the foods they buy and eat. To further this goal, in the **Federal Register** of September 28, 2018 (83 FR 49103), FDA issued a notice requesting comment on the labeling of plant-based alternatives with names that include the names of dairy foods. We invited comment on a variety of issues, including how consumers use plant-based dairy alternatives, how consumers understand terms included in the names of plant-based dairy alternatives, and whether consumers are aware of and understand differences between plant-based dairy alternatives and their dairy counterparts. We received over 13,000 comments, which helped to inform the development of this draft guidance.

We are announcing the availability of a draft guidance for industry entitled ''Labeling of Plant-based Milk Alternatives and Voluntary Nutrient Statements: Guidance for Industry.'' The draft guidance provides our view on the naming of plant-based milk alternatives and recommendations on voluntary nutrient statements for the labeling of these products. The draft guidance does not address other plant-based dairy alternatives such as plant-based cheese, yogurt, or kefir alternatives. The draft guidance is limited to plant-based milk alternatives because: (1) most comments and consumer research submitted to the notice were limited to plant-based milk alternatives; (2) the overall market for plant-based milk alternatives is greater than the market for other plant-based dairy alternatives such as yogurts and cheeses; and (3) data indicates that consumers may not understand the nutritional differences between plant-based milk alternatives and a potential public health concern may exist if plant-based milk alternatives are substituted for milk.

We are issuing the draft guidance consistent with our good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent our current thinking on this topic. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternate approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Labeling of Plant-Based Milk Alternatives and Voluntary Nutrient Statements: Guidance for Industry

OMB Control Number 0910–0381

This draft guidance, once finalized, provides recommendations on the naming of plant-based milk alternatives and on voluntary nutrient statements for the labeling of these products. The draft guidance's recommendations for labeling plant-based beverages that are used in place of milk will provide consumers with additional nutrition information to help them compare these products to milk and make informed dietary choices.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED THIRD-PARTY DISCLOSURE BURDEN

Activity	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours	Total capital costs [1] [2]
Labeling recommendations in ''Best Practices for Labeling of Plant-based Milk Alternatives''	56	6	336	1	336	$500,000

[1] One-time relabeling costs.
[2] There are no operating and maintenance costs associated with this collection of information.

The estimates in table 1 are based on our experience with similar labeling programs. We estimate that each year 56 manufacturers will relabel their products following recommendations found in the draft guidance. We estimate that each manufacturer will relabel 6 products for 336 total annual disclosures (56 manufacturers × 6 labels). Each disclosure will take an estimated 1 hour to complete for an annual third-party disclosure burden of 336 hours (336 disclosures × 1 hour). We estimate that there will be an annual capital cost of $500,000 associated with relabeling. This is the cost of designing a revised label and incorporating it into the manufacturing process. We believe that this will be a one-time burden per respondent.

III. Other Issues for Consideration

Although FDA welcomes comments on any aspect of the guidance, we particularly invite comment on the following:

- The voluntary nutrient statement recommendations provided in section III.2 of the draft guidance. We acknowledge that the labeling of some plant-based milk alternatives may have space constraints that limit listing of multiple nutrients in the voluntary nutrient statement. Therefore, we are interested in comments about the placement of and possible space constraints for the voluntary nutrient statement on product labels.
- FDA is recommending nutrient disclosure statements on the labels of plant-based milk alternatives that contain less of the following nutrients compared to milk: calcium, protein, vitamin A, vitamin D, magnesium, phosphorus, potassium, riboflavin, and vitamin B12. We chose these specific nutrients because the Dietary Guidelines for Americans identifies the Dairy Group as being a key contributor of those nutrients and to align with the nutritional standards set by the U.S. Department of Agriculture's (USDA) Food and Nutrition Service for fluid milk substitutes served in the National School Lunch Program, School Breakfast Program, and Child and Adult Care Food Program (USDA criteria) (see 7 CFR 210.10(d)(3), 220.8(d), and 226.20(g)(3)).
- For the purpose of this draft guidance, are the USDA criteria that identifies minimum levels of nutrients for fluid milk substitutes the most appropriate criteria to use? If yes, why? If not, what criteria (*i.e.,* nutrients and nutrient levels, minimums versus ranges of nutrient levels, etc.) should we consider and why? Please provide information, research, and data to help us understand your reasoning.

IV. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/guidance-documents-regulatory-information-topic-food-and-dietary-supplements, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov*.

Dated: February 15, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03513 Filed 2–22–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Global Affairs: Stakeholder Listening Session for the Intergovernmental Negotiating Body (INB) To Draft and Negotiate a WHO Convention, Agreement or Other International Instrument on Pandemic Prevention, Preparedness and Response

ACTION: Notice of public listening session; request for comments.

DATES: The listening session will be held on Wednesday, March 15, 2023, from 12:00 p.m. to 2:00 p.m., Eastern Daylight Time.

ADDRESSES: The session will be held virtually, with online slide share and dial-in information shared with registered participants.

Status: This meeting is open to the public, but requires RSVP to *OGA.RSVP@hhs.gov* by March 6, 2023. *See RSVP section below for details.*

SUPPLEMENTARY INFORMATION:

Purpose: The U.S. Department of Health and Human Services (HHS) and the Department of State are charged with co-leading the U.S. delegation to the Intergovernmental Negotiating Body to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response and will convene an informal Stakeholder Listening Session.

The Stakeholder Listening Session is designed to seek input from stakeholders and subject matter experts to help inform and prepare for U.S. government engagement with the Intergovernmental Negotiating Body.

Matters To Be Discussed: The listening session will discuss potential areas that could be included in a pandemic accord to promote pandemic prevention, preparedness, and response. Topics will include those found in the Zero Draft of the Pandemic Accord. The Zero draft of the Intergovernmental Negotiating Body (INB) can be found at this website: *https://apps.who.int/gb/inb/index.html.* Participation is welcome from stakeholder communities, including:

- Public health and advocacy groups
- State, local, and Tribal groups
- Private industry
- Minority health organizations
- Academic and scientific organizations, etc.

RSVP: Persons seeking to attend or speak at the listening session *must register by March 6, 2023*.

Registrants must include their full name and organization, if any, and indicate whether they are registering as a listen-only attendee or as a speaker participant to *OGA.RSVP@hhs.gov*.

Requests to participate as a speaker must include:

1. The name of the person desiring to participate;

2. The organization(s) that person represents, if any;

3. Identification of the primary topic of interest.

Other Information: Written comments should be emailed to *OGA.RSVP@hhs.gov with the subject line ''Written Comment Re: Stakeholder Listening Session 1 for the INB''* by Friday, March 31, 2023.

We look forward to your comments on the Intergovernmental Negotiating Body (INB) agenda items.

Dated: February 8, 2023.

Susan Kim,

Chief of Staff, Office of Global Affairs.

[FR Doc. 2023–03680 Filed 2–22–23; 8:45 am]

BILLING CODE 4150–38–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0390]

Agency Father Generic Information Collection Request; 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before April 24, 2023.

ADDRESSES: Submit your comments to *Sherrette.Funn@hhs.gov* or by calling (202) 795–7714.

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990–0390–60D, and project title for reference, to Sherrette Funn, the Reports Clearance Officer, *Sherrette.funn@hhs.gov, PRA@HHS.GOV* or call 202–264–0041.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Challenge and Prize Competition Solicitations.

Type of Collection: Father generic extension.

OMB No. 0990–0390—Office of the Assistant Secretary for Health (OASH)

Abstract: The Office of the Secretary (OS), Department of Health & Human Services (HHS) requests that the Office of Management and Budget (OMB) approve a request for an extension of generic clearance approval of the information collected for challenge and prize competition solicitations. Burden hours were increased from 333 to 558.3 total burden hours to provide more time for respondents to complete forms that may include more questions.

Challenges and prize competitions enable HHS to tap into the expertise and creativity of the public in new ways as well as extend awareness of HHS programs and priorities. Within HHS, the Office of the Assistant Secretary for Health (OASH) has taken lead responsibility in coordinating challenges and prize competitions and implementing policies regarding the use of these tools. HHS's goal is to engage a broader number of stakeholders who are inspired to work on some of our most pressing health issues, thus supporting a new ecosystem of scientists, developers, and entrepreneurs who can continue to innovate for public health.

The generic clearance is necessary for HHS to launch several challenges or prize competitions annually in a short turnaround. The information collected for these challenges and prize competitions will generally include the submitter's or other contact person's first and last name, organizational affiliation and role in the organization (for identification purposes); email address or other contact information (to follow up if the submitted solution is selected as a finalist or winner); street address (to confirm that the submitter or affiliated organization is located in the United States, for eligibility purposes); information confirming whether the submitter's age is 13 years or older (to ensure compliance with the Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501–6505 (COPPA)) or 18 years or older (to ensure necessary consents are obtained); and a narrative description of the solution. HHS may also request information indicating the submitter's technical background, educational level, ethnicity, age range, gender, and race (to evaluate entrants' diversity and backgrounds), how the submitter learned about the challenge or prize competition and what the submitter currently understands about the HHS agency hosting the challenge or prize competition (to gauge the effect of the challenge or prize competition on increasing public awareness of HHS programs and priorities, and generally to enable HHS to improve its outreach strategies to ensure a diverse and broad innovator constituency is fostered through the use of challenges and prize competitions). Finally, HHS may ask for additional information tailored to the particular challenge or prize competition through structured questions. This information will enable HHS to more effectively create and administer challenges and prize competitions.

Upon entry or during the judging process, solvers under the age of 18 will be asked to confirm parental consent, which will require them to obtain and provide a parent or guardian signature in a format outlined in the specific criteria of each challenge or prize competition in order to qualify for the contest. To protect online privacy of minors, birthdate may be required by the website host to ensure the challenge platform meets the requirements of COPPA. Eligibility to win a cash prize will be outlined in the specific criteria of each contest and will only apply to U.S. citizens, permanent residents, or private entities incorporated in and maintaining a primary place of business in the U.S. To administer the cash prize, HHS will need to collect additional relevant payment information—such as Social Security Number and/or Taxpayer ID and information regarding the winners' financial institutions—in order to comply with financial accounting and income tax reporting processes.

Likely Respondents: Likely respondents include individuals, businesses, and state and local governments who choose to participate in a challenge or prize competition hosted or overseen (*i.e.,* via contract, etc.) by HHS.

ESTIMATED ANNUALIZED BURDEN TABLE

Respondent (if necessary)	Number of respondents	Number of responses per respondent	Average burden per response (hours)	Total burden hours
Individuals or Households	1,500	1	10/60	250
Organizations	750	1	10/60	125
Businesses	1000	1	10/60	166.7
State, territory, tribal or local governments	100	1	10/60	16.7
Total				558.3

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2023–03753 Filed 2–22–23; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel Fellowships: Clinical Care and Health Interventions, March 6, 2023, 9 a.m. to March 7, 2023, 8 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, which was published in the **Federal Register** on February 08, 2023, 88 FR 8298, FR Doc 2023–02619.

This meeting is being amended to change the SRO Contact from Martha M Faraday, Ph.D., to Hoa Thi Vo, Ph.D., Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Bethesda, MD 20892; 301–594–0776. The meeting is closed to the public.

Dated: February 16, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–03700 Filed 2–22–23; 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; Human Islet Research Network.

Date: March 28, 2023.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of Diabetes and Digestive and Kidney Diseases, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Elena Sanovich, Ph.D., Scientific Review Officer, NIDDK/Scientific Review Branch, National Institutes of Health, 6707 Democracy Blvd., Room 7351, Bethesda, MD 20892, 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)

Dated: February 16, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–03679 Filed 2–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2313]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before May 24, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA

Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2313, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Woodbury County, Iowa and Incorporated Areas Project: 23–07–0012S Preliminary Date: July 8, 2022	
City of Anthon	City Hall, 301 East Main Street, Anthon, IA 51004.
City of Bronson	City Hall, 100 East 1st Street, Bronson, IA 51007.
City of Correctionville	City Hall, 312 Driftwood Street, Correctionville, IA 51016.
City of Cushing	City Hall, 200 Main Street, Cushing, IA 51018.
City of Danbury	City Hall, 207 1st Street, Danbury, IA 51019.
City of Hornick	City Hall, 400 Main Street, Hornick, IA 51026.
City of Lawton	City Hall, 315 Ash Street, Lawton, IA 51030.
City of Moville	City Hall, 21 West Main Street, Moville, IA 51039.
City of Oto	City Hall, 27 Washington Street, Oto, IA 51044.
City of Pierson	City Hall, 201 Main Street, Pierson, IA 51048.
City of Salix	City Hall, 317 Tipton Street, Salix, IA 51052.
City of Sioux City	City Hall—Planning Division, 405 6th Street, Sioux City, IA 51102.
City of Sloan	City Hall, 428 Evans Street, Sloan, IA 51055.
City of Smithland	City Hall, 110 West Jackson Street, Smithland, IA 51056.
Unincorporated Areas of Woodbury County	Woodbury County Courthouse, Community and Economic Development, 620 Douglas Street, Sioux City, IA 51101.
Winnebago Tribe of Nebraska	Winnebago Tribe of Nebraska, Blackhawk Center—Administrative Offices, 100 Bluff Street, Winnebago, NE 68071.

[FR Doc. 2023–03768 Filed 2–22–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2312]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before May 24, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2312, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Fauquier County, Virginia and Incorporated Areas Project: 14–03–3327S Preliminary Date: August 05, 2022	
Town of Remington	Town Office, 105 East Main Street, Remington, VA 22734.
Town of Warrenton	Town Office, 21 Main Street, Warrenton, VA 20186.
Unincorporated Areas of Fauquier County	GIS Department, 29 Ashby Street, Warrenton, VA 20186.

[FR Doc. 2023–03767 Filed 2–22–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2308]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before May 24, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2308, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Pipestone County, Minnesota and Incorporated Areas Project: 17–05–1533S Preliminary Date: August 26, 2022	
City of Edgerton	City Hall, 801 1st Avenue West, Edgerton, MN 56128.
City of Hatfield	City Hall, 320 C Avenue, Hatfield, MN 56164.
City of Holland	City Hall, 210 Rock Street, Holland, MN 56139.
City of Ihlen	Ihlen Eden Community Center, 110 Holman Street West, Ihlen, MN 56164.
City of Jasper	City Hall, 105 East Wall Street, Jasper, MN 56144.
City of Pipestone	Municipal Offices, 119 2nd Avenue Southwest, Suite #9, Pipestone, MN 56164.
City of Trosky	City Hall, 220 Broadway Street South, Trosky, MN 56144.
Unincorporated Areas of Pipestone County	Pipestone County Courthouse, 416 Hiawatha Avenue South, Pipestone, MN 56164.

Community	Community map repository address
Rock County, Minnesota and Incorporated Areas Project: 17–05–1535S Preliminary Date: August 26, 2022	
City of Beaver Creek	City Hall, 311 East 1st Avenue, Beaver Creek, MN 56116.
City of Jasper	City Hall, 105 East Wall Street, Jasper, MN 56144.
City of Luverne	City Hall, 305 East Luverne Street, Luverne, MN 56156.
City of Magnolia	City Hall, 113 West Luverne Street, Magnolia, MN 56158.
Unincorporated Areas of Rock County	Rock County Courthouse, 204 East Brown Street, Luverne, MN 56156.

[FR Doc. 2023–03766 Filed 2–22–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2314]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Alabama:						
Madison ...	City of Huntsville (22–04–4159P).	The Honorable Thomas Battle, Jr., Mayor, City of Huntsville, 308 Fountain Circle, Huntsville, AL 35801.	City Hall, 308 Fountain Circle, Huntsville, AL 35801.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 13, 2023	010153
Madison ...	Unincorporated areas of Madison County (22–04–4159P).	The Honorable Dale Strong, Chair, Madison County Commission, 100 North Side Square, Huntsville, AL 35801.	Madison County Engineering Department, 266–C Shields Road, Huntsville, AL 35811.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 13, 2023	010151
Florida:						
Collier	City of Marco Island (22–04–3314P).	Mike McNees, Manager, City of Marco Island, 50 Bald Eagle Drive, Marco Island, FL 34145.	Building Services Department, 50 Bald Eagle Drive, Marco Island, FL 34145.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 7, 2023 ..	120426
Duval	City of Jacksonville (22–04–3150P).	The Honorable Lenny Curry, Mayor, City of Jacksonville, 117 West Duval Street, Suite 400, Jacksonville, FL 32202.	Planning and Development Department, 214 North Hogan Street, Suite 300, Jacksonville, FL 32202.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 11, 2023	120077
Lake	City of Leesburg (22–04–1994P).	Al Minner, Manager, City of Leesburg, 501 West Meadow Street, Leesburg, FL 34748.	City Hall, 204 North 5th Street, Leesburg, FL 34748.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 22, 2023	120136
Marion	City of Ocala (22–04–4601P).	Peter Lee, Manager, City of Ocala, 110 Southeast Watula Avenue, Ocala, FL 34471.	Engineering and Water Resources Department, 1805 Northeast 30th Avenue, Ocala, FL 34470.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 11, 2023	120330
Palm Beach.	City of Greenacres (22–04–5105P).	Andrea McCue, Manager, City of Greenacres, 5800 Melaleuca Lane, Greenacres, FL 33463.	City Hall, 5800 Melaleuca Lane, Greenacres, FL 33463.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 17, 2023	120203
Polk	Unincorporated areas of Polk County (22–04–2127P).	Bill Beasley, Manager, Polk County, 330 West Church Street, Bartow, FL 33831.	Polk County Administration Building, 330 West Church Street, Bartow, FL 33831.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 27, 2023	120261
Sarasota ..	Unincorporated areas of Sarasota County (22–04–4503P).	The Honorable Alan Maio, Chair, Sarasota County Board of Commissioners, 1660 Ringling Boulevard, Sarasota, FL 34236.	Sarasota County Planning and Development Services Department, 1001 Sarasota Center Boulevard, Sarasota, FL 34240.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 12, 2023	125144
Sarasota ..	Unincorporated areas of Sarasota County (22–04–4888P).	The Honorable Alan Maio, Chair, Sarasota County Board of Commissioners, 1660 Ringling Boulevard, Sarasota, FL 34236.	Sarasota County Planning and Development Services Department, 1001 Sarasota Center Boulevard, Sarasota, FL 34240.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 12, 2023	125144
Kentucky: Warren.	City of Bowling Green (22–04–3008P).	The Honorable Todd Alcott, Mayor, City of Bowling Green, 1001 College Street, Bowling Green, KY 42101.	Planning Commission, 922 State Street, Suite 200, Bowling Green, KY 42101.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 13, 2023	210219
Massachusetts:						
Barnstable	Town of Falmouth (22–01–0808P).	The Honorable Nancy R. Taylor, Chair, Town of Falmouth Select Board, 59 Town Hall Square, Falmouth, MA 02540.	Building Department, 59 Town Hall Square, Falmouth, MA 02540.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 10, 2023	255211
Plymouth	Town of Marshfield (21–01–0914P).	The Honorable Stephen R. Darcy, Chair, Town of Marshfield Select Board, 870 Moraine Street, Marshfield, MA 02050.	Planning Department, 870 Moraine Street, Marshfield, MA 02050.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 10, 2023	250273
Montana:						
Yellowstone.	City of Billings (22–08–0233P).	The Honorable Bill Cole, Mayor, City of Billings, P.O. Box 1178, Billings, MT 59103.	Building Division, 2825 3rd Avenue North, 4th Floor, Billings, MT 59101.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 23, 2023	300085
Yellowstone.	Unincorporated areas of Yellowstone County (22–08–0233P).	The Honorable Donald Jones, Chair, Yellowstone County Board of Commissioners, P.O. Box 35000, Billings, MT 59107.	Yellowstone County Public Works Department, 316 North 26th Street, Billings, MT 59101.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 23, 2023	300142
North Carolina:						
Durham ...	City of Durham (21–04–5883P).	The Honorable Elaine O'Neal, Mayor, City of Durham, 101 City Hall Plaza, Durham, NC 27701.	Durham City-County Hall, 101 City Hall Plaza, Durham, NC 27701.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 20, 2023	370086
Madison ...	Unincorporated areas of Madison County (21–04–5687P).	The Honorable Matthew Wechtel, Chair, Madison County Board of Commissioners, P.O. Box 576, Marshall, NC 28753.	Madison County Development Services Department, 5707 U.S. Highway 25/70, Marshall, NC 28753.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 4, 2023	370153

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Rowan	City of Salisbury (21–04–5312P).	The Honorable Karen Alexander, Mayor, City of Salisbury, 132 North Main Street, Salisbury, NC 28144.	City Hall, 217 South Main Street, Salisbury, NC 28144.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 17, 2023	370215
Wake	Town of Fuquay-Varina (21–04–3215P).	The Honorable Blake Massengill, Mayor, Town of Fuquay-Varina, 134 North Main Street, Fuquay-Varina, NC 27526.	Engineering Department, 134 North Main Street, Fuquay-Varina, NC 27526.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 17, 2023	370239
Wake	Town of Holly Springs (21–04–0922P).	The Honorable Sean Mayefskie, Mayor, Town of Holly Springs, P.O. Box 8, Holly Springs, NC 27540.	Engineering Department, 128 South Main Street, Holly Springs, NC 27540.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 4, 2023	370403
Oklahoma:						
Creek	City of Sapulpa (22–06–1576P).	The Honorable Craig Henderson, Mayor, City of Sapulpa, 425 East Dewey Avenue, Sapulpa, OK 74066.	City Hall, 424 East Hobson Avenue, Sapulpa, OK 74066.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 3, 2023 ..	450053
Grady	City of Chickasha (22–06–0966P).	The Honorable Chris Mosley, Mayor, City of Chickasha, 117 North 4th Street, Chickasha, OK 73018.	Community Development Department, 117 North 4th Street, Chickasha, OK 73018.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 14, 2023	400234
Pennsylvania:						
Bucks	Borough of Doylestown (22–03–0568P).	John Davis, Manager, Borough of Doylestown, 10 Doyle Street, Doylestown, PA 18901.	Building and Zoning Department, 10 Doyle Street, Doylestown, PA 18901.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 10, 2023	421410
Delaware	Borough of Folcroft (22–03–0267P).	The Honorable Franny DiCicco, Mayor, Borough of Folcroft, 1555 Elmwood Avenue, Folcroft, PA 19032.	Borough Building, 1555 Elmwood Avenue, Folcroft, PA 19032.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 17, 2023	420415
South Carolina: Charleston.	Unincorporated areas of Charleston County (22–04–4293P).	The Honorable Teddie E. Pryor, Sr., Chair, Charleston County Council, 4045 Bridge View Drive, North Charleston, SC 29405.	Charleston County Building Services Department, 4045 Bridge View Drive, North Charleston, SC 29405.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 19, 2023	455413
South Dakota:						
Codington	City of Watertown (22–08–0217P).	Amanda Mack, Manager, City of Watertown, P.O. Box 910, Watertown, SD 57201.	Public Works Department, Engineering Division, 23 2nd Street Northeast, Watertown, SD 57201.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 20, 2023	460016
Codington	Unincorporated areas of Codington County (22–08–0217P).	The Honorable Brenda Hanten, Chair, Codington County Commissioners, 14 1st Avenue Southeast, Watertown, SD 57201.	Codington County Zoning Department, 1910 West Kemp Avenue, Watertown, SD 57201.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 20, 2023	460260
Pennington.	City of Rapid City (22–08–0282P).	The Honorable Steve Allender, Mayor, City of Rapid City, 300 6th Street, Rapid City, SD 57701.	Public Works, Engineering Services Department, 300 6th Street, Rapid City, SD 57701.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 19, 2023	465420
Pennington.	Unincorporated areas of Pennington County (22–08–0282P).	The Honorable Gary Drewes, Chair, Pennington County Board of Commissioners, 130 Kansas City Street, Suite 100, Rapid City, SD 57701.	Pennington County Planning Department, 832 Saint Joseph Street, Rapid City, SD 57701.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 19, 2023	460064
Texas:						
Bexar	City of San Antonio (22–06–1174P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 20, 2023	480045
Bexar	City of San Antonio (22–06–1982P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 20, 2023	480045
Bexar	Unincorporated areas of Bexar County (22–06–1470P).	The Honorable Nelson Wolff, Bexar County Judge, 101 West Nueva Street, 10th Floor, San Antonio, TX 78205.	Bexar County Public Works Department, 1948 Probandt Street, San Antonio, TX 78205.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 3, 2023 ..	480035
Collin	City of Anna (22–06–1094P).	The Honorable Nate Pike, Mayor, City of Anna, P.O. Box 776, Anna, TX 75409.	Public Works Building Department, 3223 North Powell Parkway, Anna, TX 75409.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 20, 2023	480132
Collin	Unincorporated areas of Collin County (22–06–2159P).	The Honorable Chris Hill, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 3, 2023 ..	480130

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Dallas	City of Dallas (22–06–2080P).	The Honorable Eric Johnson, Mayor, City of Dallas, 1500 Marilla Street, Suite 5EN, Dallas, TX 75201.	Oak Cliff Municipal Center, 320 East Jefferson Boulevard, Room 312, Dallas, TX 75203.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 3, 2023 ..	480171
Grayson ...	City of Van Alstyne (22–06–2710P).	The Honorable Jim Atchison, Mayor, City of Van Alstyne, P.O. Box 247, Van Alstyne, TX 75495.	City Hall, 152 North Main Drive, Van Alstyne, TX 75495.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 10, 2023	481620
Grayson ...	Unincorporated areas of Grayson County (22–06–2710P).	The Honorable Bill Magers, Grayson County Judge, 100 West Houston Street, Sherman, TX 75090.	Grayson County Courthouse, 100 West Houston Street, Sherman, TX 75090.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 10, 2023	480829
Johnson ...	City of Burleson (22–06–0312P).	The Honorable Chris Fletcher, Mayor, City of Burleson, 141 West Renfro Street, Burleson, TX 76028.	City Hall, 141 West Renfro Street, Burleson, TX 76028.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 13, 2023	485459
Johnson ...	Unincorporated areas of Johnson County (22–06–0312P).	The Honorable Roger Harmon, Johnson County Judge, 2 North Main Street, Cleburne, TX 76033.	Johnson County Public Works Department, 2 North Main Street, Cleburne, TX 76033.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 13, 2023	480879
Medina	Unincorporated areas of Medina County (22–06–2180P).	The Honorable Chris Shacharit, Medina County Judge, 1300 Avenue M, Room 250, Hondo, TX 78861.	Medina County Environmental Health Department, 1502 Avenue K, Hondo, TX 78861.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 7, 2023 ..	480472
Tooele	City of Tooele (22–08–0553P).	The Honorable Debra E. Winn, Mayor, City of Tooele, 90 North Main Street, Tooele, UT 84074.	Engineering Department, 90 North Main Street, Tooele, UT 84074.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 30, 2023	490145
Virginia: Fairfax.	Town of Vienna (22–03–0155P).	Mercury Payton, Town of Vienna Manager, 127 Center Street South, Vienna, VA 22180.	Public Works Department, 127 Center Street South, Vienna, VA 22180.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 29, 2023	510053

[FR Doc. 2023–03765 Filed 2–22–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *https://msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA

Map Service Center at *https://msc.fema.gov.*

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Arizona:					
Maricopa (FEMA Docket No.: B–2250).	City of Avondale (21–09–1874P).	The Honorable Kenneth N. Weise, Mayor, City of Avondale, 11465 West Civic Center Drive, Avondale, AZ 85323.	Development & Engineering Services Department, 11465 West Civic Center Drive, Avondale, AZ 85323.	Oct. 14, 2022	040038
Maricopa (FEMA Docket No.: B–2272).	City of Goodyear (21–09–1877P).	The Honorable Joe Pizzillo, Mayor, City of Goodyear, 190 North Litchfield Road, Goodyear, AZ 85338.	Engineering and Development Services, 14455 West Van Buren Street, Suite D101, Goodyear, AZ 85338.	Nov. 18, 2022	040046
Maricopa (FEMA Docket No.: B–2272).	City of Phoenix (21–09–1437P).	The Honorable Kate Gallego, Mayor, City of Phoenix, City Hall, 200 West Washington Street, Phoenix, AZ 85003.	Street Transportation Department, 200 West Washington Street, 5th Floor, Phoenix, AZ 85003.	Nov. 28, 2022	040051
Maricopa (FEMA Docket No.: B–2258).	City of Surprise (22–09–0029P).	The Honorable Skip Hall, Mayor, City of Surprise, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Public Works Department, Engineering Development Services, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Nov. 14, 2022	040053
Maricopa (FEMA Docket No.: B–2258).	City of Surprise (22–09–0374P).	The Honorable Skip Hall, Mayor, City of Surprise, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Public Works Department, Engineering Development Services, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Oct. 28, 2022	040053
Maricopa (FEMA Docket No.: B–2272).	Unincorporated Areas of Maricopa County (21–09–1437P).	The Honorable Bill Gates, Chair, Board of Supervisors, Maricopa County, 301 West Jefferson Street, 10th Floor, Phoenix, AZ 85003.	Flood Control District of Maricopa County, 2801 West Durango Street, Phoenix, AZ 85009.	Nov. 28, 2022	040037
Maricopa (FEMA Docket No.: B–2272).	Unincorporated Areas of Maricopa County (21–09–1877P).	The Honorable Bill Gates, Chair, Board of Supervisors, Maricopa County, 301 West Jefferson Street, 10th Floor, Phoenix, AZ 85003.	Flood Control District of Maricopa County, 2801 West Durango Street, Phoenix, AZ 85009.	Nov. 18, 2022	040037
Maricopa (FEMA Docket No.: B–2258).	Unincorporated Areas of Maricopa County (22–09–0374P).	The Honorable Bill Gates, Chair, Board of Supervisors, Maricopa County, 301 West Jefferson Street, 10th Floor, Phoenix, AZ 85003.	Flood Control District of Maricopa County, 2801 West Durango Street, Phoenix, AZ 85009.	Oct. 28, 2022	040037
Maricopa (FEMA Docket No.: B–2280).	Unincorporated Areas of Maricopa County (22–09–0553P).	The Honorable Bill Gates, Chair, Board of Supervisors, Maricopa County, 301 West Jefferson Street, 10th Floor, Phoenix, AZ 85003.	Flood Control District of Maricopa County, 2801 West Durango Street, Phoenix, AZ 85009.	Jan. 6, 2023	040037
Pima (FEMA Docket No.: B–2280).	Town of Marana (22–09–0373P).	The Honorable Ed Honea, Mayor, Town of Marana, 11555 West Civic Center Drive, Marana, AZ 85653.	Engineering Department, Marana Municipal Complex, 11555 West Civic Center Drive, Marana, AZ 85653.	Jan. 13, 2023	040118
Yavapai (FEMA Docket No.: B–2272).	Town of Prescott Valley (21–09–1114P).	The Honorable Kell Palguta, Mayor, Town of Prescott Valley, Civic Center, 7501 East Skoog Boulevard, 4th Floor, Prescott Valley, AZ 86314.	Town Hall, Engineering Division, 7501 East Civic Circle, Prescott Valley, AZ 86314.	Nov. 14, 2022	040121
California:					
Nevada (FEMA Docket No.: B–2280).	City of Grass Valley (22–09–0608P).	The Honorable Ben Aguilar, Mayor, City of Grass Valley, 125 East Main Street, Grass Valley, CA 95945.	Public Works Department, 125 East Main Street, Grass Valley, CA 95945.	Jan. 12, 2023	060211
Placer (FEMA Docket No.: B–2250).	Unincorporated Areas of Placer County (21–09–1181P).	The Honorable Cindy Gustafson, Chair, Board of Supervisors, Placer County, 175 Fulweller Avenue, Auburn, CA 95603.	Placer County Public Works, 3091 County Center Drive, Suite 220, Auburn, CA 95603.	Oct. 17, 2022	060239
Placer (FEMA Docket No.: B–2280).	Unincorporated Areas of Placer County (22–09–0128P).	The Honorable Cindy Gustafson, Chair, Board of Supervisors, Placer County, 175 Fulweiler Avenue Suite 206, Auburn, CA 95603.	Placer County Public Works, 3091 County Center Drive, Suite 220, Auburn, CA 95603.	Jan. 9, 2023	060239
Riverside (FEMA Docket No.: B–2280).	City of Moreno Valley (22–09–0602P).	The Honorable Yxstian A. Gutierrez, Mayor, City of Moreno Valley, 14177 Frederick Street, Moreno Valley, CA 92552.	Public Works Department, 14177 Frederick Street, Moreno Valley, CA 92552.	Jan. 9, 2023	065074

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Riverside (FEMA Docket No.: B–2258).	City of San Jacinto (21–09–1682P).	The Honorable Crystal Ruiz, Mayor, City of San Jacinto, 595 South San Jacinto Avenue, San Jacinto, CA 92583.	Tri-Lake Consultants, 24 South D Street Suite 100, Perris, CA 92570.	Nov. 9, 2022	065056
Riverside (FEMA Docket No.: B–2258).	Unincorporated Areas of Riverside County (21–09–1682P).	The Honorable Jeff Hewitt, Chair, Board of Supervisors, Riverside County, 4080 Lemon Street, 5th Floor, Riverside, CA 92502.	Riverside County, Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92501.	Nov. 9, 2022	060245
Riverside (FEMA Docket No.: B–2250).	Unincorporated Areas of Riverside County (22–09–0293P).	The Honorable Jeff Hewitt, Chair, Board of Supervisors, Riverside County, 4080 Lemon Street, 5th Floor, Riverside, CA 92501.	Riverside County, Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92501.	Oct. 11, 2022	060245
San Bernardino (FEMA Docket No.: B–2280).	City of Fontana (20–09–1006P).	The Honorable Acquanetta Warren, Mayor, City of Fontana, 8353 Sierra Avenue, Fontana, CA 92335.	City Hall, Engineering Department, 8353 Sierra Avenue, San Bernardino, CA 92415.	Dec. 12, 2022	060274
San Bernardino (FEMA Docket No.: B–2250).	City of Fontana (21–09–1351P).	The Honorable Acquanetta Warren, Mayor, City of Fontana, 8353 Sierra Avenue, Fontana, CA 92335.	Engineering Department, 17001 Upland Avenue, Fontana, CA 92335.	Oct. 3, 2022	060274
San Bernardino (FEMA Docket No.: B–2280).	City of Rialto (20–09–1006P).	The Honorable Deborah Robertson, Mayor, City of Rialto, 150 South Palm Avenue, Rialto, CA 92376.	City Hall, 150 South Palm Avenue, Rialto, CA 92376.	Dec. 12, 2022	060280
San Bernardino (FEMA Docket No.: B–2280).	City of San Bernardino (20–09–1006P).	The Honorable John Valdivia, Mayor, City of San Bernardino, 290 North D Street, San Bernardino, CA 92401.	City Hall, 300 North D Street, San Bernardino, CA 92418.	Dec. 12, 2022	060281
San Bernardino (FEMA Docket No.: B–2280).	Unincorporated Areas of San Bernardino County (20–09–1006P).	The Honorable Curt Hagman, Chair, Board of Supervisors, San Bernardino County, 385 North Arrowhead Avenue, 5th Floor, San Bernardino, CA 92415.	San Bernardino County Public Works, Water Resources Department, 825 East 3rd Street, San Bernardino, CA 92415.	Dec. 12, 2022	060270
San Bernardino (FEMA Docket No.: B–2250).	Unincorporated Areas of San Bernardino County (21–09–1351P).	The Honorable Curt Hagman, Chair, Board of Supervisors, San Bernardino County, 385 North Arrowhead Avenue, 5th Floor, San Bernardino, CA 92415.	San Bernardino County, Public Works, Water Resources Department, 825 East 3rd Street, San Bernardino, CA 92415.	Oct. 3, 2022	060270
San Diego (FEMA Docket No.: B–2258).	City of Poway (21–09–1484P).	The Honorable Steve Vaus, Mayor, City of Poway, 13325 Civic Center Drive, Poway, CA 92064.	City Hall, 13325 Civic Center Drive, Poway, CA 92064.	Nov. 4, 2022	060702
San Mateo (FEMA Docket No.: B–2272).	City of South San Francisco (21–09–0918P).	The Honorable Mark Nagales, Mayor, City of South San Francisco, 400 Grand Avenue, South San Francisco, CA 94080.	City Hall, 400 Grand Avenue, South San Francisco, CA 94080.	Nov. 17, 2022	065062
San Mateo (FEMA Docket No.: B–2272).	Town of Colma (21–09–0918P).	The Honorable Helen Fisicaro, Mayor, Town of Colma, 1198 El Camino Real, Colma, CA 94014.	Town Hall, 1198 El Camino Real, Colma, CA 94014.	Nov. 17, 2022	060316
Florida:					
St. Johns (FEMA Docket No.: B–2250).	Unincorporated Areas of St. Johns County (22–04–0054P).	Chair Henry Dean, St. Johns County Board of Commissioners, 500 San Sebastian View, St. Augustine, FL 32084.	St. Johns County Permit Center, 4040 Lewis Speedway, St. Augustine, FL 32084.	Sep. 30, 2022	125147
Nassau (FEMA Docket No.: B–2280).	Town of Callahan (21–04–4290P).	The Honorable Matthew Davis, Mayor, Town of Callahan, 542300 US Hwy 1, Callahan, FL 32011.	Town Hall, 542300 US Highway 1, Callahan, FL 32011.	Jan. 12, 2023	120171
Nassau (FEMA Docket No.: B–2280).	Unincorporated Areas of Nassau County (21–04–4290P).	Chair Jeff Gray, Nassau County Board of Commissioners, 97572 Pirates Point Road, Yulee, FL 32097.	Nassau County Building Department, 96161 Nassau Place, Yulee, FL 32097.	Jan. 12, 2023	120170
Hawaii:					
Hawaii (FEMA Docket No.: B–2272).	Hawaii County (20–09–1349P).	The Honorable Mitch Roth, Mayor, County of Hawaii, 25 Aupuni Street, Hilo, HI 96720.	Hawaii County Department of Public Works, Engineering Division, 101 Pauahi Street, Suite 7, Hilo, HI 96720.	Nov. 14, 2022	155166
Honolulu (FEMA Docket No.: B–2280).	City and County of Honolulu (21–09–0747P).	The Honorable Rick Blangiardi, Mayor, City and County of Honolulu, 530 South King Street Room 300, Honolulu, HI 96813.	Department of Planning and Permitting, 650 South King Street 1st Floor, Honolulu, HI 96813.	Dec. 6, 2022	150001
Idaho:					

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Blaine (FEMA Docket No.: B–2280).	City of Ketchum (22–10–0349P).	The Honorable Neil Bradshaw, Mayor, City of Ketchum, City Hall, P.O. Box 2315, Ketchum, ID 83340.	City Hall, 480 East Avenue North, Ketchum, ID 83340.	Dec. 22, 2022	160023
Blaine (FEMA Docket No.: B–2280).	Unincorporated Areas of Blaine County (22–10–0349P).	Chair Dick Fosbury, Blaine County Board of Commissioners, Old County Courthouse, 206 South 1st Avenue, Hailey, ID 83333.	Blaine County Planning & Zoning, 219 1st Avenue South, Suite 208, Hailey, ID 83333.	Dec. 22, 2022	165167
Kootenai (FEMA Docket No.: B–2250).	Unincorporated Areas of Kootenai County (21–10–1307P).	Commissioner Chris Fillios, District 2, Kootenai County, 451 Government Way, Coeur d'Alene, ID 83814.	Assessors Department, Kootenai County Court House, 451 Government Way, Coeur d'Alene, ID 83816.	Oct. 7, 2022	160076
Illinois:					
Cook (FEMA Docket No.: B–2258).	Village of Western Springs (21–05–1260P).	The Honorable Alice Gallagher, Village President, Village of Western Springs, Village Hall, 740 Hillgrove Avenue, Western Springs, IL 60558.	Village Hall, Community Development Department, 740 Hillgrove Avenue, Western Springs, IL 60558.	Oct. 28, 2022	170171
Kendall (FEMA Docket No.: B–2295).	Village of Oswego (22–05–1225P).	The Honorable Troy Parlier, Village President, Village of Oswego, 100 Parkers Mill, Oswego, IL 60543.	Village Hall, 100 Parkers Mill, Oswego, IL 60543.	Jan. 13, 2023	170345
Will (FEMA Docket No.: B–2272).	City of Lockport (22–05–1296P).	The Honorable Steven Streit, Mayor, City of Lockport, 222 East 9th Street, Lockport, IL 60441.	Public Works and Engineering Department, 17112 South Prime Boulevard, Lockport, IL 60441.	Nov. 18, 2022	170703
Will (FEMA Docket No.: B–2272).	Unincorporated Areas of Will County (22–05–1296P).	The Honorable Jennifer Bertino-Tarrant, Will County Executive, Will County Office Building, 302 North Chicago Street, Joliet, IL 60432.	Will County Land Use Department, 58 East Clinton Street, Suite 100, Joliet, IL 60432.	Nov. 18, 2022	170695
Will (FEMA Docket No.: B–2258).	Village of Bolingbrook (22–05–1649P).	The Honorable Mary Alexander-Basta, Mayor, Village of Bolingbrook, 375 West Briarcliff Road, Bolingbrook, IL 60440.	Village Hall, 375 West Briarcliff Road, Bolingbrook, IL 60440.	Oct. 24, 2022	170812
Indiana:					
Morgan (FEMA Docket No.: B–2258).	City of Martinsville (22–05–1449P).	The Honorable Kenneth Costin, Mayor, City of Martinsville, P.O. Box 1415, Martinsville, IN 46151.	City Hall, 59 South Jefferson Street, Martinsville, IN 46151.	Sep. 28, 2022	180177
Morgan (FEMA Docket No.: B–2258).	Unincorporated Areas of Morgan County (22–05–1449P).	Commissioner Don Adams, Morgan County Board of Commissioners, 180 South Main Street, Suite 112, Martinsville, IN 46151.	Morgan County Administration Building, 180 South Main Street, Martinsville, IN 46151.	Sep. 28, 2022	180176
Steuben (FEMA Docket No.: B–2250).	Town of Hamilton (21–05–2799P).	President Mary Vail, Town of Hamilton, 900 South Wayne Street, Hamilton, IN 46742.	Town Hall, 7750 South Wayne Street, Hamilton, IN 46742.	Sep. 14, 2022	180248
Steuben (FEMA Docket No.: B–2250).	Unincorporated Areas of Steuben County (21–05–2799P).	President Wil Howard, Steuben County Board of Commissioners, 317 South Wayne Street, Angola, IN 46703.	Steuben County, Plan Commission Courthouse, 317 South Wayne Street, Angola, IN 46703.	Sep. 14, 2022	180243
Kentucky: Scott (FEMA Docket No.: B–2272).	Unincorporated Areas of Scott County (21–04–4848P).	Executive Joe Pat Covington, Scott County, 101 East Main Street, Suite 210, Georgetown, KY 40324.	Georgetown-Scott County Planning Commission, 230 East Main Street, Georgetown, KY 40324.	Nov. 21, 2022	210207
Michigan:					
Ingham (FEMA Docket No.: B–2258).	Charter Township of Lansing (22–05–1554P).	Supervisor Maggie Sanders, Charter Township of Lansing, 3209 West Michigan Avenue, Lansing, MI 48917.	Township Hall, 3209 West Michigan Avenue, Lansing, MI 48917.	Oct. 27, 2022	260632
Ingham (FEMA Docket No.: B–2258).	City of East Lansing (22–05–1554P).	The Honorable Ron Bacon, Mayor, City of East Lansing, 410 Abbot Road, Room 100, East Lansing, MI 48823.	City Hall, 410 Abbott Road, East Lansing, MI 48823.	Oct. 27, 2022	260089
Ingham (FEMA Docket No.: B–2258).	City of Lansing (22–05–1554P).	The Honorable Andy Schor, Mayor, City of Lansing, 124 West Michigan Avenue, 9th Floor, Lansing, MI 48933.	City Hall, 124 West Michigan Avenue, Lansing, MI 48933.	Oct. 27, 2022	260090
Shiawassee (FEMA Docket No.: B–2250).	City of Owosso (21–05–4550P).	The Honorable Christopher Eveleth, Mayor, City of Owosso, 301 West Main Street, Owosso, MI 48867.	City Hall, 301 West Main Street, Owosso, MI 48867.	Oct. 7, 2022	260596
Wayne (FEMA Docket No.: B–2272).	Township of Canton (22–05–0850P).	Supervisor Anne Marie Graham-Hudak, Township of Canton, 1150 Canton Center South, Canton, MI 48188.	Canton Municipal Complex, 1150 South Canton Center Road, Canton, MI 48188.	Nov. 28, 2022	260219
Nebraska:					

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Saline (FEMA Docket No.: B–2258).	City of Crete (20–07–0590P).	The Honorable Dave Bauer, Mayor, City of Crete, 243 East 13th Street, Crete, NE 68333.	City Hall, 241 East 13th Street, Crete, NE 68333.	Oct. 27, 2022	310186
Saline (FEMA Docket No.: B–2258).	Unincorporated Areas of Saline County (20–07–0590P).	Commissioner Russ Karpisek, Chair, Saline County, 315 North Shimerda, Wilber, NE 68465.	Saline County Courthouse, 215 South Court Street, Wilber, NE 68465.	Oct. 27, 2022	310472
Nevada:					
Clark (FEMA Docket No.: B–2258).	City of Henderson (22–09–0379P).	The Honorable Debra March, Mayor, City of Henderson, 240 South Water Street, Henderson, NV 89015.	Public Works Department, 240 South Water Street, Henderson, NV 89015.	Oct. 24, 2022	320005
Clark (FEMA Docket No.: B–2280).	City of North Las Vegas (22–09–0330P).	The Honorable John J. Lee, Mayor, City of North Las Vegas, 2250 Las Vegas Boulevard North, North Las Vegas, NV 89030.	Public Works Department, 2250 Las Vegas Boulevard North, Suite 200, North Las Vegas, NV 89030.	Jan. 11, 2023	320007
Washoe (FEMA Docket No.: B–2280).	City of Sparks (22–09–0027P).	The Honorable Ed Lawson, Mayor, City of Sparks, 431 Prater Way, Sparks, NV 89431.	City Hall, 431 Prater Way, Sparks, NV 89431.	Dec. 12, 2022	320021
Washoe (FEMA Docket No.: B–2280).	Unincorporated Areas of Washoe County (22–09–0027P).	The Honorable Vaughn Hartung, Chair, Board of Commissioners, Washoe County, 1001 East 9th Street, Reno, NV 89512.	Washoe County Administration Building, Department of Public Works, 1001 East 9th Street, Reno, NV 89512.	Dec. 12, 2022	320019
New York:					
Delaware (FEMA Docket No.: B–2250).	Town of Walton (21–02–0345P).	Supervisor Joseph M. Cetta, Town of Walton, 129 North Street, Walton, NY 13856.	Town Hall, 129 North Street, Walton, NY 13856.	Nov. 3, 2022	360215
Delaware (FEMA Docket No.: B–2250).	Village of Walton (21–02–0345P).	The Honorable Edward Snow, Sr., Mayor, Village of Walton, 21 North Street, Walton, NY 13856.	Village Hall, 21 North Street, Walton, NY 13856.	Nov. 3, 2022	360216
Erie (FEMA Docket No.: B–2272).	Town of Evans (21–02–0897P).	Supervisor Mary Hosler, Town of Evans Board Members, 8787 Erie Road, Angola, NY 14006.	Town Hall, 8787 Erie Road, Angola, NY 14006.	Jan. 26, 2023	360240
Montgomery (FEMA Docket No.: B–2258).	City of Amsterdam (21–02–0893P).	The Honorable Michael Cinquanti, Mayor, City of Amsterdam, 61 Church Street, Amsterdam, NY 12010.	City Hall, 61 Church Street, Amsterdam, NY 12010.	Dec. 1, 2022	360440
Montgomery (FEMA Docket No.: B–2258).	Town of Amsterdam (21–02–0893P).	Supervisor Thomas Dimezza, Town of Amsterdam, 283 Manny's Corners Road, Amsterdam, NY 12010.	Office Building, 283 Manny's Corners Road, Amsterdam, NY 12010.	Dec. 1, 2022	360441
Montgomery (FEMA Docket No.: B–2258).	Town of Florida (21–02–0893P).	Supervisor Eric Mead, Town of Florida, 214 Fort Hunter Road, Amsterdam, NY 12010.	Office Building, 214 Fort Hunter Road, Amsterdam, NY 12010.	Dec. 1, 2022	360445
Montgomery (FEMA Docket No.: B–2258).	Town of Mohawk (21–02–0893P).	Supervisor Ed Bishop, Town of Mohawk, P.O. Box 415, Fonda, NY 12068.	Mohawk Richard A. Papa Office Building, 2–4 Park Street, Fonda, NY 12068.	Dec. 1, 2022	360452
Montgomery (FEMA Docket No.: B–2258).	Village of Fort Johnson (21–02–0893P).	The Honorable Michael Simmons, Mayor, Village of Fort Johnson, P.O. Box 179, Fort Johnson, NY 12070.	Fort Johnson Municipal Building, 1 Prospect Street, Fort Johnson, NY 12070.	Dec. 1, 2022	360447
Orange (FEMA Docket No.: B–2272).	Village of Harriman (21–02–0938P).	The Honorable Lou Medina, Mayor, Village of Harriman, 1 Church Street, Harriman, NY 10926.	Village Hall, 1 Church Street, Harriman, NY 10926.	Jan. 12, 2023	360618
Richmond (FEMA Docket No.: B–2250).	City of New York (21–02–1113P).	The Honorable Eric Adams, Mayor, City of New York, City Hall, New York, NY 10007.	City Department of City Planning, Waterfront Division, 22 Reade Street, New York, NY 10007.	Nov. 17, 2022	360497
Westchester (FEMA Docket No.: B–2250).	Town of Mamaroneck (22–02–0217P).	Supervisor Jaine Elkind Eney, Town of Mamaroneck, 740 West Boston Post Road, Mamaroneck, NY 10543.	Town Hall, 740 West Boston Post Road, Mamaroneck, NY 10543.	Dec. 1, 2022	360917
Oregon:					
Multnomah (FEMA Docket No.: B–2250).	City of Fairview (22–10–0253P).	The Honorable Brian Cooper, Mayor, City of Fairview, 1300 Northeast Village Street, Fairview, OR 97024.	Planning Department, 1300 Northeast Village Street, Fairview, OR 97024.	Oct. 6, 2022	410180

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Multnomah (FEMA Docket No.: B–2250).	City of Gresham (21–10–1434P).	The Honorable Travis Stovall, Mayor, City of Gresham, 1333 Northwest Eastman Parkway, 3rd Floor, Gresham, OR 97030.	City Hall, 1333 Northwest Eastman Parkway, Gresham, OR 97030.	Sep. 26, 2022	410181
South Carolina: Spartanburg (FEMA Docket No.: B–2258).	Unincorporated Areas of Spartanburg County (21–04–4426P).	Chair A. Manning Lynch, Spartanburg County, 366 North Church Street, Main Level, Suite 1000, Spartanburg, SC 29303.	Spartanburg County Administration Building, 366 North Church Street, Spartanburg, SC 29303.	Oct. 3, 2022	450176
Texas: Tarrant (FEMA Docket No.: B–2272).	City of North Richland Hills (21–06–2663P).	The Honorable Oscar Trevino, Jr., Mayor, City of North Richland Hills, P.O. Box 820609, North Richland Hills, TX 76182.	City Hall, 4301 City Point Drive, North Richland Hills, TX 76180.	Dec. 15, 2022	480607
Washington: Okanogan (FEMA Docket No.: B–2280).	Unincorporated Areas of Okanogan County (22–10–0287P).	Chair Chris Branch, Board of Commissioner District 1, 149 North 3rd Avenue, Okanogan, WA 98840.	Okanogan Planning Department, 123 North 5th Street, Okanogan, WA 98840.	Dec. 16, 2022	530117
Wisconsin:					
Brown (FEMA Docket No.: B–2280).	Unincorporated Areas of Brown County (22–05–0903P).	Commissioner Patrick Buckley, Brown County, 305 East Walnut Street, Green Bay, WI 54305.	Brown County Zoning Office, 305 East Walnut Street, Green Bay, WI 54301.	Dec. 19, 2022	550020
Brown (FEMA Docket No.: B–2280).	Village of Bellevue (21–05–4432P).	President Steve Soukup, Village of Bellevue, 2828 Allouez Avenue, Bellevue, WI 54311.	Village Hall, 2828 Allouez Avenue, Bellevue, WI 54311.	Dec. 15, 2022	550627
Brown (FEMA Docket No.: B–2280).	Village of Hobart (22–05–0903P).	President Richard Heidel, Village of Hobart, 2990 South Pine Tree Road, Hobart, WI 54155.	Village Hall, 2990 South Pine Tree Road, Hobart, WI 54155.	Dec. 19, 2022	550626
Waukesha (FEMA Docket No.: B–2272).	Village of Summit (21–05–1028P).	President Jack Riley, Village of Summit, 37100 Delafield Road, Summit, WI 53066.	Village Hall, 2911 North Dousman Road, Oconomowoc, WI 53066.	Nov. 28, 2022	550663

[FR Doc. 2023–03764 Filed 2–22–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below. The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP).

DATES: The date of July 19, 2023 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *https://msc.fema.gov* by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Clinton County, Iowa and Incorporated Areas Docket No.: FEMA–B–2212	
City of Clinton	City Hall, 611 South 3rd Street, Clinton, IA 52733.
Penobscot County, Maine (All Jurisdictions) Docket No.: FEMA–B–2228	
City of Bangor	City Hall, 73 Harlow Street, Bangor, ME 04401.
City of Brewer	City Hall, 80 North Main Street, Brewer, ME 04412.
City of Old Town	City Hall, 265 Main Street, Old Town, ME 04468.
Penobscot Indian Nation	Penobscot Tribal Office, 12 Wabanaki Way, Indian Island, ME 04468.
Town of Bradley	Town Office, 165B Main Street, Bradley, ME 04411.
Town of Carmel	Municipal Building, 1 Safety Lane, Carmel, ME 04419.
Town of Clifton	Municipal Office, 135 Airline Road, Clifton, ME 04428.
Town of Corinth	Municipal Office, 31 Exeter Road, Corinth, ME 04427.
Town of Dixmont	Town Office, 758 Western Avenue, Dixmont, ME 04932.
Town of Eddington	Town Office, 906 Main Road, Eddington, ME 04428.
Town of Etna	Municipal Building, 17 Shadow Lane, Etna, ME 04434.
Town of Exeter	Town Office, 1221 Stetson Road, Exeter, ME 04435.
Town of Glenburn	Town Office, 144 Lakeview Road, Glenburn, ME 04401.
Town of Hampden	Town Office, 106 Western Avenue, Hampden, ME 04444.
Town of Hermon	Town Office, 333 Billings Road, Hermon, ME 04401.
Town of Holden	Town Office, 570 Main Road, Holden, ME 04429.
Town of Kenduskeag	Town Office, 4010 Broadway, Kenduskeag, ME 04450.
Town of Levant	Town Office, 691 Town House Road, Levant, ME 04456.
Town of Milford	Town Office, 62 Davenport Street, Milford, ME 04461.
Town of Newburgh	Municipal Office, 2220 Western Avenue, Newburgh, ME 04444.
Town of Orono	Town Office, 59 Main Street, Orono, ME 04473.
Town of Orrington	Municipal Office, 1 Municipal Way, Orrington, ME 04474.
Town of Plymouth	Town Office, 1947 Moosehead Trail Highway, Plymouth, ME 04969.
Town of Stetson	Town Office, 394 Village Road, Stetson, ME 04488.
Town of Veazie	Town Office, 1084 Main Street, Veazie, ME 04401.
Kent County, Rhode Island (All Jurisdictions) Docket No.: FEMA–B–2180	
Town of Coventry	Town Clerk's Office, 1670 Flat River Road, Coventry, RI 02816.
Town of West Greenwich	Town Hall, 280 Victory Highway, West Greenwich, RI 02817.
Providence County, Rhode Island (All Jurisdictions) Docket No.: FEMA–B–2180	
Town of Burrillville	Town of Burrillville Building Department, 144 Harrisville Main Street, Harrisville, RI 02830.
Town of Foster	Town Hall, 181 Howard Hill Road, Foster, RI 02825.
Town of Glocester	Glocester Town Hall, Town Clerk's Office, 1145 Putnam Pike, Chepachet, RI 02814.
Washington County, Rhode Island (All Jurisdictions) Docket No.: FEMA–B–2180	
Town of Exeter	Town Hall, Town Clerk's Office, 675 Ten Rod Road, Exeter, RI 02822.
Bexar County, Texas and Incorporated Areas Docket No.: FEMA–B–2177	
City of China Grove	City Hall, 2412 FM 1516 South, China Grove, TX 78263.
City of Elmendorf	City Hall, 8304 FM 327, Elmendorf, TX 78112.
City of San Antonio	Public Works Department—Storm Water Division, City Tower, 100 West Houston Street, 15th Floor, San Antonio, TX 78205.
Unincorporated Areas of Bexar County	Bexar County Public Works Department, 1948 Probandt Street, San Antonio, TX 78214.
Wilson County, Texas and Incorporated Areas Docket No.: FEMA–B–2177	
City of Elmendorf	City Hall, 8304 FM 327, Elmendorf, TX 78112.
Unincorporated Areas of Wilson County	Wilson County Courthouse, 1420 3rd Street, Suite 101, Floresville, TX 78114.

Community	Community map repository address
Pierce County, Washington and Incorporated Areas Docket No.: FEMA–B–2215	
Unincorporated Areas of Pierce County	Pierce County Tacoma Mall Plaza, 2702 South 42nd Street, Suite 201, Tacoma, WA 94809.

[FR Doc. 2023–03769 Filed 2–22–23; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7076–N–04; OMB Control No. 2577–0267]

60-Day Notice of Proposed Information Collection: Enterprise Income Verification (EIV) Systems—Access Authorization Form and Rules of Behavior and User Agreement

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, PIH, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* April 24, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

FOR FURTHER INFORMATION CONTACT: Erica Mahoney, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW, Room 3178, Washington, DC 20410; telephone 202–402–4109, (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of available documents submitted to OMB may be obtained from Ms. Mahoney.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: EIV System User Access Authorization Form and Rules of Behavior and User Agreement.

OMB Approval Number: 2577–0267.

Type of Request: Renewal of currently approved collection.

Form Number: 52676 and 52676I.

Description of the need for the information and proposed use: In accordance with statutory requirements at 5 U.S.C. 552a, as amended (most commonly known as the Federal Privacy Act of 1974), the Department is required to account for all disclosures of information contained in a system of records. Specifically, the Department is required to keep an accurate accounting of the name and address of the person or agency to which the disclosure is made. The Enterprise Income Verification (EIV) System (HUD/PIH–5) is classified as a System of Records, as initially published on July 20, 2005, in the **Federal Register** at page 41780 (70 FR 41780), and as amended and published on September 1, 2009, in the **Federal Register** on page 45235 (74 FR 45235).

As a condition of granting access to the EIV system, each prospective user of the system must (1) request access to the system; (2) agree to comply with HUD's established rules of behavior; and (3) review and signify their understanding of their responsibilities of protecting data protected under the Federal Privacy Act (5 U.S.C. 522a, as amended). As such, the collection of information about the user and the type of system access required by the prospective user is required by HUD to: (1) identify the user; (2) determine if the prospective user in fact requires access to the EIV system and in what capacity; (3) provide the prospective user with information related to the Rules of Behavior for system usage and the user's responsibilities to safeguard data accessed in the system once access is granted; and (4) obtain the signature of the prospective user to certify the user's understanding of the Rules of Behavior and responsibilities associated with his/her use of the EIV system.

HUD collects the following information from each prospective user: Public Housing Agency (PHA) code, organization name, organization address, prospective user's full name, HUD-assigned user ID, position title, office telephone number, facsimile number, type of work which involves the use of the EIV system, type of system action requested, requested access roles to be assigned to prospective user, public housing development numbers to be assigned to prospective PHA user, and prospective user's signature and date of request. The information is collected electronically and manually (for those who are unable to transmit electronically) via a PDF-fillable or Word-fillable document, which can be emailed, faxed or mailed to HUD. If this information is not collected, the Department will not be in compliance with the Federal Privacy Act and be subject to civil penalties.

ESTIMATE OF THE HOUR OF BURDEN OF THE COLLECTION OF INFORMATION

Information collection	Number of respondents	Frequency of respondents	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
HUD–52676	13,192	On occasion	13,703	Initial 1/hr.; Periodic 0.25/hr.	10,754	$25.94	$278,959

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Steven Durham,

Acting Chief, Office of Policy, Programs and Legislative Initiatives.

[FR Doc. 2023–03773 Filed 2–22–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–09]

30-Day Notice of Proposed Information Collection: FHA-Insured Mortgage Loan Servicing Involving the Loss Mitigation Programs; OMB Control No. 2502–0589

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* March 27, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_submission@omb.eop.gov* or *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 8210 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on December 1, 2022 at 87 FR 73774.

A. Overview of Information Collection

Title of Information Collection: FHA-Insured Mortgage Loan Servicing Involving the Loss Mitigation Program.

OMB Approval Number: 2502–0589.

Type of Request: Revision.

Form Numbers: HUD–27011, HUD–90035, HUD–90041, HUD–90045, HUD–90051, HUD–90052.

Description of the need for the information and proposed use: FHA's Loss Mitigation program options (24 CFR 203.501) and incentives efforts provide mortgagees with reimbursement for using tools to bring a delinquent FHA-insured mortgage loan current in as short a time as possible, to provide an alternative to foreclosure to the extent possible, and to minimize losses to the Mutual Mortgage Insurance Fund. Home retention options promote reinstatement of the mortgage, allowing the mortgagor to retain home ownership, while disposition options assist mortgagors who cannot recover with an alternative to foreclosure. The HUD forms used are part of the collection effort for non-performing insured mortgage loans.

Respondents: Mortgagees or Mortgagors.

Estimated Number of Respondents: 412,966.

Estimated Number of Responses: 1,254,958.

Frequency of Response: On occasion.

Average Hours per Response: 1.38 hours.

Total Estimated Burdens: 1,736,478.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information

technology, *e.g.,* permitting electronic submission of responses. (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–03712 Filed 2–22–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R8–ES–2023–0025; FF08ESMF00–FXES11140800000–189]

Byron Sand Mine Evo East Quarry Expansion, Contra Costa County, California; Draft Categorical Exclusion and Draft Habitat Conservation Plan

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the receipt of an application from G3 enterprises (applicant) for an incidental take permit (ITP) under the Endangered Species Act (ESA).The applicant requests an ITP to take the San Joaquin kit fox, the Central Valley distinct population segment of the California tiger salamander, the California red-legged frog, and the vernal pool fairy shrimp, incidental to the construction of the Byron Sand Mine Evo East Quarry Expansion Project in Contra Costa County, California. We request public comment on the application, which includes the applicant's proposed habitat conservation plan (HCP), and on the Service's preliminary determination that the proposed permitting action may be eligible for a categorical exclusion pursuant to the Council on Environmental Quality's National Environmental Policy Act (NEPA) regulations, the Department of the Interior's (DOI) NEPA regulations, and the DOI Departmental Manual. To make this preliminary determination, we prepared a draft environmental action statement and low-effect screening form, both of which are also available for public review. We invite comment from the public and local, State, Tribal, and Federal agencies. Before issuing the requested permit, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before March 27, 2023.

ADDRESSES:

Obtaining Documents: You may obtain copies of the documents online in Docket No. in Docket No. FWS–R8–ES–2023–0025 at *https://www.regulations.gov.*

Submitting Comments: To submit comments, please use one of the following methods, and note which document(s) your information requests or comments pertain to.

- *Internet:* Submit comments at *https://www.regulations.gov* under Docket No. FWS–R8–ES–2023–0025.
- *U.S. Mail:* Public Comments Processing, Attn: Docket No. FWS–R8–ES–2023–0025; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

For more information, see Public Comments and Public Availability of Comments, under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Jason Hanni, Fish and Wildlife Biologist (*jason_hanni@fws.gov*), or Ryan Olah, Chief, Coast Bay Division (*ryan_olah@fws.gov*), Fish and Wildlife Service, Sacramento Fish and Wildlife Office, by phone at 916–414–6600. 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: We, the U.S. Fish and Wildlife Service (Service), announce the receipt of an application from G3 enterprises (applicant) for a 20-year incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicant requests the ITP to take the federally listed as endangered San Joaquin kit fox (*Vulpes macrotis mutica;* kit fox), the threatened Central Valley distinct population segment (DPS) of the California tiger salamander (*Ambystoma californiense*), the threatened California red-legged frog (*Rana draytonii*), and the threatened vernal pool fairy shrimp (*Branchinecta lynchi*), incidental to the construction of the Byron Sand Mine Evo East Quarry Expansion Project in Contra Costa County, California.

We request public comment on the application, which includes the applicant's habitat conservation plan (HCP), and on the Service's preliminary determination that this proposed ITP qualifies as ''low effect,'' and may qualify for a categorical exclusion pursuant to the Council on Environmental Quality's National Environmental Policy Act (NEPA) regulations (40 CFR 1501.4), the Department of the Interior's (DOI) NEPA regulations (43 CFR 46), and the DOI's Departmental Manual (516 DM 8.5(C)(2)). To make this preliminary determination, we prepared a draft environmental action statement and low-effect screening form, both of which are also available for public review.

Background

Section 9 of the ESA (16 U.S.C. 1531–1544 *et seq.*) and Federal regulations (50 CFR part 17) prohibit the taking of fish and wildlife species listed as endangered or threatened under section 4 of the ESA. Under section 10(a)(1)(B) of the ESA (16 U.S.C. 1539(a)(1)(B)), we may issue permits to authorize take of listed fish and wildlife species that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing permits for endangered and threatened species are at 50 CFR 17.22 and 17.32. For more about the Federal habitat conservation plan (HCP) program, go to *https://www.fws.gov/service/habitat-conservation-plans.*

Proposed Project

For the proposed project, the Service would issue an ITP to the applicant for a period of 20 years for certain covered activities (described below). The applicant has requested an ITP for four covered species.

Habitat Conservation Plan Area

The geographic scope of the draft HCP encompasses an 80-acre (ac) parcel, which encompasses both a 20-ac mine expansion area and a 60-ac mitigation area and is adjacent to the project site. The Evo East Expansion Project consists of a total disturbed area of 20 ac, which includes an estimated 15-ac mine expansion area and an estimated 5-ac overburden storage area where topsoil from the quarry will be stored for later use in reclamation. The proposed expansion and overburden areas are directly adjacent to the existing Evo East Quarry. The project would expand the approved Evo East footprint to the

southeast, creating a single contiguous quarry that encompasses approximately 50 ac total. The Evo East Expansion Area would be mined in a sequential manner, with rejected material placed on depleted mining areas to avoid the need for separate reject material storage. The existing mine infrastructure would be used to complete mining operations. The remaining 60 ac within the plan area would not be disturbed and would be set aside as mitigation for the project. The proposed project is located at the southwest corner of Vasco Road and Camino Diablo Road in Byron, Contra Costa County, California.

Covered Activities

The proposed ESA section 10 ITP would allow take of four covered species from covered activities in the proposed HCP area. The applicant is requesting incidental take authorization for covered activities, including mining the approximately 15-ac site as well as utilizing an approximate 5-ac overburden pile that would occur in the project area. The applicant is proposing to implement a number of project design features, including best management practices, as well as general and species-specific avoidance and minimization measures to minimize the impacts of the take from the covered activities.

Covered Species

The federally listed as endangered San Joaquin kit fox, the threatened Central Valley DPS of the California tiger salamander, the threatened California red-legged frog, and the threatened vernal pool fairy shrimp are proposed to be included as covered species in the proposed HCP.

Our Preliminary Determination

The Service has made a preliminary determination that the proposed applicant's project, including the construction of the quarry expansion project, would individually and cumulatively have a minor, nonsignificant effect on the proposed covered species and the human environment. Therefore, we have preliminarily determined that the proposed ESA section 10(a)(1)(B) permit would be a ''low-effect'' ITP that individually or cumulatively would have a minor effect on the proposed covered species and may qualify for application of a categorical exclusion pursuant to the Council on Environmental Quality's NEPA regulations, DOI's NEPA regulations, and the DOI Departmental Manual. A ''low-effect'' incidental take permit is one that would result in (1) minor or negligible effects on species covered in the HCP; (2) nonsignificant effects on the human environment; and (3) impacts that, when added together with the impacts of other past, present, and reasonable foreseeable actions, would not result in significant cumulative effects to the human environment.

Public Comments

We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on this notice and the documents we are making available for comment. We particularly seek comments on the following:

1. Biological information concerning the species;
2. Relevant data concerning the species;
3. Additional information concerning the ranges, distribution, population sizes, and population trends of the species;
4. Current or planned activities in the area and their possible impacts on the species;
5. The presence of archeological sites, buildings and structures, historic events, sacred and traditional areas, and other historic preservation concerns, which are required to be considered in project planning by the National Historic Preservation Act; and
6. Any other environmental issues that should be considered with regard to the proposed development and permit action.

Public Availability of Comments

Before including your address, phone number, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—might 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.

Next Steps

We will evaluate the application, associated documents, and any public comments we receive as part of our NEPA compliance process to determine whether the application meets the requirements of section 10(a) of the ESA. If we determine that those requirements are met, we will conduct an intra-Service consultation under section 7 of the ESA for the Federal action of potentially issuing an ITP. If the intra-Service consultation confirms that issuance of the ITP will not jeopardize the continued existence of any endangered or threatened species, or destroy or adversely modify critical habitat, we will issue a permit to the applicant for the incidental take of the covered species.

Authority

We provide this notice under section 10(c) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.32) and the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR parts 1500–1508 and 43 CFR part 46).

Michael Fris,

Field Supervisor, Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, Sacramento, California.

[FR Doc. 2023–03678 Filed 2–22–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/A0A501010.999900; OMB Control Number 1076–0186]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Indian Child Welfare Act Proceedings in State

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Indian Affairs (BIA) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before March 27, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection request (ICR) should be sent within 30 days of publication of this notice to the Office of Information and Regulatory Affairs (OIRA) through *https://www.reginfo.gov/public/do/PRA/icrPublicCommentRequest?ref_nbr=202302-1076-005* or by visiting *https://www.reginfo.gov/public/do/PRAMain* and selecting ''Currently under Review—Open for Public Comments'' and then scrolling down to the ''Department of the Interior.''

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Evangeline M.

Campbell, *Evangeline.Campbell@bia.gov,* (202) 513–7621. 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. You may also view the ICR at *https://www.reginfo.gov/public/Forward?SearchTarget=PRA&textfield=1076-0186.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on July 22, 2022 (87 FR 43889). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. 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.

Abstract: The Indian Child Welfare Act (ICWA or Act), 25 U.S.C. 1901 *et seq.,* imposes certain requirements for child custody proceedings that occur in State court when a child is an ''Indian child.'' The regulations, primarily located in Subpart I of 25 CFR 23, provide procedural guidance for implementing ICWA, which necessarily involves information collections to determine whether the child is Indian, provide notice to the Tribe and parents or Indian custodians, and maintain records. The information collections are conducted during a civil action *(i.e.,* a child custody proceeding). While these civil actions occur in State court, and the U.S. is not a party to the civil action, the civil action is subject to the Federal statutory requirements of ICWA, which the Secretary of the Interior oversees under the Act and general authority to manage Indian affairs under 25 U.S.C. 2 and 9.

Title of Collection: Indian Child Welfare Act (ICWA) Proceedings in State.

OMB Control Number: 1076–0186.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals/households and State/Tribal governments.

Total Estimated Number of Annual Respondents: 7,556.

Total Estimated Number of Annual Responses: 98,069.

Estimated Completion Time per Response: Varies from 15 minutes to 12 hours, depending on the activity.

Total Estimated Number of Annual Burden Hours: 301,811.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $364,972.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Steven Mullen,

Information Collection Clearance Officer, Office of Regulatory Affairs and Collaborative Action—Indian Affairs.

[FR Doc. 2023–03791 Filed 2–22–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMTL01000.L16100000.PN0000; MO # 4500165300; MTM–89170–02]

Public Land Order No. 7919; Withdrawal of Public Land for the Zortman-Landusky Mine Reclamation Site; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This Public Land Order (PLO) withdraws 912.33 acres of public lands in Phillips County, Montana, from location or entry under the United States mining laws, but not from the mineral leasing or mineral materials disposal laws, for a 20-year period, subject to valid existing rights, to protect the Zortman-Landusky Mine reclamation site.

DATES: This PLO takes effect on February 23, 2023.

FOR FURTHER INFORMATION CONTACT: Micah Lee, Realty Specialist, Bureau of Land Management, Havre Field Office, telephone (406) 262–2851, email at *mrlee@blm.gov,* during business hours, 8:00 a.m. to 4:30 p.m., Monday through Friday, except holidays. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or Tele Braille) 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 of the withdrawal established by this PLO is to protect the Zortman-Landusky Mine area and facilitate reclamation and stabilization of the site.

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, the following described public lands are

hereby withdrawn from location or entry under the United States mining laws, but not from the mineral leasing or mineral materials disposal laws.

Principal Meridian, Montana

T. 25 N., R. 24 E.,
Sec. 1, lots 14 and 15;
Sec. 11, lot 9;
Sec. 12, lots 11, 12, 13, 17, and 25;
Sec. 13, NE¼NE¼;
Sec. 14, lot 3;
Sec. 21, NE¼NE¼;
Sec. 22, SE¼SW¼SW¼, S½SE¼SW¼, NE¼SE¼, E½SE¼SE¼, NW¼SE¼SE¼, E½SW¼SE¼SE¼, and NW¼SW¼SE¼SE¼;
Sec. 23, E½NE¼.
T. 25 N., R. 25 E.,
Sec. 6, lots 13 thru 16, lot 18, NE¼SW¼, and SE¼;
Sec. 16, lot 2, N½NW¼SW¼, N½SE¼NW¼SW¼, S½SW¼SW¼SW¼, S½SE¼SW¼SW¼, NE¼SE¼SW¼, S½SE¼SW¼, and SW¼SE¼;
Sec. 17, NE¼NE¼, SW¼NE¼NW¼SE¼, S½NW¼NW¼SE¼, SW¼NW¼SE¼, W½SE¼NW¼SE¼, W½NE¼SW¼SE¼, W½SW¼SE¼, SE¼SW¼SE¼, and S½SE¼SE¼.

The areas described aggregate 912.33 acres, according to the official plats of the surveys of the said lands on file with the Bureau of Land Management.

2. This withdrawal will expire 20 years from the effective date of this order, unless as a result of a review conducted before 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.

(Authority: 43 CFR 2300)

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2023–03725 Filed 2–22–23; 8:45 am]

BILLING CODE 4331–20–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MTM–79374–01]

Public Land Order No. 7920; Extension of Public Land Order No. 6958; Withdrawal of National Forest System Land To Protect and Preserve the Crystal Park Recreation Area; Montana

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. 6958, which would otherwise expire March 1, 2023, for an additional 30-year period. PLO No. 6958 withdrew 220 acres of National Forest System land from location and entry under the United States mining laws, but not from leasing under the mineral leasing laws, subject to valid existing rights, to protect and preserve the United States Forest Service (USFS)-managed Crystal Park Recreation Area.

DATES: This PLO takes effect on March 2, 2023.

FOR FURTHER INFORMATION CONTACT: Will Pedde, Land Status Program Manager, U.S. Forest Service Region One, Office of the Regional Forester, Region One, 26 Fort Missoula Road, Missoula, Montana 59804, (406) 329–3204 or *will.pedde@usda.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 the withdrawal extension in order to continue to protect and preserve the USFS-managed Crystal Park Recreation Area, facilities, and capital improvements.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), it is ordered as follows:

1. Subject to valid existing rights, PLO No. 6958 (58 FR 11968 (1993)), which withdrew 220 acres of National Forest System lands from location and entry under the United States mining laws, but not from leasing under the mineral leasing laws, to protect and preserve Crystal Park Recreation Area, is hereby extended for an additional 30-year period.

2. The withdrawal extended by this Order will expire on March 1, 2053, unless, as a result of 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 the withdrawal shall be further extended.

(Authority: 43 CFR 2310)

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2023–03721 Filed 2–22–23; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–35323; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before February 4, 2023, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by March 10, 2023.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email, you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov,* 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before February 4, 2023. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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.

Nominations submitted by State or Tribal Historic Preservation Officers

KEY: State, County, Property Name, Multiple Name (if applicable), Address/

Boundary, City, Vicinity, Reference Number.

ARIZONA

Yavapai County

Schuerman Homestead House, 120 Loy Ln., Sedona vicinity, SG100008708

CALIFORNIA

Calaveras County

Chinatown Gardens Archaeological District, (Asian Americans and Pacific Islanders in California, 1850–1970 MPS), 8435 East Center St., Mokelumne Hill, MP100008712

Orange County

Fullerton College Historic District, 321 East Chapman Ave., Fullerton, SG100008709
New Lynn Theater, 154–162 South Coast Hwy., Laguna Beach, SG100008710

COLORADO

Chaffee County

Chaffee County Courthouse and Jail Buildings (Boundary Increase), 506 and 516 East Main St.; 113 and 205 North Court St., Buena Vista, BC100008735

Elbert County

First National Bank of Elizabeth, 188 South Main St., Elizabeth, SG100008713

Lake County

Golden Burro Cafe and Lounge, 710 Harrison Ave., Leadville, SG100008732

Pueblo County

St. Paul African Methodist Episcopal (AME) Church, 613 West Mesa Ave., Pueblo, SG100008733

Teller County

Crystola Bridge, (Highway Bridges in Colorado MPS), .06 mi. north of Crystola on Teller Cty. Rd. 21, Crystola vicinity, MP100008724

MICHIGAN

Berrien County

Clark Equipment Company Administrative Complex, 301–324 East Dewey St. and 204–302 North Red Bud Trail, Buchanan, SG100008725

MISSOURI

Lafayette County

Douglass School, 215 West 16th St., Higginsville, SG100008715

MONTANA

Powell County

Hillcrest Cemetery, West Milwaukee Ave., approx. .1 mi. west of Deer Lodge, Deer Lodge vicinity, SG100008723

NEW JERSEY

Mercer County

New Jersey Division of Motor Vehicles Building, 25 South Montgomery St., Trenton, SG100008729

Passaic County

Garritse-Doremus-Westervelt House, Park Dr., Clifton City, SG100008730

NEW YORK

Onondaga County

Amphion Piano Player Factory, (Industrial Resources in the City of Syracuse, Onondaga County, NY MPS), 689 North Clinton and 156 Solar Sts., Syracuse, MP100008717
St. Paul's Methodist Episcopal Church and Parsonage, 300–306 West Seneca Tpk., Syracuse, SG100008718

OHIO

Butler County

Oakland Residential Historic District, Bounded by 1st' Curtis, Woodlawn, Parkview, and Calumet Aves., Grove, Garfield, and Richmond Sts., Middletown, SG100008736

VIRGINIA

Petersburg Independent City

Walnut Hill Historic District, Roughly bounded by Johnson Rd., North, East, and South Blvds., Mount Vernon, Fleur de Hundred, and East Tuckahoe Sts., Petersburg, SG100008702

An owner objection has been received for the following resource:

NORTH DAKOTA

Grand Forks County

DeRoche Block, 624 5th Ave. North Apt 1–8 (formerly 612–626 and 624 Dakota Ave.), Grand Forks, SG100008731

A request to move has been received for the following resource:

WISCONSIN

Fond Du Lac County

Little White Schoolhouse, 1074 West Fond du Lac St., Ripon, MV73000079

Additional documentation has been received for the following resources:

COLORADO

Chaffee County

Chaffee County Courthouse and Jail Buildings (Additional Documentation), 506 and 516 East Main St.; 113 and 205 North Court St., Buena Vista, AD79000575

UTAH

Sanpete County

Neilson, N. S., House (Additional Documentation), 179 West Main St., Mt. Pleasant, AD82004160

Authority: Section 60.13 of 36 CFR part 60.

Dated: February 8, 2023.

Sherry A. Frear,

Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2023–03701 Filed 2–22–23; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1277]

Certain Smart Thermostats, Load Control Switches, and Components Thereof; Notice of a Commission Determination To Review in Part a Final Initial Determination Finding No Violation of Section 337, and on Review, To Affirm With Certain Modifications; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined to review in part a final initial determination (''ID'') of the presiding administrative law judge (''ALJ''), finding no violation of section 337, and on review, to affirm with certain modifications set forth herein. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3042. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: On September 2, 2021, the Commission instituted this investigation based on a complaint filed by Causam Enterprises, Inc. (''Causam'') of Raleigh, North Carolina. 86 FR 49345–46 (Sept. 2, 2021). The complaint alleged violations of section 337 based on the importation into the United States, the sale for importation, or the sale within the United States after importation of certain smart thermostats, load control switches, and components thereof by reason of infringement of one or more of claims 1–9, 16, 19–21, 23–28, and 30 of U.S. Patent No. 8,805,552 (''the '552 patent''); claims 1–8, 10, 13–17, 19–23, and 25–29 of U.S. Patent No. 9,678,522 (''the '522 patent''); claims 1–11, 13–16, 18, and 19 of U.S. Patent No. 10,394,268

(''the '268 patent''); and claims 1, 2, 8, 9, 11, 13, 14, and 17 of U.S. Patent No. 10,396,592 (''the '592 patent'') (collectively, ''Asserted Patents''). *Id.* The Commission's notice of investigation named the following nine entities as respondents: Alarm.com Holdings, Inc. of Tysons, Virginia; Alarm.com Inc. of Tysons, Virginia; Ecobee, Inc. of Toronto, Ontario, Canada; EnergyHub, Inc. of Brooklyn, New York; Itron, Inc. of Liberty Lake, Washington; Itron Distributed Energy Management, Inc. of Liberty Lake, Washington (''Itron Distributed''); Resideo Smart Homes Technology (Tianjin) of Tianjin, China; Resideo Technologies, Inc. of Austin, Texas (''Resideo Technologies''); and Xylem Inc., of Rye Brook, New York (''Xylem''). The Office of Unfair Import Investigations was not named as a party in this investigation. *Id.*

On December 10, 2021, the ALJ issued an ID granting a motion to terminate the investigation as to Xylem based upon settlement. Order No. 7 (Dec. 10, 2021), *unreviewed by* Comm'n Notice (Jan. 10, 2022).

On April 21, 2022, the ALJ issued an ID granting a motion (1) to amend the complaint and notice of investigation to substitute new respondent Ademco Inc. of Melville, New York for respondent Resideo Technologies and (2) to terminate the investigation as to respondent Itron Distributed; claim 21 of the '552 patent; claims 5, 14, and 17 of the '522 patent; claims 5, 13, and 16 of the '268 patent; and claims 8 and 9 of the '592 patent based upon withdrawal of the allegations in the complaint. Order No. 12 (Apr. 21, 2022), *unreviewed by* Comm'n Notice (May 17, 2022).

The Chief ALJ (''CALJ'') held an evidentiary hearing from June 28–July 1, 2022 and received post-hearing briefs thereafter (this investigation was reassigned from ALJ Shaw to Chief ALJ Cheney on June 17, 2022).

On November 16, 2022, the CALJ issued the final ID finding no violation of section 337 as to the asserted patent claims. The ID found that by appearing and participating in the investigation and not contesting jurisdiction, the parties have consented to personal jurisdiction at the Commission. ID at 17. The ID also found that the Commission has *in rem* jurisdiction over the accused products. *Id.* The ID further found that the importation requirement under 19 U.S.C. 1337(a)(1)(B) is satisfied. *Id.* at 16 (citing JX–0015C, JX–0016C, JX–0017C, JX–0018C (stipulations between the parties as to importation)). The ID, however, found that Causam failed to demonstrate that it has standing to assert a claim of infringement for any of the Asserted Patents. *Id.* at 17–26. The ID also found that Causam failed to prove infringement of the asserted claims, and that Respondents failed to show that any of the asserted claims are invalid. *Id.* at 40–120, 177–224. Finally, the ID found that Causam proved the existence of a domestic industry that practices the Asserted Patents as required by 19 U.S.C. 1337(a)(2). *Id.* at 120–177. The ID included the CALJ's recommended determination on remedy and bonding (''RD''). The RD recommended that, should the Commission find a violation, issuance of a limited exclusion order and cease and desist orders would be appropriate. ID/RD at 225–230. The RD also recommended imposing a bond in the amount of one hundred percent (100%) of entered value for covered products imported during the period of Presidential review. *Id.* at 230–32.

On November 28, 2022, Causam filed a petition for review of the ID and Respondents filed a contingent petition for review of the ID. On December 6, 2022, the parties filed responses to the petitions.

Having reviewed the record of the investigation, including the final ID, the parties' submissions, the petitions for review, and the response thereto, the Commission has determined to review the final ID in part. Specifically, the Commission has determined to review (1) the final ID's findings as to Causam's standing to assert infringement of the asserted patents; (2) the final ID's findings on obviousness; and (3) the final ID's domestic industry findings.

The Commission, upon review, takes no position on (1) whether Causam has standing to assert infringement of the asserted patents; (2) whether the asserted patent claims are invalid for obviousness; and (3) whether Causam satisfied the technical or economic prongs of the domestic industry requirement. The Commission adopts all findings in the final ID that are not inconsistent with the Commission's determination.

The investigation is terminated with a finding of no violation of section 337.

The Commission vote for this determination took place on February 16, 2023.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: February 16, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–03703 Filed 2–22–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. TA–201–076 (Evaluation)]

Large Residential Washers: Evaluation of the Effectiveness of Import Relief

AGENCY: United States International Trade Commission.

ACTION: Institution and scheduling of an investigation under section 204(d) of the Trade Act of 1974.

SUMMARY: Pursuant to section 204(d) of the Trade Act of 1974 (''the Act''), the Commission has instituted investigation No. TA–201–076, Large Residential Washers: Evaluation of the Effectiveness of Import Relief, for the purpose of evaluating the effectiveness of the relief action imposed by the President on imports of large residential washers and parts thereof under section 203 of the Act, which terminated on February 7, 2023.

DATES: February 7, 2023.

FOR FURTHER INFORMATION CONTACT: Kristina Lara (202–205–3386), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On January 23, 2018, the President, pursuant to section 203 of the Act (19 U.S.C. 2253), issued Proclamation 9694, imposing a safeguard measure on imports of certain large residential washers and parts thereof in the form of tariff-rate quotas. The proclamation was published in the **Federal Register** on January 25, 2018 (83 FR 3553). The measure took effect on February 7, 2018, for a period of three years and one day, or through February 7, 2021, as modified by Proclamation 9887 of May 16, 2019 (84

FR 23425), Proclamation 9902 of May 31, 2019 (84 FR 26323), and Proclamation 9979 of January 23, 2020 (85 FR 5125). The President imposed the measure following receipt of a report from the Commission in December 2017 under section 202 of the Trade Act (19 U.S.C. 2252) that contained an affirmative determination, remedy recommendations, and certain additional findings (see Large Residential Washers, Inv. No. TA–201–076, USITC Publication 4745, Dec. 2017).

On December 8, 2020, in response to a petition filed on behalf of Whirlpool Corporation, Benton Harbor, Michigan, the Commission issued its determination and report pursuant to section 204(c) of the Act (19 U.S.C. 2254(c)), finding that the safeguard measure continued to be necessary to prevent or remedy the serious injury to the domestic industry, and that there was evidence that the domestic industry was making a positive adjustment to import competition (see Large Residential Washers: Extension of Action, Inv. No. TA–201–076, USITC Publication 5144, December 2020). On January 14, 2021, the President issued Proclamation 10133 (86 FR 6541, January 21, 2021), pursuant to section 203(e)(1)(B) of the Act (19 U.S.C. 2253(e)(1)(B)), extending the safeguard measure on large residential washers and parts thereof through February 7, 2023.

Section 204(d) of the Act requires the Commission, following termination of a relief action, to evaluate the effectiveness of the action in facilitating positive adjustment by the domestic industry to import competition, consistent with the reasons set out by the President in the report submitted to the Congress under section 203(b) of the Act. The Commission is required to submit a report on the evaluation to the President and the Congress no later than 180 days after the day on which the relief action was terminated. Section 204(d)(2) requires the Commission to hold a hearing in the course of conducting its evaluation.

For further information concerning the conduct of the investigation, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 206, subparts A and F (19 CFR part 206).

Participation in the investigation and public service list.—Persons wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, not later than 21 days after publication of this notice in the **Federal Register**. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigation upon the expiration of the period for filing entries of appearance.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Limited disclosure of confidential business information (CBI) under an administrative protective order (APO) and CBI service list.—Pursuant to 206.54(e) of the Commission's rules, the Secretary will make CBI gathered in this investigation available to authorized applicants under the APO issued in the investigation in accordance with the procedures set forth in section 206.17 of the rules, provided that the application is made not later than 21 days after the publication of this notice in the **Federal Register**. The Secretary will maintain a separate service list for those parties authorized to receive CBI under the APO.

Hearing.—As required by statute, the Commission has scheduled a hearing in connection with this investigation. The hearing will be held beginning at 9:30 a.m. on Thursday, June 1, 2023. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before May 25, 2023. Any requests to appear as a witness via videoconference must be included with your request to appear. Requests to appear via videoconference must include a statement explaining why the witness cannot appear in person; the Chairman, or other person designated to conduct the investigation, may in their discretion for good cause shown, grant such a request. Requests to appear as remote witness due to illness or a positive COVID–19 test result may be submitted by 3pm the business day prior to the hearing. Further information about participation in the hearing will be posted on the Commission's website at *https://www.usitc.gov/calendarpad/calendar.html.*

All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference, if deemed necessary, to be held at 9:30 a.m. on May 30, 2023. Parties shall file and serve written testimony and presentation slides in connection with their presentation at the hearing by no later than 4 p.m. on May 31, 2023. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2) and 201.13(f) of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party is encouraged to submit a prehearing brief to the Commission. The deadline for filing prehearing briefs is May 24, 2023. Parties may also file posthearing briefs. The deadline for filing posthearing briefs is June 8, 2023. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement concerning the matters to be addressed in the report on or before June 8, 2023. All written submissions must conform with the provisions of section 201.8, 206.7, and 206.8 of the Commission's rules; any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the Commission's rules. Any confidential business information that is provided will be subject to limited disclosure under the APO (see above) and may be included in the report that the Commission sends to the President and the U.S. Trade Representative. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, will not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 206.8 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by the public service list) and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of 204(d) of the Trade Act of 1974; this notice is published pursuant to section 206.3 of the Commission's rules.

By order of the Commission.

Issued: February 16, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–03686 Filed 2–22–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–539–C (Fifth Review)]

Uranium From Russia; Scheduling of an Expedited Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of an expedited review pursuant to the Tariff Act of 1930 (''the Act'') to determine whether revocation of the antidumping duty order on uranium from Russia would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: December 5, 2022.

FOR FURTHER INFORMATION CONTACT: (Ahdia Bavari (202) 205–3191), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On December 5, 2022, the Commission determined that the domestic interested party group response to its notice of institution (87 FR 53774, September 1, 2022) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.[1] Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Staff report.—A staff report containing information concerning the subject matter of the review has been placed in the nonpublic record, and will be made available to persons on the Administrative Protective Order service list for this review on March 1, 2023. A public version will be issued thereafter, pursuant to § 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in § 207.62(d) of the Commission's rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the review may file written comments with the Secretary on what determination the Commission should reach in the review. Comments are due on or before March 9, 2023 and may not contain new factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the review by March 9, 2023. However, should the Department of Commerce (''Commerce'') extend the time limit for its completion of the final results of its review, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination.—The Commission has determined that this review is extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: February 17, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–03758 Filed 2–22–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 701–TA–678 (Final)]

Barium Chloride From India

Determination

On the basis of the record[1] developed in the subject investigation, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of barium chloride from India, provided for in subheading 2827.39.45 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (''Commerce'') to be subsidized by the government of India.[2]

Background

The Commission instituted this investigation effective January 12, 2022, following receipt of a petition filed with the Commission and Commerce by Chemical Products Corp., Cartersville, Georgia. The Commission scheduled the final phase of the investigation following notification of a preliminary determination by Commerce that imports of barium chloride from India were being subsidized within the

[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's website.

[2] The Commission has found the responses submitted on behalf of Crow Butte Resources, Inc., Power Resources, Inc., Energy Fuels Resources (USA) Inc., Ur-Energy USA Inc., ConverDyn, Centrus Energy Corp. and its wholly-owned subsidiary, United States Enrichment Corporation, Global Laser Enrichment, LLC, Louisiana Energy Services, LLC, and Uranium Producers of America to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] 88 FR 1044 (January 6, 2023).

meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of September 7, 2022 (87 FR 54714). The Commission conducted its hearing on January 5, 2023. All persons who requested the opportunity were permitted to participate.

The Commission made this determination pursuant to section 705(b) of the Act (19 U.S.C. 1671d(b)). It completed and filed its determination in this investigation on February 17, 2023. The views of the Commission are contained in USITC Publication 5406 (February 2023), entitled *Barium Chloride from India: Investigation No. 701–TA–678 (Final).*

By order of the Commission.

Issued: February 17, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–03757 Filed 2–22–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1347]

Certain Location-Sharing Systems, Related Software, Components Thereof, and Products Containing Same; Notice of Commission Determination Not To Review an Initial Determination Granting Complainants' Unopposed Motion To Amend the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 7) of the presiding administrative law judge (''ALJ'') granting complainants' unopposed motion to amend the complaint and notice of investigation in the above-captioned investigation to substitute Panasonic Holdings Corporation in place of named respondent Panasonic Corporation.

FOR FURTHER INFORMATION CONTACT: Richard P. Hadorn, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3179. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on December 30, 2022, based on a complaint filed by Advanced Ground Information Systems, Inc. of Jupiter, Florida and AGIS Software Development LLC of Marshall, Texas (collectively, ''AGIS''). 87 FR 80568–69 (Dec. 30, 2022). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based on the importation into the United States, the sale for importation, and the sale within the United States after importation of certain location-sharing systems, related software, components thereof, and products containing same by reason of the infringement of certain claims of U.S. Patent Nos. 8,213,970; 9,467,838; 9,445,251; 9,749,829; and 9,820,123. *Id.* at 80568. The complaint further alleges that a domestic industry exists. *Id.*

The notice of investigation named 26 respondents: Google LLC of Mountain View, California; Samsung Electronics, Co., Ltd. of Suwon, Republic of Korea; Samsung Electronics America, Inc. of Ridgefield Park, New Jersey; OnePlus Technology (Shenzhen) Co., Ltd. of Shenzhen, Guangdong, China; TCL Technology Group Corporation of Huizhou, Guangdong, China; TCL Electronics Holdings Limited of Hong Kong Science Park, Hong Kong; TCL Communication Technology Holdings Limited of Hong Kong Science Park, Hong Kong; TCT Mobile (US) Inc. of Irvine, California; Lenovo Group Ltd. of Beijing, China; Lenovo (United States) Inc. of Morrisville, North Carolina; Motorola Mobility LLC of Chicago, Illinois; HMD Global of Espoo, Finland; HMD Global OY of Espoo, Finland; HMD America, Inc. of Miami, Florida; Sony Corporation of Tokyo, Japan; Sony Mobile Communications, Inc. of Tokyo, Japan; ASUSTek Computer Inc. of Taipei, Taiwan; ASUS Computer International of Fremont, California; BLU Products of Doral, Florida; Panasonic Corporation of Osaka, Japan; Panasonic Corporation of North America of Secaucus, New Jersey; Kyocera Corporation of Kyoto, Japan; Xiaomi Corporation of Grand Cayman, Cayman Islands; Xiaomi H.K. Ltd. of Kowloon City, Hong Kong; Xiaomi Communications Co., Ltd. of Beijing, China; and Xiaomi Inc. of Beijing, China. *Id.* at 80569. The Office of Unfair Import Investigations (''OUII'') is also named as a party. *Id.*

On January 27, 2023, AGIS filed a motion to amend the complaint and notice of investigation to substitute Panasonic Holdings Corporation for the presently named respondent Panasonic Corporation. The motion states that (i) OUII and respondents Panasonic Corporation, Panasonic Corporation of North America, and Kyocera Corporation do not oppose the motion and (ii) the remaining respondents take no position on the motion. Mot. at 1. No responses to the motion were filed.

On February 1, 2023, the ALJ issued the subject ID granting the motion. The ID finds that, in accordance with Commission Rule 210.14(b) (19 CFR 210.14(b)), ''good cause exists for amending the complaint to substitute Panasonic Holdings Corporation in place of named Respondent Panasonic Corporation'' because ''amending the Complaint and Notice of Investigation to reflect the proper name of the Respondent will aid in the development of the Investigation and is necessary to avoid prejudicing the public interest and rights of the parties to the Investigation.'' ID at 2. No petitions for review of the subject ID were filed.

The Commission has determined not to review the subject ID. The complaint and notice of investigation are amended to substitute Panasonic Holdings Corporation in place of the named respondent Panasonic Corporation.

The Commission vote for this determination took place on February 17, 2023.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: February 17, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–03759 Filed 2–22–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Hazardous Conditions Complaints

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting Mine Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before March 27, 2023.

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

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nora Hernandez by telephone at 202–693–8633, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811(a), authorizes the Secretary of Labor to develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal and metal and nonmetal mines. Under Section 103(g) of Mine Act, a representative of miners, or any individual miner where there is no representative of miners, may submit a written or oral notification of an alleged violation of the Mine Act or a mandatory standard or that an imminent danger exists. The notifier has the right to obtain an immediate inspection by MSHA. A copy of the notice must be provided to the operator, with individual miner names redacted. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 30, 2022 (87 FR 59461).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–MSHA.

Title of Collection: Hazardous Conditions Complaints.

OMB Control Number: 1219–0014.

Affected Public: Businesses or other for-profits institutions.

Total Estimated Number of Respondents: 1,785.

Total Estimated Number of Responses: 1,785.

Total Estimated Annual Time Burden: 357 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nora Hernandez,

Departmental Clearance Officer.

[FR Doc. 2023–03790 Filed 2–22–23; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Welding, Cutting, and Brazing Standard

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety & Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before March 27, 2023.

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

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202–693–0213, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The information collected is used by employers and workers whenever welding, cutting, and brazing are performed. The purpose of the information is to ensure that employers evaluate hazards associated with welding and ensure that adequate measures are taken to make the process safe. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 9, 2022 (87 FR 67717).

This information collection is subject to the PRA. A Federal agency generally

cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Welding, Cutting, and Brazing Standard.

OMB Control Number: 1218–0207.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 21,070.

Total Estimated Number of Responses: 84,280.

Total Estimated Annual Time Burden: 5,619 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D).)

Nicole Bouchet,

Senior PRA Analyst.

[FR Doc. 2023–03705 Filed 2–22–23; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (23–009)]

Privacy Act of 1974; System of Records

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, the National Aeronautics and Space Administration is providing public notice of a new system of records entitled Opportunities and Associated Reviewers (OAAR). The notice incorporates all NASA locations and NASA standard routine uses. The system of records is more fully described in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Submit comments within 30 calendar days from the date of this publication. The proposed system will take effect at the end of that period if no significant adverse comments are received.

ADDRESSES: Submit comments to Bill Edwards-Bodmer, Privacy Act Officer, Office of the Chief Information Officer, Mary W. Jackson NASA Headquarters, Washington, DC 20546–0001, 757–864–3292, or *NASA-PAOfficer@nasa.gov.*

FOR FURTHER INFORMATION CONTACT: NASA Privacy Act Officer, Bill Edwards-Bodmer, 757–864–3292, or *NASA-PAOfficer@nasa.gov.*

SUPPLEMENTARY INFORMATION: NASA accepts solicited and unsolicited proposals and makes funded, non-funded and no-exchange-of-funds agreements using its other transaction authority (OTA) under the Space Act, the FAR, the NASA FAR Supplement, 2 CFR part 200 Grants and Agreement and directed appropriations (commonly called earmarks), that are managed by multiple NASA organizations using the Opportunities and Associated Reviewers (OAAR) records system. OAAR enables the review of proposals and the monitoring of performance and costing of any subsequent awards and/or partnership agreements.

Cheryl Parker,

Federal Register Liaison Officer.

SYSTEM NAME AND NUMBER:

Opportunities and Associated Reviewers, NASA 10OAAR.

SECURITY CLASSIFICATION:

Unclassified; Classified.

SYSTEM LOCATION:

- Mary W. Jackson NASA Headquarters, National Aeronautics and Space Administration, Washington, DC 20546–0001.
- NASA Shared Services Center, Building 1111, Jerry Hlass Road, Stennis Space Center, MS 39529.

SYSTEM MANAGER(S):

- Mission Directorates' Official Representative(s), NASA Research and Education Support Services, Mary W. Jackson NASA Headquarters—Washington, DC 20546–0001.
- Grants Activities Branch Chief, NASA Shared Services Center (NSSC) Stennis Space Center, MS 39529–6000.
- Director, NASA Partnerships Mary W. Jackson NASA Headquarters—Washington, DC 20546–0001.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

- 51 U.S.C. 20113(a).
- 44 U.S.C. 3101.
- Title 2 of The Code of Federal Regulations.
- The Foundations for Evidence-Based Policymaking Act of 2019.
- Grant Reporting Efficiency and Agreements Transparency Act of 2019.
- Title 51—National and Commercial Space Programs. This title was enacted by Public Law 111–314, section 3, Dec. 18, 2010, 124 Stat. 3328; Public Law 111–314, 124 Stat. 3328 (Dec. 18, 2010).
- Title VI of the Civil Rights Act of 1964.
- Title IX of the Education Amendments of 1972.
- Section 504 of the Rehabilitation Act of 1973.
- The Age Discrimination Act of 1975.
- The American Innovation and Competitiveness Act (Pub. L. 114–329; Section 303(b)).
- The Federal Advisory Committee Act (''FACA'') of 1972 (5 U.S.C, Appendix 2, as amended).

PURPOSE(S) OF THE SYSTEM:

1. To evaluate proposals or requests for NASA-funds, including projects conducted on a no-exchange of funds basis, with partners under the authority of the Space Act or other transaction authority using data generated as part of the NASA merit review process.

2. To identify and contact subject matter experts (*e.g.,* scientists, engineers, educators), who may be interested in applying for support, in attending a scientific or similar meeting, in applying for a position, or engagement in some similar opportunity or who may be interested in serving as reviewers in the peer review system or for inclusion on a NASA panel or advisory committee. Information from this system for this purpose may be used as a source of potential candidates to serve as reviewers as part of the NASA merit review process, or for inclusion on a review panel or advisory committee.

3. To evaluate progress and results of NASA-funded and other projects for program management, evaluation, or public reporting. Anonymized demographic information from this system for this purpose may be used to ensure compliance with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and for public reporting in Agency- or Federally-produced products that are statistical in nature and do not identify individuals. Information from this system may be merged with other computer files to complete such public reporting, studies or evaluations as required by public law, regulations and/or executive orders.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals, sometimes known as key personnel or project participants collectively, *i.e.,* principal investigators, co-investigators, graduate students, postdoctoral fellows, educators, collaborators, subject matter experts, etc. and peer reviewers: (1) who have requested and/or received research funding or other support from NASA, either independently or via a non-profit or for-profit organization, a NASA Center or tribal, federal, state, local or foreign government agency and/or (2) who have been requested to or have served as a reviewer for NASA proposals or other types of applications, such as competed Space Act Agreements and requests for information (RFIs).

CATEGORIES OF RECORDS IN THE SYSTEM:

1. Proposal/Application/RFI Data—Names and contact information of investigators/partners; NASA-assigned non-sensitive identification numbers; sensitive demographic data, when voluntarily provided; proposals and supporting data from human and institutional applicants; and financial data.

2. Reviewer Data—Names, social security numbers, sensitive demographic data, contact information and responses from peer reviewers, including reviews and/or panel discussion summaries as applicable or other related material.

3. Post-Selection Data for (i) Awards, *i.e.,* assistance, procurements, interagency transfer agreements and other funded agreements and (ii) no-exchange of funds partnership type agreements. Data may take the form of project and performance reports that may include major research activities and findings; research training; educational and outreach activities; and products such as citations to publications, contributions resulting from the research, and other related material.

RECORD SOURCE CATEGORIES:

Record sources are key project participants, academic or other applicant institutions, proposal reviewers, and NASA program officials.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Any disclosures of information in this system of records will be relevant, necessary, and compatible with the purpose for which the Agency collected the information. Under the following routine uses that are unique to this system of records, records from this system may be disclosed to:

1. Qualified reviewers for their opinion and evaluation of applicants and their proposals as part of the NASA application review process; and to other government agencies or other entities needing information regarding applicants or nominees as part of a joint application review process, or in order to coordinate programs or policy; or to compensate reviewers for their work in accordance with reporting requirements under U.S. tax code.

2. Individual or institutional applicants and grantee/contracted institutions to provide or obtain data as part of the application review process, award decisions, or administering grant/procurement/cooperative awards.

3. Other entities when merging records with other computer files to carry out studies for or otherwise assist NASA with program management, evaluation, or reporting. Disclosure may be made for this purpose to NASA contractors, collaborating researchers, other government agencies, and qualified research institutions and their staffs. Disclosures are made only after scrutiny of research protocols and with appropriate controls. The results of such studies are administrative or statistical in nature and do not identify individuals.

4. Contractors, grantees, volunteers, experts, consultants, advisors, and other individuals who perform a service to or work on or under a contract, grant, cooperative agreement, advisory committee, independent review boards, or other arrangement with or for NASA or for the Federal government, as necessary to carry out their duties in pursuit of the purposes described above. The contractors are subject to the provisions of the Privacy Act.

5. The name, home institution, field of study, city, state, and zip code of key personnel whose proposals are selected for funding by NASA may be released for public information/affairs purposes, including press releases, if the disclosure of such record(s) would not constitute an unwarranted invasion of personal privacy.

6. Another Federal entity, including the Office of Science and Technology Policy, the National Science and Technology Council, etc., so the demographic and institutional data may be used for cross-Federal program management, evaluation, or reporting only after scrutiny of research protocols and with appropriate controls. The results of such strategic plans, reports, studies, or evaluations are statistical in nature and do not identify individuals.

In addition, information may be disclosed under the following NASA Standard Routine Uses:

1. *Law Enforcement*—When a record on its face, or in conjunction with other information, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order, disclosure may be made to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order, if NASA determines by careful review that the records or information are both relevant and necessary to any enforcement, regulatory, investigative or prosecutive responsibility of the receiving entity.

2. *Certain Disclosures to Other Agencies*—A record from this SOR may be disclosed to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary, to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

3. *Certain Disclosures to Other Federal Agencies*—A record from this SOR may be disclosed to a Federal agency, in response to its request, for a matter concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

4. *Department of Justice*—A record from this SOR may be disclosed to the Department of Justice when (a) NASA, or any component thereof; or (b) any employee of NASA in his or her official capacity; or (c) any employee of NASA in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States, where NASA determines that litigation is likely to affect NASA or any of its components, is a party to litigation or has an interest in such litigation, and by careful review, the use of such records by the Department of Justice is deemed by NASA to be relevant and necessary to the litigation.

5. *Courts*—A record from this SOR may be disclosed in an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when NASA determines that the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant and necessary to the proceeding.

6. *Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information*—A record from this SOR may be disclosed to appropriate agencies, entities, and persons when (1) NASA suspects or has confirmed that there has been a breach of the system of records; (2) NASA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, NASA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NASA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

7. *Members of Congress*—A record from this SOR may be disclosed to a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

8. *Disclosures to Other Federal Agencies in Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information*—A record from this SOR may be disclosed to another Federal agency or Federal entity, when NASA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

9. *National Archives and Records Administration*—A record from this SOR may be disclosed as a routine use to the officers and employees of the National Archives and Records Administration (NARA) pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

10. *Audit*—A record from this SOR may be disclosed to another agency, or organization for purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records primarily are stored on electronic digital media; however, when necessary, records may be stored in paper.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by an individual's name or proposal number or institution.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained and disposed of in accordance with NARA approved record schedules. Awarded proposals are permanent records and are transferred to NARA in accordance with the approved record schedule. Declined or withdrawn paper proposals are destroyed five years after close of year in which declined or withdrawn. Declined electronic proposals are retained in electronic archive on site at NASA for ten years after close of year in which declined or withdrawn. Electronic files are destroyed at the end of the ten-year retention period. Some records may be cumulative and maintained indefinitely.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records are protected by administrative, technical, and physical safeguards administered by NASA or by contractors on behalf of NASA.

RECORD ACCESS PROCEDURES:

In accordance with 14 CFR part 1212, Privacy Act—NASA Regulations, and subject to exemptions described therein, individuals who wish to gain access to their records should submit their request in writing to the System Manager or Subsystem Manager at locations listed above. Requests may also be requested electronically by the individual on whom the records are maintained or by their authorized representative.

CONTESTING RECORD PROCEDURES:

The NASA regulations for access to records and for contesting contents and appealing initial determinations by the individual concerned appear in 14 CFR part 1212.

NOTIFICATION PROCEDURES:

In accordance with 14 CFR part 1212, Privacy Act—NASA Regulations, information may be obtained from the cognizant system or subsystem manager [or managers] listed at the above locations where the records are created and/or maintained.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The portions of this system consisting of data that would identify reviewers or other persons supplying evaluations of NASA proposals or for some personnel provided in proposals and awards have been exempted at 45 CFR part 613.5, pursuant to 5 U.S.C. 552a(k)(5).

HISTORY:

None.

[FR Doc. 2023–03749 Filed 2–22–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (23–008)]

Privacy Act of 1974; System of Records

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, the National Aeronautics and Space Administration is providing public notice of a modification to a previously announced system of records, Harassment Report Case Files/NASA 10HRCF. The most significant modification is that the system of records will now be exempt from certain subsections of the Privacy Act. A statement of purpose for maintaining the records was also added. Enhancements were made to the categories of individuals, the records source categories, and the records access procedures. One duplicative routine use was deleted, and three new routine uses unique to this system were added. The notice incorporates locations and NASA standard routine uses. The system of records is more fully described in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Submit comments within 30 calendar days from the date of this publication. The proposed modifications will take effect at the end of that period if no significant adverse comments are received. Records may be released under Routine Uses No. 3 and No. 5, after 30 days from the date of this publication.

ADDRESSES: Submit comments to Bill Edwards-Bodmer, Privacy Act Officer, Office of the Chief Information Officer, Mary W. Jackson, NASA Headquarters, Washington, DC 20546–0001, 757–864–3292, or *NASA-PAOfficer@nasa.gov.*

FOR FURTHER INFORMATION CONTACT: NASA Privacy Act Officer, Bill Edwards-Bodmer, 757–864–3292, or *NASA-PAOfficer@nasa.gov.*

SUPPLEMENTARY INFORMATION: This system notice includes substantial revisions to NASA's existing system of records notice (SORN) for Harassment Report Case Files/NASA 10HRCF. The most significant change is that this Privacy Act SORN will now be exempt under 5 U.S.C. 552a(k)(2) and (k)(5), from certain subsections of the Privacy Act. l. The determination to exempt these records was made because it is necessary for NASA to continue to investigate violations of law, regulation, and policy and determine continued suitability for federal employment. In accordance with federal anti-discrimination laws, the Equal Employment Opportunity Commission requires that all federal agencies have an Antiharassment policy and program. NASA's specific policy prohibits harassment by all employees, provides an avenue for individuals to report allegations of harassment, and a process by which NASA fact-finders conduct inquiries/investigations. Furthermore, NASA's policy prohibits retaliation against individuals for raising allegations of harassment or participating in the process. In order for NASA to promptly address and resolve potential violations of law, regulation, or NASA policy, individuals who are participating in this process must be assured that their statements will be kept confidential consistent with law. Some investigations have been hindered by witnesses' lack of willingness to come forward fearful that their statements or identities would be revealed. Other agencies, including the EEOC, have exempted these records from certain provisions of the Privacy Act.

This SORN relies on multiple legal authorities to support exempting these records under 5 U.S.C. 552a(K)(2) and (K)(5), including, NASA's Antiharassment Policy, which states that NASA has an affirmative obligation to maintain a harassment-free workplace and to take prompt and effective action when allegations arise. NASA's policy encourages all employees to report concerns and for NASA to address such conduct before it becomes ''severe or pervasive'' within the meaning of the anti-discrimination laws. Additional authoritative sources include the Equal Opportunity Commission (EEOC), anti-discrimination laws, and Supreme Court precedent that require Agencies to take prompt and effective action if an e individual is alleging harassment by a NASA employee. Additionally, the investigatory material compiled by this system of records may be used to determine a putative harasser's suitability for continued NASA employment and such records would be exempt from release under certain provisions of the Privacy Act but only in cases where the disclosure of such information would reveal the identity of a source who provided information to NASA under the condition of anonymity.

This notice also clarifies categories of individuals on whom NASA maintains records, adds a previously omitted description of the purpose of the system, and provides more detailed descriptions of the categories of records in the system and records source categories. It updates record access procedures to include the ability to request records electronically. The notice deleted a routine use for release to contractors that is duplicated by Standard Routine Use No. 7 and adds three new routine uses unique to this System.

- The first, Routine Use 2, will permit the Agency to provide minimal information to the alleged harasser or the alleged harassee regarding the status and the results of the investigation.
- The second new routine use, Routine Use 4, allows release to officials of the Labor Union information to which they are statutorily entitled when relevant and necessary to their duties.
- The third new routine use, Routine Use 5, permits release of information to the alleged harasser in the event of a disciplinary hearing based on a charge of harassment. This notice updates technical safeguards to reflect updated security measures.

Finally, minor revisions to NASA's existing system of records notice bring its format into compliance with OMB guidance and updates records access, notification, and contesting procedures consistent with NASA Privacy Act regulations.

Cheryl Parker,

Federal Register Liaison Officer.

SYSTEM NAME AND NUMBER:

Harassment Report Case Files, NASA 10HRCF.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Mary W. Jackson, NASA Headquarters, Washington, DC 20546–0001.

SYSTEM MANAGER(S):

Agency Anti-Harassment Coordinator, Mary W. Jackson, NASA Headquarters, Washington, DC 20546–0001.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

29 U.S.C. 621 *et seq.;* 29 U.S.C. 791 *et seq.,* 42 U.S.C. 2000e–16 *et seq.;* 44 U.S.C. 3101; 51 U.S.C. 20113(a); E.O. 11478, 34 FR 12985; E.O. 13087, 63 FR 30097; E.O. 13152, 63 FR 26115.

PURPOSE OF THE SYSTEM:

These records are maintained to facilitate NASA internal fact-finding investigations into allegations of harassment brought by current or former NASA employees, contractors, grantees, interns, applicants, and volunteers, and for taking appropriate action in accordance with NASA's policy.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system maintains information on individuals who have reported harassing conduct or have been accused of harassing conduct under NASA's Anti-Harassment Policy and Procedures. This includes, but is not limited to, current and former NASA employees, contractors, grantees, applicants, interns, and volunteers who have reported or been accused of allegations of harassment in violation of NASA's policy. It also includes information from witnesses contacted as part of the fact-finding process.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system maintains all documents related to a complaint or report of harassment, which may include the complaint, statements of witnesses, reports of interviews, information generated during fact-finding investigations, in-take forms, close-out letters, and other records related to the investigation and/or any corrective action taken because of the allegations. This system also contains case tracking information.

RECORD SOURCE CATEGORIES:

The information in this system is obtained from individual complainants; Agency EEO Officials; supervisors; management officials; witnesses; current and former employees; current and former contractors, or grantees; Factfinders, the Agency Anti-Harassment Coordinator, and Center Anti-Harassment Coordinators.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

Any disclosures of information in this system of records will be relevant, necessary, and compatible with the purpose for which the Agency collected the information. Under the following routine uses that are unique to this system of records, records from this system may be disclosed:

1. To disclose information as necessary to any appropriate source from which additional information is requested while processing a complaint or report of harassment made pursuant to NASA policy.

2. To the individual alleging harassment, the alleged harasser, or their representatives only information that is necessary to provide the status or the results of the investigation or case involving them.

3. To an authorized grievance official, deciding official, complaints examiner, administrative judge, contract investigator, arbitrator, or duly authorized official for use in investigation, administrative personnel or corrective action, litigation, or settlement of a grievance, complaint, or appeal filed by an employee.

4. To provide to officials of labor organizations recognized under the Civil Service Reform Act information to which they are statutorily entitled when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting work conditions.

5. To provide to the alleged harasser information in the event of a disciplinary hearing based on a charge of harassment.

In addition, information may be disclosed under the following NASA Standard Routine Uses:

1. *Law Enforcement*—When a record on its face, or in conjunction with other information, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order, disclosure may be made to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order, if NASA determines by careful review that the records or information are both relevant and necessary to any enforcement, regulatory, investigative or prosecutive responsibility of the receiving entity.

2. *Certain Disclosures to Other Agencies*—A record from this SOR may be disclosed to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary, to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

3. *Certain Disclosures to Other Federal Agencies*—A record from this SOR may be disclosed to a Federal agency, in response to its request, for a matter concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

4. *Department of Justice*—A record from this SOR may be disclosed to the Department of Justice when (a) NASA, or any component thereof; or (b) any employee of NASA in his or her official capacity; or (c) any employee of NASA in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States, where NASA determines that litigation is likely to affect NASA or any of its components, is a party to litigation or has an interest in such litigation, and by careful review, the use of such records by the Department of Justice is deemed by NASA to be relevant and necessary to the litigation.

5. *Courts*—A record from this SOR may be disclosed in an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when NASA determines that the records are relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

6. *Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information*—A record from this SOR may be disclosed to appropriate agencies, entities, and persons when (1) NASA suspects or has confirmed that there has been a breach of the system of records; (2) NASA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, NASA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NASA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

7. *Contractors*—A record from this SOR may be disclosed to contractors, grantees, experts, consultants, students, volunteers, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the federal government, when necessary to accomplish a NASA function related to this SOR. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to NASA employees.

8. *Members of Congress*—A record from this SOR may be disclosed to a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

9. *Disclosures to Other Federal Agencies in Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information*—A record from this SOR may be disclosed to another Federal agency or Federal entity, when NASA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

10. *National Archives and Records Administration*—A record from this SOR may be disclosed as a routine use to the officers and employees of the National Archives and Records Administration (NARA) pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

11. *Audit*—A record from this SOR may be disclosed to another agency, or organization for purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in paper and/or in electronic form.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by the name of the alleged harassee, and/or by the name of the alleged harasser, or unique case identifiers.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records will be maintained for four years after the complaint or report of harassment is closed. Records older than four years will be destroyed in accordance with NRRS 1441.1, NASA Records Retention Schedules as Schedule 3, Item 53.5.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Electronic records are maintained on secure NASA servers and protected in accordance with all Federal standards and those established in NASA regulations at 14 CFR 1212.605. Additionally, server and data management environments employ infrastructure encryption technologies both in data transmission and at rest on servers. Electronic messages sent within and outside of the Agency that convey sensitive data are encrypted and transmitted by staff via pre-approved electronic encryption systems as required by NASA policy. Approved security plans are in place for information systems containing the records in accordance with the Federal Information Security Management Act of 2002 (FISMA) and OMB Circular A–130, Management of Federal Information Resources. Only authorized personnel requiring information in the official discharge of their duties are authorized access to records through approved access or authentication methods. Access to electronic records is achieved only from workstations within the NASA Intranet or via a secure Virtual Private Network (VPN) connection that requires two-factor hardware token authentication or via employee Personal Identity Certification (PIV) badge authentication from NASA-issued computers. Non-electronic records are secured in locked rooms or locked file cabinets.

RECORD ACCESS PROCEDURES:

In accordance with 14 CFR part 1212, Privacy Act—NASA Regulations, and subject to exemptions described therein, individuals who wish to gain access to their records should submit their request in writing to the System Manager or Subsystem Manager at locations listed above. Requests may also be requested electronically by the individual on whom the records are maintained or by their authorized representative.

CONTESTING RECORD PROCEDURES:

The NASA regulations for access to records and for contesting contents and appealing initial determinations by the individual concerned appear in 14 CFR part 1212.

NOTIFICATION PROCEDURES:

In accordance with 14 CFR part 1212, Privacy Act—NASA Regulations, information may be obtained from the cognizant system or subsystem manager listed at the above locations where the records are created and/or maintained.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

This system of records is exempt under 5 U.S.C. 552a(k)(2) and 5 U.S.C. 552a(k)(5) from the following subsections of the Privacy Act of 1974, specifically (c)(3) relating to access to the disclosure accounting; (d) relating to access to the records; (e)(1) relating to the type of information maintained in the records; (e)(4)(G), (H), and (I) relating to publishing in the annual system notice information as to agency procedures for access and correction and information as to the categories of sources of records; and (f) relating to developing agency rules for gaining access and making corrections. The determination to exempt investigative records of the Harassment Fact-Finding Reports and Case Files has been made by the Administrator of NASA or designee in accordance with 5 U.S.C. 552a(k)(2), 5 U.S.C. 552a(k)(5), and the NASA regulations set forth in 14 CFR part 1212.

HISTORY:

- (11–001, 76 FR 5, pp. 1195–1197)
- (11–091, 76 FR 200, pp. 64113–64114)
- (15–068, 80 FR 193, pp. 60410–60411)

[FR Doc. 2023–03750 Filed 2–22–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Polar Programs; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Advisory Committee for Polar Programs (AC OPP) (1130).

Date and Time: March 20, 2023; 2:00 p.m. to 3:00 p.m. EST.

Place: National Science Foundation 2415 Eisenhower Avenue, Alexandria, VA 22314 | Virtual via Zoom.

A virtual link will be posted on the AC OPP website at: *https://nsf.gov/geo/opp/advisory.jsp.*

Type of Meeting: Open.

Contact Person: Sara Eckert, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Ave., Alexandria, VA 22314; Contact: (703) 292–7899, *seckert@nsf.gov.*

Purpose of Meeting: Advisory committee review of Science Advisory Subcommittee (SASC) report.

Agenda: Review and evaluate the SASC report(s), and vote on whether the report(s) should be forwarded to the NSF Office of Polar Programs.

Dated: February 17, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023–03709 Filed 2–22–23; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–293 and 72–1044; NRC–2023–0040]

Holtec Decommissioning International, LLC; Pilgrim Nuclear Power Station Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has issued an exemption to Holtec Decommissioning International, LLC, (HDI), for Pilgrim Nuclear Power Station (PNPS), Independent Spent Fuel Storage Installation (ISFSI). The exemption allows PNPS to deviate from the requirements in Certificate of Compliance (CoC) No. 1014, Amendment No. 14, Appendix A, Technical Specifications (TS) for the HI-STORM 100 System, Section 5.4, ''Radioactive Effluent Control Program,'' subsection c related to the timing of submission for an annual radiological effluent report.

DATES: The exemption was issued on January 31, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0040 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–2023–0040. 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 ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *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 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tilda Liu, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 404–997–4730, email: *Tilda.Liu@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Holtec Decommissioning International, LLC, (HDI) submitted a request to the NRC for an exemption from title 10 of the *Code of Federal Regulations* (10 CFR) 72.212(a)(2), (b)(2), (b)(3), (b)(4), (B)(5)(i), (b)(11), and 72.214 for Pilgrim Independent Spent Fuel Storage Facility (ISFSI) Annual Radioactive Effluent Release Report (ARERR), by letter dated August 29, 2022 (ADAMS Accession No. ML22241A112), as supplemented by letter dated December 9, 2022 (ADAMS Accession No. ML22343A165). In particular, the exemption request, if approved, would allow Pilgrim Nuclear Power Station (PNPS) to deviate from the requirements in Certificate of Compliance (CoC) No. 1014, Amendment No. 14, Appendix A, Technical Specifications (TS) for the HI–STORM 100 System, Section 5.4, ''Radioactive Effluent Control Program,'' subsection c related to the timing of submission for its ARERR.

In its August 29, 2022 letter, HDI requested relief regarding the 60-day reporting requirement, so that the annual liquid and gaseous effluent release report for the PNPS ISFSI be incorporated into, and submitted with, the Pilgrim site ARERR on or before May 15, rather than prior to March 1, of each year to align with the submittal of its ARERR as required by PNPS Renewed Facility Operating License, DPR–35, PNPS Defueled Safety Analysis Report Section 5.0, ''Administrative Controls,'' Appendix B, Section B–5.6.3, ''Radioactive Effluent Release Report.''

II. Discussion

The NRC issued an exemption (ADAMS Package Accession No. ML22356A070) to HDI for the PNPS ISFSI. The exemption granted provides relief from the 60-day requirement so that the annual effluent release report for the PNPS ISFSI may be submitted on or before May 15, rather than prior to March 1, of each year. The granted exemption only changes the due date and not the content of the information that the licensee would provide in the annual report.

III. Conclusion

Based on the staff's evaluation, the NRC has determined that, pursuant to 10 CFR 72.7, ''Specific Exemptions,'' the exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Accordingly, the NRC granted HDI an exemption from 10 CFR 72.212(a)(2), (b)(2), (b)(3), (b)(4), (b)(5)(i), (b)(11), and 72.214.

Dated: February 16, 2023.

For the Nuclear Regulatory Commission.

Tilda Y. Liu,

Acting Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023–03695 Filed 2–22–23; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96948; File No. SR–OCC–2023–001]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update The Options Clearing Corporation's Operational Loss Fee Pursuant to Its Capital Management Policy

February 17, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 7, 2023, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii)[3] of the Act and Rule 19b–4(f)(2)[4] thereunder so that the proposal 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

The proposed rule change would revise OCC's schedule of fees to update the maximum contingent Operational Loss Fee listed in OCC's schedule of fees in accordance with OCC's Capital Management Policy. Proposed changes to OCC's schedule of fees are included as Exhibit 5 to File Number SR–OCC–2023–001. Material proposed to be added to OCC's schedule of fees as currently in effect is underlined and material proposed to be deleted is marked in strikethrough text. All capitalized terms not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] OCC's By-Laws and Rules can be found on OCC's public website: *https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules.*

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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of this proposed rule change is to revise OCC's schedule of fees to update the maximum aggregate Operational Loss Fee that OCC would charge Clearing Members in equal shares in the unlikely event that OCC's shareholders' equity (''Equity'') falls below certain thresholds defined in OCC's Capital Management Policy.

The proposed fee change is designed to enable OCC to replenish capital to comply with Rule 17Ad–22(e)(15) under the Exchange Act, which requires OCC, in pertinent part, to ''hold[ ] liquid net assets funded by equity to the greater of either (x) six months . . . current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and service'' [6] and ''[m]aintain[ ] a viable plan, approved by the board of directors and updated at least annually, for raising additional equity should its equity fall close to or below the amount required.'' [7] The proposed rule change would implement a change in the maximum contingent Operational Loss Fee listed in OCC's schedule of fees in accordance with OCC's Capital Management Policy.

OCC's Capital Management Policy includes OCC's replenishment plan.[8] Pursuant to the Capital Management Policy, OCC would charge an Operational Loss Fee in equal shares to Clearing Members to raise additional capital should OCC's Equity, less the Minimum Corporate Contribution,[9] fall below certain defined thresholds relative to OCC's Target Capital Requirement (*i.e.,* a ''Trigger Event''), after first applying the unvested balance held in respect of OCC's Executive Deferred Compensation Program.[10] Based on the Board-approved Target Capital Requirement for 2023 of $303 million, a Trigger Event would occur if OCC's Equity less the Minimum Corporate Contribution falls below $272.7 million at any time or below $303 million for a period of 90 consecutive calendar days.

In the unlikely event those thresholds are breached, OCC would charge an Operational Loss Fee in an amount to raise Equity to 110% of OCC's Target Capital Requirement, up to the maximum Operational Loss Fee identified in OCC's schedule of fees less the amount of any Operational Loss Fees previously charged and not refunded.[11] OCC calculates the maximum aggregate Operational Loss Fee based on the amount determined by the Board to be sufficient for a recovery or orderly wind-down of critical operations and services (''RWD Amount''),[12] which is determined based on the assumptions in OCC's Recovery and Orderly Wind-Down Plan (''RWD Plan'').[13] In order to account for OCC's tax liability for retaining the Operational Loss Fee as earnings, OCC may apply a tax gross-up to the RWD Amount (''Adjusted RWD Amount'') depending on whether the operational loss that caused OCC's Equity to fall below the Trigger Event thresholds is tax deductible.[14]

The RWD Amount and, in turn, the Adjusted RWD Amount are determined annually based on OCC's corporate budget, the assumptions articulated in the RWD Plan, and OCC's projected effective tax rate.[15] The current Operational Loss Fee listed in OCC's schedule of fees is the Adjusted RWD Amount calculated based on OCC's 2022 corporate budget. Budgeted operating expenses in 2023 are higher than the 2022 budgeted operating expenses. This proposed rule change would revise the maximum Operational Loss Fee to reflect the Adjusted RWD Amount based on OCC's 2023 budget,[16] as follows:

Current fee schedule	Proposed fee schedule
$157,000,000.00 less the aggregate amount of Operational Loss Fees previously charged and not refunded as of the date calculated, divided by the number of Clearing Members at the time charged.	$174,000,000.00 less the aggregate amount of Operational Loss Fees previously charged and not refunded as of the date calculated, divided by the number of Clearing Members at the time charged.

Since the allocation of the Operational Loss Fee is a function of the number of Clearing Members at the time of the charge, the maximum Operational Loss Fee per Clearing Member is subject to fluctuation during the course of the year. However, if the proposed Operational Loss Fee were charged to 111 Clearing Members, the number of Clearing Members as of December 13, 2022, for example, the maximum Operational Loss Fee per Clearing Member would be $1,567,568.

OCC would also update the schedule of fees to reflect the levels of Equity at which OCC would charge the Operational Loss Fee according to the thresholds defined in the Capital Management Policy, as well as the level of Equity at which OCC would limit the

[6] *See* 17 CFR 240.17Ad–22(e)(15)(ii).

[7] *See* 17 CFR 240.17Ad–22(e)(15)(iii).

[8] *See* Exchange Act Release No. 88029 (Jan. 24, 2020), 85 FR 5500 (Jan. 30, 2020) (File No. SR–OCC–2019–007) (''Order Approving OCC's Capital Management Policy'').

[9] The Minimum Corporate Contribution is defined in the Capital Management Policy as the minimum level of OCC's own funds maintained exclusively to cover credit losses or liquidity shortfalls, the level of which the OCC's Board of Directors (''Board'') shall determine from time to time. *See* Exchange Act Release No. 92038 (May 27, 2021), 86 FR 29861, 29862 (June 3, 2021) (File No. SR–OCC–2021–003). For 2023, the Board has approved a Minimum Corporate Contribution of $69 million. When combined with the unvested funds held in respect of OCC's Executive Deferred Compensation Plan contributed after January 1, 2020 (the ''EDCP Unvested Balance,'' as defined in OCC's Rules), OCC's persistent minimum level of skin-in-the-game for 2023 would be at least $76 million, or 25% of OCC's Target Capital Requirement. In addition to this minimum level, OCC would also contribute liquid net assets funded by equity greater than 110% of the Target Capital Requirement. *See* OCC Rule 1006(e).

[10] *See* Exchange Act Release No. 91199 (Feb. 24, 2021), 86 FR 12237, 12241 (Mar. 2, 2021) (File No. SR–OCC–2021–003) (amending OCC's replenishment plan, including the measurement for a Trigger Event, to account for the establishment of OCC's persistent minimum skin-in-the-game).

[11] *See* Order Approving OCC's Capital Management Policy, 85 FR at 5503.

[12] *Id.*

[13] The RWD Plan states OCC's basic assumptions concerning the resolution process, including assumptions about the duration of the resolution process, the cost of the resolution process, OCC's capitalization through the resolution process, the maintenance of Critical Services and Critical Support Functions, as defined by the RWD Plan, and the retention of personnel and contractual relationships. *See* Exchange Act Release No. 83918 (Aug. 23, 2018), 83 FR 44091, 44094 (Aug. 29, 2018) (File No. SR–OCC–2017–021).

[14] *See* Order Approving OCC's Capital Management Policy, 85 FR at 5503.

[15] *See* Order Approving OCC's Capital Management Policy, 85 FR at 5501 n.20, 5503.

[16] Confidential data and analysis evidencing the calculation of the Adjusted RWD Amount based on OCC's 2023 corporate budget is included in Exhibit 3 to File Number SR–OCC–2023–001.

Operational Loss Fee charged, based on OCC's current Target Capital Requirement.[17] Consistent with OCC's approach to its persistent minimum skin-in-the-game, the threshold in the schedule of fees continues to reflect that consistent with OCC's Capital Management Policy, the Trigger Event threshold is measured against Equity less the Minimum Corporate Contribution.

OCC proposes the fee change to be effective immediately upon filing, because the Board approved the Adjusted RWD Amount upon which the Operational Loss Fee is based for 2023. Notwithstanding the immediate effectiveness, OCC would not make the fee change operative until after the time required to self-certify the proposed change with the Commodity Futures Trading Commission (''CFTC'').

(2) Statutory Basis

OCC believes the proposed rule change is consistent with the Act [18] and the rules and regulations thereunder. In particular, OCC believes that the proposed fee change is also consistent with Section 17A(b)(3)(D) of the Act,[19] which requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. OCC believes that the proposed fee change is reasonable because it is designed to replenish OCC's Equity in the form of liquid net assets as a component of OCC's plan to replenish its capital in the event that OCC's Equity, less the Minimum Corporate Contribution reserved as the primary portion of OCC's minimum persistent skin-in-the-game, falls close to or below its Target Capital Requirement so that OCC can continue to meet its obligations as a systemically important financial market utility (''SIFMU'') to Clearing Members and the general public should operational losses materialize (including through a recovery or orderly wind-down of critical operations and services) and thereby facilitate compliance with Rule 17Ad–22(e)(15)(iii).[20] The maximum Operational Loss Fee is sized to ensure that OCC maintains sufficient liquid net assets to support its RWD Plan and imposes a contingent obligation on Clearing Members that is approximately the same amount as a Clearing Member's contingent obligation for Clearing Fund assessments for a Clearing Member operating at the minimum Clearing Fund deposit.[21] Therefore, OCC believes the proposed maximum Operational Loss Fee sized to OCC's Adjusted RWD Amount is reasonable.

OCC also believes that the proposed Operational Loss Fee would result in an equitable allocation of fees among its participants because it would be equally applicable to all Clearing Members. As the Commission has recognized, OCC's designation as a SIFMU and its role as the sole covered clearing agency for all listed options contracts in the U.S. makes it an integral part of the national system for clearance and settlement, through which ''Clearing Members, their customers, investors, and the markets as a whole derive significant benefit . . . regardless of their specific utilization of that system.'' [22] Neither the SEC nor OCC has observed any correlation between measures of Clearing Member utilization or OCC's benefit to Clearing Members [23] and its risk of operational loss.[24] As a result, OCC believes that the proposed change to OCC's fee schedule provides for the equitable allocation of reasonable fees in accordance with Section 17A(b)(3)(D) of the Act.[25]

In addition, OCC believes that the proposed rule change is consistent with Rule 17Ad–22(e)(15)(iii), which requires that OCC establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage OCC's general business risk, including by maintaining a viable plan, approved by the Board and updated at least annually, for raising additional equity should its equity fall close to or below the amount required under Rule 17Ad–22(e)(15)(ii).[26] While Rule 17Ad–22(e)(15)(iii) does not by its terms specify the amount of additional equity a clearing agency's plan for replenishment capital must be designed to raise, the SEC's adopting release states that ''a viable plan generally should enable the covered clearing agency to hold sufficient liquid net assets to achieve recovery or orderly wind-down.'' [27] OCC sets the maximum Operational Loss Fee at an amount sufficient to raise, on a post-tax basis, the amount determined annually by the Board to be sufficient to ensure recovery or orderly wind-down pursuant to the RWD Plan.[28] Therefore, OCC believes the proposed change to OCC's schedule of fees is consistent with Rule 17Ad–22(e)(15)(iii) and the guidance provided by the SEC in the adopting release.

OCC also believes that the proposed fee change is consistent with Section 19(g)(1) of the Act,[29] which, among other things, requires every self-regulatory organization to comply with its own rules. OCC filed its Capital Management Policy as a ''proposed rule change'' within the meaning of Section 19(b) of the Act,[30] and Rule 19b–4 under the Act.[31] The Capital Management Policy specifies that the maximum Operational Loss Fee shall be the Adjusted RWD Amount.[32] Because the Adjusted RWD Amount will change annually based, in part, on OCC's corporate budget, fee filings are necessary to ensure that the maximum Operational Loss Fee in OCC's schedule of fees remains consistent with the amount identified in the Capital Management Policy. In addition, the amounts associated with the thresholds at which OCC would charge the Operational Loss Fee and the limit to the amount would change in accordance with the Capital Management Policy are determined based upon the level at which the Board sets OCC's Target Capital Requirement. Consequently, OCC seeks to amend the amounts identified in the schedule of fees to

[17] OCC does not propose any change to the thresholds and limits defined in the Capital Management Policy. This proposed change merely conforms the disclosure in OCC's schedule of fees to the current amounts based on the Board-approved Target Capital Requirement of $303 million.

[18] 15 U.S.C. 78a *et seq.*

[19] 15 U.S.C. 78q–1(b)(3)(D).

[20] 17 CFR 240.17Ad–22(e)(15)(iii).

[21] A Clearing Member operating at the minimum Clearing Fund deposit ($500,000) could be assessed up to an additional $1 million (the minimum deposit, assessed up to two times), for a total contingent obligation of $1.5 million. *See* OCC Rule 1006(h).

[22] *See* Order Approving OCC's Capital Management Policy, 85 FR at 5506.

[23] *Id.* (''The Commission is not aware of evidence demonstrating that those benefits are tied directly or positively correlated to an individual Clearing Member's rate of utilization of OCC's clearance and settlement services.'')

[24] *Id.* (rejecting an objection to the equal allocation of the proposed Operational Loss Fee based on the SEC's regulatory experience and OCC's analyses of Clearing Member utilization (*e.g.,* contract volume) or credit risk (*e.g.,* Clearing Fund size) and the various operational and general business risks that could trigger an Operational Loss Fee). To date, OCC has observed no correlation between Clearing Member utilization or credit risk and OCC's potential risk of operational loss. *See* Confidential Exhibit 3.

[25] 15 U.S.C. 78q–1(b)(3)(D).

[26] 17 CFR 240.17Ad–22(e)(15)(iii).

[27] Standards for Covered Clearing Agencies, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70836 (Oct. 13, 2016) (File No. S7–03–14).

[28] *See* Order Approving OCC's Capital Management Policy, 85 FR at 5510 (''The Operational Loss Fee would be sized to the Adjusted RWD Amount, and therefore would be designed to provide OCC with at least enough capital either to continue as a going concern or to wind-down in an orderly fashion.'')

[29] 15 U.S.C. 78s(g)(1).

[30] 15 U.S.C. 78s(b).

[31] 17 CFR 240.19b–4.

[32] Order Approving OCC's Capital Management Policy, 85 FR at 5503.

reflect OCC's current Target Capital Requirement and OCC's current Capital Management Policy, which reflects the establishment of the Minimum Corporate Contribution.[33] Therefore, OCC believes that the proposed change to OCC's fee schedule is consistent with Section 19(g)(1) of the Act.

(B) Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act[34] requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. OCC does not believe that the proposed rule change would have any impact or impose a burden on competition. Although the proposed Operational Loss Fee affects Clearing Members, their customers, and the markets that OCC serves, OCC believes that the proposed increase in the Operational Loss Fee would not disadvantage or favor any particular user of OCC's services in relationship to another user because the proposed Operational Loss Fee would apply equally to all Clearing Members. In addition, OCC does not believe that the proposed Operational Loss Fee imposes a significant burden on smaller firms because the maximum Operational Loss Fee imposes a contingent obligation on Clearing Members that is approximately the same amount as a Clearing Member's contingent obligation for Clearing Fund assessments for a Clearing Member operating at the minimum Clearing Fund deposit.[35] Accordingly, OCC does not believe that the proposed rule change would have any impact or impose a burden on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii)[36] of the Act, and Rule 19b–4(f)(2) thereunder,[37] the proposed rule change is filed for immediate effectiveness as it constitutes a change in fees charged to OCC Clearing Members. 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. The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.[38]

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–OCC–2023–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–OCC–2023–001. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at *https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules.*

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–OCC–2023–001 and should be submitted on or before March 16, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03774 Filed 2–22–23; 8:45 am]

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[33] *See supra* notes 9 and 10, and accompanying text.

[34] 15 U.S.C. 78q–1(b)(3)(I).

[35] *See supra* note 21.

[36] 15 U.S.C. 78s(b)(3)(A)(ii).

[37] 17 CFR 240.19b–4(f)(2).

[38] Notwithstanding its immediate effectiveness, implementation of this rule change will be delayed until this change is deemed certified under CFTC Regulation 40.6.

[39] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96943; File No. SR–ICEEU–2023–006]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments Part Q of its White Sugar Delivery Procedures

February 16, 2023.

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 February 6, 2023, 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.

[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).

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 amend Part Q of its White Sugar Delivery Procedures to make certain clarifications around the origin of the deliverable crop and certain matters relating to delivery notifications and presentation of delivery documents.[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 Part Q of its Delivery Procedures to clarify certain provisions relating to delivery specifications for ICE Futures Europe Financial and Softs White Sugar futures contracts, to be consistent with amendments that have been made to the contract specifications under exchange rules. The proposed amendments would provide that deliverable sugar under such contracts must have been produced in a country included in the list of deliverable countries of production maintained by the exchange, consistent with exchange rules. Delivery would have to be made at an eligible delivery port (as defined in exchange rules as a port located in one of such countries that meets the requirements in exchange rules).

The amendments would update documentation and other requirements under the delivery timetable. The amendments would clarify the relevant Tender Day (which is the business day following the Last Trading Day). The concept of Notice of Tender would be replaced with Delivery Notification, to be consistent with exchange rules, and the amendments would clarify that a separate notification must be provided for each underlying client at each Delivery Port. The contents of the Delivery Notification and manner of submission would also be specified. The timing of allocations of white sugar to Buyers (and related notifications) would be moved from after 10:30 LPT to after 14:00 LPT.

Consistent with exchange rules, the concept of ''Insufficient Seller'' would be revised to be a seller in respect of a Delivery Port for which the minimum lot requirement under exchange rules is not satisfied (and the concept of non-qualifying port would be removed). Requirements for Insufficient Sellers to submit revised Delivery Notifications would be clarified (including that relevant notifications must be made to and from the Clearing House, instead of the exchange). The amendments would add that revised Delivery Notifications that do not meet a minimum Delivery Port lot requirement will be rejected, and Insufficient Sellers would be required to submit a further revised Delivery Notification meeting the relevant requirement. Where the Insufficient Seller fails to do so, the Clearing House will determine the Deliver Port from which tenders are to be made.

The amendments would also clarify the delivery documentation to be provided by the seller, including relevant certifications in accordance with the contract terms, as well as procedures for rejection of presented documents. The amendments would also provide that certain related notifications are to be made to and from the Clearing House (rather than the exchange), consistent with the role of the Clearing House in the delivery process.

Certain typographical corrections and similar non-substantive drafting clarifications have been made in Part Q.

(b) Statutory Basis

ICE Clear Europe believes that the proposed amendments to Part Q of the Delivery Procedures are consistent with the requirements of Section 17A of the Act[6] and the regulations thereunder applicable to it. In particular, Section 17A(b)(3)(F) of the Act[7] 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 Delivery Procedures are designed to clarify ICE Clear Europe's arrangements and delivery procedures relating to Financial and Softs White Sugar futures contracts and ensure consistency with the relevant contract specifications under exchange rules. Notably, the amendments would reflect the requirement under exchange rules that deliverable sugar be produced in one of the countries listed in the list of deliverable countries of production maintained by the exchange. In addition, the amendments clarify the timing of allocations by the Clearing House and certain related delivery notification and delivery documentation requirements. The contracts will otherwise continue to be cleared by ICE Clear Europe in the same manner as they are currently. In ICE Clear Europe's view, the amendments are thus consistent with the prompt and accurate clearance and settlement of cleared contracts and the protection of investors and the public interest. (ICE Clear Europe would not expect the amendments to affect the safeguarding of securities and funds in ICE Clear Europe's custody or control or for which it is responsible). Accordingly, the amendments satisfy the requirements of Section 17A(b)(3)(F).[8]

In addition, Rule 17Ad–22(e)(10)[9] requires that each covered clearing agency ''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.'' As discussed above, the amendments would clarify the delivery specifications for Financial and Softs White Sugar futures contracts. The amendments would also clarify the obligations of the Clearing House (as opposed to the exchange) in the notification and delivery documentation process. The amendments would not otherwise change the manner in which the contracts are cleared or in which delivery is made, as supported by ICE Clear Europe's existing financial resources, risk management, systems and operational arrangements. The amendments thus clarify the role and responsibilities of the Clearing House and Clearing Members with respect to physical delivery. As a result, ICE Clear Europe believes the amendments are

[5] Capitalized terms used but not defined herein have the meanings specified in the Delivery Procedures or, if not defined therein, the ICE Clear Europe Clearing Rules.

[6] 15 U.S.C. 78q–1.

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 15 U.S.C. 78q–1(b)(3)(F).

[9] 17 CFR 240.17Ad–22(e)(10).

consistent with the requirements of Rule 17Ad–22(e)(10).[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 proposed amendments are being adopted to update and clarify the delivery specifications in Part Q of the Delivery Procedures in connection with White Sugar contracts. ICE Clear Europe does not expect that the proposed changes will adversely affect access to clearing or the ability of Clearing Members, their customers or other market participants to continue to clear contracts. ICE Clear Europe also does not believe the amendments would materially affect the cost of clearing or otherwise impact competition among Clearing Members or other market participants or limit market participants' choices for selecting clearing services. Accordingly, ICE Clear Europe does not believe the amendments would impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed amendments have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any 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 [11] and paragraph (f) of Rule 19b–4 [12] 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–2023–006 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–2023–006. 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/clear-europe/regulation.*

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–2023–006 and should be submitted on or before March 16, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Sherry R. Haywood,

Assistant Secretary.

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[10] 17 CFR 240.17Ad–22(e)(10).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96941; File No. SR–MRX–2023–06]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX Options 7, Section 7

February 16, 2023.

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 February 6, 2023, Nasdaq MRX, LLC (''MRX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend MRX's Pricing Schedule at Options 7, Section 7.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/mrx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange 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. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 2, 2022, MRX initially filed this proposal to amend its Pricing Schedule at Options 7, Section 7, to assess market data fees, which had not been assessed since MRX's inception in 2016.[3] The proposed changes are designed to update data fees to reflect their current value, rather than their value when it was a new exchange six years ago. Newly-opened exchanges often charge no fees for market data to attract order flow to an exchange, and later amend their fees to reflect the true value of those services.[4] Allowing newly-opened exchanges time to build and sustain market share before charging for their market data encourages market entry and promotes competition.

This Proposal reflects MRX's assessment that it is ready to distribute its market data on the same basis as the other 15 options exchanges. When these fees were initially proposed in May 2022, MRX was the only options exchange out of the 16 current options exchanges not to assess market data fees.

The Exchange proposes to amend fees for the following market data feeds within Options 7, Section 7: (1) Nasdaq MRX Depth of Market Data Feed (''Depth of Market Feed'');[5] (2) Nasdaq MRX Order Feed (''Order Feed'');[6] (3) Nasdaq MRX Top of Market Feed (''Top Feed'');[7] (4) Nasdaq MRX Trades Feed (''Trades Feed'');[8] and (5) Nasdaq MRX Spread Feed (''Spread Feed'').[9] Prior to the initial filing of these proposed price changes on May 2, 2022, no fees had been assessed for these feeds.

In addition to the proposed fees for each data feed, the Exchange proposes an Internal Distributor Fee[10] of $1,500 per month for the Depth of Market Feed, Order Feed, and Top Feed, an Internal Distributor Fee of $750 per month for the Trades Feed, and an Internal Distributor Fee of $1,000 per month for the Spread Feed. If a Member subscribes to both the Trades Feed and the Spread Feed, both Internal Distributor Fees would be assessed.

The Exchange also proposes to assess an External Distributor Fee of $2,000 per month for the Depth of Market Feed, Order Feed, and Top Feed, an External Distributor Fee of $1,000 per month for the Trades Feed, and an External Distributor Fee of $1,500 per month for the Spread Feed.

MRX will also assess Professional[11] and Non-Professional[12] subscriber fees. The Professional Subscriber fee will be $25 per month, and the Non-Professional Subscriber fee will be $1 per month. These subscriber fees (both Professional and Non-Professional) cover the usage of all five MRX data products identified above and would not be assessed separately for each product.[13]

MRX also proposes a Non-Display Enterprise License for $7,500 per month. This license would lower costs for internal professional subscribers and lower administrative costs overall by permitting the distribution of all MRX proprietary direct data feed products to an unlimited number of internal non-display Subscribers without incurring

[3] The Exchange initially filed the proposed pricing changes on May 2, 2022 (SR–MRX–2022–04), instituting fees for membership, ports and market data. *See* Securities Exchange Act Release No. 94901 (May 12, 2022), 87 FR 30305 (May 18, 2022) (SR–MRX–2022–04). On June 29, 2022, the Exchange withdrew that filing, and submitted separate filings for membership (SR–MRX–2022–07), market data (SR–MRX–2022–08) and ports (SR–MRX–2022–09). On August 25, 2022, the Exchange withdrew the market data filing (SR–MRX–2022–08) and replaced it with SR–MRX–2022–14. *See* Securities Exchange Act Release No. 95708 (September 8, 2022), 87 FR 56457 (September 14, 2022) (SR–MRX–2022–14). On October 14, 2022, the Exchange withdrew SR–MRX–2022–14 and replaced it with SR–MRX–2022–22 to reflect changes to the information contained within each of the five MRX market data feeds proposed in SR–MRX–2022–18. *See* Securities Exchange Act Release No. 96144 (October 24, 2022), 87 FR 65273 (October 28, 2022) (SR–MRX–2022–22) (MRX market data fee filing); Securities Exchange Act Release No. 95982 (October 4, 2022), 87 FR 61391 (October 11, 2022) (SR–MRX–2022–18) (modifying the definitions of MRX feeds). On December 8, 2022, the Exchange withdrew SR–MRX–2022–22 and replaced it with SR–MRX–2022–27. On December 19, 2022, the Exchange withdrew SR–MRX–2022–27 and replaced it with SR–MRX–2022–30. *See* Securities Exchange Act Release No. 96561 (December 21, 2022), 87 FR 79915 (December 28, 2022) (SR–MRX–2022–30). On February 6, 2023, the Exchange withdrew SR–MRX–2022–30 and replaced it with the instant filing.

[4] *See, e.g.,* Securities Exchange Act Release No 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), also available at *https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf* (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

[5] Nasdaq MRX Depth of Market Data Feed is a data feed that provides full order and quote depth information for individual orders and quotes on the Exchange book and last sale information for trades executed on the Exchange. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on the Exchange and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening (size of matched contracts and size of the imbalance). *See* Options 3, Section 23(a)(1).

[6] Nasdaq MRX Order Feed provides information on new orders resting on the book (*e.g.* price, quantity, market participant capacity and Attributable Order tags when provided by a Member). The data provided for each option series includes the symbols (series and underlying security), displayed order types, order attributes (*e.g.,* OCC account number, give-up information, CMTA information), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on MRX and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening (size of matched contracts and size of the imbalance), auction and exposure notifications. *See* Options 3, Section 23(a)(2).

[7] Nasdaq MRX Top of Market Feed calculates and disseminates MRX's best bid and offer position, with aggregated size (including total size in aggregate, for Professional Order size in the aggregate and Priority Customer Order size in the aggregate), based on displayable order and quote interest in the System. The feed also provides last trade information and for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on MRX and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening. *See* Options 3, Section 23(a)(3).

[8] Nasdaq MRX Trades Feed displays last trade information. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on MRX and identifies if the series is available for closing transactions only. *See* Options 3, Section 23(a)(4).

[9] Nasdaq MRX Spread Feed is a feed that consists of: (1) options orders for all Complex Orders (*i.e.,* spreads, buy-writes, delta neutral strategies, etc.); (2)full Complex Order depth information, including prices, side, size, capacity, Attributable Complex Order tags when provided by a Member, and order attributes (*e.g.,* OCC account number, give-up information, CMTA information), for individual Complex Orders on the Exchange book; (3) last trades information; and (4) calculating and disseminating MRX's complex best bid and offer position, with aggregated size (including total size in aggregate, for Professional Order size in the aggregate and Priority Customer Order size in the aggregate), based on displayable Complex Order interest in the System. The feed also provides Complex Order auction notifications. *See* Options 3, Section 23(a)(5).

[10] A ''distributor'' of Nasdaq MRX data is any entity that receives a feed or data file of data directly from Nasdaq MRX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All distributors shall execute a Nasdaq Global Data Agreement.

[11] A Professional Subscriber is any Subscriber that is not a Non-Professional Subscriber.

[12] A Non-Professional Subscriber is a natural person who is neither: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ''investment adviser'' as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.

[13] For example, if a firm has one Professional (Non-Professional) Subscriber accessing Top Quote Feed, Order, and Depth of Market Feed the firm would only report the Subscriber once and pay $25 ($1 for Non-Professional).

additional fees for each internal Subscriber, or requiring the customer to count internal subscribers.[14] The Non-Display Enterprise License is in addition to any other associated distributor fees for MRX proprietary direct data feed products.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[16] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposal is reasonable and unlikely to burden the market in light of MRX's small size, the nature of the fees, and the demonstrated ability of MRX customers to cancel their subscriptions for market data.[17] MRX has had a consistently low percentage of market share, starting at approximately 0.2 percent when it opened as an Exchange and ending in approximately 1.37% in November 2022. This is the smallest market share of the 16 operating options exchanges.

The proposed fees are comparable to, and in some cases less than, those of other exchanges; in particular, the proposed MRX fees are lower than those charged by ISE today, as well as those of the MIAX Emerald Options Exchange, C2 Options, and NYSE American Options.

The MIAX Emerald Options Exchange charges $3,000 for internal distribution and $3,500 for external distribution of the MIAX Order Feed (''MOR'').[18] The proposed MRX Order Feed is $1,500 for internal distribution and $2,000 for external distribution.

C2 Options charges $2,500 per month for internal and external distribution of its Book Depth Data Feed, plus $50 per Device or user ID for Display Only Service Users (external users).[19] MRX proposes to charge $1,500 for internal distribution, and $2,000 for external distribution, of its Depth of Market Feed.

NYSE American Options charges an access fee of $3,000 per month for its American Options Top, American Options Deep and American Options Complex products, plus a multiple datafeed fee of $200, a redistribution fee of $2,000 per month, and a Professional per user fee of $50 per month and a Non-Professional user fee of $1 per month.[20] MRX proposes to charge no access or multiple datafeed fees, but rather a monthly external distributor fee of $2,000 for Top Feed, and a monthly external distributor fee of $2,000 for its Depth of Market Feed.

Internal distribution fees for the Nasdaq ISE Order Feed is $3,000 per month per distributor for internal use, and $3,000 per month for external redistribution, with additional fees for external controlled devices.[21] Proposed Distributor fees for the MRX Order Feed is $1,500 per month for internal distribution, and $2,000 per month for external distribution.

The Top Quote Feed for ISE is $3,000 per month per distributor for internal use, plus additional fees; $3,000 per month per distributor for professional external distribution, plus other charges; and $3,000 per distributor per month for external Non-Professional distribution through a controlled device.[22] Proposed distributor fees for the MRX Top Feed are $1,500 per month for internal distribution, and $2,000 for external distribution.

A sizeable portion of subscribers—approximately 15 percent—have terminated their subscriptions following the implementation of the proposed fees. As of May 2, 2022, the date that MRX initially proposed these market data fees, MRX reported that two customers had terminated their market data subscriptions.[23] As of now, a total of five firms have cancelled, amounting to approximately 15 percent of the 34 customers that had been taking MRX feeds in the first quarter of 2022.[24] Two of the five customers had access to all five feeds: the Depth of Market Data, the Order Feed, the Top Feed, the Trades Feed, and the Spread Feed. The three remaining customers had access to only two feeds: the Order Feed and the Top Feed. All five customers cancelled all feeds that they had access to.

Three of the five customers were either data vendors or technology suppliers. Data vendors purchase exchange data and redistribute it to downstream customers, while technology suppliers incorporate exchange data into software solutions, which are sold to downstream customers. The remaining two firms engage in options trading, either on their own behalf or that of a customer. The three data vendors/technology suppliers do not trade on their own behalf or on the behalf of any downstream customs, although their customers may do so. The Exchange understands that these three firms cancelled due to insufficient demand from their downstream customers for MRX data. The two remaining firms, which do engage in options trading, have not traded on MRX, but are active traders on other Nasdaq options exchanges.

The Proposal is not unfairly discriminatory. The five market data feeds at issue here—the Depth of Market Feed, Order Feed, Top Feed, Trades Feed, and Spread Feed—are used by a variety of market participants for a variety of purposes. Users include regulators, market makers, competing exchanges, media, retail, academics, portfolio managers. Market data feeds will be available to members of all of these groups on a non-discriminatory basis.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Nothing in the Proposal burdens inter-market competition (the competition among self-regulatory organizations) because approval of the Proposal does not impose any burden on the ability of other options exchanges to compete. MRX fees are comparable to, and in some cases less than, those of other exchanges, as discussed above.

Nothing in the Proposal burdens intra-market competition (the

[14] The Non-Display Enterprise License of $7,500 per month is optional. A firm that does not have a sufficient number of subscribers to benefit from purchase of the license need not do so.

[15] *See* 15 U.S.C. 78f(b).

[16] *See* 15 U.S.C. 78f(b)(4) and (5).

[17] Nasdaq announced that, beginning in 2022, it would migrate its North American markets to Amazon Web Services in a phased approach, starting with MRX. The MRX migration took place in November 2022. The proposed fee changes are unrelated to that effort.

[18] *See* MIAX Emerald Options Exchange, Fee Schedule (December 8, 2022), available at *https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_12082022c.pdf.*

[19] *See* Cboe U.S. Options Fee Schedule, C2 Options, BBO Data Feed (Effective September 1, 2022), available at *https://www.cboe.com/us/options/membership/fee_schedule/ctwo/.*

[20] *See* NYSE American Options Fee Schedule (March 1, 2022), available at *https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Options_Market_Data_Fee_Schedule.pdf.*

[21] *See* Nasdaq ISE Rules, Options 7 (Pricing Schedule), Section 10(G) (Nasdaq ISE Order Feed).

[22] *See* Nasdaq ISE Rules, Options 7 (Pricing Schedule), Section 10(H) (Nasdaq ISE Top Quote Feed).

[23] *See* Securities Exchange Act Release No. 94901 (May 12, 2022), 87 FR 30305 (May 18, 2022) (SR–MRX–2022–04).

[24] These terminations were limited to market data; none of these customers were members of MRX and therefore purchased neither memberships nor ports from the Exchange.

competition among consumers of exchange data) because MRX market data is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase MRX market data can do so on a non-discriminatory basis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

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)(ii) of the Act.[25]

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MRX–2023–06 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–MRX–2023–06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MRX–2023–06 and should be submitted on or before March 16, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03697 Filed 2–22–23; 8:45 am]

BILLING CODE 8011–01–P

[25] 15 U.S.C. 78s(b)(3)(A)(ii).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Advisers Act Release No. 6244/ File No. 803–00258]

J.P. Morgan Investment Management Inc.

February 16, 2023.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an exemptive order under Section 206A of the Investment Advisers Act of 1940 (the ''Act'') and rule 206(4)–5(e) under the Act.

APPLICANT: J.P. Morgan Investment Management Inc.

SUMMARY OF APPLICATION: Applicant requests that the Commission issue an order under Section 206A of the Act and rule 206(4)–5(e) under the Act exempting it from rule 206(4)–5(a)(1) under the Act to permit Applicant to receive compensation from a government entity for investment advisory services provided to the government entity within the two-year period following a contribution by an individual, who was subsequently hired and became a covered associate of the Applicant, to an official of the government entity.

FILING DATES: The application was filed on December 15, 2022, and amended on December 22, 2022.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicant with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on March 13, 2023, and should be accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons may request notification of a hearing by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov*. Applicant: J.P. Morgan Investment Management Inc. *Ki.Hong@skadden.com, Tyler.Rosen@skadden.com, Lee.K.Michel@jpmchase.com*.

FOR FURTHER INFORMATION CONTACT: Priscilla Dao, Attorney-Adviser, at (202) 551–5997 or Marc Mehrespand, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website at *http://www.sec.gov/rules/iareleases.shtml* or by calling (202) 551–8090.

Applicant's Representations

1. Applicant is a Delaware corporation registered with the Commission as an investment adviser under the Act. Applicant provides, among other things, discretionary investment advisory services directly to institutional investors and mutual funds (the ''Funds'').

2. The individual who made the campaign contribution that triggered the compensation ban (the ''Contribution'') is Ashbel Williams (the ''Contributor'').

The Contributor was offered a position by the Applicant on March 18, 2022 to serve as a liaison between Applicant and certain large investors. At the time of the Contribution, he was between jobs—having retired from the Florida State Board of Administration in September of 2021. He was not a ''covered associate'' as defined in rule 206(4)–5(f)(2) at the time of the Contribution. The Contributor started employment with the Applicant on April 4, 2022, and first solicited a government entity for investment advisory business on June 9, 2022. The Contributor does not hold an executive officer position. However, his role does include attending meetings with prospective investors. Since joining the Applicant, the Contributor has, in fact, attended meetings with and solicited representatives of certain government entities, although none from the Recipient's jurisdiction. As such, he is a covered associate as defined in rule 206(4)–5(f)(2)(ii).

3. A public pension plan identified as a government entity, as defined in rule 206(4)–5(f)(5)(ii), with respect to the City of Tallahassee (the ''Client''), has a separate account managed by the Applicant and offers one of the Funds advised by the Applicant as an option in a participant-directed plan.

4. The recipient of the Contribution was John Dailey (the ''Recipient''), who was the mayor of Tallahassee and running for re-election as mayor. The investment decisions for the Client, including the hiring of an investment adviser, are overseen by a six-member board, on which the mayor serves in an ex-officio capacity. Due to the Recipient's service on the Client's board, the Recipient is an ''official'' of the Client as defined in rule 206(4)–5(f)(6)(i). The Contribution that implicated rule 206(4)–5's prohibition on compensation under rule 206(4)–5(a)(1) was given on January 13, 2022 in the amount of $1,000 to the Recipient's campaign for mayor. Applicant states that a friend invited the Contributor to attend a fundraiser for the Recipient's re-election campaign, and the Contributor contributed in connection with that event. As a resident of Tallahassee, the Contributor had a legitimate personal interest in the outcome of the campaign and genuinely believed that the Recipient would promote more favorable centrist and pro-free enterprise policies for Tallahassee. When the Contributor attended the fundraiser discussed above, he and the Recipient shared a conversation, but did not discuss the Client, its relationship to the Applicant—with whom the Contributor was not affiliated—or any other existing or prospective investors. Applicant states that there was no discussion of the Recipient's powers, influence or responsibilities involving the investment of city assets or public pension funds. At the time of the Contribution, the Contributor had no intention of soliciting investment advisory business from the Client or any other government entity of which the Recipient was an official. Applicant represents that the Contributor did not solicit any other persons to make contributions to the Recipient's campaign, and did not arrange any introductions to potential supporters. The Contribution and attendance at the fundraiser was the Contributor's only involvement with the Recipient's campaign. The Contributor never informed the Client or its relationship managers at the Applicant of the Contribution. Applicant represents that at no time did any employees of the Applicant other than the Contributor have any knowledge that the Contribution had been made prior to its discovery by the Applicant in February as a result of its routine prospective employee onboarding procedures.

5. The Client's advisory relationship with the Applicant dates back to at least 1989, and the Client began offering a Fund managed by Applicant as an option in a participant-directed plan in 2016, in both cases before the Recipient was elected and began serving on the Client's board. Applicant represents that the Contributor has never presented for, or met with, any of the Client's representatives over the course of the relationship. The Contributor has no role with respect to the Client. The Contributor has had no contact with any representative of the Client regarding investment advisory business.

6. The Contribution was discovered by the Applicant's compliance department in February 2022 in the course of prospective employee vetting that included review of a pre-hire political contribution disclosure form on which the Contributor disclosed the Contribution. The Contributor formally applied for the position with the Applicant on February 1, 2022. Pursuant to the Applicant's pre-hire process for applicants for covered associate positions, the Contributor then received a form asking him to disclose past political contributions and provided that form (on which he disclosed the Contribution) to the Applicant on February 2. The Applicant informed the Contributor that he would need to seek a refund, which he did by contacting the Recipient on February 10, 2022. The Contribution was refunded by the campaign on February 11, 2022.

7. The Applicant determined that after beginning employment and soliciting a government entity the Contributor would become a covered associate and trigger a ban. At the point he became a covered associate, the Applicant ceased invoicing the Client or accepting compensation for its separate account investment advisory services for the period beginning on the date the Contributor became a covered associate until two years after the date of the Contribution. The Applicant also established a procedure to ensure that any compensation for investment advisory services associated with the Client's investment in a Fund for that period will be held by such Fund in a segregated account and not distributed to the Applicant. When the Client inquired about the status of its invoices for separate account investment advisory services, the Applicant promptly notified Client of the Contribution and the resulting two-year prohibition on compensation absent exemptive relief from the Commission. The Applicant told the Client that they would not be charged fees for the duration of the two-year period absent exemptive relief from the Commission. The Applicant noted that, as an alternative, the fees and compensation could be placed in escrow pending resolution of the Applicant's exemptive application; however, the Client expressed a preference for the Applicant's approach.

8. The Applicant states that it also took steps to limit the Contributor's contact with any representative of the Client for the duration of the two-year period beginning January 13, 2022, including informing the Contributor that he could have no contact with any representative of the Client regarding the Applicant's investment advisory business.

9. The Applicant's Pay-to-Play Policies and Procedures (the ''Policy'') were adopted and implemented before the Contribution was made. The Policy was adopted even before rule 206(4)–5's proposal to address state pay-to-play laws. Applicant represents that at all times the Policy has been more restrictive than what was contemplated by rule 206(4)–5. All contributions to federal, state and local office incumbents and candidates are subject to pre-clearance, not post-contribution reporting, by employees under the Policy. There is no *de minimis* exception from pre-clearance for small contributions to state and local officials. All employees of the Applicant are subject to the Policy and the spouse,

domestic partner, and dependent child of each employee are also fully subject to the Policy. The Applicant requires that all employees periodically certify to their compliance with the Policy. Additionally, the Applicant conducts periodic testing (*i.e.,* searches of federal and state campaign finance databases) to confirm the Policy is being followed. Prior to hiring, all prospective hires for covered associate positions are required to disclose any political contributions within the past two years. The Applicant's Compliance department circulates quarterly compliance certifications that reiterate the need to pre-clear all political contributions. The Applicant's employees also receive regional compliance reminders about the Code of Conduct and the Policy, and additional reminders of the need to pre-clear contributions during election season. The Policy has been incorporated into the firm's Code of Conduct-related trainings and its periodic reminders.

Applicant's Legal Analysis

1. Rule 206(4)–5(a)(1) under the Act prohibits a registered investment adviser from providing investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate of the investment adviser. The Client is a ''government entity,'' as defined in rule 206(4)–5(f)(5), the Contributor is a ''covered associate'' as defined in rule 206(4)–5(f)(2), and the Recipient is an ''official'' as defined in rule 206(4)–5(f)(6).

2. Section 206A of the Act authorizes the Commission to ''conditionally or unconditionally exempt any person or transaction . . . from any provision or provisions of [the Act] or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act].''

3. Rule 206(4)–5(e) provides that the Commission may conditionally or unconditionally grant an exemption to an investment adviser from the prohibition under rule 206(4)–5(a)(1) upon consideration of the factors listed below, among others:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act;

(2) Whether the investment adviser: (i) before the contribution resulting in the prohibition was made, adopted and implemented policies and procedures reasonably designed to prevent violations of the rule; (ii) prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and (iii) after learning of the contribution: (A) has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and (B) has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the investment adviser, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (*e.g.,* federal, state or local); and

(6) The contributor's apparent intent or motive in making the contribution which resulted in the prohibition, as evidenced by the facts and circumstances surrounding such contribution.

4. Applicant requests an order pursuant to Section 206A and rule 206(4)–5(e), exempting it from the two-year prohibition on compensation imposed by rule 206(4)–5(a)(1) with respect to investment advisory services provided to the Client within the two-year period following the Contribution.

5. Applicant submits that the exemption is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicant further submits that the other factors set forth in rule 206(4)–5(e) similarly weigh in favor of granting an exemption to the Applicant to avoid consequences disproportionate to the violation.

6. Applicant contends that, given the nature of the Contribution and the lack of any evidence that the Applicant or the Contributor intended to, or actually did, interfere with the Client's merit-based process for the selection or retention of advisory services, the interests of the Client are best served by allowing the Applicant and the Client to continue their relationship uninterrupted. Applicant states that causing the Applicant to serve without compensation for the remainder of the two year period could result in a financial loss that is approximately 1,000 times the amount of the Contribution. Applicant suggests that the policy underlying rule 206(4)–5 is served by ensuring that no improper influence is exercised over investment decisions by governmental entities as a result of campaign contributions, and not by withholding compensation as a result of unintentional violations.

7. Applicant represents that, before the Contribution occurred, the Applicant had a Policy which was fully compliant with, and more rigorous than, rule 206(4)–5's requirements before the rule's initial proposal by the Commission and substantially before the rule's adoption or dates for required compliance. The Applicant also implemented a mandatory political contribution disclosure for all prospective employees as part of the standard corporate employment application process, and performed compliance testing that included random searches of campaign contribution databases for the names of employees. Applicant states that it was this disclosure that was effective in identifying the Contribution before the Contributor became a covered associate.

8. Applicant asserts actual knowledge of the Contribution at the time of its making cannot be imputed to the Applicant, given that the Contributor was not an employee of the Applicant and had not yet received an offer of employment with the Applicant. At no time did any employees of the Applicant other than the Contributor have any knowledge that the Contribution had been made prior to its discovery by the Applicant in February 2022 as part of its standard pre-hire vetting process.

9. Applicant asserts that after learning of the Contribution, the Applicant and the Contributor took all available steps to obtain a return of the Contribution. Before the Contributor was offered employment with the Applicant, the Contributor had obtained a full refund of the Contribution. At the point he became a covered associate, the Applicant ceased invoicing the Client or accepting compensation for its separate account investment advisory services for the period beginning on the date the Contributor became a covered associate until two years after the date of the Contribution. The Applicant also established a procedure to ensure that any compensation for investment advisory services associated with the Client's investment in a Fund for that period will be held by such Fund in a segregated account and not distributed to the Applicant. The Applicant has restricted the Contributor from soliciting the Client and began restricting compensation related to the Client once

the Contributor solicited a government entity.

10. Applicant states that the Contributor is employed to act as a liaison between the Applicant and certain large investors in both the public and private sector. Since joining the Applicant, the Contributor has attended meetings with representatives of certain government entities for the purpose of obtaining or retaining those clients. Accordingly, the Contributor is a covered associate of the Applicant. However, he is not an executive officer of the Applicant, as defined under rule 206(4)–5(f)(4). After learning of the Contribution, the Applicant took steps to limit the Contributor's contact with any representative of the Client for the remainder of the two-year period beginning January 13, 2022. The Applicant informed the Contributor that he could have no contact with any representative of the Client regarding any aspect of the Applicant's investment advisory business, including current or prospective investments of the Client.

11. Applicant states the Client's decision to invest substantially predates the Contributor's employment with the Applicant and the Recipient's becoming a covered official. The Client's decisions to invest with Applicant and/or to establish advisory relationships have been made on an arms' length basis free from any improper influence as a result of the Contribution. Applicant also submits that the nature of the election and other facts and circumstances indicate that the Contributor's apparent intent in making the Contribution was not to influence the selection or retention of the Applicant. The Contributor has long been involved in public policy and his community. After leaving public service, where he had a practice of not making political contributions, he felt free to support a candidate whom he knew through an economic club and whose policy views were in line with his own. The Contributor also had a legitimate interest in the outcome of the campaign given that he lives in Tallahassee.

12. Applicant states that the Contributor's action in making a contribution that would later trigger a ban resulted from his lack of knowledge about rule 206(4)–5's look-back provisions and, thus, his failure to appreciate the fact that the Contribution might impact potential future activities for an investment advisory firm that might employ him in the future. Applicant represents that the Contributor never spoke with the Recipient or anyone else about the authority of the mayor over investment decisions. The Contributor was not affiliated with the Applicant at the time of the Contribution and, in any event, never mentioned the Client, its relationship to the Applicant, or any other existing or prospective investors to the Recipient. Applicant contends that the Contributor had no intention of soliciting investment advisory business from the Client or any other government entity of which the Recipient was an official. The Contributor never told any prospective or existing investor (including the Client) or any relationship manager at the Applicant about the Contribution.

13. Applicant submits that neither the Applicant nor the Contributor sought to interfere with the Client's merit-based selection process for advisory services, nor did they seek to negotiate higher fees or greater ancillary benefits than would be achieved in arms' length transactions. Applicant further submits that there was no violation of the Applicant's fiduciary duty to deal fairly or disclose material conflicts given the absence of any intent or action by the Applicant or the Contributor to influence the selection process. Applicant contends that in the case of the Contribution, the imposition of the two-year prohibition on compensation does not achieve rule 206(4)–5's purposes and would result in consequences disproportionate to the mistake that was made.

Applicant's Conditions

The Applicant agrees that any order of the Commission granting the requested relief will be subject to the following conditions:

(1) The Contributor will be prohibited from discussing any business of the Applicant with any ''government entity'' client or prospective client for which the Recipient is an ''official'' as defined in rule 206(4)–5(f)(6), until January 13, 2024.

(2) The Contributor will receive written notification of this condition and will provide a quarterly certification of compliance until January 13, 2024. Copies of the certifications will be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the Applicant, and be available for inspection by the staff of the Commission.

(3) The Applicant will conduct testing reasonably designed to prevent violations of the conditions of this Order and maintain records regarding such testing, which will be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the Applicant, and be available for inspection by the staff of the Commission.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03675 Filed 2–22–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–281, OMB Control No. 3235–0316]

Proposed Collection; Comment Request; Extension: Form N–3

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

The title for the collection of information is ''Form N–3 (17 CFR 239.17a and 274.11b) under the Securities Act of 1933 (15 U.S.C. 77) and under the Investment Company Act of 1940 (15 U.S.C. 80a), Registration Statement of Separate Accounts Organized as Management Investment Companies.'' Form N–3 is the form used by separate accounts offering variable annuity contracts which are organized as management investment companies to register under the Investment Company Act of 1940 (''Investment Company Act'') and/or to register their securities under the Securities Act of 1933 (''Securities Act''). Form N–3 is also the form used to file a registration statement under the Securities Act (and any amendments thereto) for variable annuity contracts funded by separate accounts which would be required to be registered under the Investment Company Act as management investment companies except for the exclusion provided by Section 3(c)(11) of the Investment Company Act (15 U.S.C. 80a–3(c)(11)). Section 5 of the Securities Act (15 U.S.C. 77e) requires the filing of a registration statement prior to the offer of securities to the

public and that the statement be effective before any securities are sold, and Section 8 of the Investment Company Act (15 U.S.C. 80a–8) requires a separate account to register as an investment company.

Form N–3 also permits separate accounts offering variable annuity contracts which are organized as investment companies to provide investors with a prospectus and a statement of additional information covering essential information about the separate account when it makes an initial or additional offering of its securities. Section 5(b) of the Securities Act requires that investors be provided with a prospectus containing the information required in a registration statement prior to the sale or at the time of confirmation or delivery of the securities. The form also may be used by the Commission in its regulatory review, inspection, and policy-making roles.

Commission staff estimates that there will be 1 initial registration statements over the nest three years and 6 insurer separate accounts that file post-effective amendments on Form N–3 per year, with an average of 3 investment options per post-effective amendment. The Commission further estimates that the hour burden for preparing and filing a post-effective amendment on Form N–3 is 157.55 hours per portfolio. The total annual hour burden for preparing and filing post-effective amendments is 2,836 hours (6 post-effective amendments × 3 investment options per post-effective amendment × 157.55 hours per portfolio). The estimated annual hour burden for preparing and filing initial registration statements is 309 hours. The total annual hour burden for Form N–3, therefore, is estimated to be 3,145 hours (2,836 hours + 309 hours). Respondents may rely on outside counsel or auditors in connection with the preparation and filing of Form N–3. Commission staff estimates that the annual cost burden associated with preparing and filing Form N–3 is $139,696.

The information collection requirements imposed by Form N–3 are mandatory. Responses to the collection of information will not be kept confidential. 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 control number.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by April 24, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov*.

Dated: February 17, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03771 Filed 2–22–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34835; File No. 812–15352]

The RBB Fund, Inc., et al.

February 17, 2023.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

SUMMARY OF APPLICATION: Applicants request an order (''Order'') that permits: (a) The Funds (as defined in the Applicants' application) to issue shares (''Shares'') redeemable in large aggregations only (''creation units''); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value; (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; and (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of creation units. The relief in the Order would incorporate by reference terms and conditions of the same relief of a previous order granting the same relief sought by applicants, as that order may be amended from time to time (''Reference Order'').[1]

APPLICANTS: The RBB Fund, Inc.; Summit Global Investments, LLC; and Quasar Distributors, LLC.

FILING DATES: The application was filed on June 15, 2022, and amended on September 26, 2022, November 1, 2022, and November 29, 2022.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email, if an email address is listed for the relevant applicant below, or personally or by mail, if a physical address is listed for the relevant applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on March 14, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov*. Applicants: Steven Plump, The RBB Fund, Inc., *splump@rbbfund.com;* Jillian L. Bosmann, Esq., Faegre Drinker Biddle & Reath LLP, *jillian.bosmann@faegredrinker.com*.

FOR FURTHER INFORMATION CONTACT: Stephan N. Packs, Senior Counsel, or Terri G. Jordan, Branch Chief, at (202) 551–6825 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' third amended and restated application, dated November 29, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *https://www.sec.gov/edgar/searchedgar/*

[1] Natixis ETF Trust II, et al., Investment Company Act Rel. Nos. 33684 (November 14, 2019) (notice) and 33711 (December 10, 2019) (order).

legacy/companysearch.html. You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03776 Filed 2–22–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission Investor Advisory Committee will hold a public meeting on Thursday, March 2, 2023. The meeting will begin at 10:00 a.m. (ET) and will be open to the public.

PLACE: The meeting will be conducted by remote means. Members of the public may watch the webcast of the meeting on the Commission's website at *www.sec.gov.*

STATUS: This Sunshine Act notice is being issued because a majority of the Commission may attend the meeting.

Public Comment: The public is invited to submit written statements to the Committee. Written statements should be received on or before March 1, 2023.

Written statements may be submitted by any of the following methods:

Electronic Statements

- Use the Commission's internet submission form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email message to *rules-comments@sec.gov.* Please include File No. 265–28 on the subject line; or

Paper Electronic Statements

- Send paper statements to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. 265–28. This file number should be included on the subject line if email is used. To help us process and review your statement more efficiently, please use only one method.

Statements also will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Room 1503, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All statements 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.

MATTERS TO BE CONSIDERED: The agenda for the meeting includes: welcome and introductory remarks; opening remarks; introduction of the new Investor Advocate; approval of previous meeting minutes; a panel discussion examining the growth of private markets relative to the public markets; a panel discussion regarding the oversight of investment advisers; a panel discussion regarding the open-end fund liquidity risk management/swing pricing rule proposal; a discussion of a recommendation regarding improving customer account statements to better serve investors; subcommittee reports; access and inclusion working group report, and a non-public administrative session.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Authority: 5 U.S.C. 552b.

Dated: February 21, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–03873 Filed 2–21–23; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34836; File No. 812–15356]

The RBB Fund, Inc., et al.

February 17, 2023.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

SUMMARY OF APPLICATION: Applicants request an order (''Order'') that permits: (a) The Funds (as defined in the Applicants' application) to issue shares (''Shares'') redeemable in large aggregations only (''creation units''); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value; (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; and (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of creation units. The relief in the Order would incorporate by reference terms and conditions of the same relief of a previous order granting the same relief sought by applicants, as that order may be amended from time to time (''Reference Order'').[1]

APPLICANTS: The RBB Fund, Inc.; Summit Global Investments, LLC; and Quasar Distributors, LLC.

FILING DATES: The application was filed on June 22, 2022, and amended on September 26, 2022, November 1, 2022, and November 29, 2022.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email, if an email address is listed for the relevant applicant below, or personally or by mail, if a physical address is listed for the relevant applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on March 14, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Steven Plump, The RBB Fund, Inc., *splump@rbbfund.com;* Jillian L. Bosmann, Esq., Faegre Drinker Biddle & Reath LLP, *jillian.bosmann@faegredrinker.com.*

FOR FURTHER INFORMATION CONTACT: Stephan N. Packs, Senior Counsel, or Terri G. Jordan, Branch Chief, at (202) 551–6825 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal

[1] Blue Tractor ETF Trust and Blue Tractor Group, LLC, Investment Company Act Rel. Nos. 33682 (Nov. 14, 2019) (notice) and 33710 (Dec. 10, 2019) (order).

analysis, and conditions, please refer to Applicants' third amended and restated application, dated November 29, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03777 Filed 2–22–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96940; File No. SR–MRX–2022–30]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Withdrawal of Proposed Rule Change To Amend Options 7, Section 7 To Add Market Data Fees

February 16, 2023.

On December 19, 2022, Nasdaq MRX, LLC (''MRX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 [1] and Rule 19b–4 thereunder,[2] a proposed rule change to assess market data fees. The proposed rule change was published for comment in the **Federal Register** on December 28, 2022.[3]

On February 6, 2023, MRX withdrew the proposed rule change (SR–MRX–2022–30).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[4]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03696 Filed 2–22–23; 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. 96561 (December 21, 2022), 87 FR 79915.

[4] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96944; File No. SR–NYSE–2023–11]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 7.44 Relating to the Retail Liquidity Program

February 16, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on February 14, 2023, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify Rule 7.44 relating to the Retail Liquidity Program. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify Rule 7.44, which sets forth the Exchange's Retail Liquidity Program (the ''Program'').[4] The purpose of the Program is to attract retail order flow to the Exchange and allow such order flow to receive potential price improvement. Under Rule 7.44, a class of market participants called Retail Liquidity Providers (''RLPs'') and non-RLP member organizations are able to provide potential price improvement to retail investor orders in the form of a non-displayed order that is priced better than the best protected bid or offer, called a Retail Price Improvement Order (''RPI Order'').[5] When there is an RPI Order in a particular security, the Exchange disseminates an indicator, known as the Retail Liquidity Identifier, that such interest exists.[6] Retail Member Organizations (''RMOs'') can submit a Retail Order to the Exchange, which interacts, to the extent possible, with available contra-side RPI Orders and then may interact with other liquidity on the Exchange or elsewhere, depending on the Retail Order's instructions.[7] The segmentation in the Program allows retail order flow to receive potential price improvement as a result of their order flow being deemed more desirable by liquidity providers. The Exchange recently modified the Program to be available for all securities traded on the Exchange.[8]

Rule 7.44(k) currently describes the operation of a Retail Order pursuant to the Program, which is defined in Rule 7.44(a)(3) as an agency order or a riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by an RMO, provided that no change is made to the

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Program was established on a pilot basis in 2012 and was approved by the Commission to operate on a permanent basis in 2019. *See* Securities Exchange Act Release No. 85160 (February 15, 2019), 84 FR 5754 (February 22, 2019) (SR–NYSE–2018–28). In connection with the Commission's approval of the Program on a pilot basis, the Commission granted the Exchange's request for exemptive relief from Rule 612 of Regulation NMS, 17 CFR 242.612 (the ''Sub-Penny Rule''), which, among other things, prohibits a national securities exchange from accepting or ranking orders priced greater than $1.00 per share in an increment smaller than $0.01. *See* Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR–NYSE–2011–55). The Exchange notes that the change proposed in this filing has no substantive impact under the Sub-Penny Rule and thus does not require an update or revision to the exemptive relief previously granted by the Commission.

[5] *See* Rules 7.44(a)(1) (defining an RLP) and 7.44(a)(4) (defining RPI Order).

[6] *See* Rule 7.44(j).

[7] *See* Rule 7.44(a)(2) (defining RMO); Rules 7.44(a)(3) and 7.44(k) (describing Retail Orders).

[8] *See* Securities Exchange Act Release No. 96112 (October 20, 2022), 87 FR 64831 (October 26, 2022) (SR–NYSE–2022–47) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7.44).

terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. Rule 7.44(k) provides that a Retail Order is a non-routable Limit IOC Order to buy (sell) that will trade only with available RPIs to sell (buy) and all other orders to sell (buy) with a working price below (above) the PBO (PBB) on the Exchange Book. Any quantity of a Retail Order to buy (sell) that does not trade with eligible orders to sell (buy) will be immediately and automatically cancelled. Rule 7.44(k) further provides that a Retail Order will be rejected on arrival if the PBBO is locked or crossed and may not be designated with a minimum trade size modifier (''MTS Modifier'').[9]

The Exchange now proposes to permit Retail Orders to be designated with an MTS Modifier and, accordingly, proposes to modify the last sentence of Rule 7.44(k) to reflect this change. The proposed change is intended to provide RMOs with the option to designate Retail Orders with a minimum trade size if they so choose. The Exchange believes that the proposed change would provide additional flexibility to RMOs entering Retail Orders, which could encourage retail order flow to the Exchange and promote additional opportunities for price improvement for such orders. The Exchange notes that the proposed change would not otherwise impact the operation of Retail Orders as set forth in current Exchange rules and would simply make an existing modifier available for use with Retail Orders. The Exchange also believes that the proposed change would allow it to compete with other exchanges' retail price improvement programs that permit retail orders to be designated with a minimum trade size.[10]

The Exchange also proposes non-substantive clarifying changes to Rules 7.44(a)(3) and 7.44(a)(4)[11] relating to the size of Retail Orders and RPI Orders. Rules 7.44(a)(3) and 7.44(a)(4)(E) currently include text providing that Retail Orders and RPI Orders, respectively, may be an odd lot, round lot, or mixed lot. The Exchange now proposes to delete such rule text as extraneous because Exchange rules already provide that orders may be entered in any size unless otherwise specified.[12]

Subject to the effectiveness of this proposed rule change, the Exchange will implement this change no later than in the second quarter of 2023 and announce the implementation date by Trader Update.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[13] in general, and furthers the objectives of Section 6(b)(5),[14] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes the proposed change would remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, protect investors and the public interest by allowing RMOs the option to designate Retail Orders with a minimum trade size, which could attract additional retail order flow to the Exchange, thereby promoting additional opportunities for price improvement and order execution on the Exchange and promoting competition with other exchanges operating retail price improvement programs that allow retail orders to be designated with a minimum trade size.[15] The Exchange also believes that the proposed change would remove impediments to, and perfect the mechanism of, a free and open market and a national market system and promote just and equitable principles of trade because it would permit the use of the existing MTS Modifier with Retail Orders and would not otherwise impact the operation of Retail Orders as provided under current Exchange rules. The Exchange further believes that the proposed clarifying changes to Rule 7.44 would remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, protect investors and the public interest because they are intended only to streamline Exchange rules and would not impact the operation of existing Exchange rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that, to the extent the proposed change encourages RMOs to direct additional Retail Orders to the Exchange and increases opportunities for price improvement and order execution, the proposed change would promote competition by making the Exchange a more attractive venue for order flow and enhancing market quality for all market participants. The Exchange also believes that the proposed change would promote competition with retail price improvement programs on other equities exchanges that permit retail orders to be designated with a minimum trade size.[16]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[17] and Rule 19b–4(f)(6) thereunder.[18] Because the foregoing proposed rule change does not: (i) significantly affect the protection

[9] *See* Rule 7.31(i)(3) (providing that the MTS Modifier designates an order with a minimum trade size and an order with an MTS Modifier will be rejected if the MTS is less than a round lot or if the MTS is larger than the size of the order). The Exchange notes that the rule text currently providing that a Retail Order may not be designated with an MTS Modifier was introduced in connection with the Exchange's transition to the Pillar trading platform and was intended to ensure that Exchange rules continued to accurately reflect the operation of Retail Orders (as established prior to such transition). *See* Securities Exchange Act Release No. 85930 (May 23, 2019), 84 FR 25100 (May 30, 2019) (SR–NYSE–2019–26) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change of New Rule 7.44 To Operate Its Retail Liquidity Program on Pillar, the Exchange's New Technology Trading Platform).

[10] *See, e.g.,* Investors Exchange LLC (''IEX'') Rules 11.190(b)(9)(G), 11.190(b)(10)(G), and 11.232(a)(2) (providing that a Retail order may be a Discretionary Peg order or Midpoint Peg order, either of which may be designated with a minimum trade size). The Exchange notes that IEX's retail improvement program differs from the NYSE RLP in that the IEX program is designed to provide price improvement at the midpoint but does not believe that difference to be meaningful with respect to the ability to designate a retail order with a minimum trade size.

[11] The Exchange also proposes a non-substantive change to Rule 7.44(a)(4)(A) to improve the clarity of the rule text, with no change to the operation of the rule.

[12] *See* Rule 7.38(a).

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] *See* note 10, *supra.*

[16] *Id.*

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6).

of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [19] and subparagraph (f)(6) of Rule 19b–4 thereunder.[20]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [21] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2023–11 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–NYSE–2023–11. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2023–11 and should be submitted on or before March 16, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03699 Filed 2–22–23; 8:45 am]

BILLING CODE 8011–01–P

[19] 15 U.S.C. 78s(b)(3)(A)(iii).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17787 and #17788; Illinois Disaster Number IL–00077]

Administrative Declaration of a Disaster for the State of Illinois

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Illinois dated 02/16/2023.

Incident: Harper Square Cooperative Apartment Building Fire.

Incident Period: 01/25/2023.

DATES: Issued on 02/16/2023.

Physical Loan Application Deadline Date: 04/17/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 11/16/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Cook.

Contiguous Counties:

Illinois: DuPage, Kane, Lake, McHenry, Will.

Indiana: Lake.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	4.625
Homeowners without Credit Available Elsewhere	2.313
Businesses with Credit Available Elsewhere	6.610
Businesses without Credit Available Elsewhere	3.305
Non-Profit Organizations with Credit Available Elsewhere	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	3.305
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 17787 5 and for economic injury is 17788 0.

The States which received an EIDL Declaration # are Illinois, Indiana.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2023–03674 Filed 2–22–23; 8:45 am]

BILLING CODE 8026–09–P

SURFACE TRANSPORTATION BOARD

30-Day Notice of Intent To Seek Extension of Approval: Class I Railroad Annual Report

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the

Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the collection of Class I Railroad Annual Reports, as described below.

DATES: Comments on this information collection should be submitted by March 27, 2023.

ADDRESSES: Written comments should be identified as ''Paperwork Reduction Act Comments, Class I Railroad Annual Report.'' Written comments for the proposed information collection should be submitted via *www.reginfo.gov/public/do/PRAMain.* This information collection can be accessed by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. As an alternative, written comments may be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Michael J. McManus, Surface Transportation Board Desk Officer: via email at *oira_submission@omb.eop.gov;* by fax at (202) 395–1743; or by mail to Room 10235, 725 17th Street NW, Washington, DC 20503.

Please also direct all comments to Chris Oehrle, PRA Officer, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, or to *PRA@stb.gov.* When submitting comments, please refer to ''Statutory Authority to Preserve Rail Service.'' For further information regarding this collection, contact Pedro Ramirez at (202) 245–0333 or *pedro.ramirez@stb.gov.* Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Board previously published a notice about this collection in the **Federal Register** (87 FR 74206 (Dec. 2, 2022)). That notice allowed for a 60-day public review and comment period. No comments were received.

Comments are requested concerning: (1) the accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) 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, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Subjects: In this notice, the Board is requesting comments on the extension of the following information collection:

Description of Collection

Title: Class I Railroad Annual Report.

OMB Control Number: 2140–0009.

Form Number: R–1.

Type of Review: Extension without change.

Respondents: Class I railroads.

Number of Respondents: Seven.

Estimated Time per Response: No more than approximately 250 hours. This estimate includes time spent reviewing instructions; searching existing data sources; gathering and maintaining the data needed; completing and reviewing the collection of information; and converting the data from the carrier's individual accounting system to the Board's Uniform System of Accounts, which ensures that the information will be presented in a consistent format across all reporting railroads. In prior years, the estimate was higher, but many of these functions have become automated and more routine through the respondents' software programming. Thus, the time per response has been reduced, with additional technological efficiencies anticipated in the future.

Frequency of Response: Annual.

Total Annual Hour Burden: No more than approximately 1,750 hours annually.

Total Annual ''Non-Hour Burden'' Cost: The respondent carriers are required by statute to submit a copy of the annual report, signed under oath. *See* 49 U.S.C. 11145. A hard copy of the report is mailed to the agency at an estimated cost of $6.00 per respondent, resulting in a total annual non-burden-hour cost of approximately $42.00 for all seven respondents. No other non-hour costs for operation, maintenance, or purchase of services associated with this collection have been identified, as: (a) this collection will not impose start-up costs on respondents; and (b) an additional copy of the report in Excel format is submitted to the agency electronically.

Needs and Uses: Annual reports are required to be filed by Class I railroads under 49 U.S.C. 11145. The reports show operating expenses and operating statistics of the carriers. Operating expenses include costs for right-of-way and structures, equipment, train and yard operations, and general and administrative expenses. Operating statistics include such items as car-miles, revenue-ton-miles, and gross ton-miles. These reports are used by the Board, other Federal agencies, and industry groups to monitor and assess railroad industry growth, financial stability, traffic, and operations, and to identify industry changes that may affect national transportation policy. Information from these reports is also entered into the Uniform Railroad Costing System (URCS), which is the Board's general purpose costing methodology. URCS, which was developed by the Board pursuant to 49 U.S.C. 11161, is used as a tool in rail rate proceedings (in accordance with 49 U.S.C. 10707(d)) to calculate the variable costs associated with providing a particular service. The Board also uses information from this collection to more effectively carry out other regulatory responsibilities, including: acting on railroad requests for authority to engage in Board-regulated financial transactions such as mergers, acquisitions of control, and consolidations, *see* 49 U.S.C. 11323–24; analyzing the information that the Board obtains through the annual railroad industry waybill sample, *see* 49 CFR 1244; measuring off-branch costs in railroad abandonment proceedings, in accordance with 49 CFR 1152.32(n); developing the ''rail cost adjustment factors,'' in accordance with 49 U.S.C. 10708; and conducting investigations and rulemakings.

Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Information from certain schedules contained in these reports is compiled and published on the Board's website, *https://www.stb.gov/reports-data/economic-data/.* Information in these reports is not available from any other source.

Dated: February 17, 2023.

Regena Smith-Bernard,

Clearance Clerk.

[FR Doc. 2023–03788 Filed 2–22–23; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0057]

Commercial Driver's License: Pitt Ohio Express, LLC; Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received an application from Pitt Ohio Express, LLC (Pitt Ohio) to exempt its drivers from one of the requirements in the Agency's Safe Driver Apprenticeship Pilot (SDAP) program. Pitt Ohio is requesting to use drivers under the age 21 that have a Commercial Learner's Permit (CLP) to operate commercial motor vehicles (CMVs) in interstate commerce to participate in the SDAP program. If granted, Pitt Ohio believes it would have less difficulty recruiting drivers to participate in the program. FMCSA requests public comment on the applicant's request for exemption.

DATES: Comments must be received on or before March 27, 2023.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Number FMCSA–2023–0057 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* See the Public Participation and Request for Comments section below for further information.
- *Mail:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Each submission must include the Agency name and the docket number (FMCSA–2023–0057) for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

Privacy Act: In accordance with 49 U.S.C. 31315(b), DOT solicits comments from the public to better inform its exemption process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the system of records notice DOT/ALL 14–FDMS, which can be reviewed at *https://www.transportation.gov/privacy,* the comments are searchable by the name of the submitter.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards, FMCSA, at (202) 366–2722 or *richard.clemente@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Dockets Operations at (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2023–0057), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *www.regulations.gov* and put the docket number ''FMCSA–2023–0057'' in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, click the ''Comment'' button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The Agency must publish its decision in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption and the regulatory provision from which the exemption is granted. The notice must specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Background

Applicant's Request

Pitt Ohio is a less-than-truckload regional carrier which operates multiple straight trucks. The applicant seeks an exemption from the requirement in the Agency's SDAP program that an apprentice hold a CDL prior to enrolling in the program. Pitt Ohio requests the exemption to allow it to use CLP holders in the SDAP Program. These CLP holders would still need to meet all the remaining apprentice requirements, as well as the existing regulatory requirements for CLP holders (*e.g.* presence of a valid CDL holder in the passenger seat). If granted, Pitt Ohio estimates that 25 CLP holders would operate under the exemption a year. The applicant believes the exemption would relieve Pitt Ohio of the ''difficulty locating and recruiting apprentice drivers into [the] SDAP Program.''

A copy of Pitt Ohio's application for exemption is available for review in the docket for this notice.

IV. Request for Comments

In accordance with 49 U.S.C. 31315(b), FMCSA requests public comment from all interested persons on Pitt Ohio's application for an exemption from the requirement in the SDAP program that an apprentice already hold a CDL. FMCSA also seeks comment on whether this exemption should be limited to Pitt Ohio, or whether it should be drafted to apply to any SDAP program participating motor carrier that is currently listed as a certified training provider for purposes of the FMCSRs, or that enters into a partnership with a certified training provider. All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–03783 Filed 2–22–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0013]

Hours of Service of Drivers: Application for Exemption; Matthew Killmer

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that Matthew Killmer has requested an exemption from the hours-of-service (HOS) regulations to allow him to split his sleeper-berth time into two 5-hour periods. The applicant indicates that the exemption would allow him to be a more alert and well rested commercial motor vehicle (CMV) operator and allow him to find a safe place to park his CMV. FMCSA requests public comment on the applicant's request for exemption.

DATES: Comments must be received on or before March 27, 2023.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2023–0013 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* See the Public Participation and Request for Comments section below for further information.
- *Mail:* Docket Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice (FMCSA–2023–0013). Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; 202–366–2722 or *richard.clemente@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2023–0013), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *www.regulations.gov* and put the docket number, ''FMCSA–2023–0013'' in the ''Search'' box, and click ''Search.'' When the new screen appears, click on ''Documents'' button, then click the ''Comment'' button associated with the latest notice posted. Another screen will appear, insert the required information. Choose whether you are submitting your comment as an individual, an organization, or anonymous. Click ''Submit Comment.''

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and materials received during the comment period.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from certain Federal Motor Carrier Safety Regulations. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the

current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Background

Applicant's Request

Matthew Killmer requests an exemption from certain restrictions imposed in 49 CFR 395.1(g)(1)(i)(D) on the use of the sleeper berth to accumulate the required off-duty time under 49 CFR 395.3(a)(1). Section 395.1(g)(1)(i)(D), in relevant part, allows a driver operating a CMV equipped with a sleeper berth to obtain the required 10-hour rest period in a sleeper berth. To use this provision however, the driver must use a combination of sleeper berth time of not more than two periods of either sleeper berth time or a combination of off-duty time and sleeper berth time totaling ten hours if: (1) neither rest period is shorter than 2 hours; and (2) one rest period is at least 7 consecutive hours in the sleeper berth; and (3) driving time before and after each rest period, when added together does not exceed 11 hours under 395.3(a)(3) and does not violate the 14-hour duty-period limit under 395.3(a)(2). Mr. Killmer requests that he, and other drivers, be allowed to shorten the required 7 consecutive hour sleeper berth period to 5 hours to accumulate the required 10-hour rest period.

A copy of Matthew Killmer's application for exemption is included in the docket for this notice.

IV. Request for Comments

In accordance with 49 U.S.C. 31315(b), FMCSA requests public comment from all interested persons on Matthew Killmer's application for an exemption from the sleeper-berth provision in the HOS regulations in 49 CFR 395(g)(1)(i)(D). All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the Addresses section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable.

In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–03780 Filed 2–22–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2022–0199]

Hours of Service of Drivers: Application for Exemption; Wayne Moore, Jr.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition; denial of application for exemption.

SUMMARY: FMCSA announces its decision to deny the application from Wayne Moore, Jr. for an exemption from four provisions of the Federal hours-of-service (HOS) regulations. FMCSA analyzed the application and public comments and determined that the exemption would not achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; 202–366–2722 or *richard.clemente@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Viewing Comments and Documents

To view comments, go to *www.regulations.gov,* insert the docket number ''FMCSA–2022–0199'' in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''View Related Comments.''

To view documents mentioned in this notice as being available in the docket, go to *www.regulations.gov,* insert the docket number ''FMCSA–2022–0199'' in the keyword box, click ''Search,'' and chose the document to review.

If you do not have access to the internet, you may view the docket by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Background

Current Regulatory Requirements

To reduce the possibility of driver fatigue, FMCSA's HOS regulations in 49 CFR part 395 limit the time drivers of commercial motor vehicles (CMVs) may drive. The HOS regulations in 49 CFR 395.3(a)(1) prohibit driving after 11 hours driving or 14 consecutive hours on duty until the driver has been off duty for a minimum of 10 consecutive hours, or the equivalent of at least 10 consecutive hours. Under 49 CFR 395.3(a)(2), commonly referred to as the 14-hour ''driving window,'' a driver has 14 consecutive hours in which to drive up to 11 hours after being off duty for 10 or more consecutive hours. Section 395.3(a)(3)(ii) requires drivers to take a 30-minute break when they have driven

for a period of 8 cumulative hours without at least a 30-minute interruption. The break may be satisfied by 30 consecutive minutes of on-duty not driving, off duty, or sleeper berth time, or any combination of these taken consecutively. Section 395.3(b)(2) prohibits drivers for a motor carrier that operates CMVs every day of the week from driving a CMV after being on duty for 70 hours in any 8 consecutive days.

Applicant's Request

Mr. Moore requests a five-year exemption from 49 CFR 395.3(a)(1) and (2), 395.3(a)(3)(ii), and 395.3(b)(2). Mr. Moore is a CMV operator who has driven for over 25 years, and currently works for a large transportation company in Indiana. He states that he would like the ability to split off-duty time into periods that are more conducive to proper rest and sleep without having to comply with the HOS regulations. He also states that he has the ability to decide whether he is sufficiently rested to drive.

IV. Method To Ensure an Equivalent or Greater Level of Safety

The applicant believes that his level of safety under the exemption, if granted, would be better than he could achieve by complying with the HOS regulations because he would be able to get the proper rest when needed. He states that he can safely drive and knows when he is tired and has an excellent driving record, with no accidents or incidents and has never had any HOS violations.

V. Public Comments

On December 1, 2022, FMCSA published Mr. Moore's application and requested public comment (87 FR 73804). The Agency received 79 total comments, the majority from individual drivers and owner-operators. Thirty supported the request, 30 opposed it, and 18 commenters offered no position either for or against the request. The Truck Safety Coalition, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers made the following joint comment: ''[we] request this inadequately justified exemption to HOS requirements be denied in full. Large truck crash fatalities continue to increase at an alarming pace, and it is incumbent on the Department of Transportation and FMCSA to take every measure possible to reverse this trend and affirm life safety as its top priority by denying the request.'' General themes from other opposing comments included: (1) HOS rules do save lives and are there for everyone's safety; (2) the Agency cannot grant this request for individuals; and (3) there is no scientific data to support the HOS claims.

Commenters supporting the exemption suggested a graduated program that allowed more driving hours for drivers with more driving experience. One commenter said: ''I feel that the FMCSA should take a 3-step approach to the hours-of-service requirements and implement rules for 5–10–15 year drivers who have demonstrated a level of safety equal to or greater than what was achieved with the hours of service.'' None of the commenters who supported the exemption request presented relevant data or reasoning to demonstrate how an equivalent level of safety would be met if the exemption were granted. Those taking no position either for or against Mr. Moore's application provided general comments and complaints about the HOS and the Electronic Logging Device regulations and suggested that the Agency needs to revise them.

VI. FMCSA Safety Analysis and Decision

After evaluating Mr. Moore's application and the public comments, FMCSA denies the exemption request. Under 49 U.S.C. 31315(b)(1), to grant an exemption, FMCSA must ''find that the exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' Among other requirements, 49 CFR 381.310(c)(5) requires a person seeking an exemption to explain how it would ensure that it could achieve an equivalent level of safety. Mr. Moore failed to explain how he would maintain a level of safety equivalent to, or greater than, the level achieved without the exemption. Although Mr. Moore stated that he would be responsible for ensuring that he has adequate rest and that he has an excellent driving record and no HOS violations, those representations do not provide a basis from which the Agency could conclude that the proposed exemption would provide an equivalent level of safety.

The Agency's HOS regulations are designed to prevent fatigued drivers from operating by imposing limits on when and how long an individual may drive, to ensure that drivers stay awake and alert, and to reduce the possibility of cumulative fatigue (85 FR 33396, Sept. 29, 2020). A fatigued driver is more prone to perform poorly on tasks requiring the vigilance and decision-making needed to operate a CMV safely than a person who is alert. The Agency also agrees with commenters who argued that exempting one individual from the HOS regulations could open the door for a huge number of similar exemption requests. Such a result would be inconsistent with a primary goal of the HOS regulations.

For the reasons stated, FMCSA denies Wayne Moore, Jr.'s exemption application.

Robin Hutcheson,

Administrator.

[FR Doc. 2023–03688 Filed 2–22–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA–2022–0020]

National Transit Database Safety and Security Reporting Changes and Clarifications

AGENCY: Federal Transit Administration, United States Department of Transportation (DOT).

ACTION: Final notice; response to comments.

SUMMARY: This Notice finalizes and responds to comments on proposed changes and clarifications to the National Transit Database (NTD) Safety and Security (S&S) reporting requirements published in the **Federal Register** on July 15, 2022.

DATES: The S&S–60 reporting requirements will take effect beginning in NTD Report Year (RY) 2023, which corresponds to an agency's fiscal year, while all changes to the S&S–40 and S&S–50 will take effect in Calendar Year (CY) 2023.

FOR FURTHER INFORMATION CONTACT: Thomas Coleman, Analysis Division Chief, FTA Office of Budget and Policy, (202) 366–5333, *thomas.coleman@dot.gov.*

SUPPLEMENTARY INFORMATION:

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A. Background

The National Transit Database (NTD) is the Federal Transit Administration's (FTA) primary database for statistics on the transit industry in the United States. Pursuant to 49 U.S.C. 5334(k), FTA published a notice in the **Federal Register** on July 15, 2022, (87 FR 42539) seeking public comment on proposed changes and clarifications to NTD Safety & Security (S&S) reporting requirements. The comment period closed on September 13, 2022.

The proposed updates to NTD S&S reporting requirements implement changes to Federal transportation law made by the Bipartisan Infrastructure Law, enacted as the Infrastructure Investment and Jobs Act (Pub. L. 117–58). FTA proposed changes and clarifications on two topics: (1) assaults on a transit worker; and (2) fatalities that result from an impact with a bus. FTA received 24 comments from 8 unique commenters. One comment was outside the scope of the proposal and is not addressed in this document.

B. Assaults on a Transit Worker

Twenty-three comments addressed elements of FTA's proposals regarding assaults on a transit worker, including related definitions. FTA's proposals stemmed from changes to 49 U.S.C. 5335(c), following enactment of the Bipartisan Infrastructure Law.

1. Definitions

Comments: FTA received three comments in response to its proposal to change the definition of ''assault.'' One of these comments expressed that FTA should adopt an existing definition of assault, such as the one used by the Federal Bureau of Investigation's (FBI) National Incident-Based Reporting System, rather than adopting a new definition. A second comment requested that FTA amend its definition of ''assault'' to align it with State law, saying that the proposed definition is too vague and would include assaults that were not criminally prosecutable. The last comment requested that FTA revise its definition of ''assault'' to include ''an act of interference with a transit worker's performance of their duties,'' emphasizing that this definition should capture any interference with a transit worker such as verbal assaults, and that this is a low threshold for what constitutes an assault.

FTA Response: FTA appreciates the comments received on its proposed definition of ''assault.'' Prior to the enactment of the Bipartisan Infrastructure Law, the NTD specified a definition of ''assault.'' Congress then amended 49 U.S.C. 5302, adding a definition of ''assault on a transit worker.'' However, Congress did not define ''assault.''

FTA proposed changing the NTD's definition of ''assault'' to ''an attack by one person on another without lawful authority or permission'' to ensure consistency with the new statutory definition of ''assault on a transit worker.'' ''Although this definition is potentially broader than how assault'' is defined under State law, this change is necessary to ensure the definition is consistent with the statute. For this reason, FTA declines to adopt the suggestion that the NTD use a different definition of ''assault,'' such as the definition in the FBI's National Incident-Based Reporting System.

FTA notes that a definition of ''assault'' is necessary to collect data on attacks against individuals other than transit workers (*e.g.,* an attack on a bus by one passenger on another) when such events meet an NTD reporting threshold. FTA's new definition of ''assault'' (as applied to all individuals) is not identical to the definition of ''assault on a transit worker.'' FTA recognizes that transit workers face unique challenges that make identical definitions for these terms impractical. For instance, the statutory definition of ''assault on a transit worker'' includes ''interfere[ence] with . . . a transit worker while the transit worker is performing the duties of the transit worker,'' which would not apply to assaults on individuals who are not transit workers. This is because passengers and other non-transit workers would not have official duties where interference could occur. Moreover, passengers interact or potentially interfere with each other's activities in other contexts that would not qualify as an assault (*e.g.,* standing across an entire escalator step). FTA therefore declines to adopt the suggestion to include ''an act of interference with a transit worker's performance of their duties'' in the definition of ''assault.'' However, FTA notes that the NTD is adopting the statutory definition of ''assault on a transit worker'' verbatim. Accordingly, assaults on transit workers involving interference are reportable on either the S&S–40, S&S–50, or S&S–60. Thus, FTA is adopting the definition of ''assault'' as proposed.

Comments: FTA received two comments regarding the definition of ''assault on a transit worker.'' One comment supported FTA's adoption of the statutory definition of ''assault on a transit worker'' found in 49 U.S.C. 5302(1). The second comment provided legislative history about the statutory definition and emphasized that the key phrase in this definition is ''interferes with,'' noting that this is a low threshold.

FTA Response: FTA appreciates the comments received about the definition of ''assault on a transit worker.'' As discussed in the **Federal Register** notice published on July 15, 2022, FTA did not seek comment on this definition. FTA will incorporate the statutory definition into the NTD without change.

Comments: FTA received two comments on the proposed definition of ''transit worker.'' One commenter expressed support for the definition of ''transit worker,'' noting the importance of including assaults on contractors and volunteers, while also noting that the change would require them to make changes to an internal database. One comment recommended that FTA use the definition of ''transit employee'' from the NTD Safety and Security Policy Manual instead of developing a new definition of ''transit worker.'' This commenter also requested that, if FTA adopts the proposed definition of ''transit worker,'' FTA clarify that the definition applies only to NTD reporting of assaults on a transit worker.

FTA Response: FTA appreciates the comments about this proposal and recognizes that this change may require transit agencies to update existing processes. FTA is not replacing the definition of ''transit employee'' but is adding a definition for ''transit worker.'' The NTD Safety and Security (S&S) manual states that transit employees are ''compensated by the transit agency,'' which does not meet FTA's intent to capture assaults on any volunteer for the transit agency in addition to those compensated by the agency. Further, FTA currently uses ''employee'' in the context of reporting Employee hours and counts annually on the Employees (R–10) form. Expanding the definition of transit employee to include volunteers would require additional notice for purposes of annual NTD reporting. Therefore, these will be separate terms. FTA confirms that the NTD will only use the term ''transit worker'' in the context of transit worker assault reporting. FTA will adopt the definition of ''transit worker'' as proposed.

2. Collections

Comment: One comment suggested that FTA should require all grant recipients to report any incident in which a transit worker has experienced interference while performing their job duties. As discussed above, the commenter also provided legislative history regarding the statutory definition of ''assault on a transit worker,'' emphasizing the importance of the ''interferes with'' language in the definition.

FTA Response: FTA agrees that all assaults on transit workers involving interference are assaults that are reportable on either the S&S–40, S&S–50, or S&S–60. Regarding the requirements for reporting assaults, FTA notes that the collection of data is also dependent on a reporting agency's resources. For example, Full Reporters

use the S&S–40 and S&S–50, and smaller agencies generally complete the S&S–60. FTA will continue to review the data over time and potentially determine that smaller reporters must also complete the S&S–40 depending on future trends.

Comments: Three comments concerned the proposed collection and availability of safety data for reporting purposes. One comment noted the importance of making data on assaults available to transit agencies, workers, academics, unions, and FTA in order to identify strategies to combat the threat of assault in transit systems. The second comment concerned the format of NTD data products. This commenter requested that the NTD provide data users the ability to create and export data products. The commenter noted that such capabilities would allow transit agencies to more efficiently analyze safety and security information. The third comment noted that ensuring valid data collection ''will require new or additional promotional efforts'' and that ''FTA should assist agencies in promoting assault awareness and reporting.''

FTA Response: While the Bipartisan Infrastructure Law does not include mandates to change data products, such as adding export functionality, FTA understands this concern. FTA appreciates the recommendation and has taken steps to improve our data products to meet individual data user needs. For instance, FTA recently published an enhanced safety and security dataset that offers export functionality here: *https://data.transportation.gov/Public-Transit/Major-Safety-Events/9ivb-8ae9*.

Furthermore, FTA will continue to make iterative improvements to increase the usefulness of reports involving transit worker assaults and other safety and security data. FTA will also promote data reporting requirements via NTD Reporting Webinars via *https://transit.dot.gov/ntd* once the requirement takes effect. FTA is actively promoting assault awareness through its Enhanced Transit Safety and Crime Prevention Initiative. For more information on related funding eligibility, training on Assault Awareness and Prevention, and other resources, agencies may visit *https://www.transit.dot.gov/regulations-and-programs/safety/enhanced-transit-safety-and-crime-prevention-initiative.*

Comments: Two comments expressed concern about the potential burden that certain changes would create. One commenter noted that requiring State reporters, who complete reports on behalf of Rural Reporters, to report monthly S&S–50 forms may be a burden on staff resources and requested clarification about how this requirement and the S&S–60 requirement apply to State reporters. The commenter also suggested that State reporters only be required to submit data annually. Another commenter asked FTA to consider the capacity of smaller transit systems when implementing the new reporting requirements.

FTA Response: State reporters do not have to fill out a response to the S&S–50 form. State reporters, on behalf of Rural Reporters, will be required to submit the new S&S–60 form. FTA understands the limited staffing resources of State Departments of Transportation and smaller transit systems, and we have taken these concerns into consideration when creating the S&S–60. This form is completed once annually and collects summary data instead of detailed event reports.

Comment: One commenter asked which definitions would apply to certain terms used in the S&S–50 and S&S–60 transit worker assault reporting fields. Regarding the S&S–60, the commenter asked whether FTA is using the existing definition of the terms ''revenue facility'' and ''non-revenue facility'' from the NTD Safety and Security Policy Manual. The commenter also requested clarification on what should be included in reporting for ''other location.'' Regarding terms used on the S&S–50 form, the commenter asked if transit agencies should use the definition of ''transit vehicle operator'' in the NTD Safety and Security Policy Manual when reporting for ''operators.'' The commenter also asked for clarification regarding which individuals should be captured in the reporting for ''other transit workers.'' The commenter requested confirmation that there are no additional changes to existing definitions.

FTA Response: FTA's intent is for the S&S forms to capture data and leverage existing NTD definitions wherever practicable. FTA confirms that the term ''revenue facility'' and ''non-revenue facility'' used in the transit worker assault reporting fields in the S&S–50 and S&S–60 will align with the existing definitions of those terms listed in the NTD Safety and Security Policy Manual. Specifically, ''Revenue Facility'' will include all areas defined in the 2022 NTD S&S Reporting Policy Manual with the ''Revenue Facility'' prefix (*e.g.,* Revenue Facility: Transit Center/Station or Terminal). Non-Revenue Facility will include all areas defined in the S&S–50 section of the manual as ''Non-Revenue Facility.'' ''Other Locations'' will include all areas defined in the S&S–50 section of the manual as ''Other.''

In response to comments, FTA will provide clarifications in certain data fields to ensure consistent data collection and curation. To provide additional clarification on assaults on ''other transit workers,'' FTA will add parenthetical examples to related fields in the S&S–50 and S&S–60 forms. In the NTD S&S Reporting Manual, instead of ''other worker'' and ''other transit staff'' person types on the S&S–40, S&S–50, and S&S–60, FTA may use ''other worker (*e.g.,* commercial worker, utilities worker, transit police, station agent, etc.)'' or ''other transit staff (*e.g.,* transit police, station agent, etc.).''

Similarly, to clarify ''other'' location, FTA will add a parenthetical example to related reporting fields on the S&S–50 and S&S–60. Thus, instead of ''other,'' the reporting fields will read ''other: *e.g.,* city street.'' In addition, FTA confirms that the references to ''operator'' in the new S&S questions refer to transit vehicle operators as defined in the NTD Safety and Security Policy Manual. FTA also confirms that it has not made any other changes to existing definitions.

Comments: FTA received five comments regarding separating physical and non-physical transit worker assault data. One comment opposed FTA's proposal to require separate reporting of physical and non-physical transit worker assaults, noting no such distinction should be made, especially if it could be used to ''artificially deflate the number of assaults counted at each agency.'' The second asked for additional guidance to clarify the distinction between physical and non-physical assaults. The commenter requested clarification on whether spitting would be captured as a physical assault, and whether the use of pepper spray would be considered a weapon. The third noted the importance of collecting both physical and other forms of assault (*e.g.,* non-physical) data. The fourth asked FTA to instruct grant recipients to track all physical and non-physical transit worker assaults and report these data to the NTD. The fifth commenter stated that the headers (fields) on the S&S–50 table ''appear to repeat the content.''

FTA Response: As proposed, the S&S–40, S&S–50, and S&S–60 will collect and distinguish assaults on transit workers that were physical from non-physical assaults. Data users can then combine or separate the data as they need. While FTA cannot address the concern that statistics may be misused by data consumers to ''artificially deflate'' the number of assaults, FTA

will include clear labels and respective data definitions wherever assaults (or components thereof) appear in NTD data publications. In response to the comment requesting further guidance about the distinction between these two types of assault, FTA notes that FTA's S&S–40 proposal contains definitions of ''physical'' and ''non-physical'': to be considered ''physical,'' an assault requires physical contact with the transit worker. This could include any physical contact with the victim from the attacker's body, a weapon, a projectile, or other item. A non-physical assault is an assault in which the attack involves no physical contact with the transit worker. This could include threats or intimidation that did not result in any physical contact with the transit worker. FTA confirms that these definitions also apply to the S&S–50 and S&S–60 forms. These definitions will assist agencies as they record and report these data. For instance, an assault where someone spits on a transit worker would be reported as a physical assault, while an assault involving spitting near, but without making contact with, the transit worker (*e.g.,* spitting on an operator compartment barrier) would be reported as a non-physical assault. In all cases, agencies are required to track and report transit worker assault data to the NTD, either on the S&S–40, S&S–50, or S&S–60 form, as applicable. FTA also confirms that no data collection is repeated in columns the S&S–50 table as stated by the fifth commenter.

Comment: One comment requested that FTA require reporting of non-major assault data on the S&S–50 and S&S–60 that would be more expansive than what FTA proposed, noting that the additional data is ''vital to all transit stakeholders' understanding of what kinds of assaults are occurring and how transit agencies can prevent them.'' The commenter requested data collection for the following:

- ''The type of incident that occurred (*i.e.* a physical attack, verbal harassment, a threat of violence, an incidence of spitting, etc.)
- If the assailant used a weapon, what type of weapon it was
- The time of day at which the assault occurred
- The location of the assault
- Whether there was a response from law enforcement and, if so, from what agency or agencies
- For assaults occurring on transit vehicles, whether the vehicle was equipped with a barrier or other anti-assault infrastructure—and if so, what kind.''

FTA Response: FTA's transit worker assault reporting proposal for non-major assaults would require transit agencies to report counts of transit worker assaults conforming to three categories of data. These categories (*i.e.,* dimensions) require reporters to separate transit worker assaults based on (1) physical vs. non-physical, (2) operators vs. other transit workers, and (3) different location categories for where the assault occurs. FTA will adopt these dimensions as proposed, with one optional addition.

FTA recognizes that requiring reporting of additional data categories on the S&S–50 and S&S–60 can impose an additional reporting burden. Nevertheless, FTA agrees with the commenter that reporting of additional details about non-major assaults is necessary for FTA, transit agencies, and transit workers to gain a better understanding of these events and how to prevent them. As a result, FTA will add an open text field on the S&S–50 and S&S–60 forms that will allow agencies to report additional details associated with their summaries of transit worker assaults. The field will be optional; agencies can choose how much additional detail to provide, if any. For instance, agencies could use the open text field to provide details on the times of day assaults took place, whether transit vehicles involved in assaults were equipped with anti-assault infrastructure (*e.g.,* operator compartment barrier, silent alarm, audio/video surveillance, etc.), whether assaults involved physical attacks, verbal harassment, threats of violence, incidences of spitting, whether assaults involved weapons, whether law enforcement responded to assaults, or any other information they choose to report.

Gathering additional details on non-major transit worker assaults via the open text field is critical for FTA to identify risk factors and potential near-term mitigations to reduce the risk of transit worker assault by identifying more precise categories to classify the assaults in the future. FTA will monitor the initial data collected on transit worker assaults, including additional details provided by transit agencies in the open text field, to identify risk factors related to transit worker assault. In the future, FTA may propose additional data fields to strengthen its understanding of factors associated with transit worker assault that may help inform further mitigations to protect transit workers.

Comments: Two commenters emphasized that assault reporting should distinguish assaults on transit workers from assaults on transit riders.

FTA Response: FTA notes that the proposed assault reporting requirements on the S&S–40, S&S–50, and S&S–60 will result in data that distinguishes assaults on transit workers from other events. Compared to the status quo, these data will provide FTA and other stakeholders with information specifically about assaults on transit workers.

Regarding assaults on transit riders, FTA did not propose to collect data on non-major assaults on persons other than transit workers, such as riders. This is consistent with the Bipartisan Infrastructure Law, which only requires the NTD to collect data on assaults on transit workers. As such, FTA will not change the data collection proposed.

FTA notes that the S&S–40 already captures data related to assaults on riders. The S&S–40 collects more data than the S&S–50 and applies to major events (*e.g.,* fatalities). The S&S–40 currently captures additional details about such events, such as person type: ''transit vehicle rider.'' FTA understands concerns that the S&S–50 also could capture non-major event data on transit rider assaults. However, FTA's approach will follow the legislative requirement to collect data on all transit worker assaults, while also continuing to collect data on transit rider assaults that meet the threshold of ''major events.''

Comments: Two comments sought clarification on reporting thresholds for the S&S–40 and S&S–50 forms. One comment asked whether reporting thresholds for the S&S–40 and the S&S–50 would change.

FTA Response: The S&S–40 thresholds will not change. The form will continue to require reporting only of major events, as defined by the NTD Safety and Security Policy Manual. The reporting thresholds of the S&S–50 will change to include any assault on a transit worker that is not covered in the S&S–40. FTA has chosen to limit the amount of data collected on non-major assaults (as it currently does with non-major events) to prevent excess burden on reporting agencies; as such, reporting of non-major assaults will not require details included in major event reports like the time of day of each event, weather, right-of-way configuration, and detailed event description.

Comment: One comment asked FTA to augment the collection of incident data on the S&S–50 and S&S–60 to include data about assaults on station agents (*i.e.,* ticket agents, station clerks, etc.), noting that station agents face unique hazards as frontline transit

workers that engage directly with the public.

FTA Response: FTA appreciates this comment and recognizes that station agents can be victims of assault due to their customer-facing role. Under FTA's proposal, data about assaults on station agents would be collected through the assaults on ''other transit workers'' field. Requiring transit agencies to report separate data for station agents, as opposed to ''operator'' and ''other worker,'' would place an unnecessary burden on transit agencies in data collection; unlike operators, there may not be a roster of station agents updated regularly enough to accommodate monthly safety reporting. Therefore, FTA is not changing this data dimension at this time.

Comment: One comment requested that FTA require transit agencies to maintain anonymous reporting procedures for their workforce to help prevent the underreporting of non-major transit worker assaults. The commenter noted that without an anonymous reporting.mechanism, transit workers may fail to report non-major assaults due to fear of retaliation. The commenter further expressed that the Public Transportation Agency Safety Plan (PTASP) Safety Committees and risk reduction programs required by the Bipartisan Infrastructure Law would be able to function only if NTD data about assaults on transit workers is usable and complete.

FTA Response: Pursuant to the PTASP regulation (49 CFR part 673), applicable transit agencies must establish a process that allows employees to report safety conditions to senior management and protections for employees who make such reports. Transit agencies may establish employee safety reporting procedures and mechanisms to facilitate anonymous reporting of safety concerns; however, the PTASP regulation does not require anonymous reporting processes. Any potential changes to PTASP employee reporting program requirements would occur through regulatory action distinct from the NTD reporting requirement updates addressed in this Notice.

FTA acknowledges that underreporting can be a challenge for data collection, especially for new data collection efforts. FTA notes that nothing in FTA's proposal prohibits transit agencies from creating anonymous safety-related reporting mechanisms. As such, FTA declines to require that transit agencies establish anonymous reporting processes.

After consideration of comments received, FTA will adopt the assault on a transit worker reporting requirements as proposed, with two changes: (a) FTA will provide clarifications in certain data fields to ensure consistent data collection and curation; and (b) FTA will add an optional open text field on the S&S–50 and S&S–60 forms that will allow agencies to report additional details associated with their summaries of transit worker assaults. The S&S–60 reporting requirements will take effect beginning in NTD Report Year 2023, which corresponds to an agency's fiscal year, while all changes to the S&S–40 and S&S–50 will take effect in Calendar Year 2023.

C. Fatalities That Result From an Impact With a Bus

Comments: FTA received two comments on the collection of bus fatality data. One of the two commenters supported the requirements as proposed. The other commenter requested that FTA require reporting of additional bus fatality data from Reduced, Rural, Tribal, and Capital Asset-only reporters, noting that Full Reporters are required to report detailed information about such events to the NTD, but other reporters are not. The commenter asked FTA to collect additional data on bus collision fatalities, including what part of the bus was impacted, the location of the collision, and the time and weather during the event.

FTA Response: FTA believes that the collection of data on the new S&S–60 form is sufficiently detailed as proposed and that requiring only summary data from Reduced, Rural, Tribal, and Capital Asset-only reporters is an appropriate mitigation of reporting burden. The summary S&S–60 form collects collisions with pedestrians, collisions with vehicles, collisions with other (*e.g.,* animals), injuries, and other major events separately. FTA will reevaluate the collection of summary data in the future and, depending on trends, may at a later date propose that some of these reporter types complete S&S–40 event report forms.

Regarding collecting additional details on bus collision fatalities, FTA does not collect data on the physical part of the bus involved in a bus fatality directly (*e.g.,* the bumper). However, FTA does collect data that can be used to infer certain parts involved.

Specifically, the S&S–40 event report form captures the vehicle ''action'' and the time of collision, which often corresponds to the part of the vehicle involved. For example, if a vehicle was going straight and collided with a pedestrian, that would typically involve the bumper. Collecting additional data about the part of the vehicle would add to the S&S–40 burden, which is already considerable as it is one of the longest NTD forms. FTA declines to make any other updates to the S&S–60 form.

After consideration of comments received, FTA will adopt the reporting requirements regarding fatalities that result from an impact with a bus as proposed. The S&S–60 reporting requirements will take effect beginning in NTD Report Year 2023, which corresponds to an agency's fiscal year.

Nuria I. Fernandez,

Administrator.

[FR Doc. 2023–03789 Filed 2–22–23; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0016]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval: Request for Comment; Consumer Complaint Information

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments on a reinstatement of a previously approved collection of information.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) summarized below is being forwarded to the Office of Management and Budget (OMB) for review and approval. The ICR describes the nature of the information collection and its expected burden. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on April 7, 2022. One comment was received.

DATES: Comments must be submitted on or before March 27, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection, including suggestions for reducing burden, should be submitted to the Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain.* To find this particular information collection, select ''Currently under Review—Open for Public Comment'' or use the search function.

FOR FURTHER INFORMATION CONTACT: For additional information or access to

background documents, contact Randy Reid, Office of Defects Investigation (NEF–100), 212–366–2315, National Highway Traffic Safety Administration, W48–335, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, email: *randy.reid@dot.gov.* Please identify the relevant collection of information by referring to its OMB Control Number (2127–0008).

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), a Federal agency must receive approval from the Office of Management and Budget (OMB) before it collects certain information from the public and a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. In compliance with these requirements, this notice announces that the following information collection request will be submitted OMB.

Title: Consumer Complaint Information.

OMB Control Number: 2127–0008.

Form Number: O.M.B No. 2127–0008.

Type of Request: Reinstatement of a previously approved information collection.

Type of Review Requested: Regular.

Length of Approval Requested: Three years from date of approval.

Summary of the Collection of Information:

Chapter 301 of title 49 of the United States Code authorizes the Secretary of Transportation (NHTSA by delegation) to require manufacturers of motor vehicles and motor vehicle equipment to conduct owner notification and remedy, *i.e.,* a recall campaign, when it has been determined that a safety defect exists in the performance, construction, components, or materials in motor vehicles and motor vehicle equipment. Pursuant to title 49 of the United States Code of Federal Regulations (CFR) parts 573 and 577, manufacturers are required to notify NHTSA, as well as motor vehicle and motor vehicle equipment owners, dealers, and distributors, that a determination has been made to remedy a defect through the issuance of a safety recall. Manufacturers often initiate safety recalls voluntarily, while other recalls are influenced by NHTSA investigations or ordered by NHTSA via a court ruling. A manufacturer of each such motor vehicle or item of replacement equipment presented for remedy pursuant to such notification is required to remedy the safety defect at no charge to the owner. The manufacturer shall cause the vehicle to be remedied by any of the following means: (1) by repairing such vehicle or equipment; (2) by replacing such motor vehicle or equipment with an identical or similar product; or (3) by refunding the purchase price less depreciation.

In order to help NHTSA identify safety-related defects, the agency solicits information from vehicle owners. This information is used to identify and evaluate possible safety-related defects and provide the necessary evidence of the existence of such a defect. NHTSA also uses the information to monitor the adequacy of a manufacturer's recall efforts. Consumers of motor vehicles or motor vehicle equipment voluntarily submit complaints through NHTSA's Vehicle Safety Hotline, NHTSA's website (*www.nhtsa.gov*), or through correspondence.

Description of the Need for the Information and Proposed Use of the Information:

NHTSA uses input from consumers to help identify potential safety-related defects that could lead to a safety recall or recall inadequacies. The complaints disclose consumers' allegations of a safety defect that they experienced with their vehicle or vehicle equipment, including defects that resulted in injuries, crashes, property damage, or death. All complaints are converted to a Vehicle Owner Questionnaire (VOQ) format and reviewed by NHTSA investigation/engineer staff. A NHTSA investigator may respond to a consumer submitting a complaint if more information is required. NHTSA staff review complaints/VOQs and determines whether further action by the agency is warranted. The agency has used this information to develop technical foundations of evidence with which to prove to manufacturers and a court that safety-related defects exist which require remedy. The information collection provides valuable information that helps NHTSA identify unreasonable safety risks in specific makes, models, and model years of vehicles and equipment and helps the agency determine when to open an investigation or initiate a recall. In this way, the information collection helps to reduce the number of crashes, fires, injuries, and fatalities that occur on our Nation's highways.

60-Day Notice:

On April 7, 2022, NHTSA published a 60-day notice requesting comment on NHTSA's intention to submit this ICR to OMB for approval (87 FR 20504). NHTSA received 1 comment, from the National Association of Mutual Insurance Companies (NAMIC). In its comment, NAMIC stated that it fully supports NHTSA's proposed collection of information as necessary and appropriate and states that it believes the information surveyed will have significant practical utility. NAMIC also stated that NHTSA's estimate of the burden and the quality, utility, and clarity of the information to be collected seem appropriate. NAMIC's comment also suggested that NHTSA consider regulations or recommendations to manufacturers that will ensure that the vehicle owner/policyholder can access and control vehicle data. NAMIC also provided a list of data elements for consideration in a regulation or recommendation.

We appreciate the comments and recommendations from NAMIC. However, the recommendations and suggestions regarding data availability are beyond the scope of the current information collection request. NHTSA will consider enhanced data collection and retrieval capabilities for vehicle owners and policy holders in future actions.

Affected Public: Consumers of motor vehicles and motor vehicle equipment.

Estimated Number of Respondents: 55,433.

There is an average of 58,350 complaints submitted per year (average of 160 complaints submitted each day). Some individuals submit multiple complaints to NHTSA. To estimate the total of unique respondents per year, NHTSA estimates that the number of unique respondents is 95 percent of the total number of complaints. Therefore, NHTSA estimates that there will be approximately 55,433 respondents each year (58,250 × .95).

Frequency: On-occasion.

The submission of complaints is triggered by the occurrence of a problem with a consumer's vehicle.

Number of Responses: 58,350.

Estimated Total Annual Burden Hours: 9,725 hours.

Respondents have averaged 58,350 consumer complaints per year to NHTSA between January 2018 and December 2020. NHTSA anticipates that a respondent can complete a VOQ in approximately 10 minutes. The consumer is asked to provide his/her name, complete mailing address, product information, failed component information, and incident information, copies of supporting documentation, and his/her signature. NHTSA estimates the total annual burden respondents to be 9,725 hours (58,350 respondents × 10 minutes per VOQ = 9,725 annual hourly burden). To calculate the opportunity cost to respondents associated with the collection, NHTSA used the national average hourly earnings of all employees on private nonfarm payrolls which the Bureau of Labor Statistics

lists at $30.44.[1] Therefore, opportunity cost associated with annual burden hours associated with respondents submitting complaints is estimated to be $296,029 (9,725 hours × $30.44 per hour = $296,029 annual opportunity cost burden).

TABLE 1—ANNUAL HOUR BURDEN ESTIMATES

Annual number of respondents/responses	Estimated time per response (minutes)	Average hourly opportunity cost	Opportunity cost per submission	Total annual burden hours	Total annual opportunity costs
58,350	10	$30.44	$5.07	9,725	$296,029

Estimated Total Annual Burden Cost: $0.

Participation in this collection is voluntary, and there are no costs to respondents beyond the time spent submitting a complaint.

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 the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. 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 1.49; and DOT Order 1351.29A.

Stephen Ridella,

Director, Office of Defects Investigation, NHTSA.

[FR Doc. 2023–03708 Filed 2–22–23; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2019–0224; Notice No. 2023–01]

Hazardous Materials: Notice of Public Meetings in 2023 for International Standards on the Transport of Dangerous Goods

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Hazardous Materials Safety, Department of Transportation (DOT).

ACTION: Notice of 2023 public meetings.

SUMMARY: This notice announces that PHMSA's Office of Hazardous Materials Safety will host four public meetings during 2023 in advance of certain international meetings. For each of these meetings, PHMSA will solicit public input on current proposals.

DATES: Each public meeting will take place approximately two weeks preceding the international meeting.

- The first meeting will be held in preparation of the International Civil Aviation Organization's (ICAO) Dangerous Goods Panel (DGP) Working Group 23 (WG/23) scheduled for May 15–19, 2023, in Rio de Janeiro, Brazil.
- The second meeting will be held in preparation of the 62nd session of the United Nations Sub-Committee of Experts on the Transport of Dangerous Goods (UNSCOE TDG) scheduled for July 3–July 7, 2023, in Geneva, Switzerland.
- The third meeting will be held in preparation of the 29th session of the ICAO DGP (DGP/29) scheduled for November 13–17, 2023, in Montreal, Canada.
- The fourth meeting will be held in preparation of the 63rd session of the UNSCOE TDG scheduled for November 27–December 6, 2023, in Geneva, Switzerland.

ADDRESSES: DOT Headquarters, West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. A remote participation option will also be available. Specific information for each meeting will be posted when available on the PHMSA website at *www.phmsa.dot.gov/international-program/international-program-overview* under ''Upcoming Events.'' This information will include the public meeting date, time, remote access login, conference dial-in number, and details for advanced registration.

FOR FURTHER INFORMATION CONTACT: Steven Webb or Aaron Wiener, PHMSA, U.S. Department of Transportation, by phone at 202–366–8553.

SUPPLEMENTARY INFORMATION: The purpose of PHMSA's public meetings held in advance of certain international meetings is to allow the public to give input on the current proposals being considered by the international standards setting bodies.

The 62nd and 63rd sessions of the UNSCOE TDG will represent the first round of meetings scheduled for the 2023–2024 biennium. The UNSCOE TDG will consider proposals for the 24th Revised Edition of the *United Nations Recommendations on the Transport of Dangerous Goods: Model Regulations* (Model Regulations), which may be implemented into relevant domestic, regional, and international regulations starting January 1, 2027. Copies of working documents, informal documents, the agenda, and the post-meeting final report may be obtained from the United Nations Transport Division's website at *www.unece.org/trans/danger/danger.html.*

The ICAO DGP–WG/23 and DGP/29 meetings will represent the second and final round of meetings of the 2022–2023 biennium. The ICAO DGP will consider proposals for the 2024–2025 edition of the *Technical Instructions for the Safe Transport of Dangerous Goods by Air* (Doc 9284). Copies of working papers, information papers, the agenda, and the post-meeting final report may be obtained from the ICAO DGP website at *www.icao.int/safety/DangerousGoods/Pages/DGPMeetings.aspx.*

Signed in Washington, DC, on February 17, 2023.

William S. Schoonover,

Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2023–03726 Filed 2–22–23; 8:45 am]

BILLING CODE 4910–60–P

[1] See Table B–3. Average hourly and weekly earnings of all employees on private nonfarm payrolls, June 2021, available at *https://www.bls.gov/news.release/empsit.t19.htm* (accessed September 16, 2021).

DEPARTMENT OF TRANSPORTATION

[Docket No. DOT–OST–2022–0120]

Agency Information Collection Activities: DOT Technical Assistance PRA

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requirements (ICR) 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 March 27, 2023.

ADDRESSES: You may send comments within 30 days of publication of this notice to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Attention DOT Desk Officer. All comments received are part of the public record. Comments will generally be posted without change. All comments should include the Docket number DOT–OST–2022–0120.

FOR FURTHER INFORMATION CONTACT: Please email *ThrivingCommunities@dot.gov* or contact Victor Austin at 202–366–2996. Office hours are from 8 a.m. to 5 p.m. EDT, Monday through Friday, except for Federal holidays.

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 November 22, 2022, OST published a 60-day notice (87 FR 71408) in the **Federal Register** soliciting comments on the ICR that the agency was seeking OMB approval. OST 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: DOT Technical Assistance PRA.

OMB Control Number: 2105–0584.

Background: Bipartisan Infrastructure Law (BIL) enacted as the Infrastructure Investment and Jobs Act (IIJA) (H.R. 3684, Public Law 117–58, also known as the Bipartisan Infrastructure Law or BIL) created several new programs at the US Department of Transportation (DOT) that allow local governments, non-profit organizations, tribal governments, and other political subdivisions of state or local governments to apply directly for DOT discretionary grant funding. In response to President Biden's Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government and Executive Oder 14008, Tackling the Climate Crisis at Home and Abroad, DOT has included criteria in its notices of funding opportunity to prioritize the needs of disadvantaged communities for many of these new programs.

The Thriving Communities Initiative will include programs by which DOT will utilize cooperative agreements and procurements with technical assistance and capacity building providers to support communities seeking to advance transformative, equitable, and climate-friendly infrastructure projects that benefit disadvantaged communities. Further, the Thriving Communities Initiative will solicit applications for grants and in-kind technical assistance that will assist communities in analysis and delivery of projects. Specifically, these include the Thriving Communities program, the Rural and Tribal Infrastructure Assistance Pilot Program *(see § 21205 of Pub. L. 117–58),* and Asset Concession and Innovative Finance Assistance Program *(see 23 U.S.C. 611 as amended by § 71001 of Pub. L. 117–58).*

DOT will utilize a Letter of Interest (LOI) or use a simplified in-take form from communities interested in receiving technical assistance and capacity building through these programs. Technical assistance and capacity building is offered by the Government at no charge and with no required non-federal share.

Establishment of the program has two distinct tasks: (a) contracting of technical assistance advisors through a Notice of Funding Opportunity (NOFO) or existing procurement vehicles; and (b) recruitment of project sponsors who will receive technical assistance services. Responding to both will occur on a voluntary basis, utilizing an electronic platform.

For item A, eligible applicants to provide technical assistance through the Thriving Communities Program will request cooperative agreement funding through an application process in response to a published NOFO. The application for Fiscal Year 2022 was a one-time information collection. DOT estimated approximately 20 hours was required to complete the NOFO application process used to select capacity builders under the Thriving Communities program. DOT estimates the recipients of Thriving Communities program funding will spend another 4 hours, annually, submitting post-award reports. In addition, reporting requirements will be submitted by the select capacity building providers and technical assistance recipients during the implementation, and evaluation phases.

For item B, the intake form to be used by communities seeking technical assistance is estimated to take no more than 1 hour to complete. Recipients of technical assistance support are estimated to spend no more than 1 hour annually providing feedback and evaluation of the quality of services received through the program.

For the Asset Concession and Innovative Finance Assistance Program, project sponsors will make an application in response to a Notice of Funding Opportunity. Successful applicants will receive reimbursable grants to procure technical assistance to develop projects. Preparation of a NOFO response is estimated to require 25 hours of staff time. Successful applicants must also prepare progress reports as a condition of funding. Progress reporting is estimated to require 4 hours per year.

For the Rural and Tribal Assistance Program, project sponsors will make an

application in response to a Notice of Funding Opportunity. The application process is streamlined for this program and is estimated to require 15 hours to complete. Award recipients must also prepare progress reports as a condition of funding. Progress reporting is estimated to require 4 hours per year.

Respondents to Item A (technical assistance providers): for-profit companies, non-profit organizations, or other technical assistance providers.

Respondents to Item B (requestors of grants or technical assistance): philanthropic entities, non-profit organizations, other Federal agencies, state or local governments and their agencies, and Indian Tribes.

Frequency: Once a year.

Thriving Communities Program

Number of respondents to NOFO: 46.

Estimated Burden Hours per NOFO respondents: 24.

Estimated Total Annual Burden Hours for NOFO respondents: 1,104.

Number of requestors of technical assistance: 373.

Estimated Annual Burden Hours for requestors of technical assistance: 373.

Estimated Annual Burden Hours for respondents to technical assistance: 45.

Estimated Total Annual Cost: $179,596.

Asset Concession and Innovative Finance Grant Program

Estimated Number of respondents to NOFO: 50.

Estimated Burden Hours per NOFO respondents: 25.

Estimated Total Annual Burden Hours for NOFO respondents: 1,250.

Estimated Award Winners: 30.

Estimated Hours for Progress Reporting, per Award: 4.

Estimated Annual Burden Hours for Progress Reporting: 120.

Estimated Total Annual Cost: $161,660.

Rural and Tribal Assistance Grants

Estimated Number of Respondents to NOFO: 12.

Estimated Burden Hours per NOFO Respondents: 15.

Estimated Total Annual Burden Hours for NOFO respondents: 180.

Estimated Award Winners: 12.

Estimated Hours for Progress Reporting, per Award: 4.

Estimated Annual Burden Hours for Progress Reporting: 48.

Estimated Total Annual Cost: $26,904.

Total for All Thriving Communities Initiative Programs

Estimated Total Hours: 3,120.

Estimated Total Cost: $368,160.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the DOT's performance; (2) the accuracy of the estimated burdens; (3) ways for the DOT 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; 23 U.S.C. 134 and 135; and 23 CFR chapter 1, subchapter E, part 450.

Dated: February 16, 2023.

Mariia Zimmerman,

Strategic Advisor for Technical Assistance and Community Solutions, Office of the Secretary, U.S. Department of Transportation.

[FR Doc. 2023–03691 Filed 2–22–23; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of Agriculture

Food and Nutrition Service

7 CFR Part 246

Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Online Ordering and Transactions and Food Delivery Revisions To Meet the Needs of a Modern, Data-Driven Program; Proposed Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

[FNS–2022–0015]

RIN 0584–AE85

Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Online Ordering and Transactions and Food Delivery Revisions To Meet the Needs of a Modern, Data-Driven Program

AGENCY: Food and Nutrition Service (FNS), Department of Agriculture (USDA).

ACTION: Proposed rule.

SUMMARY: The Food and Nutrition Service, USDA (the Department), proposes to remove barriers to online ordering and internet-based transactions in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) through this rulemaking. This is expected to improve the WIC shopping experience while increasing equity and access to nutritious foods for WIC participants, thus positively impacting nutrition security. The proposed rule also complements the Program's near-complete transition to electronic benefit transfer (EBT) by streamlining and modernizing certain WIC food delivery regulations to support current technology and future innovation, and by introducing measures intended to meet the needs of a modern, data-driven program that uses these technologies for food delivery.

DATES: Written comments must be received on or before May 24, 2023 to be assured of consideration.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit written comments on this proposed rule. Comments may be submitted in writing by one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the online instructions for submitting comments. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of May 24, 2023.
- *Regular U.S. Mail:* WIC Vendor and Technology Branch, Policy Division, Food and Nutrition Service, P.O. Box 2885, Fairfax, Virginia 22031–0885.
- *Overnight, Courier, or Hand Delivery:* Patricia Bailey, WIC Vendor and Technology Branch, Policy Division, Food and Nutrition Service, 1320 Braddock Place, 3rd Floor, Alexandria, Virginia 22314.
- All written comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the written comments publicly available on the internet via *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Patricia Bailey, Chief, WIC Vendor and Technology Branch, Policy Division, Supplemental Nutrition and Safety Programs, Food and Nutrition Service, USDA, 1320 Braddock Place, Alexandria, Virginia 22314, (703) 305–2435 or *patricia.bailey@usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Overview

The retail grocery industry has changed over the past several years and online shopping has become an increasingly common method to shop for groceries. Advances in technology related to online shopping and the development of new payment types have greatly influenced the way Americans shop and pay for food. To ensure that participants in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) have equal access to available shopping options and can transact their WIC benefits as the retail marketplace innovates and evolves, the Department proposes to remove barriers to innovation and to modernize certain WIC food delivery regulations. To accompany these proposed changes, the Department proposes additional measures to meet the needs of a modern, data-driven program that uses current technologies for food delivery.

Specifically, this rulemaking proposes to:

(1) Remove barriers to online ordering and internet-based transactions in WIC, including a current prohibition of the authorization of internet-based vendors. The proposed revisions would provide State agencies the flexibility to offer online shopping to participants in a way that maintains program integrity. The revisions support oversight measures and policies appropriate for current and future technologies and security requirements and also support program integrity as the retail marketplace innovates.

(2) Streamline and modernize WIC food delivery. The proposed revisions are intended to reflect the Program's near-complete transition to electronic benefit transfer (EBT), support current technology and future innovation, and expand opportunities for the retail grocery industry to innovate in ways that benefit WIC participants. The proposed revisions would also allow State agencies to develop and test new types of food instruments (*e.g.,* mobile payments) and allow for the remote issuance of WIC benefits.

(3) Meet the needs of a modern, data-driven program that uses current technologies for food delivery by updating reporting requirements and introducing new staff positions intended to support the operational capacity of WIC State agencies.

In the development of this proposed rule, the Department prioritized equity and access for WIC participants. However, the Department recognizes that the proposed rule would impact WIC State agencies, including Indian Tribal Organizations (ITOs), as well as local agencies, clinics, and vendors in ways that could affect participants' access to benefits. To mitigate any potential civil rights-related impacts of the proposed rule, FNS intends to provide State agencies with technical assistance to implement and communicate program changes in alternative languages and formats that are accessible to all participants and vendors, and to enable small vendors, especially small, minority- and Tribal-owned stores, to engage with online shopping.

The Department's overarching goal is to advance nutrition security by improving the WIC shopping experience and ensuring that WIC participants have equitable access to nutritious foods. At the same time, the Department recognizes the importance of maintaining security and oversight measures at the Federal and State agency levels. This rule represents a major transition for the WIC Program and is expected to increase participant satisfaction and, ultimately, participation and retention while preserving program integrity.

II. Background

This part provides key terms used throughout this preamble, an overview of the WIC Program, challenges of the current WIC shopping experience, and a summary of information used to develop this proposed rule. Proposed regulatory changes are discussed in detail in part III.

A. Introduction of Key Terms

For the purposes of this proposed rule preamble, the Department will use the following terms:

• ''WIC shopper'' means a person shopping using WIC benefits (*i.e.,* a WIC participant, proxy, or a parent or caretaker of an infant or child participant).

• ''Online shopping'' means the general use of an online, internet-based ordering system, platform, or site. It can encompass online ordering with or without internet-based transactions (*i.e.,* the transaction can occur via the internet, in store, curbside, or at the point of delivery).

• ''Online ordering'' means the process a customer (including a WIC shopper) uses to select food items for purchase via an internet-based ordering system, platform, or site.

• ''Transaction'' means the process by which a WIC shopper exchanges their WIC benefits for supplemental foods.

• ''Internet-based transaction'' means a transaction where the WIC payment is completed through the payment section of the online ordering system, platform, or site. This terminology is being used in lieu of ''online transaction'' to avoid confusion with transactions that occur using online EBT technology.

• ''Redemption'' means the process in which a vendor submits records of electronic benefits for redemption and the State agency (or its financial agent) makes payment to the vendor.

B. Overview of the WIC Program

The WIC Program is administered by 89 WIC State agencies, including the 50 States, 33 Indian Tribal Organizations, the District of Columbia, and 5 U.S. Territories (American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands). WIC serves to safeguard the health of low-income pregnant, breastfeeding, and non-breastfeeding postpartum individuals, and infants and children up to age five who are found to be at nutritional risk. In 2019, WIC participants included nearly 43 percent of all infants in the United States,[1] and in fiscal year (FY) 2020, WIC served an average of 6.25 million participants per month.[2]

The Department provides Federal grants to WIC State agencies to provide supplemental foods, health care referrals, and nutrition education, including breastfeeding promotion and support, to WIC participants. WIC participants typically access supplemental foods through a retail food delivery system. In such systems, a WIC shopper goes to a WIC-authorized vendor (*i.e.,* a retail store authorized by the State agency), selects foods available in their benefit balance, and uses an EBT card to purchase the items. In FY 2020, there were approximately 40,000 WIC-authorized vendors nationwide, and nearly 93 percent of WIC participants received WIC benefits via EBT.

C. Challenges of the Current WIC Shopping Experience

Currently, WIC regulations at 7 CFR 246.12(r)(4) require participants to pick up food instruments (*e.g.,* paper food instruments, cash-value vouchers (CVVs), or EBT cards) in person. While WIC State agencies are required to develop plans per § 246.4(a)(23) to ''minimize the time participants and applicants must spend away from work'' and issue food instruments and CVVs ''through means other than direct participant pick-up,'' participants report that the time and money spent traveling to a WIC clinic to pick up food instrument(s) remains a barrier to participation. The proposed rule would encourage State agencies to remotely issue electronic benefits and mail EBT cards whenever possible, potentially reducing the number of clinic visits that WIC participants are required to make.

Additionally, WIC regulations generally only allow WIC State agencies to authorize vendors with a single, fixed location (§ 246.2, *Vendor*) and require the WIC shopper to sign food instruments or enter a Personal Identification Number (PIN) in the presence of a cashier (§ 246.12(h)(3)(vi)). These two provisions require that the WIC transaction occurs in the physical space of a brick-and-mortar store.

These in-person requirements present challenges to families, particularly those with limited mobility or access to transportation, those who live in remote or rural communities, and/or those with special dietary needs who require supplemental food substitutions that may not be readily available at the closest WIC-authorized grocery store. WIC households, which are less likely to use a personal vehicle for grocery shopping than higher-income non-WIC households,[3] are expected to benefit from additional flexibilities around both benefit issuance and pickup and the shopping experience.

D. Key Information Used in the Development of This Rule

To develop this proposed rule, FNS reviewed technical materials developed by a wide variety of WIC stakeholders, including:

• The Gretchen Swanson Center for Nutrition (GSCN), through a grant from FNS, developed a comprehensive plan for implementing online shopping in WIC. This plan, called the Blueprint for WIC Online Ordering Projects (the ''Blueprint''), was published on June 15, 2021.[4] GSCN utilized an input and consensus building process (a Delphi process) to gather information from WIC stakeholders on policy, technical, and programmatic factors important to the implementation of online shopping in WIC. The Blueprint provides implementation guidance for all WIC State agencies and stakeholders testing online shopping in WIC.

• The Task Force on Supplemental Foods Delivery (the ''Task Force''), authorized by the Consolidated Appropriations Act for Fiscal Year 2021 (Pub. L. 116–260), consisted of WIC stakeholders convened to independently ''study measures to streamline the redemption of supplemental foods benefits that promote convenience, safety, and equitable access to supplemental foods, including infant formula.'' The Task Force consisted of 18 member organizations from multiple sectors to ensure a diverse range of input from: WIC providers, retailers, manufacturers, EBT processing companies, advocacy organizations, WIC participants, and additional stakeholders. The Task Force submitted its recommendation report to FNS on September 30, 2021.[5]

FNS reviewed the Task Force's recommendation report and the Blueprint's summary of regulatory barriers, and this proposed rule addresses the online shopping

[1] U.S. Department of Agriculture, Food and Nutrition Service, ''National- and State-Level Estimates of WIC Eligibility and WIC Program Reach in 2019: Final Report, Volume I,'' pp. 65, by Kelsey Farson Gray et al. Project Officer Grant Lovellette, Alexandria, VA: February 2022. Available online at: *https://fns-prod.azureedge.net/sites/default/files/resource-files/WICEligibles2019-Volume1.pdf.*

[2] U.S. Department of Agriculture Food and Nutrition Service, ''WIC Data Tables,'' 2021. Available online at: *https://www.fns.usda.gov/pd/wic-program.*

[3] U.S. Department of Agriculture, Economic Research Service, ''Where Do Americans Usually Shop for Food and How Do They Travel to Get There? Initial Findings from the National Household Food Acquisition and Purchase Survey,'' EIB–138, pp. 10, by Michele Ver Ploeg et al., March 2015. Available online at: *https://www.ers.usda.gov/publications/pub-details/?pubid=79791.*

[4] Gretchen Swanson Center for Nutrition, ''Blueprint for WIC Online Ordering Projects,'' June 2021. Available online at: *https://static1.squarespace.com/static/58a4dda16a49633eac5e02a1/t/60c8ea51296905287a9420eb/1623779922155/Blueprint+for+WIC+Online+Ordering.pdf.*

[5] U.S. Department of Agriculture, Food and Nutrition Service, ''Task Force on Supplemental Food Delivery in the WIC Program—Recommendations Report,'' September 2021. Available online at: *https://www.fns.usda.gov/wic/food-delivery-task-force-recommendations-report.*

recommendations from these documents that are within the appropriate scope of this rulemaking. While in some instances FNS has taken a different approach than recommended by the Task Force's recommendation report and/or Blueprint, the proposed revisions reflect the overall goals of these stakeholder efforts while adhering to the general purpose and scope of the WIC Program.

This proposed rule was also informed by State agency feedback, including feedback on waivers of WIC regulatory requirements issued to State agencies as part of the Department's COVID–19 pandemic response (under time-limited waiver authority granted by the Families First Coronavirus Response Act, Pub. L. 116–127). Feedback on waivers related to the WIC shopping experience (*e.g.,* remote benefit issuance, transaction without presence of cashier, and removing the on-site requirement from monitoring actions) highlighted opportunities for modernization within the Program. For example, almost all WIC State agencies reported that the ''remote benefit issuance waivers made WIC safer, more accessible, and more convenient for participants' schedules during the pandemic.'' [6]

FNS has also heard from WIC State agencies that identifying and recruiting top talent are integral to the success of the WIC Program as it evolves to better serve participants through modern technologies. The improved data collection and strengthened staffing requirements proposed in this rule would ensure that the WIC Program has the resources needed to run a modern, data-driven program while maintaining program integrity and security measures.

Additionally, this proposed rule was informed by WIC participant feedback, which indicates strong interest in expanded WIC shopping options. In a National WIC Association survey that collected responses from 26,642 WIC participants from 12 WIC State agencies, about two-thirds of respondents reported that they would like to be able to order their supplemental foods online or by phone, and about one-third even indicated that they would be willing to pay an additional out-of-pocket fee for home delivery.[7]

This proposed rule also incorporates lessons learned from the Supplemental Nutrition Assistance Program's (SNAP) efforts to support online shopping for SNAP participants, including the importance of building program integrity measures into all levels of oversight. Learning from SNAP's experiences will allow the two programs to move forward consistently, to the extent possible, and ensure that cross-program integrity efforts continue without interruption.

III. Discussion of Proposed Revisions

1. Remove Barriers to Online Ordering and Internet-Based Transactions

The proposed revisions would remove regulatory barriers to online shopping and allow the Program to adapt with the marketplace, in order to ensure that WIC participants have access to a broader array of shopping options and are not left behind as the industry innovates. The proposed revisions would ensure that WIC State agencies have the flexibility necessary to oversee new types of vendors and to maintain program integrity and security. FNS would support WIC State agencies through technical assistance to make online shopping platforms and communications about program changes accessible in appropriate languages and alternative formats for all participants and vendors.

The following is a discussion of each proposed provision.

a. Allow Vendors and WIC Shoppers to Complete Internet-Based Transactions [§§ 246.12(h)(3)(v), (vi), and (xxxii), (v)(1)(iv), and (bb)(2)].

The Department proposes to allow vendors and WIC shoppers to complete internet-based transactions by removing the requirement that WIC shoppers must sign food instruments, or enter a PIN, in the presence of a cashier (§ 246.12(h)(3)(vi)). This flexibility would allow WIC State agencies to modernize along with the retail grocery industry.

The Department proposes the following changes to:

(i) Clarify which vendor agreement provisions apply only to paper food instruments.

The Department proposes changing ''printed'' to ''paper'' in § 246.12(h)(3)(vi) to indicate that the remainder of the provision applies specifically to paper food instruments. The Department also proposes to consolidate the requirement from § 246.12(h)(3)(v) to enter the purchase price of the authorized supplemental foods on paper food instruments and CVVs before they are signed into a single provision at § 246.12(h)(3)(vi). In addition to this change, the Department proposes modernizing the remaining text at § 246.12(h)(3)(v), to ensure that the requirements around the calculation of the purchase price continue to be applicable in EBT, and that a WIC shopper is made aware of the total purchase price of a transaction before the transaction is completed, as a program integrity measure.

(ii) Remove the requirement that WIC shoppers must sign in the presence of a cashier.

The Department proposes further revising the signature requirement for paper food instruments and CVVs at § 246.12(h)(3)(vi) by removing the requirement that the WIC shopper's signature is completed in the presence of a cashier. WIC shoppers would still be required to sign the paper food instrument or CVV to complete the transaction. Separate transaction authentication policies, described below, include program security requirements for EBT transactions.

(iii) Remove the requirement to use a PIN in lieu of a signature and create new provisions to allow WIC State agencies to explore and identify options to authenticate EBT transactions.

The Department proposes to remove the portion of § 246.12(h)(3)(vi) that allows use of a PIN in lieu of a signature and create a new provision at § 246.12(h)(3)(xxxii), which would require vendors to authenticate EBT transactions in accordance with State agency policies. The Department also proposes a new provision at § 246.12(bb)(2) to require that State agencies' transaction authentication policies are in compliance with standards established by the Department. Together, these provisions will provide State agencies the flexibility to develop transaction authentication policies that are appropriate and secure for the specific technologies they choose to adopt while ensuring a level of consistency across State agencies.

Taken together, the creation of § 246.12(h)(3)(xxxii) and (bb)(2) along with the revisions to § 246.12(h)(3)(vi) would provide WIC State agencies the flexibility to allow internet-based transactions using modern and appropriate authentication technologies, and allow the Department the flexibility to develop the necessary technical and security requirements in technical documents that can be updated as the industry innovates. The Department

[6] U.S. Department of Agriculture, Food and Nutrition Service, ''Changes in WIC Operations During the COVID–19 Pandemic: A First Look at the Impact of Federal Waivers,'' pg. 1, December 2021. Available online at: *https://www.fns.usda.gov/wic/operations-impact-federal-waivers-during-covid-19-pandemic.*

[7] Lorrene Ritchie et al., ''Multi-State WIC Participant Satisfaction Survey: Learning from Program Adaptations During COVID,'' pg. 14, National WIC Association: December 2021. Available online at: *https://s3.amazonaws.com/aws.upl/nwica.org/nwamulti-state-wic-participant-satisfaction-surveynationalreportfinal.pdf.*

proposes similar edits to § 246.12(v)(1)(iv), which would ensure that transactions at authorized farmers and farmers' markets also occur in accordance with the procedures established by the State agency and developed according to standards established by the Department.

b. Create New Types of Vendors [§ 246.2].

The Department proposes creating separate definitions for different types of vendors at § 246.2. The Department proposes new definitions for ''brick-and-mortar vendors,'' ''internet vendors,'' and ''mobile vendors.'' Creating new types of vendors would provide State agencies with flexibility to authorize the types of vendors needed to support program modernization while ensuring participant access to supplemental foods throughout their jurisdictions. To ensure continued and effective State agency management and oversight, all authorized vendors, no matter the type, would be subject to all regulations governing vendors.

The Department proposes the following changes to:

(i) Create a new definition for ''brick-and-mortar vendor.''

The Department proposes a definition for ''brick-and-mortar vendor,'' which would allow this type of vendor to be defined separately and distinctly from other vendor types (*e.g.,* internet or mobile vendors). Historically, vendors authorized under a retail food delivery system were required to be brick-and-mortar vendors. The Department proposes to clarify that ''all transactions that take place at a brick-and-mortar vendor will be assigned to that vendor'' to reinforce that the location of the transaction (*e.g.,* at a single, physical, fixed location; via an internet-based transaction; or at mobile vendor) is used to classify vendors by vendor type, not the location where the order was made or fulfilled.

(ii) Create a new definition for ''internet vendor.''

The Department proposes a new definition of ''internet vendor'' to distinguish vendors operating through an online platform with internet-based transactions from brick-and-mortar vendors. The proposed definition for ''internet vendor'' is based, in part, on SNAP's working definition of ''internet retailer,'' and would be implemented consistently with SNAP's definition, to the extent possible, to ensure that cross-program integrity efforts may continue without interruption.

(iii) Create a new definition for ''mobile vendor.''

The Department proposes to create a separate definition of ''mobile vendor'' to distinguish mobile vendors with transactions that take place at a truck, bus, pushcart, or other mobile vehicle. This is different from vendors operating a brick-and-mortar location with transactions at the physical, fixed location.

(iv) Update the definition of ''above-50-percent vendors.''

The Department proposes to revise this definition to ensure that any type of authorized vendor (*e.g.,* brick-and-mortar, internet, or mobile) could also be classified as an above-50-percent vendor if it meets the conditions of the definition.

c. Modernize the Definition of ''Vendor'' [§§ 246.2 & 246.4(a)(14)(xv)].

The Department proposes to modernize the current definition of ''vendor'' to allow State agencies the flexibility to authorize more types of vendors (*e.g.,* ''internet vendors,'' and ''mobile vendors'').

The Department proposes the following changes to:

(i) Remove language from the definition of ''vendor'' that currently only allows WIC State agencies to authorize vendors with a ''single, fixed location'' (*i.e.,* brick-and-mortar vendors).

The Department proposes to remove this requirement to allow for the creation of distinct vendor type definitions, including ''brick-and-mortar,'' ''internet,'' and ''mobile'' vendors, as described in more detail above. The proposed revision would allow State agencies the flexibility to authorize vendors that would provide supplemental foods through means other than a single, fixed location.

(ii) Simplify the definition of ''vendor'' by replacing current regulatory language delineating different business structures that a vendor may have (*i.e.,* a sole proprietorship, partnership, cooperative association, corporation, or other business entity) with the term ''business entity.'' This simplified language would clarify that any type of business entity may be authorized as long as it meets the State agency's selection criteria. This would remove the burden of proving or determining business structure from vendor applicants and WIC State agencies during the vendor authorization process.

(iii) Remove a clause in the definition of ''vendor'' requiring a special needs justification for mobile vendors.

The Department proposes removing the requirement for a State agency to justify the authorization of mobile vendors in its State Plan. This would allow State agencies to authorize mobile vendors more easily and would remove the burden of providing justification to FNS for such authorizations. This change is in alignment with the proposed removal of the related provision at § 246.4(a)(14)(xv).

(iv) Clarify that all vendors must be authorized separately.

The Department proposes to clarify that all vendors, regardless of type, must be authorized by the State agency separately. To ensure that an authorization in SNAP is related to only one WIC authorization per State agency, vendors with a unique SNAP authorization number must be authorized as unique vendors by any WIC State agency that authorizes them. This allows for coordination of vendor/retailer activities between the two programs, supports the ability for the programs to move forward consistently, to the extent possible, and ensures that cross-program integrity efforts continue without interruption (*e.g.,* reciprocal disqualifications, etc.).

For vendors with store locations that are not SNAP authorized, the Department proposes that each single, separate location is considered a unique vendor from all other store locations and, therefore, must be authorized separately. This is consistent with how the WIC Program currently authorizes vendors.

The proposed revision also clarifies that a vendor providing supplemental foods through any means other than a single, fixed location must be authorized separately from brick-and-mortar vendors, even if operated by the same business entity. This is consistent with SNAP's current retailer authorization practices.

The Task Force encouraged FNS to explore ''the option for a national authorization process, with State opt-ins, that could streamline multistate authorization for virtual vendor platforms.'' However, as section (c)(2)(A) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(c)(2)(A)) obligates the Secretary to ''make cash grants to State agencies for the purpose of administering the program,'' the Department does not have authority to authorize vendors in the WIC Program. This activity, along with all other vendor management functions, is delegated to WIC State agencies. The Department's proposed provisions aim to streamline and modernize WIC food delivery wherever possible, while remaining within the scope and purpose of the Program.

d. Allow Vendors to Return Benefits to a Participant's Benefit Balance [§§ 246.12(h)(3)(ii) introductory text, (h)(3)(ii)(A) and (C), (x)(2)(iii), (x)(4) introductory text, and (x)(4)(i)].

The Department proposes revisions to allow electronic benefits to be returned to the participant's benefit balance when an item requested through the online ordering process is not fulfilled as ordered, while reinforcing that cash refunds continue to be prohibited. The proposed revisions would also provide changes to support the electronic benefit return process, including providing additional time for participants to use their returned electronic benefits to purchase supplemental foods. This is intended to ensure that WIC shoppers who attempt to order items online close to the last date of use for those benefits do not lose them if the vendor is unable to fulfill the order. These changes would support the participant's ability to fully transact their electronic benefits for supplemental foods (*i.e.,* to allow the use of the benefit balance at a later date or at another vendor) and ensure that the State agency is only charged for foods received by the participant. These flexibilities are expected to be particularly important to support the purchase of fruits and vegetables with cash-value benefits (CVBs), since those items are often priced by weight.

The differences proposed in this rule between food instruments, electronic benefits, CVVs, and CVBs are discussed in more detail with the Department's proposal to permit the remote issuance of electronic benefits to a participant's benefit balance (section 2.a.).

The Department proposes the following changes to:

(i) Clarify that cash refunds are still prohibited and update exchange policy to accommodate recalls.

The Department proposes adding ''cash'' to the sentence, ''[n]o substitutions, cash, credit, *cash refunds,* or exchanges'' in § 246.12(h)(3)(ii) to ensure that cash refunds would continue to be prohibited. The proposed provision would clarify that the vendor must not provide cash in exchange for electronic benefits, nor a cash refund for supplemental foods purchased with benefits.

The Department proposes additional changes to § 246.12(h)(3)(ii) introductory text and (3)(ii)(A), and to introduce § 246.12(h)(3)(ii)(C). First, the Department proposes to clarify when language refers to paper food instruments and CVVs versus electronic benefits throughout the provision. Second, the Department proposes adding ''type'' and ''physical form'' to the list of characteristics to ensure that exchanges are limited to identical authorized supplemental food items. Lastly, the Department proposes to introduce language at § 246.12(h)(3)(ii)(C) to ensure that all customers, including WIC shoppers, are treated the same in the event that an authorized supplemental food is recalled. The Department proposes introducing this vendor agreement provision to ensure that WIC-authorized vendors include WIC shoppers in their recall exchange policies, including policies related to replacements (which may include, but are not limited to, the same product, a substitute product, store credit, or a cash refund). Under this new provision, WIC shoppers would be able to exchange recalled product like all other consumers.

(ii) Allow for the return and use of electronic benefits when an online order cannot be fulfilled.

The Department proposes to add the provisions at § 246.12(x)(4) to allow for the return and use of electronic benefits when an online order cannot be fulfilled. This proposed provision would support participants' ability to fully transact their benefits for supplemental foods, and to ensure that the State agency is only charged for foods received by the participant.

(iii) Allow for the return and use of electronic benefits not successfully transacted before the last date of use.

To address issues that may arise as transactions approach the last date of use, the Department proposes § 246.12(x)(4)(i) to allow the return of electronic benefits, and to provide time for subsequent transactions to occur. This provision would provide the participant with no less than 7 calendar days to transact the returned benefits when electronic benefits are returned to a participant's benefit balance. This would promote full benefit redemption for participants, while establishing an expectation for the length of time electronic benefits would remain available after the original last date of use.

This proposed creation of these provisions would necessitate a revision to § 246.12(x)(2)(iii) to reference the proposed provision that addresses the return of benefits after the last date of use § 246.12(x)(4)(i). The Department expects that WIC State agencies will require additional time to develop and refine the technological solutions needed to meet these provisions and is proposing an extended implementation timeframe of eighteen months from publication of the final rule.

e. Allow State Agencies to Develop Virtual Methods of Oversight [§§ 246.2 and 246.12(g)(5) and (j)(6)(ii)(B)].

The Department proposes revising current WIC regulations to allow State agencies to develop virtual methods of oversight to ensure that their monitoring and investigative methods are appropriate for the types of vendors authorized (*e.g.,* internet vendors) and current environmental conditions (*e.g.,* during a pandemic). WIC State agencies are responsible for all vendor management and oversight, and the Department proposes to provide the flexibility necessary to use technology to streamline these efforts and develop new methods of oversight for new types of vendors.

The Department proposes the following changes to:

(i) Update the definitions of ''routine monitoring'' and ''compliance buy.''

The Department proposes removing the requirement that routine monitoring visits and compliance buys occur on site from the definition of each term in § 246.2. The purposes of monitoring visits and investigations would remain unchanged, as well as the minimum number of vendors that must be monitored and investigated annually, as outlined at § 246.12(j)(2) and (4).

Removing this requirement would also require the Department to clarify the documentation requirements outlined in § 246.12(j)(6)(ii)(B). The proposed revision adds the phrase ''if applicable'' to the requirement to document the cashier involved in a compliance buy to accommodate situations in which no cashier is present (*e.g.,* an internet-based transaction). All other documentation requirements at § 246.12(j)(6) would remain applicable regardless of the location of the transaction or type of vendor.

(ii) Introduce virtual visits as an allowable type of preauthorization visit.

The Department proposes to add virtual visits to the types of allowable preauthorization visits established at § 246.12(g)(5) to provide WIC State agencies the flexibility to streamline such visits and to develop procedures that are appropriate for the types of vendors authorized under their jurisdiction.

f. Permit WIC Shoppers to Pay for Fees Associated with Online Shopping [§§ 246.12(h)(3)(xxxiii) and (v)(1)(ix) and 246.14(b)(1)(i) and (c)(4)].

The Department proposes to add a new provision at § 246.12(h)(3)(xxxiii) to clarify that WIC-authorized vendors must not charge the State agency for fees associated with online ordering (*e.g.,* delivery, service, convenience, bag fees). If such fees are assessed to non-WIC customers using the same services, WIC participants must be allowed to pay them using another tender type. A similar provision is proposed for farmers and farmers' markets at § 246.12(v)(1)(ix).

This proposed change would work in combination with the revisions

proposed at § 246.14(b)(1)(i) and (c)(4), both of which clarify that State agencies operating home food delivery or direct distribution systems may continue to pay for the cost of transporting food under these food delivery systems. Costs in home food delivery and direct distribution are different from fees associated with online shopping in a retail food delivery system, which would only occur if the WIC shopper chooses online shopping.

The Department is specifically requesting comment on whether State agencies should have the option to pay for fees associated with online shopping in a retail food delivery system with either (1) non-Federal funding at State agency discretion and/or (2) Federal funding in situations where it is deemed necessary to meet special needs (*e.g.,* participant access or other needs as identified by the State agency). The Department requests input from stakeholders that includes a discussion of how this option would impact equitable access to online shopping for WIC participants, the rationale for State agencies to pay these fees (*e.g.,* to ensure participant access to online shopping in certain areas within the State agency's jurisdiction, to transition from a direct distribution or home food delivery system), possible models for paying for such fees (including whether there should be any limits on the amount of delivery fees paid by the WIC State agency), and any considerations necessary to pay for fees for different vendor types (*e.g.,* above-50-percent, internet, brick-and-mortar).

2. Streamline and Modernize WIC Food Delivery

The proposed revisions in this section are intended to reflect the Program's near-complete transition to EBT, support current technology and future innovation, and expand opportunities for the retail grocery industry to innovate in ways that benefit WIC participants. The proposed revisions would also allow State agencies to develop and test new types of food instruments (*e.g.,* mobile payments) and allow for the remote issuance of WIC benefits. As the Program completes the transition to EBT and innovates further, FNS will continue to support State agencies in their efforts to use current technologies to provide adequate participant access to supplemental foods.

The following is a discussion of each proposed provision.

a. Permit the Remote Issuance of Electronic Benefits to a Participant's Benefit Balance [§§ 246.4(a)(23), 246.7(f)(2)(iv), and 246.12(r)(2), (4), and (5)].

The Department proposes to remove barriers by revising § 246.12(r)(4) to specifically apply to paper food instruments and CVVs, and by creating § 246.12(r)(5) for the issuance of EBT cards and electronic benefits. This proposed provision would encourage WIC State agencies to allow for the remote issuance of electronic benefits (*i.e.,* the loading of electronic benefits to an EBT card, or other access device or technology, without requiring the participant to travel to a clinic) and for the mailing of EBT cards. The provision would require that State agencies do so in a way that ensures that participants are offered nutrition education in accordance with § 246.11(a)(2) and that their EBT cards and electronic benefits are issued within the processing timeframe requirements at § 246.7(f)(2)(iv), without jeopardizing the integrity of program services or program accountability.

Section (f)(6)(B) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(f)(6)(B)) states that a State agency may provide for delivery of vouchers to participants not scheduled for nutrition education and breastfeeding counseling or recertification. Since this legislation requires WIC participants to pick up paper food instruments when scheduled for an in-person nutrition education or subsequent certification appointment, that requirement would remain in regulations, as revised, at § 246.12(r)(4).

This proposed revision to § 246.12(r)(4) and the proposed creation of § 246.12(r)(5) would necessitate revisions to § 246.7(f)(2)(iv), to update processing timeframe requirements to support remote issuance of electronic benefits, and to §§ 246.12(r)(2) and 246.4(a)(23) for clarity.

To ensure clarity related to how these provisions apply to food instruments, CVVs, and electronic benefits, the Department proposes to create a new definition of ''electronic benefits'' in § 246.2. This new definition clarifies that electronic benefits are separate and distinct from food instruments. Electronic benefits are the WIC benefits for supplemental foods prescribed to a participant and contained within the participant's benefit balance. This definition complements the electronic benefit requirements established at § 246.12(x).

Similarly, the Department proposes to update the definition of cash-value voucher to remove the clause, ''Cash-value voucher is also known as cash-value benefit, or CVB, in an EBT environment,'' and create an independent definition of CVB as a type of electronic benefit that is a fixed-dollar amount used to obtain authorized fruits and vegetables. Additionally, the Department proposes to remove ''electronic benefit transfer (EBT) card'' as a type of CVV to ensure that the modern definitions of food instrument, electronic benefits, and cash-value benefit work together. The proposed modernization of the definition of food instrument is described in more detail below.

Lastly, the Department proposes modifying the State Plan requirements described under § 246.4(a)(23) to focus this requirement on how the State agency will improve access for all participants and prospective applicants (with an additional focus on those who are employed and/or reside in rural areas), including measures to improve access through the remote issuance of food instruments, CVVs, and/or electronic benefits. The Department also proposes edits to ensure that this provision remains consistent with § 246.12(r)(4) and (5).

b. Expand the Definition of Food Instrument [§ 246.2].

The Department proposes adding ''other electronic benefit access device or technology'' to the definition of ''food instrument'' to allow WIC State agencies to explore and adopt new technologies beyond the EBT card (*e.g.,* mobile payment) while ensuring that key program integrity requirements apply to these new technologies. In addition, the proposed revision would better match the proposed definition of ''EBT'' which includes ''other electronic benefit access device or technology.''

c. Update the Uniform Food Delivery Systems Provision to Support State Agency Innovation [§§ 246.2 and 246.12(b)].

Current WIC regulations require each food delivery system to be procedurally uniform throughout the State agency's jurisdiction, and that when used, food instruments must be uniform within each type of system.

The Department proposes the following changes to:

(i) Allow State agencies to develop and test new WIC food instrument types.

The Department proposes introducing conditions for when non-uniform food instruments may be used within a single food delivery system, such as when necessary to meet special needs described in the State agency's State Plan per § 246.4(a)(14)(i), or when transitioning from one type of food instrument to another. This proposed flexibility would provide State agencies the ability to address needs specific to their jurisdictions, and to test and

smoothly transition to new food instrument types, as needed.

(ii) Clarify uniform food delivery systems and system combinations.

The Department proposes clarifying in § 246.12(b) that State agencies may use a combination of retail, home food delivery, and direct distribution systems, and that this combination of systems together must ensure adequate participant access to supplemental foods.

Legislation (42 U.S.C. 1786 (h)(12)(A)(i)) defines EBT as a ''food delivery system that provides benefits using a card or other access device approved by the Secretary that permits electronic access to program benefits,'' although it is more precisely described as a benefit delivery method. Therefore, the Department proposes to update the definition of ''Electronic Benefit Transfer'' to clarify that it is a benefit delivery method, and to introduce ''other electronic benefit access device or technology'' to allow WIC State agencies to explore and adopt new technologies beyond the EBT card.

Further, the Department proposes to clarify in § 246.12(b) that there are three types of food delivery systems (retail, home food delivery, and direct distribution), and that these three must be procedurally uniform within a State agency's jurisdiction. When used, food instruments must be uniform within each type of system, except when the use of non-uniform food instruments (*e.g.,* introducing a mobile app for certain participants while others use EBT cards) is necessary to meet the special needs described and approved in the State agency's State Plan per § 246.4(a)(14)(i), or when transitioning from one type of food instrument to another. These changes are intended to provide clarity and flexibility to State agencies as they work to ensure participant access to supplemental foods.

d. Streamline Food Delivery Operations by Recognizing that EBT Data are a Sufficient Replacement for Routine Shelf Price Collection [§ 246.12(g)(4) introductory text, (g)(4)(ii)(B), and (g)(9)].

The Department proposes to revise the requirement at § 246.12(g)(4)(ii)(B) so that State agencies with access to EBT data do not have to collect shelf prices from vendors every six months or seek an exemption from FNS. With EBT, State agencies receive current data about vendors' prices at least daily and no longer need to either formally collect these prices through administratively burdensome surveys or take the time to request an exemption from FNS. State agencies without access to electronic benefit redemption data must continue to collect vendor shelf prices at least every six months or seek an exemption from FNS. These changes are expected to reduce burden on authorized vendors and State agencies without negatively impacting program integrity or vendor cost containment practices.

This proposed change would necessitate similar updates to § 246.12(g)(4) and (9), to allow State agencies to use other types of appropriate price data to meet requirements of vendor authorization and cost containment provisions.

e. Extend Vendor Application and Agreement Periods [§ 246.12(g)(8) and (h)(1)(i)].

The Department proposes to increase the maximum length of vendor agreements (§ 246.12(h)(1)(i)) and the minimum frequency that State agencies must accept and process applications (§ 246.12(g)(8)) from three to five years. The proposed change would reduce the administrative burden on vendors and State agencies without sacrificing program integrity, as time periods for vendor monitoring, training, and investigations would be unchanged.

f. Allow State Agencies Using a Non-Retail, Home Food Delivery System to Ship Supplemental Foods to a Location Designated by Participants [§§ 246.2 and 246.12(m)].

The Department proposes revising the definition of ''home food delivery contractor'' at § 246.2 to allow supplemental foods to be delivered to ''a location designated by the participant or State agency'' instead of limiting the delivery to the participant's home. This revision would increase flexibility for both WIC State agencies and participants to determine the most appropriate delivery location and would provide more equitable access to participants in remote areas without mail service at all homes. The revision to this provision would necessitate a similar change to § 246.12(m). The State agency must continue to ensure the accountable delivery of authorized supplemental foods to participants per § 246.12(m)(2).

Additionally, to be consistent with revisions to the definition of ''vendor,'' the Department proposes replacing the specific examples of business entities from the definition of ''home food delivery contractor'' with ''business entity.''

3. Meet the Needs of a Modern, Data-Driven Program

The Department proposes updating reporting requirements to align with data reporting via the Food Delivery Portal (FDP), which replaced The Integrity Profile (TIP) in FY 2022, and expanding State agency staffing requirements to support modernizing and streamlining WIC food delivery and customer service to participants.

The Department has heard from State agencies that identifying and recruiting top talent are key to the success of the WIC Program. This is especially important as WIC continues to evolve to better serve participants through the use of current and future technologies, including by providing electronic benefits and implementing online ordering. The ability to hire staff who can focus on food delivery and customer service would help WIC State agencies to ensure that program modernization efforts support meaningful access to program information for all participants.

The following is a discussion of each proposed provision.

a. Update Reporting Requirements for Federal Oversight [§ 246.12(j)(5)].

The Department proposes to revise § 246.12(j)(5) to reflect the types of data that have been collected for Federal oversight of State agency food delivery management since 2005, and to align with the transition in reporting systems from TIP to FDP. The TIP system, which WIC State agencies have used since 2005, was upgraded to use current technology and renamed the Food Delivery Portal in FY 2022. Since 2005, there have been changes to requirements, policies, technology, and guidance that the TIP system could not support. FDP uses a more robust data collection system to align with current security protocols and compliance guidance, support data storage and web components, ensure cost effectiveness, allow for more data-driven decision making through increased data analytic functionality, enhance FNS reporting capabilities, reduce grantee burden through automated calculations and consolidated reporting, and add data validation features to reduce reporting errors.

Additionally, current WIC regulations require the State agency to send ''a summary of the results of its vendor monitoring containing information stipulated by FNS'' to FNS once a year. The Department proposes updating this reporting requirement to ensure that WIC State agencies report to FDP on all the entities that provide supplemental foods to WIC participants: vendors, home food delivery and direct distribution contractors, farmers, and farmers' markets. The modifications would also remove language that requires a report to be sent on each fiscal year by February 1 of the following fiscal year to FNS. This would allow the Department to set data

submission timelines as appropriate for the modern system and reporting needs, which may be as frequent as quarterly but not less than annually. The reporting requirements, including data fields and submission timelines, will be provided to WIC State agencies with advance notification via policy guidance. Reporting timelines for FDP have already been set via WIC Policy Memorandum #2021–9: *Transition from The Integrity Profile to the Food Delivery Portal* through reporting year FY 2024.

b. Create Two New WIC State Agency Staff Positions to Reflect the Staffing Needs of a Modern, Innovative Program [§ 246.3(e)(5) and (6)].

Current WIC regulations at § 246.3(e)(3) outline the requirements for State agencies to employ a State WIC Nutrition Coordinator with certain qualifications, and to employ a number of Program Specialists, based on caseload. The Department proposes introducing staffing standards for two new State agency staff positions, the WIC Food Delivery and WIC Customer Service coordinators, at § 246.3(e)(5) and (6), respectively. The Department proposes that these positions be staffed with one full-time or equivalent staff when the monthly participation is more than 7,000, or a half-time or equivalent staff when the monthly participation exceeds 500 (and, in the case of the WIC Food Delivery Coordinator, if the State agency manages its own vendor cost containment system). At these thresholds, sixteen of the smallest State agencies (*i.e.,* those with under 500 monthly participants on average) would not be impacted. The proposed revisions also include the ability for State agencies to request an exception to these qualifications to allow for existing personnel or for special circumstances.

Given the importance of WIC food delivery, the Program's near-complete transition to EBT, and the special skills necessary to effectively operate and monitor a retail food delivery system in accordance with Federal vendor cost containment requirements, the Department proposes to develop stronger standards for the position of the WIC Food Delivery Coordinator.

The Department expects that adding this position would ensure that WIC State agencies have the staff in place to make the data-driven decisions necessary for a modern, efficient WIC Program that uses current technologies for food delivery.

Additionally, the Department proposes adding standards to create a WIC Customer Service Coordinator to support WIC State agencies as they work to hire staff who are well-equipped to support program improvements related to participant-facing activities, particularly those that involve emergent technologies and future innovations, potentially including those related to modernized WIC food delivery. WIC State agencies currently use participant-facing technologies to provide WIC services in a customer-centered manner. State agencies have indicated, though, that they do not always have the ability to hire staff with the necessary technical and procurement-related skills to procure, operate, and update these technologies. The Department expects that establishing a WIC Customer Service Coordinator position will help WIC State agencies as they work to recruit and retain staff that can manage current technology projects and continue WIC modernization work through the assessment and implementation of future technologies. These proposed provisions would formalize both the staffing requirement and the expected education and experience levels required for the two positions. To ensure that equity is considered in the development of these standards, the standards allow certain work experience to be treated the same as certain higher educational requirements. The Department expects that these provisions will help WIC State agencies to recruit and retain staff with the skills necessary to manage and modernize their food delivery systems, and to adopt new technologies to improve the participant experience. The WIC Food Delivery and WIC Customer Service coordinators would also play an important role in ensuring that program modernization efforts and improvements to participant-facing technologies are completed in a manner that ensures accessible and meaningful access to program information for all participants.

The Department is specifically requesting comments on whether the staffing standards proposed at § 246.3(e)(5) and (6) would support State agencies' search for qualified personnel. The Department asks stakeholders to include a discussion of the State agency's ability to recruit and fill these positions as described (considering both the recruitment and hiring of staff with the proposed credentials), an assessment of any challenges and costs associated with the adoption of these provisions, necessary timeline to operationalize such requirements, and any recommendations for changes to the standards along with related rationale.

4. Request for Public Comment on Key Topic Areas

The Department encourages stakeholders to provide comment on potential civil rights impacts of the proposed rule. Further, in addition to proposed regulatory changes described previously, the Department seeks comment on the below topic for consideration in this or a future rule. The Department will review and revise all proposed provisions, as needed, prior to submission of a final rule, considering both public comments and relevant publications by regulatory agencies.

a. Exceptions to Minimum Stocking Requirements.

The Department seeks comment on whether there is a need to authorize vendors that sell a specific subset of supplemental foods (*e.g.,* dairies, bakeries, produce sellers) but would not meet the minimum variety and quantity of supplemental foods, as required by WIC regulations (*i.e.,* two different fruits, two different vegetables, and at least one whole grain cereal per § 246.12(g)(3)(i)). The Department requests input from stakeholders that includes a discussion of:

- Whether the authorization of these specialty store types would improve WIC participant access to supplemental foods, with EBT shopping patterns and habits in mind. If so, please describe how this would improve access, equity, and/or nutrition security for participants.
- If there are any special needs or access issues that would necessitate the authorization of these store types. If so, please describe the need and how this would improve access, equity, and/or nutrition security for participants.
- An assessment of the impact on vendor oversight and monitoring, including any changes that would be needed to ensure effective oversight and program integrity.
- Any concerns around including stores that only provide certain types of foods including those relating to State agency capacity to oversee the stores.

IV. Implementation

Because the majority of the revisions proposed are introducing opportunities for increased flexibility for WIC State agencies, the Department proposes that the proposed rule would take effect 30 days after publication of the final rule, except for the following listed provisions where State agencies would have 18 months from publication of the final rule to implement: § 246.12(x)(4) introductory text and (x)(4)(i), the provisions that propose to allow for the

return and use of benefits when an online order could not be fulfilled, and § 246.3(e)(5) and (6), which would create two new WIC State agency staff positions. For § 246.12(x)(4) introductory text and (x)(4)(i), the 18 months would provide WIC State agencies the time to develop and refine the technological solutions needed to meet these provisions. For § 246.3(e)(5) and (6), the 18 months would provide WIC State agencies the necessary time to prepare for any significant changes in State agency-level hiring structures and the State agency's specific staffing requirements. The Department seeks comments from State agencies on the type and scope of the administrative burden that may be associated with implementing the provisions in this proposed rule in this manner.

Procedural Matters

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been determined to be significant and was reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Regulatory Impact Analysis Summary

As required for all rules that have been designated as Significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this proposed rule. The complete RIA follows this proposed rule as an Appendix. The following summarizes the conclusions of the regulatory impact analysis:

Need for Action

To ensure that WIC participants have equal access to available shopping options, with the expansion of online shopping in the retail grocery industry and the development of new payment types, the Department proposes to remove barriers to online shopping and to modernize certain food delivery regulations in the WIC Program through this rulemaking. The proposed measures would complement the Program's near-complete transition to EBT and aim to meet the needs of a modern, data-driven program that uses current technologies for food delivery. These changes are expected to improve nutrition security among WIC participants by increasing equity and access to available shopping options.

Costs

The Department estimates that the provisions under this proposed rule would collectively result in $404 million in costs and Federal transfers over 5 years from FY 2024 through FY 2028 (Table 1). This estimate includes increases in Federal Government WIC spending, increased net costs to WIC State agencies, and a savings for WIC retail vendors.

The Department estimates that allowing WIC online shopping will increase Federal WIC food spending, in the form of transfers, by a total of $392 million over 5 years. This is driven by an understanding that shoppers typically pay higher prices for online groceries and an expectation that online shopping would moderately increase WIC benefit redemption by making the WIC shopping experience more convenient for some participants.

The Department estimates that the proposed rule would also result in around $30 million in net WIC State agency costs from FY 2024 to FY 2028. State agency costs include nearly $27 million in total 5-year expenses required to update State agency systems to enable online transaction of WIC electronic benefits and $55 million in total 5-year costs for increased staffing expenses due to the proposed changes to State agency staffing requirements. State agency costs would be partially offset by a large reduction in State agency reporting burden and recordkeeping burden, which is estimated to result in a savings of $52 million over 5 years and is largely attributable to the removal of shelf price collection requirements for EBT State agencies and the extension of vendor agreement and application periods. These State agency costs are considered allowable expenses for State agencies under their annually awarded Nutrition Services and Administration (NSA) grants. In general, the Department believes that State agencies would be able to absorb the costs associated with implementing the provisions under this proposed rule with current NSA funds.

TABLE 1—SUMMARY OF ESTIMABLE IMPACTS ON TRANSFERS AND COSTS

[FY 2024–2028]

	Fiscal year (millions)					
	2024	2025	2026	2027	2028	Total
Federal Transfers						
Impact of online shopping on Federal WIC food spending	$5.6	$43.7	$79.0	$121.9	$142.0	$392.1
State Agency Costs						
Systems development and maintenance for online shopping	1.1	7.5	6.0	7.1	5.1	26.9
Changes to reporting and recordkeeping burden	−9.7	−10.0	−10.3	−10.6	−10.9	−51.5
New State agency staff positions	5.9	11.9	11.9	12.3	12.7	54.7
WIC Vendor Costs						
Changes to reporting burden	−3.6	−3.6	−3.7	−3.8	−3.9	−18.4
Total Estimated Impact	−0.6	49.5	83.0	127.0	145.0	403.8

Finally, the removal of shelf price collection requirements and the extension of vendor application and agreement periods are also expected to significantly reduce burden on WIC vendors. The Department estimates that the reductions in vendor reporting burden under the proposed rule would save WIC vendors $18 million over 5 years.

Benefits

The provisions under this proposed rule aim to modernize the ways that WIC participants can receive and transact their electronic benefits, creating opportunities to improve equity and accessibility in the Program as a result. An estimated 14 percent of the U.S. population lives in low-income census tracts with limited access to food stores [8] and 21 percent of WIC participants report using a means of transportation other than a personal car to travel to a vendor to use their WIC benefits.[9] Once at the vendor, participants also report challenges shopping for WIC foods. Recent USDA survey data indicate that finding the right WIC-approved products in stores, WIC-approved products being out of stock, and feeling embarrassed shopping for WIC foods are some of the most cited challenges among WIC participants who report difficulties shopping for WIC supplemental foods.[10] Online shopping may alleviate some of these issues for WIC participants and has the potential to provide benefits during supply chain disruptions. Enabling online shopping in WIC under this proposed rule is expected to reduce barriers to WIC Program services, ensure that WIC participants have an equitable shopping experience as the retail marketplace innovates, and increase participant purchases of supplemental foods. These regulatory changes would ensure that WIC participants have the ability to transact benefits online as an increasing share of U.S. consumers prefer to shop for groceries online. The proposed rule would further make WIC more convenient and accessible by encouraging State agencies to remotely issue electronic benefits and mail EBT cards whenever possible, potentially reducing the number of clinic visits that WIC participants are required to make. The proposed rule also includes provisions that would streamline and modernize WIC food delivery by promoting innovation and ensuring that State agencies have enough qualified staff meet the needs of a modern, data-driven program. These provisions provide necessary measures to ensure that State agencies can deliver a more efficient and effective program for WIC participants.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this proposed rule would not have a significant impact on a substantial number of small entities.

The provisions of this proposed rule would primarily affect WIC State agencies and WIC-authorized vendors. The staffing standards proposed at § 246.3(e)(5) and (6) would not apply to smaller State agencies, which have fewer resources. Otherwise, the proposed provisions would apply to all State agencies administering the WIC Program, regardless of size, and would largely be implemented at State agency option. The Department does not expect the proposed rule to have a significant impact on small State agencies. Large retailers may be able to implement WIC online shopping more readily than other store types. However, the Department does not expect the proposed rule to have a lasting or significant negative impact on smaller WIC vendors as WIC sales represent a relatively small share of these stores' revenue. The Department's most recent available estimates of WIC redemptions by vendor size found that in fiscal year 2012, 76 percent of WIC retail redemptions occurred at larger stores (super stores, supermarkets, or large grocery stores), 10 percent occurred at smaller stores (small grocery stores, medium grocery stores, or convenience stores), 9 percent occurred at WIC-only and above-50-percent stores, and 5 percent occurred at other stores (other retail stores, combination grocery/other stores, commissaries, or unknown store types).[11]

WIC sales make up a relatively small fraction of the revenue for smaller stores. Among convenience stores, for example, WIC sales only made up about 0.12 percent of non-fuel sales in 2012.[12] Therefore, the Department expects any revenue that convenience stores and other small vendors (such as small and medium grocery stores) may lose to online shopping at large WIC vendors to be relatively minor. The Department will provide technical assistance to State agencies when necessary to help small vendors engage with online shopping in the WIC Program.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, or Tribal governments, in the aggregate, or the private sector, of $146 million or more (when adjusted for inflation; GDP deflator source: Table 1.1.9 at *https://www.bea.gov/iTable*) in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This proposed rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector of $146 million or more in any one year. Thus, the proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

[8] U.S. Department of Agriculture, Economic Research Service, ''State-Level Estimates of Low Income and Low Access Populations,'' last updated September 30, 2019. Available online at: *https://www.ers.usda.gov/data-products/food-access-research-atlas/state-level-estimates-of-low-income-and-low-access-populations/.*

[9] U.S. Department of Agriculture, Food and Nutrition Service, ''Brief Report #6: WIC Participant Satisfaction and Shopping Experience,'' *Third National Survey of WIC Participants,* by Magness, A., et al., prepared by Capital Consulting Corporation and 2M Research Services, contract No. AG–3198–K–15–0077, Project Officer Karen Castellanos-Brown, Alexandria, VA: December 2021. Available online at: *https://www.fns.usda.gov/wic/third-national-survey-wic-participants.*

[10] Gleason, S., Wroblewska, K., Trippe, C., Kline, N., Meyers Mathieu, K., Breck, A., Marr, J., Bellows, D. (2022). WIC Food Cost-Containment Practices Study. Prepared by Insight Policy Research, Contract No. AG–3198–C–15–0022. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Ruth Morgan. Available online at: *https://www.fns.usda.gov/wic/wic-food-cost-containment-practices-study.*

[11] U.S. Department of Agriculture, Economic Research Service, ''Where Do WIC Participants Redeem Their Food Benefits? An Analysis of WIC Food Dollar Redemption Patterns by Store Type,'' EIB–152, by L. Tiehen, and E. Frazão: April 2016. Available online at: *https://www.ers.usda.gov/publications/pub-details/?pubid=44076.*

[12] Statista, ''Sales of the convenience store industry in the United States from 2011 to 2020, by format,'' January 2022. Available online at: *https://www.statista.com/statistics/308767/sales-of-the-us-convenience-store-industry-by-format/.*

Executive Order 12372

This Special Supplemental Nutrition Program for Women, Infants, and Children is listed in the Catalog of Federal Domestic Assistance under Number 10.557 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

The Department has considered the impact of this proposed rule on State and local governments and has determined that this proposed rule does not have federalism implications. Therefore, under section 6(b) of the Executive order, a federalism summary is not required.

Executive Order 12988, Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This proposed rule is not intended to have retroactive effect unless so specified in the **DATES** section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis (CRIA)

FNS has reviewed the proposed rule, in accordance with the Department Regulation 4300–004 ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the proposed rule might have on participants on the basis of race, sex, national origin, disability, or age. The requirements outlined in the proposed rule aim to remove barriers to online ordering and internet-based transactions, streamline and modernize WIC food delivery, and meet the needs of a modern, data-driven program that uses current technologies for food delivery. The proposed changes would impact WIC State agencies, including ITOs, WIC local agencies and clinics, and WIC vendors in ways that are expected to increase equity and access for WIC participants while enhancing the overall shopping experience.

In particular, the proposed rule would allow State agencies, including ITOs, to authorize new types of vendors and explore modern payment technologies and authentication methods. To comply with revised regulations and implement the proposed changes, staff at State agencies, local agencies, and WIC clinics would need to update operations and communicate these changes to participants. The rule would increase the number of WIC-authorized vendors by allowing different types of vendors (*e.g.,* internet and mobile vendors) to participate in WIC, and eliminate the requirement for vendors to collect shelf-price data, thereby expanding participant shopping options. WIC participants would further benefit from fewer in-person requirements.

To mitigate potential impacts on program access for Limited English Proficiency populations and persons with disabilities, FNS will provide State agencies with technical assistance aimed at ensuring that online shopping platforms and communications about program changes are available in appropriate languages and in alternative formats for persons with disabilities. FNS will also support State agencies as they work to engage small vendors in online shopping in the WIC Program. After reviewing the potential impacts, FNS does not believe the proposed rule would result in civil rights impacts on protected groups of WIC participants and applicants. However, the FNS Civil Rights Division will propose further outreach and mitigation strategies to alleviate any unforeseen impacts, if deemed necessary.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. On November 30, 2021, FNS held a consultation with Tribal leaders and representatives on key issues related to the proposed rule. Tribal leaders were generally supportive of online ordering for WIC, which may increase access to food benefits for those with limited access to a physical store. Tribal leaders provided substantive feedback that was taken into consideration during the development of this proposed rule, including the importance of continuing to support brick-and-mortar vendors and small, Tribal-owned stores, and concern for the barriers that fees related to online ordering could pose to participants who want to use WIC online shopping options. FNS will explore additional opportunities for engagement as needed.

Once the proposed rule is published in the **Federal Register**, FNS will encourage stakeholders representing Indian Tribal Organizations to provide input on whether the proposed rule poses any adverse Tribal implications. If a Tribe requests additional consultation in the future, FNS will work with the Office of Tribal Relations to ensure meaningful consultation is provided. FNS is unaware of any current Tribal laws that could be in conflict with this proposed rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires the Office of Management and Budget (OMB) to approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number.

This proposed rule impacts existing information collection requirements that are contained in OMB Control Number 0584–0043 Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) Program Regulations—Reporting and Recordkeeping (expiration date December 31, 2023) which are subject to review and approval by OMB in accordance with the Paperwork Reduction Act of 1995. Additionally, this proposed rule impacts existing reporting requirements that are approved under OMB Control Number 0584–0401 Food Delivery Portal (FDP) Data Collection (expiration date December 31, 2024), which are subject to review and approval by OMB in accordance with the Paperwork Reduction Act of 1995. Therefore, FNS is submitting for public comment the changes in the information collection burdens in OMB Control Numbers 0584–0043 and 0584–0401 that would result from adoption of the proposals in the rule.

Comments on the information collection for this proposed rule must be received by April 24, 2023.

Comments may be sent to: Patricia Bailey, Food and Nutrition Service, U.S. Department of Agriculture, 1320 Braddock Place, 3rd Floor, Alexandria, VA 22314. Comments will also be accepted through the Federal eRulemaking Portal. Go to *https://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information shall have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notification will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

a. Revisions to OMB Control Number 0584–0043

Title: Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) Program Regulations—Reporting and Recordkeeping Burden.

OMB Number: 0584–0043.

Expiration Date: 12/31/2023.

Type of Request: Revision of a currently approved collection.

Abstract: This is a revision of existing information collection requirements in the information collection under OMB Control Number 0584–0043 that are affected by this proposed rulemaking. Under this proposed rule, the Department proposes to remove regulatory barriers to online ordering and internet-based transactions in the WIC Program, streamline and modernize WIC food delivery, and meet the needs of a modern, data-driven program that uses current technologies for food delivery. This proposed rule impacts the burden associated with reporting requirements for State agencies, individuals and households, and vendors, as well as the burden associated with recordkeeping requirements for State agencies. This proposed rule may also result in additional financial costs to WIC participants and State agencies.

(i) Burden Revisions Related to Internet Vendor Authorization, Monitoring and Oversight, and Training

The proposed rule would allow State agencies to authorize internet vendors, in addition to brick-and-mortar vendors and mobile vendors. Using the new definitions proposed, all vendors authorized under current WIC regulations would be classified as brick-and-mortar vendors with the exception of one mobile vendor. FNS estimates that 800 internet vendors in 80 State agencies with online EBT systems will be authorized initially following the rulemaking (due to technological constraints, offline EBT systems would not be able to support online transactions), increasing the total number of WIC-authorized vendors from 41,164 in the previous information collection submission to 41,964 vendors.

WIC regulations at § 246.12(g)(5) require that State agencies visit a vendor prior to their initial authorization in the Program. During an on-site preauthorization visit, State agency staff spend approximately 40 minutes verifying information provided by the vendor applicant and 20 minutes traveling to and from the vendor.[13] FNS is seeking approval for the requirement for on-site initial preauthorization visits and its associated burden through a separate revision to OMB Control Number 0584–0043. While the proposed rule would allow initial preauthorization visits of internet vendors to take place virtually, therefore not requiring travel time for State agency staff, the initial authorization of 800 internet vendors would add 536.00 reporting burden hours for both State agencies and vendors.

The Department is proposing to increase the maximum length of vendor agreements and the minimum frequency that State agencies must accept and process applications from three to five years. FNS estimates that currently, State agencies spend approximately 45 minutes reviewing, processing, and approving vendor applications and agreements from one-third of the WIC-authorized vendors per year, for a total of 10,188.09 hours.[14] Proposed changes to the definition of ''vendor'' would remove the requirement that State agencies determine a vendor applicant's business structure, decreasing the amount of time it takes a State agency to review a vendor application by 5 minutes, from 45 to 40 minutes. This change, along with extending vendor agreement periods from three to five years and adding internet vendors, would result in a net decrease of State agencies' reporting burden of 4,592.89 hours due to the proposed rule, resulting in a total 5,595.20 hours.

Additionally, the proposed increase to the length of vendor agreement periods and the addition of internet vendors would overall result in fewer vendors submitting vendor agreements and applications for review each year (one-fifth of vendors rather than one-third), decreasing vendors' associated reporting burden by 5,191.32 hours, from 13,584.12 to 8,392.80 hours. These changes would also affect the existing State agency burden for maintaining records of vendor applications and agreements, decreasing this burden on net by 5,191.32 hours, from 13,584.12 to 8,392.80 hours. The number of respondents and frequency of responses for the State agency recordkeeping burden associated with vendor applications and agreements have also been adjusted to correct for clerical errors in this information collection. Under current regulations, the number of respondents is 89.00, rather than 13,584.12 State agencies, and the frequency of responses is 152.63 rather than 1 response per year. These clerical corrections do not affect the existing State agency recordkeeping burden as the underlying math is unchanged. As noted, the longer vendor agreement periods proposed in this rule would decrease the number of vendor agreements that each State agency collects and records each year from 152.63 to 94.30, resulting in the 5,191.32 hour decrease in the associated State agency recordkeeping burden.

Although the proposed rule would not change procedures for vendor oversight, the rulemaking would allow routine vendor monitoring and compliance investigations to be conducted virtually so that State agencies may use oversight methods appropriate for vendors. As with initial vendor preauthorization visits, FNS estimates that it takes State agency staff an average of 20 minutes round trip to travel to a brick-and-mortar or mobile vendor.

[13] The estimate of State agency travel time to visit a vendor is based on the amount of time WIC participants reported traveling to the store where WIC foods are purchased. U.S. Department of Agriculture, Food and Nutrition Service, ''Appendix G. Program Experiences Survey Tables.'' *Third National Survey of WIC Participants,* Alexandria, VA: 2021, Table 4h. Available online at: *https://www.fns.usda.gov/wic/third-national-survey-wic-participants.*

[14] FNS is seeking approval for the State agency requirement to review and process vendor agreements and its associated burden through a separate revision to OMB Control Number 0584–0043.

Considering the additional virtual routine monitoring visits on internet vendors authorized under the proposed rule would add 40.00 more hours to State agencies' reporting burden. FNS is seeking approval for the requirement for on-site routine vendor monitoring and its associated burden through a separate revision to OMB Control Number 0584–0043. The overall increase in the number of WIC-authorized vendors would increase the State agency recordkeeping burden for routine vendor monitoring by 20.00 hours, from 1,029.10 to 1,049.10 hours.

State agency staff conduct on-site compliance investigations of five percent of vendors each year, which requires 20 minutes of travel time and two hours to complete an investigation of a brick-and-mortar or mobile vendor. FNS is seeking approval for the State agency requirement to conduct on site compliance investigations and its associated burden through a separate revision to OMB Control Number 0584–00343. State agencies would also be required to conduct virtual compliance investigations of internet vendors each year, resulting in 80.00 additional burden hours. The overall increase in the number of WIC-authorized vendors would increase the State agency recordkeeping burden for compliance investigations by 80.00 hours.

The addition of 800 internet vendors under the proposed rule would also increase State agencies' reporting burden for vendor training, increasing associated burden hours by 1,600.00 hours per year. It takes two hours for vendors to attend the annual training provided by State agencies. FNS is seeking approval for the requirement for annual vendor training and its associated burden through a separate revision to OMB Control Number 0584–0043. Authorizing 800 internet vendors under the proposed rule would result in an additional 1,600.00 hours of reporting burden for those new vendors to receive training.

Further, FNS estimates that the increase in the overall number of WIC-authorized vendors will result in proportionate increases in both the number of vendors classified as ''above-50-percent'' vendors and the number of vendors that demonstrate a pattern of violations during investigations. These changes would result in associated increases in: the State agency reporting burden related to assessing a vendor's food sales data to determine if they are an ''above-50-percent'' vendor (288.00 additional hours); the vendor reporting burden required to provide such sales data (144.00 additional hours); the reporting burden for above-50-percent vendors who request approval from their State agency to provide incentive items to WIC shoppers (7.60 additional hours); the State agency recordkeeping burden to collect information on above-50-percent vendors' incentive items (7.60 additional hours); and the State agency recordkeeping burden to notify vendors in writing of violations revealed during an investigation (10.00 additional hours).

The number of respondents and frequency of responses for the State agency recordkeeping burden associated with collecting information on above-50-percent vendors' incentive items have also been adjusted to correct for clerical errors in this information collection. Under current regulations, the number of respondents is 4, rather than 389.20 State agencies, and the frequency of responses is 97.30, rather than 1 response per year. These clerical corrections do not affect the existing State agency recordkeeping burden as the underlying math is unchanged. As noted, the expected increase in the number of above-50-vendors with the addition of internet vendors in this proposed rule would increase the number of above-50-vendors that each State agency collects information from each year from 97.30 to 99.20, resulting in the 7.60 hour increase in the associated State agency recordkeeping burden stated in the previous paragraph.

(ii) Burden Revisions Related to Program Modernization

In recognition of the efficiency of using electronic benefit redemption data to analyze the prices vendors charge for supplemental foods, the proposed rule would remove the requirement that State agencies with access to EBT data collect shelf prices from vendors on a biannual basis or seek an exemption from FNS. Until all State agencies have fully implemented EBT systems, FNS estimates that four State agencies will continue to be required to collect shelf prices from WIC-authorized vendors each year, and that one of these State agencies will request an exemption to this collection requirement from FNS. Removing the shelf price collection requirement for State agencies with access to EBT data would significantly decrease the reporting burden for WIC State agencies (−158,997.93 hours for collecting shelf prices and −37.33 hours for preparing exemption requests) and WIC-authorized vendors (−140,497.26 hours).

State agencies are required to submit requests for approval for costs of capital expenditures per § 246.14(d). FNS estimates that implementing updates to State agency systems to allow for online ordering and transactions will cost approximately $90,000 per State agency. Therefore, the proposed rule is expected to increase the number of State agencies submitting such requests during online shopping implementation from 20 to 30 per year, which would increase the associated reporting burden by 1,600.00 hours.

The proposed rule would allow State agencies to adopt EBT transaction authentication technologies other than PIN authentication. State agencies would be required to develop transaction authentication policies that are appropriate for the authentication technology they choose to adopt and in accordance with standards established by the Department. FNS estimates that five State agencies will adopt a new transaction authentication method each year, requiring them to spend an estimated 25 hours developing a new transaction authentication policy. This would add 125.00 hours to State agencies' reporting burden.

The proposed rule would encourage State agencies to issue electronic benefits remotely and mail EBT cards to participants to reduce the number of clinic visits households make to receive benefits. FNS expects that this proposal will decrease the burden associated with picking up food instruments and cash-value vouchers outside of a certification clinic visit by 1,049,334.86 hours. These estimates assume that: on average, WIC households consist of two WIC participants,[15] requiring only one trip to the clinic to pick up both participants' benefits; currently, households in State agencies without an online EBT system are required to travel to a clinic to pick up paper food instruments and CVVs or reload offline EBT cards three times a year outside of another scheduled appointment; and currently, new participants in State agencies with online EBT systems are required to pick up their EBT card in person. With the proposed rule, only participants who need to reload an offline EBT card would be required to travel to a clinic to pick up benefits in person. FNS estimates that on average, picking up benefits in person takes a household 30 minutes, including 26 minutes of round-trip travel time and 4 minutes to obtain the benefits.[16] FNS is

[15] U.S. Department of Agriculture, ''WIC Participant and Program Characteristics 2020 Appendices.'' *WIC Participant and Program Characteristics 2020,* Alexandria, VA: February 2022, Table C.14. Available online at: *https://www.fns.usda.gov/wic/participant-program-characteristics-2020.*

[16] This estimate is based on the amount of time WIC participants reported traveling to the WIC clinic. U.S. Department of Agriculture, Food and

seeking approval for the burden for participants to visit a clinic to pick up food instruments and CVVs outside of a scheduled appointment and its associated burden through a separate revision to OMB Control Number 0584–0043.

Finally, the proposed rule would make small adjustments to the information that State agencies are required to submit annually to FNS in their State Plans. FNS estimates that one State agency currently provides justification to authorize a mobile vendor in their State Plan which requires approximately one hour to complete. Therefore, across all State agencies, the removal of the requirement to justify authorization of mobile vendors would result in less than a one-minute decrease in the number of hours that an average WIC State agency spends preparing their State Plan each year (from 134.62 to 134.61 hours; 1 hour ÷ 89 State agencies = 0.01 hours). This change to the State Plan requirement would result in a small overall decrease in State agencies' reporting burden of 0.89 hours.

Additionally, the proposed rule would allow State agencies to use non-uniform food instruments within a food delivery system when justified in their State Plan. FNS estimates that five State agencies will pursue using non-uniform food instruments through their State Plan as they either transition from offline to online EBT systems or test alternative payment technologies. These justifications each would require an estimated one hour to complete, resulting in an increase to State agencies' total reporting burden of 5.00 hours.

(iii) Costs Associated With the Proposed Rule and OMB Control Number 0584–0043

In addition to the changes to the information collection burdens discussed in this section, implementing the proposed rule is expected to create additional costs for State agencies and WIC participants. As previously noted, FNS estimates that it will cost each of the 89 WIC State agencies approximately $90,000 to update their EBT system to implement online shopping. Altogether, these one-time implementation costs would total $8.01 million. After implementation, the Department anticipates that maintenance of such systems will cost approximately $4,000 per month. Therefore, in an average year following implementation of online shopping in all State agencies, these ongoing maintenance costs would total $4.27 million per year.

The proposed rule would add staffing standards at § 246.3(e) for two new State agency positions: the WIC Food Delivery Coordinator and the WIC Customer Service Coordinator. FNS estimates that 51 State agencies have over 7,000 monthly participants and would be required to employ full-time or equivalent staff persons for both proposed positions, and that current staff meet the requirements for the WIC Food Delivery Coordinator at 13 State agencies, and for the WIC Customer Service Coordinator at 3 State agencies. Additionally, 22 State agencies with monthly participation above 500 but below 7,000 would need to employ a half-time or equivalent staff person for these two new positions, equivalent to 11 additional full-time WIC Food Delivery Coordinators and 11 additional full-time WIC Customer Service Coordinators. Therefore, FNS estimates that in response to the proposed staffing standards, State agencies would need to fill 108 new full-time positions (49 WIC Food Delivery Coordinators and 59 WIC Customer Service Coordinators). Altogether, FNS estimates that these new part-time and full-time staffing standards would cost State agencies approximately $117,590 for each full-time position, or $12.7 million total, in staffing costs per year.[17]

The proposed rule would add a provision at § 246.12(h)(3)(xxxiii) that would allow WIC participants who choose to shop for supplemental foods online to pay for fees associated with such services using another tender type, as long as those fees are also assessed to non-WIC customers using the same services. FNS estimates that an average online grocery order in 2024 will be assessed $9.59 in delivery and service fees. Additionally, FNS estimates that once online shopping has been implemented across all State agencies, 20 percent of WIC households (consisting of two WIC participants, on average) would make one online WIC order each month and that 33 percent of WIC online shopping orders will be placed for home delivery. Therefore, FNS estimates that approximately 229,000 households would place an online order for home delivery each month, costing WIC participants a total of about $26.4 million per year if all State agencies implemented online shopping.

(iv) Summary of Revisions to OMB Control Number 0584–0043

The current approved burden for OMB Control Number 0584–0043 is 4,547,099 hours and 48,798,800 total responses. The baseline current burden discussed here and in the tables below includes revisions to OMB Control Number 0584–0043 that FNS is seeking separately. The updated current burden for this information collection is 6,144,866 hours and 51,864,053 total responses. Changes to the burden due to the rulemaking decrease the total burden by 1,357,162 hours, resulting in a revised burden of 4,787,704 hours. The proposed rule is estimated to decrease the revised total number of responses by 2,260,446 resulting in 49,603,607 total responses. The estimated addition of 800 internet vendors due to the proposed rule is expected to increase the total number of respondents for this information collection from 6,913,189 to 6,913,989. One-time costs associated with the proposed rule are expected to total $8.01 million and annual costs and fees following implementation of online shopping are estimated to total $47.64 million. The average burden per response, the annual burden hours, and the total fees and costs related to this proposed rule are explained below and summarized in the tables which follow.

The change in burden hours to OMB Control Number 0584–0043 and costs associated with the proposed rule are best estimates. The Department requests comments on the burden and all proposed changes. Comments received in response to the proposed rule and burden estimates will inform the final burden estimates.

Respondents: State agencies, including Indian Tribal Organizations and U.S. Territories (note that burden estimates for local agencies are not affected by this proposed rule).

Estimated Number of Respondents: 89.

Reporting

Estimated Number of Reporting Responses per Respondent: 651.22.

Estimated Number of Responses: 57,958.17.

Nutrition Service, ''Appendix G. Program Experiences Survey Tables.'' *Third National Survey of WIC Participants,* Alexandria, VA: 2021, Table 5c.2. Available online at: *https://www.fns.usda.gov/wic/third-national-survey-wic-participants.*

[17] Hourly compensation is based on the hourly total compensation for all State and local workers from calculated by the U.S. Bureau of Labor Statistics for FY 2021 (U.S. Bureau of Labor Statistics, ''Total compensation cost per hour worked for state and local government workers.'' Available online at: *https://data.bls.gov/timeseries/CMU3010000000000D.*), adjusted for inflation. Total annual compensation for a full-time position is calculated by multiplying hourly compensation by 1,767 hours (Organisation for Economic Co-operation and Development (OECD) Labour Force Statistics, ''2020 Average annual hours actually worked per worker in United States.'' Available online at: *https://stats.oecd.org/index.aspx?DataSetCode=ANHRS.*).

Estimated Hours per Reporting Response: 2.21.

Estimated Total Annual Reporting Burden Hours for Respondents: 127,802.22.

Recordkeeping

Estimated Number of Recordkeeping Responses per Respondent: 151.80.

Estimated Number of Responses: 13,510.00.

Estimated Hours per Recordkeeping Response: 1.08.

Estimated Total Annual Recordkeeping Burden Hours for Respondents: 14,559.10.

Respondents: Individuals and households.

Reporting

Estimated Number of Respondents: 347,366.

Estimated Number of Responses per Respondent: 2.63.

Estimated Number of Responses: 911,835.81.

Estimated Hours per Response: 0.50.

Estimated Total Annual Burden on Respondents: 455,917.90.

Respondents: WIC-authorized vendors.

Reporting

Estimated Number of Respondents: 41,964 (41,163 brick-and-mortar vendors, 800 internet vendors, and 1 mobile vendor).

Estimated Number of Responses per Respondent: 1.39.

Estimated Number of Responses: 58,145.63.

Estimated Hours per Response: 1.83.

Estimated Total Annual Burden on Respondents: 106,437.67.

Estimated Capital, Start-up, Operation, Maintenance and Implementation Costs and Fees:

SUMMARY OF COSTS ASSOCIATED WITH THE PROPOSED RULE

Description of cost	Number of respondents	One-time costs (millions)	Annual costs (millions)	Total costs (millions)
State Agencies				
Systems development and maintenance for online shopping	89	8.01	4.27	12.28
New State agency staff positions: WIC Customer Service and Food Delivery coordinators	108	0.00	12.70	12.70
Individuals and Households				
Fees associated with online shopping	229,000	0.00	26.40	26.40
Total Costs		8.01	47.64	55.65

TABLE 3—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN FOR OMB #0584–0043 AS A RESULT OF PROPOSED RULE CHANGES

Regulatory citation	Description of activities	Estimated number of respondents	Frequency of responses	Total annual responses	Average burden hours per response	Estimated total burden hours	Current burden hours in OMB #0584–0043 *	Estimated change in burden hours due to rulemaking
REPORTING BURDEN ESTIMATES								
Affected Public: State Agencies (including Indian Tribal Organizations and U.S. Territories)								
246.4	State Plan	89.00	1.00	89.00	134.61	11,980.29	*11,981.18*	−0.89
246.4(a)(14)(i)	State Plan: Justification for non-uniform food instruments.	5.00	1.00	5.00	1.00	5.00	*0.00*	5.00
246.12(g)(4)(i)	Vendor food sales data	89.00	42.28	3,763.00	4.00	15,052.00	*14,764.00*	288.00
246.12(g)(4)(ii)(B)	Vendor shelf prices	3.00	943.01	2,829.03	2.00	5,658.07	*164,656.00*	−158,997.93
246.12(g)(4)(ii)(B)	Vendor shelf prices exemption.	1.00	0.33	0.33	8.00	2.67	*40.00*	−37.33
246.12(g)(5)	Vendor initial preauthorization visits (virtual).	80.00	10.00	800.00	0.67	536.00	*0.00*	536.00
246.12(h)(1)(i)	Vendor applications & agreements.	89.00	94.30	8,392.80	0.67	5,595.20	* *10,188.09*	−4,592.89
246.12(i)(1)	Vendor training	89.00	471.51	41,964.00	2.00	83,928.00	*82,328.00*	1,600
246.12(j)(2)	Routine vendor monitoring (virtual).	80.00	0.50	40.00	1.00	40.00	*0.00*	40.00
246.12(j)(4)	Vendor compliance investigations (virtual).	80.00	0.50	40.00	2.00	80.00	*0.00*	80.00
246.12(bb)(2)	Transaction authentication policy development.	5.00	1.00	5.00	25.00	125.00	*0.00*	125.00
246.14(d)	ADP proposals—Costs allowable with approval.	30.00	1.00	30.00	160.00	4,800.00	*3,200.00*	1,600.00
Subtotal Reporting: State Agencies.		89.00	651.22	57,958.17	2.21	127,802.22	* *287,157.27*	−159,355.05

TABLE 3—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN FOR OMB #0584–0043 AS A RESULT OF PROPOSED RULE CHANGES—Continued

Regulatory citation	Description of activities	Estimated number of respondents	Frequency of responses	Total annual responses	Average burden hours per response	Estimated total burden hours	Current burden hours in OMB #0584–0043 *	Estimated change in burden hours due to rulemaking
Affected Public: Individuals and Households: Applicants for Program Benefits								
246.12(r)(4) & (r)(5)	Food instrument and cash-value voucher pick up (non-certification clinic visits).	347,366.02	2.63	911,835.81	0.50	455,917.90	* *1,505,252.76*	−1,049,334.86
Subtotal Reporting: Individuals/Households.		347,366.02	2.63	911,835.81	0.50	455,917.90	* *1,505,252.76*	−1,049,334.86
Affected Public: Business: Retail Vendors (WIC-Authorized Food Stores)								
246.12(g)(4)(i)	Vendor food sales data for A50s.	3,763.00	1.00	3,763.00	2.00	7,526.00	*7,382.00*	144.00
246.12(g)(4)(ii)(B)	Vendor shelf prices	1,414.52	2.00	2,829.03	2.00	5,658.07	*146,155.33*	−140,497.26
246.12(g)(5)	Vendor initial preauthorization visits (virtual).	800.00	1.00	800.00	0.67	536.00	*0.00*	536.00
246.12(h)	Vendor applications & Agreements.	8,392.80	1.00	8,392.80	1.00	8,392.80	*13,584.12*	−5,191.32
246.12(h)(8)(i)	Vendor incentive items	396.80	1.00	396.80	1.00	396.80	*389.20*	7.60
246.12(i)(1)	Vendor training	41,964.00	1.00	41,964.00	2.00	83,928.00	* *82,328.00*	1,600.00
Subtotal Reporting: Retail Vendors.		41,964.00	1.39	58,145.63	1.83	106,437.67	* *249,838.65*	−143,400.98
Grand Subtotal: Reporting.		389,419.02	2.64	1,027,939.61	0.67	690,157.80	*2,042,248.68*	−1,352,090.88
RECORDKEEPING BURDEN ESTIMATES								
Affected Public: State Agencies (including Indian Tribal Organizations and U.S. Territories)								
246.12(h)(1)(i)	Vendor applications & agreements.	89.00	94.30	8,392.80	1.00	8,392.80	*13,584.12*	−5,191.32
246.12(h)(8)(i)	Vendor incentive items	4.00	99.20	396.80	1.00	396.80	*389.20*	7.60
246.12(j)(6)	Routine vendor monitoring	89.00	23.58	2,098.20	0.50	1,049.10	*1,029.10*	20.00
246.12(j)(6)(ii)	Vendor compliance investigations.	89.00	23.58	2,098.20	2.00	4,196.40	*4,116.40*	80.00
246.12(l)(3)	Vendor notice of violations	89.00	5.89	524.00	1.00	524.00	*514.00*	10.00
Subtotal: Recordkeeping		89.00	151.80	13,510.00	1.08	14,559.10	*19,632.82*	−5,073.72
Grand Total: Reporting and Recordkeeping due to Rulemaking.		389,419.02	2.67	1,041,449.61	0.68	704,716.90	* *2,061,881.50*	−1,357,164.60

*To capture the estimated changes to the burden from the proposed rule as accurately as possible, the current hours reflect a baseline burden that includes revisions to OMB Control Number 0584–0043 that FNS is seeking separately.

Summary of Requested Burden Revisions:

TABLE 4—SUMMARY OF REQUESTED BURDEN REVISIONS TO #0584–0043

	Responses	Respondents	Time burden
Current Inventory: * Total Burden	51,864,053	6,913,189	6,144,866
Current Inventory: * Reporting	24,320,009	6,913,189	5,614,900
Current Inventory: * Recordkeeping	27,544,044	11,897	529,967
Total Burden Revision Requested	49,603,607	6,913,989	4,787,704
Burden Revision Requested: Reporting	22,064,657	6,913,989	4,262,811
Burden Revision Requested: Recordkeeping	27,538,950	11,897	524,893
Difference in Total Burden from Rulemaking	−2,260,446	800	−1,357,164

*To capture the estimated changes to the burden from the proposed rule as accurately as possible, the ''current inventory'' reflects a baseline that includes revisions to OMB Control Number 0584–0043 that FNS is seeking separately.

b. Revisions to OMB Control Number 0584–0401

Title: Food Delivery Portal (FDP) Data Collection.

OMB Number: 0584–0401.

Expiration Date: 12/31/2024.

Type of Request: Revision of a currently approved collection.

Abstract: This is a revision of existing information collection requirements in the information collection under OMB Control Number 0584–0401 that are affected by this proposed rulemaking. This proposed rule would revise regulations around data submission timelines for information that State agencies must report to FNS using the Food Delivery Portal (FDP). All WIC State agencies are required to submit information on their vendor monitoring and investigation activities, in accordance with § 246.12(j)(5). The revisions in the proposed rule to this section would replace the current, annual submission deadline of February 1 of each fiscal year with submission timelines that may be as frequent as quarterly but not less than annually, based on system capabilities and reporting needs. Therefore, this proposed rule revises the frequency of data preparation and submissions to FDP included in the current information collection to show the possibility of quarterly submissions. Each quarterly submission would contain one-fourth of the data typically included in an annual submission (*i.e.,* 3 months of data rather than 12 months). FDP reporting requirements, including data submission timelines, would be communicated to State agencies with advance notice to prepare submissions.

FNS estimates that 73 of the 89 WIC State agencies enter information into FDP using the data upload process. WIC State agencies using this option must (1) update redemption data, monitoring activities, compliance investigations, sanctions, and administrative reviews on existing vendors and (2) complete all data fields for new vendors, authorized during the reporting period. In instances where data submission timelines are set as quarterly, FNS estimates that it will take an average of 7.5 minutes (0.125 hours) for a WIC State agency to upload its vendor data. This is approximately a quarter of the time that FNS estimates it currently takes State agencies to upload annual data. In total, State agencies would spend an estimated 36.50 hours uploading data annually (73 State agencies × 4 submissions = 292 annual responses × 0.125 hours per response = 36.50 burden hours). The changes to this burden estimate are the frequency of data uploads and amount of time each data upload requires. The total hours would not be affected.

FNS currently estimates that each State agency requires approximately 10 hours to generate the data for each annual FDP submission. With the possibility of quarterly data submissions, FNS estimates that it would require each State agency an average of 2.5 hours per response (10 hours ÷ 4 = 2.5 hours). These responses may need to be prepared up to four times a year under the proposed rule. Therefore, across all 89 State agencies, 356 data submissions would be prepared each year (89 State agencies × 4 submissions per year), requiring 890 total burden hours (356 submissions × 2.5 hours per submission = 890). The only changes to this burden estimate are the frequency of data uploads and amount of time each data upload requires. The total hours would not be affected.

Currently, FNS estimates that 16 WIC State agencies choose to manually add or update records in FDP, rather than extracting the information from their management information system (MIS) or vendor documentation records. While the data reporting frequency for all State agencies may be as frequent as quarterly under the proposed rule, FNS does not anticipate that the burdens associated with manually adding or updating records in FDP would change with the increased frequency of submissions, because the same number of State agencies would submit the same total number of responses throughout the course of one year.

(i) Summary of Revisions to OMB Control Number 0584–0401

The current approved burden for OMB Control Number 0584–0401 is 1,189 hours and 707 total responses. Changes to the burden due to the rulemaking have no effect on the total number of burden hours, which would remain 1,189 hours. The proposed rule is estimated to increase the total number of responses by 486, resulting in 1,139 annual responses due to the increased frequency of submissions to FDP. The total number of respondents for this information collection is not expected to change from 194. The average burden per response and the annual burden hours related to this proposed rule are explained below and summarized in the tables which follow.

The change in burden hours to OMB Control Number 0584–0401 associated with the proposed rule are best estimates. The Department requests comments on the burden and all proposed changes. Comments received in response to the proposed rule and burden estimates will inform the final burden estimates.

Respondents: State agencies, including Indian Tribal Organizations and U.S. Territories.

Estimated Number of Respondents: 162.

Reporting

Estimated Number of Reporting Responses per Respondent: 4.

Estimated Number of Responses: 648.

Estimated Hours per Reporting Response: 1.43.

Estimated Total Annual Reporting Burden Hours for Respondents: 926.50.

TABLE 5—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN FOR OMB #0584–0401 AS A RESULT OF PROPOSED RULE CHANGES

Regulatory citation	Description of activities	Estimated number of respondents	Frequency of responses	Total annual responses	Average burden hours per response	Estimated total burden hours	Current OMB approved burden hours in OMB #0584–0401	Estimated change in burden hours due to rulemaking
REPORTING BURDEN ESTIMATES								
Affected Public: State Agencies (including Indian Tribal Organizations and U.S. Territories)								
246.12(j)(5)	Data Upload	73	4.00	292.00	0.125	36.50	*36.50*	0.00
246.12(j)(5)	Data Preparation	89	4.00	356.00	2.500	890.00	*890.00*	0.00
Total: Reporting due to Rulemaking.		162	4.00	648.00	1.43	926.50	*926.50*	0.00

Summary of Requested Burden Revisions:

TABLE 6—SUMMARY OF REQUESTED BURDEN REVISIONS TO OMB #0584–0401

	Responses	Respondents	Time burden
Current OMB Inventory: Total Burden	707	194	1,189
Total Burden Revision Requested	1,193	194	1,189
Difference in Total Burden from Rulemaking	486	0	0

E-Government Act Compliance

The Department is committed to complying with the E-Government Act of 2002, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 246

Administrative practice and procedure, Civil rights, Food assistance programs, Foods, Grants administration, Grant programs—health, Grant programs—social programs, Indians, Infants and children, Maternal and child health, Nutrition, Penalties, Public health, Reporting and recordkeeping requirements, Women.

Accordingly, the FNS proposes to amend 7 CFR part 246 as follows:

PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN

■ 1. The authority citation for part 246 continues to read as follows:

Authority: 42 U.S.C. 1786.

■ 2. In § 246.2:
■ a. Remove the definition of ''Above-50-percent vendors'' and add in its place the definition of ''Above-50-percent vendor'';
■ b. Add the definitions of ''Brick-and-mortar vendor'' and ''Cash-value benefit'' in alphabetical order;
■ c. Revise the definitions of ''Cash-value voucher'' and ''Compliance buy'';
■ d. Remove the definition of ''Electronic Benefit Transfer'' and add in its place the definition of ''Electronic benefit transfer'';
■ e. Add the definition of ''Electronic benefits'' in alphabetical order;
■ f. Revise the definitions of ''Food instrument'' and ''Home food delivery contractor'';
■ g. Add the definitions of ''Internet vendor'' and ''Mobile vendor'' in alphabetical order; and
■ h. Revise the definitions of ''Routine monitoring'' and ''Vendor''.

The revisions and additions read as follows:

§ 246.2 Definitions.

* * * * *

Above-50-percent vendor means any type of vendor that derives more than 50 percent of its annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion under guidelines approved by FNS.

* * * * *

Brick-and-mortar vendor means a type of vendor authorized to provide authorized supplemental foods to participants through transactions at a single, physical, fixed location. All transactions that take place at the brick-and-mortar vendor will be assigned to that vendor.

Cash-value benefit means a type of electronic benefit that is a fixed-dollar amount used to obtain authorized fruits and vegetables.

Cash-value voucher means a fixed-dollar amount check, voucher, or other document which is used to obtain authorized fruits and vegetables.

* * * * *

Compliance buy means a covert investigation in which a representative of the Program poses as a participant, parent or caretaker of an infant or child participant, or proxy, transacts food instruments, cash-value vouchers, or electronic benefits, and does not reveal during the visit their identity as a program representative.

* * * * *

Electronic benefit transfer (EBT) means a benefit delivery method that permits electronic access to WIC food benefits using a card or other electronic benefit access device or technology approved by the Secretary.

Electronic benefits mean the WIC benefits for supplemental foods prescribed to a participant and contained within the participant's benefit balance.

* * * * *

Food instrument means a paper voucher, check, coupon, other document; or an EBT card or other electronic benefit access device or technology that is used to obtain supplemental foods.

* * * * *

Home food delivery contractor means a business entity that contracts directly with a State agency to deliver authorized supplemental foods to a location designated by the participant or State agency under a home food delivery system.

* * * * *

Internet vendor means a type of vendor authorized to provide authorized supplemental foods to participants through internet-based transactions.

* * * * *

Mobile vendor means a type of vendor authorized to provide authorized supplemental foods to participants through transactions that take place at a truck, bus, pushcart, or other mobile vehicle.

* * * * *

Routine monitoring means overt monitoring during which program representatives identify themselves to vendor personnel.

* * * * *

Vendor means a business entity authorized by the State agency to provide authorized supplemental foods to participants under a retail food delivery system. Each vendor with a unique SNAP authorization number must be authorized separately. For vendors that are not SNAP authorized, each single, separate location constitutes a unique vendor from other store locations and must be authorized separately. A vendor providing supplemental foods through any means other than a single, physical, fixed location must be authorized separately from any related brick-and-mortar vendors.

* * * * *

■ 3. In § 246.3:
■ a. Revise paragraph (e)(5); and
■ b. Redesignate paragraph (e)(6) as paragraph (e)(7) and add a new paragraph (e)(6).

The revision and addition read as follows:

§ 246.3 Administration.

* * * * *

(e) * * *

(5) For food delivery system management, one full-time or equivalent

staff person when the monthly participation is above 7,000, or a half-time or equivalent staff when the monthly participation exceeds 500 and the State agency manages its own vendor cost containment system. The staff person will be named WIC Food Delivery Coordinator and must meet State personnel standards and qualifications in paragraph (e)(5)(i) or (ii) of this section and have the qualifications in paragraph (e)(5)(iii) of this section. Upon request, an exception to these qualifications may be granted by FNS to allow for existing personnel or for special circumstances. The WIC Food Delivery Coordinator must—

(i) Hold a Master's degree or higher, with sufficient statistical coursework to independently analyze and act upon food delivery data, including vendor cost containment data, and have at least one year experience in:

(A) Public health, government administration, or equivalent; or

(B) A WIC food delivery or vendor management position that involved data analysis and vendor cost containment activities; or

(ii) Hold a Bachelor's degree or equivalent educational experience from an accredited four-year institution, with sufficient statistical coursework to independently analyze and act upon food delivery data, including vendor cost containment data; and have at least three years of experience in:

(A) Public health, government administration, or equivalent; or

(B) A WIC food delivery or vendor management position that involved data analysis and vendor cost containment activities; and

(iii) Have demonstrated proficiency in at least one of the following: Program management skills; experience coordinating with information technology contractors; or experience with external stakeholder engagement.

(6) To ensure the State agency's operations are participant-centered and comply with Federal requirements, one full-time or equivalent staff person designated when the monthly participation is above 7,000, or a half-time or equivalent staff when the monthly participation exceeds 500. The staff person will be named WIC Customer Service Coordinator and will be responsible for improvements related to participant-facing activities and technologies. The WIC Customer Service Coordinator must meet State personnel standards and qualifications in paragraph (e)(6)(i) or (ii) of this section and have the qualifications in paragraph (e)(6)(iii) of this section. Upon request, an exception to these qualifications may be granted by FNS to allow for existing personnel or for special circumstances. The WIC Customer Service Coordinator must—

(i) Hold a Master's degree or higher, and have at least one year experience in:

(A) Public health, government administration, or equivalent; product or technology management; acquisitions management; or

(B) A position focused on innovation or modernization with similar complexities to the WIC Program; or

(ii) Hold a Bachelor's degree or equivalent educational experience from an accredited four-year institution and have at least three years of experience in:

(A) Public health, government administration, or equivalent; product or technology management; acquisitions management; or

(B) A position focused on innovation or modernization with similar complexities to the WIC Program; and

(iii) Have demonstrated proficiency in at least one of the following: Product management or product ownership (to include owning business and product vision of technology systems, defining and measuring project objectives, and/or communication and collaboration across cross-functional teams); experience with user-centered design, agile development, DevOps, and other modern technologies, experience managing information technology contractors that employ modern practices; extensive IT or acquisition management experience; experience with contract management.

* * * * *

■ 4. In § 246.4:

■ a. Remove and reserve paragraph (a)(14)(xv); and

■ b. Revise paragraph (a)(23).

The revision reads as follows:

§ 246.4 State plan.

* * * * *

(a) * * *

(23) A plan to improve access to the Program for participants and prospective applicants, with additional focus on those who are employed and/or reside in rural areas. The plan must identify and address the needs of these individuals, and must include, at a minimum, policies and procedures to minimize the time they must spend away from work and the distances they must travel. This plan must include measures to improve access to the Program through the remote issuance of food instruments, cash-value vouchers, and/or electronic benefits, as applicable, to participants through means other than direct participant pick-up, pursuant to § 246.12(r)(4) and (5). The State agency must also describe the State agency's policy for approving transportation of participants to and from WIC clinics per § 246.14(c)(7). This plan must describe how the State agency will ensure the integrity of Program services and fiscal accountability.

* * * * *

■ 5. In § 246.7, revise paragraph (f)(2)(iv) to read as follows:

§ 246.7 Certification of participants.

* * * * *

(f) * * *

(2) * * *

(iv) Each local agency using a retail food delivery system must issue food instruments, cash-value vouchers, or electronic benefits, as applicable, to the participant at the same time as notification of certification. Such food instruments, cash-value vouchers, and electronic benefits must be provided for the current month or the remaining portion thereof and must be transactable immediately upon receipt by the participant. Local agencies may issue electronic benefits remotely or mail the food instruments and cash-value vouchers with the notification of certification, as provided in § 246.12(r)(4) and (5).

* * * * *

■ 6. In § 246.12:

■ a. Revise paragraph (b);

■ b. Revise the third sentence of the introductory text of paragraph (g)(4), paragraphs (g)(4)(ii)(B) and (g)(5), the first sentence of paragraph (g)(8), and the last sentence of paragraph (g)(9);

■ c. Revise the second sentence of paragraph (h)(1)(i) and paragraphs (h)(3)(ii), (v), and (vi);

■ d. Add paragraphs (h)(3)(xxxii) and (xxxiii);

■ e. Revise paragraphs (j)(5) and (j)(6)(ii)(B);

■ f. Revise the first sentence of the introductory text of paragraph (m);

■ g. Revise paragraphs (r)(2) and (4);

■ h. Redesignate paragraphs (r)(5) and (6) as paragraphs (r)(6) and (7), respectively, and add a new paragraph (r)(5);

■ i. Remove the period at the end of newly redesignated paragraph (r)(6) and add ''; and'' in its place;

■ i. Revise paragraphs (v)(1)(iv) and (ix);

■ j. Revise paragraph (x)(2)(iii);

■ k. Add paragraph (x)(4);

■ l. Redesignate paragraphs (bb)(2) and (3) as paragraph (bb)(3) and (4), respectively, and add a new paragraph (bb)(2).

The revisions and additions read as follows:

§ 246.12 Food delivery methods.

* * * * *

(b) *Uniform food delivery systems.* The State agency may operate a combination of up to three types of food delivery systems under its jurisdiction—retail, home food delivery, and direct distribution. These three food delivery systems must be procedurally uniform throughout the jurisdiction of the State agency and the combination of systems used must ensure adequate participant access to supplemental foods. When used, food instruments must be uniform within each type of system, except when the use of non-uniform food instruments is necessary to meet the special needs described and approved in the State agency's State Plan per § 246.4(a)(14)(i), or when transitioning from one type of food instrument to another.

* * * * *

(g) * * *

(4) * * * The State agency must consider a vendor applicant's prices for non-WIC customers or the prices it bids for supplemental foods, which must not exceed the price charged to non-WIC customers. * * *

* * * * *

(ii) * * *

(B) The analysis of vendor prices to monitor vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section and to ensure State agency policies and procedures dependent on price data are efficient and effective. State agencies without access to electronic benefit redemption data must collect vendor shelf prices at least every six months to ensure compliance with this paragraph (g)(4)(ii)(B). FNS may grant an exemption from the requirement to collect shelf prices if the State agency demonstrates to FNS' satisfaction that an alternative methodology for monitoring vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section is efficient and effective and other State agency policies and procedures are not dependent on frequent collection of shelf price data. Such exemption would remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first; and

* * * * *

(5) *Preauthorization visit.* The State agency must conduct an on-site or virtual visit prior to or at the time of a vendor's initial authorization.

* * * * *

(8) * * * The State agency may limit the periods during which applications for vendor authorization will be accepted and processed, except that applications must be accepted and processed at least once every five years. * * *

* * * * *

(9) * * * In addition, if the State agency does not have access to electronic benefit redemption data, the State agency must collect the vendor applicant's current prices for supplemental foods.

* * * * *

(h) * * *

(1) * * *

(i) * * * The agreements must be for a period not to exceed five years. * * *

* * * * *

(3) * * *

(ii) *No substitutions, cash, credit, cash refunds, or exchanges.* The vendor may provide only the authorized supplemental foods listed on the paper food instrument and cash-value voucher or available in the participant's benefit balance.

(A) Except as specified in paragraph (h)(3)(ii)(C) of this section, the vendor must not provide unauthorized food items, nonfood items, cash, or credit (including rain checks) in exchange for benefits. The vendor must not provide cash refunds or permit exchanges for authorized supplemental foods obtained with benefits, except for exchanges of an identical authorized supplemental food item when the original authorized supplemental food item is defective, spoiled, or has exceeded its ''sell by,'' ''best if used by,'' or other date limiting the sale or use of the food item. An identical authorized supplemental food item means the exact brand, type, physical form, and size as the original authorized supplemental food item obtained and returned by the participant.

(B) The vendor may provide only the authorized infant formula which the vendor has obtained from sources included on the list described in paragraph (g)(11) of this section to participants in exchange for food instruments specifying infant formula.

(C) During a supply chain disruption, as defined in section 17(b)(24) of the Child Nutrition Act of 1966, as amended, including a supplemental food product recall, the vendor must treat all customers, including WIC participants, parents or caretakers of infant or child participants, and proxies the same. This should be reflected in store recall exchange policies, including policies related to replacements (which may include, but are not limited to, the same product, a substitute product, store credit, or a cash refund).

* * * * *

(v) *Purchase price.* The vendor must ensure that the purchase price is calculated in accordance with the procedures described in the vendor agreement. The purchase price must include only the amount(s) for the authorized supplemental food items actually provided, and the WIC participant, parent or caretaker of an infant or child participant, or proxy must be made aware of the total purchase price of the transaction before the transaction is completed.

(vi) *Signature on paper food instruments and cash-value vouchers.* For paper food instruments and cash-value vouchers, the vendor must ensure the participant, parent or caretaker of an infant or child participant, or proxy signs the paper food instrument or cash-value voucher after the purchase price is entered.

* * * * *

(xxxii) *Transaction authentication.* The vendor must authenticate transactions in accordance with the policies established by the State agency.

(xxxiii) *Fees associated with online ordering.* A vendor must not charge the State agency for fees associated with online ordering (*e.g.,* delivery, service, convenience, bag fees). If such fees are assessed to non-WIC customers using the same services, WIC participants must be allowed to pay them using another tender type.

* * * * *

(j) * * *

(5) *Reporting.* The State agency must send FNS certain vendor, direct distribution contractor, home food delivery contractor, farmer, and farmers' market data containing information stipulated by FNS via reporting requirements that will be provided to WIC State agencies with advance notification. Reporting requirements will include required data fields and data submission timelines, which may be as frequent as quarterly but not less than annually based on system capabilities and reporting needs. Plans for improvement in the coming year must be included in the State Plan in accordance with § 246.4(a)(14)(iv).

(6) * * *

(ii) * * *

(B) A description of the cashier involved in each transaction, if applicable;

* * * * *

(m) * * * Home food delivery systems are systems in which authorized supplemental foods are delivered to a location designated by the participant or State agency. * * *

* * * * *

(r) * * *

(2) *Signature requirement.* Ensure that the participant, parent or caretaker of an infant or child participant, or proxy signs for receipt of food instruments, cash-value vouchers, or authorized supplemental foods, except as provided in paragraphs (r)(4) and (5) of this section;

* * * * *

(4) *Paper food instrument and cash-value voucher pick up.* Require participants, parents and caretakers of infant and child participants, and proxies to pick up paper food instruments and cash-value vouchers in person when scheduled for in-person nutrition education or for an in-person appointment to determine whether participants are eligible for a second or subsequent certification period. In all other circumstances the State agency may opt to mail paper food instruments or cash-value vouchers unless FNS determines that it would jeopardize the integrity of program services or program accountability;

(5) *EBT card and electronic benefit issuance.* Ensure participants receive their EBT cards and electronic benefits in accordance with §§ 246.7(f)(2)(iv) and 246.11(a)(2), without jeopardizing the integrity of program services or program accountability. The State agency is encouraged to remotely issue electronic benefits and mail EBT cards, when possible, unless FNS determines that it would jeopardize the integrity of program services or program accountability;

* * * * *

(v) * * *

(1) * * *

(iv) Transact and redeem cash-value vouchers or cash-value benefits in accordance with procedures established by the State agency. Such procedures must include:

(A) A requirement for the farmer or farmers' market to allow the participant, parent or caretaker of an infant or child participant, or proxy to pay the difference when the purchase price of fruits and vegetables exceeds the value of the cash-value vouchers or cash-value benefits. This is known as a split tender transaction; and

(B) Procedures to ensure that the WIC participant, parent or caretaker of an infant or child participant, or proxy is made aware of the total purchase price of the transaction before the transaction is completed;

* * * * *

(ix) Offer WIC participants, parents or caretakers of infant or child participants, or proxies the same courtesies as other customers. If fees associated with online ordering (*e.g.,* delivery, service, convenience, bag fees) are assessed to non-WIC customers using the same services, WIC participants must be allowed to pay them using another tender type;

* * * * *

(x) * * *

(2) * * *

(iii) *Last date of use.* The last date on which the electronic benefit may be used to obtain authorized supplemental foods. This date must be a minimum of 30 days, or in the month of February 28 or 29 days, from the first date on which it may be used to obtain authorized supplemental foods except for the participant's first month of issuance when it may be the end of the month or cycle for which the electronic benefit is valid. This must be extended, as applicable, per paragraph (x)(4)(i) of this section; and

* * * * *

(4) *Return of benefits.* If applicable, the State agency must allow for the return of electronic benefits to a participant's balance when items in an online order are not fulfilled. The return of electronic benefits and subsequent purchase must be linked to one or more items in the original transaction and must comply with the following requirements:

(i) *Return of benefits after the last date of use.* When electronic benefits are returned to a participant's balance, the State agency must provide the participant with no less than 7 calendar days to transact the returned benefits.

(ii) [Reserved]

* * * * *

(bb) * * *

(2) The State agency must develop policies to ensure that each transaction is authenticated according to standards established by FNS.

* * * * *

■ 7. In § 246.14, revise paragraphs (b)(1)(i) and (c)(4) to read as follows:

§ 246.14 Program costs.

* * * * *

(b) * * *

(1) * * *

(i) Purchasing supplemental foods in a retail food delivery system using WIC benefits and/or acquiring supplemental foods provided to State or local agencies or participants, whichever receives the supplemental foods first in a home food delivery system or a direct distribution food delivery system;

* * * * *

(c) * * *

(4) The cost of administering the food delivery system, including the cost of transporting supplemental foods, except as prohibited at § 246.12(h)(3)(xxxiii) and (v)(1)(ix).

* * * * *

Cynthia Long,

Administrator, Food and Nutrition Service.

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

Appendix A—Regulatory Impact Analysis

Statement of Need

The methods consumers, including those served by the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), use to purchase food have changed in response to advances in technology as well as changes in purchasing behavior brought on by the COVID–19 pandemic. The Department's regulations have not been changed to reflect these increased options available to consumers. To ensure that WIC participants have equal access to available shopping options, with the expansion of online shopping in the retail grocery industry and the development of new payment types, the Department proposes to remove barriers its current regulations impose on online shopping and to modernize certain food delivery regulations in the WIC Program through this rulemaking. The proposed measures would complement the Program's near-complete transition to electronic benefit transfer (EBT) and aim to meet the needs of a modern, data-driven program that uses current technologies for food delivery. These changes are expected to improve nutrition security among WIC participants by increasing equity and access to available shopping options.

Background

Introduction of Key Terms

For the purposes of this proposed rule and analysis, the Department will use the following definitions:

- ''WIC shopper'' means a person shopping using WIC benefits (*i.e.,* a WIC participant, proxy, or a parent or caretaker of an infant or child participant).
- ''Online shopping'' means the general use of an online, internet-based ordering system, platform, or site. It can encompass online ordering with or without internet-based transactions (*i.e.,* the transaction can occur via the internet, in store, curbside, or at the point of delivery).
- ''Online ordering'' means the process a customer (including a WIC shopper) uses to select food items for purchase via an internet-based ordering system, platform, or site.
- ''Transaction'' means the process by which a WIC shopper exchanges their WIC benefits for supplemental foods.
- ''internet-based transaction'' means a transaction where the WIC payment is completed through the payment section of the online ordering system, platform, or site. This terminology is being used in lieu of ''online transaction'' to avoid confusion with transactions that occur using online EBT technology.
- ''Redemption'' means the process in which a vendor submits records of electronic

benefits for redemption and the State agency (or its financial agent) makes payment to the vendor.

Overview of the WIC Program and Shopping Experience

The WIC Program is administered by 89 WIC State agencies, including the 50 States, 33 Indian Tribal Organizations, the District of Columbia, and 5 U.S. Territories (American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands). WIC serves to safeguard the health of low-income pregnant, breastfeeding, and non-breastfeeding postpartum individuals, and infants and children up to age five who are found to be at nutritional risk. In 2019, WIC participants included nearly 43 percent of all infants in the United States,[1] and in fiscal year (FY) 2020, WIC served an average of 6.25 million participants.[2]

The Department provides Federal grants to WIC State agencies to provide supplemental foods, health care referrals, and nutrition education, including breastfeeding promotion and support, to WIC participants. WIC participants typically access supplemental foods through a retail food delivery system. In such systems, a WIC shopper goes to a WIC-authorized vendor (*i.e.,* a retail store authorized by the State agency), selects foods available in their benefit balance, and uses an EBT card to purchase the items. In FY 2020, there were approximately 40,000 WIC-authorized vendors nationwide, and nearly 93 percent of WIC participants received WIC benefits via EBT.

Current WIC regulations were written for a paper-based benefit delivery system and restrain State agencies from making use of the opportunities that EBT provides, including remotely issuing electronic benefits and transacting those benefits online. Current regulations that require participants to pick up food benefits in person and transact food benefits in the presence of a cashier pose challenges to participants with special dietary needs, limited mobility or access to transportation, and/or those who live in remote or rural communities. These requirements also present unique challenges during disasters or public health emergencies, such as the COVID–19 pandemic.

Key Information Used in the Development of This Proposed Rule and Analysis

The 2014 Farm Bill (Pub. L. 113–79) mandated that the Department conduct a pilot to assess the feasibility and implications of allowing retailers authorized under the Supplemental Nutrition Assistance Program (SNAP) to accept SNAP benefits for online transactions. The SNAP Online Purchasing Pilot initially launched in New York in April 2019, then expanded to Washington in January 2020, followed by Alabama, Oregon, and Iowa in March 2020, and Nebraska in April 2020. The onset of the COVID–19 pandemic spurred a rapid expansion of the pilot across 47 States and the District of Columbia by early 2021. While online shopping with SNAP benefits is now available in nearly all States, WIC shoppers do not yet have widespread access to online shopping due in part to barriers under current WIC regulations.

In September 2020, the Department awarded a grant to the Gretchen Swanson Center for Nutrition (GSCN) to develop a plan for implementing online shopping in WIC. With extensive stakeholder input, GSCN developed the Blueprint for WIC Online Ordering Projects (the ''Blueprint''), which was published in June 2021.[3] As a part of the grant agreement, GSCN has since awarded sub-grants to State agency and vendor partners to fund four projects that will test WIC online shopping across seven geographic States and one Indian Tribal Organization (ITO).

The Consolidated Appropriations Act for Fiscal Year 2021 (Pub. L. 116–260) authorized the Department to establish the Task Force on Supplemental Foods Delivery (the ''Task Force''). The Task Force was charged with assembling WIC stakeholders to independently ''study measures to streamline the redemption of supplemental foods benefits that promote convenience, safety, and equitable access to supplemental foods, including infant formula.'' The Task Force submitted its recommendation report to the Department on September 30, 2021. The Department was then required to report a plan to Congress on how the recommendations would be carried out as well as whether any legislative changes would be required.[4]

The proposed Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Online Ordering and Transactions and Food Delivery Revisions to Meet the Needs of a Modern, Data-Driven Program rule is informed by WIC stakeholder input and recommendations in both the Blueprint and the final reports of the Task Force. The Department has also incorporated lessons learned from the SNAP Online Purchasing Pilot. The GSCN sub-grant projects will be evaluated over the next year to assess the start-up costs required by State agencies and vendors to operationalize WIC online shopping and the impact that online shopping has on key outcomes including WIC benefit redemption rates. The Department intends to review the findings from the GSCN projects and use updated data to inform future iterations of this initial impact analysis throughout the rulemaking process, especially on implementation costs and redemption rate impacts.

Summary of Provisions

The proposed rule would update WIC regulations to remove current regulatory barriers to online ordering and transactions in WIC, streamline and modernize food and benefit delivery options for WIC participants, and introduce measures intended to meet the needs of a modern, data-driven program that uses current technologies for food delivery. Specifically, the rule proposes the following changes:

- Remove barriers to online ordering and internet-based transactions.
  - Allow vendors and WIC shoppers to complete internet-based transactions and allow State agencies to explore and identify options to authenticate EBT transactions that are appropriate for the specific technologies they choose to adopt.
  - Allow State agencies to authorize new types of vendors to give WIC participants more shopping options by:
    - Creating definitions for ''brick-and-mortar,'' ''internet,'' and ''mobile'' vendors.
    - Removing language from the definition of ''vendor'' that currently only allows State agencies to authorize vendors with a ''single, fixed location'' (*i.e.,* brick-and-mortar vendors).
  - Allow vendors to return benefits to a participant's benefit balance when an item requested through an online order cannot be fulfilled.
  - Allow State agencies to develop virtual methods of oversight.
  - Permit WIC shoppers to pay for fees related to online shopping (*e.g.,* delivery, service, convenience, bag fees) using a separate tender type if such fees are assessed to non-WIC customers using the same services.
- Streamline and modernize WIC food delivery.
  - Permit the remote issuance of electronic benefits to a participant's benefit balance and clarify the definitions of ''electronic benefits'' and ''cash-value benefit'' as separate and distinct from paper food instruments.
  - Add ''other electronic benefit access device or technology'' to the definition of a ''food instrument.''
  - Allow State agencies to develop and test new WIC food instrument types.
  - Streamline food delivery operations by recognizing that EBT data are a sufficient replacement for routine shelf price collection.
  - Extend vendor application and agreement periods from three to five years.
  - Allow State agencies using a home food delivery system (non-retail) to ship supplemental foods to a location designated by participants (*e.g.,* Alaska Natives who do not have at-home mail service).
- Meet the needs of a modern, data-driven program.
  - Update reporting requirements for Federal oversight to align with the transition in reporting systems from The Integrity Profile (TIP) to the Food Delivery Portal (FDP).

[1] U.S. Department of Agriculture, Food and Nutrition Service, ''National- and State-Level Estimates of WIC Eligibility and WIC Program Reach in 2019: Final Report, Volume I,'' pp. 65, by Kelsey Farson Gray et al. Project Officer Grant Lovellette, Alexandria, VA: February 2022. Available online at: *https://fns-prod.azureedge.net/sites/default/files/resource-files/WICEligibles2019-Volume1.pdf.*

[2] U.S. Department of Agriculture Food and Nutrition Service, ''WIC Data Tables,'' 2021. Available online at: *https://www.fns.usda.gov/pd/wic-program.*

[3] Gretchen Swanson Center for Nutrition. ''Blueprint for WIC Online Ordering Projects,'' 2021. Available online at: *https://www.centerfornutrition.org/wic-online-ordering.*

[4] More information on the WIC Task Force on Supplemental Foods Delivery, including links to both the Departmental and Congressional reports, is available online at: *https://www.fns.usda.gov/wic/task-force-supplemental-foods-delivery.*

○ Create two new WIC State agency staff positions to reflect staffing needs of a modern, innovative program.

Summary of Impacts

• **Costs**

The Department estimates that the provisions under this proposed rule would collectively result in a total of $404 million in costs and Federal transfers over 5 years from FY 2024 through FY 2028 (Table 1). This estimate includes increases in Federal Government WIC spending, increased net costs to WIC State agencies, and a savings for WIC retail vendors.

The Department estimates that allowing WIC online shopping will increase Federal WIC food spending, in the form of transfers, by a total of $392 million over 5 years. This is driven by an understanding that shoppers typically pay higher prices for online groceries and an expectation that online shopping would moderately increase WIC benefit redemption by making the WIC shopping experience more convenient for some participants.

TABLE 1—SUMMARY OF ESTIMABLE IMPACTS ON TRANSFERS AND COSTS

[FY 2024–2028]

	Fiscal year (millions)					
	2024	2025	2026	2027	2028	Total
Federal Transfers						
Impact of online shopping on Federal WIC food spending	$5.6	$43.7	$79.0	$121.9	$142.0	$392.1
State Agency Costs						
Systems development and maintenance for online shopping	1.1	7.5	6.0	7.1	5.1	26.9
Changes to reporting and recordkeeping burden	−9.7	−10.0	−10.3	−10.6	−10.9	−51.5
New State agency staff positions	5.9	11.9	11.9	12.3	12.7	54.7
WIC Vendor Costs						
Changes to reporting burden	−3.6	−3.6	−3.7	−3.8	−3.9	−18.4
Total Estimated Impact	−0.6	49.4	83.0	127.0	145.0	403.8

Notes: All monetary figures are adjusted for annual inflation.

The Department estimates that the proposed rule would also result in around $30 million in net WIC State agency costs from FY 2024 to FY 2028. State agency costs include nearly $27 million in total 5-year expenses required to update State agency systems to enable online transaction of WIC electronic benefits and $55 million in total 5-year costs for increased staffing expenses due to the proposed changes to State agency staffing requirements. State agency costs would be partially offset by a large reduction in State agency reporting burden and recordkeeping burden, which is estimated to result in a savings of $52 million over 5 years and is largely attributable to the removal of shelf price collection requirements for EBT State agencies and the extension of vendor agreement and application periods. These State agency costs are considered allowable expenses for State agencies under their annually awarded Nutrition Services and Administration (NSA) grants. The Department expects that State agencies would be able to absorb the costs associated with implementing the provisions under this proposed rule with current NSA funds without any increase in the level of NSA grants.

Finally, the removal of shelf price collection requirements and the extension of vendor application and agreement periods are also expected to significantly reduce burden on WIC vendors. The Department estimates that the reductions in vendor reporting burden under the proposed rule would save WIC vendors $18 million over 5 years.

• **Benefits**

The provisions under this proposed rule aim to modernize the ways that WIC participants can receive and transact their electronic benefits, creating opportunities to improve equity and accessibility in the Program as a result. An estimated 14 percent of the U.S. population lives in low-income census tracts with limited access to food stores,[5] and 21 percent of WIC participants report using a means of transportation other than their own personal car to travel to a vendor to use their WIC benefits.[6] By comparison, 95 percent of higher income households (above 185 percent of the Federal poverty line) use their own vehicle to travel to a grocery store.[7] Once at the vendor, participants also report challenges shopping for WIC foods. Recent USDA survey data indicate that finding the right WIC-approved products in stores, WIC-approved products being out of stock, and feeling embarrassed shopping for WIC foods are some of the most cited challenges among WIC participants who report difficulties shopping for WIC supplemental foods.[8] Online shopping may alleviate some of these issues for WIC participants and has the potential to provide benefits during supply chain disruptions.

Enabling online shopping in WIC under this proposed rule is expected to reduce barriers to WIC services, ensure that WIC participants have an equitable shopping

[5] USDA Economic Research Service. ''State-Level Estimates of Low Income and Low Access Populations.'' Last updated September 30, 2019. Available online at: *https://www.ers.usda.gov/data-products/food-access-research-atlas/state-level-estimates-of-low-income-and-low-access-populations/.*

[6] Magness, A., Williams, K. Gordon, E., Morrissey, N., Papa, F., Garza, A., Okyere, D., Nisar, H., Bajowski, F., & Singer, B. (2021). Third National Survey of WIC Participants: WIC Participant Satisfaction and Shopping Experience: Brief Report #6. Prepared by Capital Consulting Corporation and 2M Research Services. Contract No. AG–3198–K–15–0077. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Karen Castellanos-Brown. Available online at: *https://www.fns.usda.gov/wic/third-national-survey-wic-participants.*

[7] Ver Ploeg, Michele, Lisa Mancino, Jessica E. Todd, Dawn Marie Clay, and Benjamin Scharadin. Where Do Americans Usually Shop for Food and How Do They Travel To Get There? Initial Findings From the National Household Food Acquisition and Purchase Survey, EIB–138, U.S. Department of Agriculture, Economic Research Service, March 2015. Available online at: *https://www.ers.usda.gov/publications/pub-details/?pubid=79791.*

[8] Gleason, S., Wroblewska, K., Trippe, C., Kline, N., Meyers Mathieu, K., Breck, A., Marr, J., Bellows, D. (2022). WIC Food Cost-Containment Practices Study. Prepared by Insight Policy Research, Contract No. AG–3198–C–15–0022. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Ruth Morgan. Available online at: *https://www.fns.usda.gov/wic/wic-food-cost-containment-practices-study.*

experience as the retail marketplace innovates, and increase participant purchases of supplemental foods. Online shopping may also expand participant choice in supplemental foods, particularly for authorized supplemental food substitutions needed to meet certain dietary restrictions, that may not be readily available at the closest WIC-authorized grocery stores. These regulatory changes would ensure that WIC participants have the ability to transact benefits online as an increasing share of U.S. consumers prefer to shop for groceries online. The proposed rule would further make WIC more convenient and accessible by encouraging State agencies to remotely issue electronic benefits and mail EBT cards whenever possible, potentially reducing the number of clinic visits that WIC participants are required to make. The proposed rule also includes provisions that would streamline and modernize WIC food delivery by promoting innovation and ensuring that State agencies have enough qualified staff meet the needs of a modern, data-driven program. These provisions provide necessary measures to ensure that State agencies can deliver a more efficient and effective program for WIC participants.

Section-by-Section Analysis

A. Baseline for Cost Estimate

Baseline Federal Costs

The total projected baseline Federal cost of WIC absent the proposed rule for FY 2024 through FY 2028 is shown in Table 2 below. At the Federal level, WIC expenditures are broadly split between grants to State agencies to fund food benefits (''food costs'') and NSA grants to fund all approved non-food expenses (''NSA costs''). WIC food costs are a function of the number of participants receiving each food package, the retail prices of supplemental foods, the quantity of WIC foods prescribed to each participant, and the percentage of WIC benefits used by participants to purchase the supplemental foods that WIC-authorized vendors have submitted for reimbursement from the State agency (known as the ''redemption rate'').

TABLE 2—PROJECTED BASELINE FEDERAL WIC SPENDING

[FY 2024–2028]

	Fiscal year (millions)					
	2024	2025	2026	2027	2028	Total
Total Food Costs	$3,434.9	$3,595.9	$3,766.8	$3,948.1	$4,140.6	$18,886.4
Total Nutrition Services & Administration Costs	2,157.6	2,224.5	2,293.4	2,364.5	2,437.8	11,477.8
Total Federal Spending	5,592.5	5,820.4	6,060.2	6,312.6	6,578.4	30,364.1

Note: Totals may not sum due to rounding.

Participation

This analysis bases WIC participation projections on participation changes observed during FY 2020 and FY 2021 (including when program flexibilities were implemented in response to the COVID–19 pandemic); specifically, a fixed level of participation among women and infants and annual increases in participation among children. Accordingly, growth in child participation is estimated at 2.08 percent annually between FY 2021 and FY 2023 and to rise to 4.82 percent annual growth between FY 2023 and FY 2026 before leveling off at the higher participation level in FY 2027 and FY 2028. In 2019, the most recent data available, only 45 percent of eligible children participated in WIC. The share of eligible children that do not participate in WIC is considered the ''coverage gap.'' [9] The estimated increases in child participation used in this analysis reflect a projected narrowing of the coverage gap among WIC-eligible children as a result of current and future efforts to improve child retention in WIC. While declining birth rates in the U.S. have contributed to a decrease in women and infants enrolling in WIC since 2009, the Department projects participation of women and infants to level off due to future outreach efforts to increase participation among the eligible population.[10]

TABLE 3—BASELINE WIC PARTICIPATION PROJECTIONS

[FY 2024–2028]

	Fiscal year participants				
	2024	2025	2026	2027	2028
Women	1,381,305	1,381,305	1,381,305	1,381,305	1,381,305
Infants	1,468,664	1,468,664	1,468,664	1,468,664	1,468,664
Children	3,714,820	3,894,002	4,081,826	4,081,826	4,081,826
Total Participants	6,564,789	6,743,971	6,931,795	6,931,795	6,931,795

Source: Internal USDA estimates.

- **Key Assumptions**

Adoption of Online Ordering

While the proposed rule would remove barriers to allow for online shopping in WIC, it would not require State agencies to implement online shopping. However, due to widespread interest in improving the WIC shopping experience, particularly through online shopping, this analysis assumes that by FY 2027, all 89 State agencies will have implemented WIC online shopping for WIC participants. However, like the adoption of EBT, the analysis assumes that online shopping will gradually roll out across State

[9] Gray K., Balch-Crystal E., Giannarelli, L., and Johnson, P. (2022). National- and State-Level Estimates of the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) Eligibility and WIC Program Reach in 2019. Prepared by Insight Policy Research, Contract No. AG–3198–D–16–0095. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Grant Lovellette. Available online at: *www.fns.usda.gov/research-analysis.*

[10] Although birthrates increased slightly (by about 1 percent) between 2020 and 2021, births continue to be below 2019 levels. Source: Martin JA, Hamilton BE, Osterman MJK. Births in the United States, 2021. NCHS Data Brief, no. 442. Hyattsville, MD: National Center for Health Statistics. 2022. DOI: *https://dx.doi.org/10.15620/cdc:119632.*

agencies between FY 2024 and FY 2027, covering around half of WIC State agencies by FY 2025. State agencies may vary in the time it takes to implement online shopping systems for many reasons, including contracting requirements with technology partners, the need to coordinate changes with Management Information Systems (MIS), or resource allocation constraints due to other State agency priorities. The Department also recognizes that implementation of online shopping in WIC depends upon authorized vendors offering this service to WIC participants. Because the Department is unable to predict at this time which State agencies will be the earliest adopters of online shopping, the analysis also assumes an even distribution of WIC participants across these State agencies (*i.e.,* the 51 percent of WIC State agencies offering online shopping in FY 2025 will also cover 51 percent of WIC participants).

TABLE 4—ESTIMATED NUMBER OF STATE AGENCIES USING WIC ONLINE SHOPPING

[FY 2024–2028]

	Fiscal year				
	2024	2025	2026	2027	2028
Number of State Agencies	7	45	68	89	89
(% of Total)	(8%)	(51%)	(76%)	(100%)	(100%)

Notes: The 7 State agencies expected to offer online shopping in FY 2024 represent the 7 State agencies currently participating in the Gretchen Swanson Center for Nutrition WIC Online Purchasing Sub-grant Projects.

In addition to estimating the number of State agencies offering online shopping in WIC, this analysis must also estimate how many WIC participants will transact any benefits online and, among online WIC shoppers, what share of their benefits will be transacted online. A recent nationally representative poll conducted in July 2021 found that 23 percent of Americans reported ordering groceries online for pickup or delivery at least once a month.[11] Online grocery sales are estimated to have accounted for about 12 percent of total grocery sales in 2021, in terms of total revenue, with their market share expected to grow to around 19 percent by 2024 (a 53 percent increase).[12] By the end of FY 2021, just over 8 percent of SNAP households nationwide made at least one SNAP purchase online in a given month, and online redemptions accounted for just under 5 percent of the total dollar amount of SNAP redemptions between August and September 2021.[13] This analysis assumes that SNAP shoppers are a better proxy for WIC shoppers than the general population but also estimates that growth in online shopping among all shoppers will follow at least the same 53 percent total increase that Mercatus predicts for the general population between 2021 and 2024. Accordingly, by increasing the 8 percent of SNAP households redeeming benefits online in 2021 by 53 percent total between 2021 and 2024, the Department projects that among State agencies operating online shopping in WIC, 12 percent of WIC participants will transact at least some of their benefits online in FY 2024. As online grocery shopping continues to gain popularity, the share of WIC participants shopping online is expected to increase each year between FY 2024 and FY 2028 within participating State agencies. The Mercatus report also projects around a 13 percent relative increase in the online grocery shopping market share between 2024 and 2025. The Department applies the same 13 percent year-to-year growth rate to project the growth of WIC online shopping between FY 2024 and FY 2028. Beginning in FY 2024, this 13 percent annual growth rate amounts to about a 2-percentage point increase each year in the share of WIC participants, within participating State agencies, using at least some of their WIC benefits online between FY 2024 and FY 2028 (see Table 5).

TABLE 5—ESTIMATED USE OF WIC ONLINE SHOPPING WHERE AVAILABLE

[FY 2024–2028]

	Fiscal year				
	2024	2025	2026	2027	2028
Percentage of WIC participants expected to transact at least some benefits online	12%	14%	16%	18%	20%

Notes: Estimates for each year reflect the percentage of participants that will use WIC online shopping only in State agencies where it is available at that time.

Even among online WIC shoppers, it is reasonable to assume some level of variation in exactly what percentage of their WIC benefits are transacted online. Thus, this analysis assumes that the average online WIC shopper will transact about half of their benefits online in a given month. This is consistent with initial estimates of SNAP online shopping, based on the share of SNAP benefits redeemed compared to the share of SNAP households shopping online after adjusting for estimated variations in in-store and online retail prices (described later in this analysis).

- **Cost, Participant, Vendor, and State Agency Impacts**

- **Remove Barriers to Online Ordering and Internet-Based Transactions**

Discussion

While use of online grocery shopping has expanded in recent years, including among SNAP shoppers, WIC participants do not have widespread access to online shopping with WIC benefits due in part to barriers in current WIC regulations. Current regulations require that WIC transactions occur in the presence of a cashier, allowing WIC shoppers to either sign a paper food instrument or enter a Personal Identification Number (PIN) for an EBT transaction. While some States agencies, including one ITO, have recently adopted WIC online ordering, this in-person requirement has prevented the transaction of WIC benefits from occurring online. Current rules also typically require WIC vendors to have a single, fixed location and require most vendor oversight activities to occur through on-site visits to those locations. The Department proposes several changes under this rule to address these and other regulatory barriers to allow WIC shoppers and WIC-approved vendors to complete

[11] Brenan, M. ''More in U.S. Grocery Shopping Online, Fewer Dining Out.'' *Gallup,* 10 August 2021. Available online at: *https://news.gallup.com/poll/353090/grocery-shopping-online-fewer-dining.aspx.*

[12] Mercatus. ''eGrocery Transformed: Market projections and insight into online grocery's elevated future,'' 2021.

[13] Based on internal, unpublished data on monthly online SNAP redemptions in FY 2021.

transactions online. Specifically, the proposed rule would:

- Allow vendors and WIC shoppers to complete internet-based transactions by removing the requirement that participants complete WIC transactions in the presence of a cashier. Associated new provisions would allow State agencies to explore and identify options to authenticate EBT transactions that are appropriate for the specific technologies they choose to adopt.
- Allow State agencies to authorize new types of vendors to give WIC participants more shopping options by:
  - Creating definitions for ''brick-and-mortar,'' ''internet,'' and ''mobile'' vendors to distinguish vendors operating solely online from stores with a single, fixed location. The definitions for ''internet vendor'' and ''mobile vendor'' are based on SNAP's definitions of ''internet retailer'' and ''house-to-house trade route,'' respectively, to ensure that cross-program integrity efforts continue without interruption.
  - Removing language from the definition of ''vendor'' that currently only allows State agencies to authorize vendors with a ''single, fixed location'' (*i.e.,* brick-and-mortar vendors).
- Allow vendors to return benefits to a participant's benefit balance when an item requested through an online order cannot be fulfilled to ensure that WIC benefits are not lost in these situations.
- Allow State agencies to develop virtual methods of oversight to ensure their monitoring and investigative methods are appropriate for the types of vendors authorized (*e.g.,* internet vendors) and current environmental circumstances (*e.g.,* during a pandemic).
- Permit WIC shoppers to pay for fees associated with online shopping by clarifying that WIC-authorized vendors, farmers, and farmers' markets must not charge the State agency for fees associated with online ordering (*e.g.,* delivery, service, convenience, and bag fees). If such fees are assessed to non-WIC customers using the same services, WIC participants must be allowed to pay them using another tender type. The Department is requesting comment on whether State agencies should have the option to pay for such fees with either (1) non-Federal funding at State agency discretion and/or (2) Federal funding in situations where it is deemed necessary to meet special needs (*e.g.,* participant access or other needs as identified by the State agency).

Cost

Impact on Federal WIC Food Costs

Over the 5 years between FY 2024 and FY 2028, the rollout of WIC online shopping under this proposed rule is expected to increase Federal WIC food costs by $392 million in total. The effect of allowing online shopping in WIC on Federal food costs is a function of both the effect on total WIC redemptions and the effect on the prices of WIC foods. When estimating the impact of online shopping on WIC food costs under this proposed rule, the analysis collectively considers the effect of each provision required to operate a modern online retail system, including allowing electronic benefits to be returned to a participant's benefit balance when an online order cannot be fulfilled. Because these provisions all contribute to enabling online shopping, the Department does not provide separate estimates for each provision.

On average, WIC participants do not use all their WIC benefits each month. WIC benefit redemption rates vary by food category. For example, in 2020, the estimated redemption rate was 44 percent for whole wheat bread and whole grains and about 72 percent for fruits and vegetables purchased with the cash-value benefit (CVB).[14] WIC participants report various barriers to using WIC benefits that impact these redemption rates, both in terms of traveling to a WIC-authorized vendor and using their benefits once there.

One USDA study, which surveyed a representative sample of WIC participants from 12 State agencies, found that 90 percent of respondents reported experiencing at least one negative shopping experience while transacting their WIC benefits in stores.[15] Among those, around 77 percent reported they had selected the wrong item and were sent back at checkout to find the correct WIC item, around 72 percent found a WIC item to be out of stock or unavailable in the correct container size, and around 34 percent reported they had felt embarrassed while using WIC benefits in stores. Traveling to a WIC-authorized vendor also presents challenges to some participants. In the same study, when surveying former WIC participants from three State agencies, 15 percent of respondents reported that they lacked convenient access to a WIC-authorized vendor.

Based on the opportunities that online shopping presents to address many of the in-store barriers and challenges that WIC shoppers report, as described above, the Department estimates that participants who use any WIC benefits online will, on average, increase their overall benefit redemption by 10 percent (*e.g.,* a participant who previously purchased $30 worth of WIC benefits would purchase $33 under this proposed rule), independent of price variations. This analysis estimates an overall increase to purchases, rather than food category level impacts, because sufficient data are not available to project whether some food items will be impacted by online shopping more than others.

In order to better understand and estimate the effect online shopping may have on redemption rates, the GSCN sub-grant projects will evaluate the impacts of WIC online shopping on redemption rates. The Department has provided a range of cost estimates at different levels of redemption in the Uncertainties section of this analysis. These estimates will be updated, as appropriate, in future cost analyses later in the rulemaking process once redemption data from the GSCN projects become available. The Department also invites public comment on how online shopping in WIC may affect redemption rates.

The Federal WIC food costs associated with the proposed rule are also expected to be impacted by differences in the retail prices of online groceries compared to in-store options. A recent analysis published by Information Resources, Inc. (IRI), a retail market research firm, estimates that in May 2021 online grocery shoppers paid about 13 percent higher per unit retail prices (*i.e.,* before separate delivery or other convenience fees) for fresh foods online compared to similar in-store products.[16] While online and in-store price differences tend to vary by vendor, these higher prices often reflect the added convenience costs of assembling online orders and processing internet-based transactions, which many retailers include within the unit costs of food items rather than charging separately (unlike delivery fees, which are typically separate and cannot be paid for with WIC benefits). WIC benefits are redeemed on a per unit basis (*e.g.,* one gallon of milk or one dozen eggs) rather than as a set dollar amount, with the exception of the CVB. WIC shoppers are not expected to be price sensitive when using WIC benefits, and thus higher prices are expected to directly increase the Federal cost of the WIC food package. For this analysis, the Department uses IRI's recent estimate to project that, on average, WIC food items purchased online will be about 13 percent more expensive than in-store prices. Although the CVB is transacted as a set dollar amount, rather than per food item like other WIC foods, the Department estimates the same 13 percent price increase for online CVB redemptions, on average.[17] Because WIC participants transact around 72 percent of their CVB in an average month, a 13 percent increase in food prices online may be reflected as an apparent increase in the CVB redemption rate, as participants would need to use 13 percent more of their CVB to purchase the same amount of fruits and vegetables that they would in brick-and-

[14] Based on internal USDA data collected in March 2021 covering monthly WIC redemptions for all months in calendar year 2020.

[15] Gleason, S., Wroblewska, K., Trippe, C., Kline, N., Meyers Mathieu, K., Breck, A., Marr, J., Bellows, D. (2022). WIC Food Cost-Containment Practices Study. Prepared by Insight Policy Research, Contract No. AG–3198–C–15–0022. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Ruth Morgan. Available online at: *https://www.fns.usda.gov/wic/wic-food-cost-containment-practices-study.*

[16] The term ''fresh foods'' in this context includes items classified by retailers as bakery, dairy, deli, fresh produce, fresh meat and seafood, and meat alternatives. Although some WIC approved foods fall outside of this definition (including infant formula), this analysis applies the estimated 13 percent increase in online prices as an average across all WIC food types due to a lack more detailed and available industry data on food specific variations. For information see: Information Resources, Inc. and 210 Analytics. ''Grocery E-Commerce—Opportunity Remains,'' 2021. Available online at: *https://www.iriworldwide.com/IRI/media/Library/IRI-Ecommerce-Update-May-2021.pdf.*

[17] Note that these estimates and the analysis are based on the average WIC shopper redeeming 72 percent of their CVB prior to the proposed rule. WIC shoppers that currently spend all or nearly all of their CVB may find that they cannot purchase the same quantity of fruits and vegetables online as they can afford in brick-and-mortar stores.

mortar vendors. The Department will continue to collect data on price differences as it becomes available. The Department presents a range of cost estimates based on different pricing variations in the Uncertainties section of this analysis.

TABLE 6—PROJECTED UPTAKE OF ONLINE SHOPPING AND IMPACT ON MONTHLY PER PERSON FOOD PACKAGE COST

[FY 2024–2028]

	Fiscal year				
	2024	2025	2026	2027	2028
Projected number of State agencies offering WIC online shopping	7	45	68	89	89
Percentage of participants making at least one WIC purchase online, within participating State agencies	12	14	16	18	20
Average percentage of WIC benefits used online among online shoppers	50	50	50	50	50
Expected increase in total redemptions among online WIC shoppers	10	10	10	10	10
Expected increase in online retail food prices, compared to in-store	13	13	13	13	13
Total WIC participation	6,564,789	6,743,971	6,931,795	6,931,795	6,931,795
Number of participants making at least one WIC purchase online	61,960	477,382	847,392	1,247,723	1,386,359
Baseline monthly per person WIC food cost [a]	$43.60	$44.43	$45.28	$47.46	$49.78
Projected monthly WIC food cost among online shoppers [a b]	51.08	52.05	53.05	55.60	58.32

Notes:

[a] Food cost inflation is estimated for FY 2024 through FY 2028 using the Office of Management and Budget's (OMB) food at home projections used in the most recent President's Budget request.

[b] The projected monthly food cost among online shoppers includes both in-store and online shopping with the assumption that half of benefits are transacted in-store and half online. The half of benefits transacted online are then increased by 13 percent to reflect the projected increase in prices for online food items.

The projected 10 percent increase in total redemptions among online shoppers and the estimated 13 percent increase in retail unit prices for online food items would collectively increase the expected monthly per person WIC food costs from a baseline of $43.60 among exclusively in-store shoppers to $51.08 among average online shoppers in FY 2024.[18] Table 6 summarizes the expected uptake of WIC online shopping among participants and provides annual estimates for monthly per person food package costs, adjusted for annual inflation.

The cost impact of online shopping will continue to increase as more WIC State agencies offer online shopping and as use among WIC shoppers in those State agencies increases. In FY 2024, online shopping is only expected to increase total Federal WIC food spending by about $5.6 million because the Department estimates that just 12 percent of participants in seven State agencies will transact WIC benefits online. The annual cost is expected to rise to $121.9 million in FY 2027 and $142.0 million in FY 2028 when WIC online shopping is expected to be offered by all 89 State agencies and used by an increasing share of participants (see Table 7).

TABLE 7—ESTIMATED IMPACT OF ONLINE SHOPPING ON FEDERAL WIC FOOD SPENDING

[FY 2024–2028]

	Fiscal year (millions)					
	2024	2025	2026	2027	2028	Total
Total food costs, online shoppers	$38.0	$298.2	$539.4	$832.5	$970.1	$2,678.3
Total food costs, in-store shoppers	3,402.5	3,341.4	3,306.3	3,237.4	3,312.5	16,600.1
Total food costs, all shoppers	3,440.5	3,639.6	3,845.7	4,070.0	4,282.6	19,278.4
Baseline food costs without online shopping	*3,434.9*	*3,595.9*	*3,766.8*	*3,948.1*	*4,140.6*	*18,886.4*
Increase in WIC food costs due to online shopping	5.6	43.7	79.0	121.9	142.0	392.1

Notes: All monetary estimates are adjusted for annual inflation.

Online Shopping System Development and Maintenance

Spending associated with EBT system development and maintenance is estimated to increase WIC State agency costs by around $27 million in total over 5 years between FY 2024 and FY 2028. Implementation of WIC online shopping would initially require new costs to State agencies associated with systems design, development, and testing of new processes for transacting WIC electronic benefits online. In addition to these initial costs, State agencies would incur new ongoing costs required to pay EBT processor fees associated with monthly support and maintenance of EBT systems to allow for online transaction of benefits. The State agency costs detailed below assume the same implementation timeline presented previously in Table 6.

[18] Estimated $45.64 monthly per person food costs assumes an average online WIC shopper is using 50 percent of their transacted benefits online and 50 percent in-store.

The Department expects that State agencies would be able to absorb these EBT processor costs using existing NSA funds. State agencies are generally allowed considerable flexibility in how they spend NSA funds. The estimates in Table 8 represent an initial assessment of projected costs. As mentioned above, the Department is testing these activities through the GSCN sub-grant projects and will collect information on actual costs incurred during the projects to better understand future implementation expenses. The Department also seeks public comment from State agencies, EBT processors, and WIC-authorized vendors on expected costs associated with these and any unforeseen, required system updates to help refine the estimates below.

The estimate of WIC State agency costs includes both initial costs and ongoing costs. To estimate initial costs, the Department has estimated EBT processor costs to design, develop, and test new technology solutions that would allow participants and vendors to transact WIC electronic benefits online. The Department estimates that the costs for EBT processors to design, develop, and test new online shopping solutions will be spread over 2 years and total $2.20 million across all current EBT processors (see Table 8). The same small number of EBT processors contract with multiple State agencies.[19] Therefore, these initial costs to design, develop, and test new online shopping solutions are expected to be shared across multiple State agencies using common EBT processors. Initial costs would also include separate start-up costs paid to EBT processors each time a new State agency is added to an online shopping solution. The Department estimates that, once EBT processors have developed online shopping solutions, there will be an average one-time cost of $90,000 (in FY 2022 dollars, adjusted annually for inflation) for each State agency to update its EBT system to implement online shopping (see Table 8). As new State agencies gradually implement online shopping solutions, the Department estimates $8.26 million in start-up costs over 5 years for EBT updates to implement online shopping in 82 State agencies, in addition to the $2.20 million estimate for design, development, and testing.[20]

TABLE 8—ESTIMATED EBT PROCESSOR COSTS TO IMPLEMENT WIC ONLINE SHOPPING

[FY 2024–2028]

	Fiscal year (millions)					
	2024	2025	2026	2027	2028	Total
Initial Costs:						
Design, develop, and test new online shopping solutions	$0.80	$1.40	$0.00	$0.00	$0.00	$2.20
Start-up cost to implement solution across all State agencies	0.00	3.74	2.33	2.19	0.00	8.26
Ongoing Costs:						
Monthly support and maintenance costs	0.34	2.36	3.67	4.95	5.10	16.42
Total	1.14	7.50	6.00	7.14	5.10	26.88

Notes: Monetary values are adjusted annually for inflation based on CPI–W wage projections consistent with the FY 23 President's Budget as costs primarily account for labor expenses for start-up and ongoing support.

New, ongoing operational costs are also expected for each State agency offering WIC online shopping. Once State agencies have implemented online shopping, the Department estimates an additional $4,000 (in FY 2022 dollars, adjusted annually for inflation) in ongoing monthly EBT costs per State agency to address new support and system maintenance requirements. All projected costs represent estimated averages; however, actual costs may vary by State agency. In total, as all State agencies implement WIC online shopping systems, the Department estimates these ongoing monthly costs to add up to $16.4 million in State agency spending over 5 years (see Table 8). The Department expects that the additional work required to adapt State agency policies and oversight methods and resolve participant concerns related to online shopping will be addressed by the WIC Food Delivery and WIC Customer Service coordinators. The estimated costs of these proposed State agency staff positions are discussed below.

Effect on WIC Participants

This proposed rule is primarily intended to remove barriers that prevent WIC participants from accessing the benefits of online shopping. Enabling WIC participants to shop online is expected to increase participant access to WIC foods, address barriers and challenges participants report related to shopping for WIC foods, and broadly improve equity in the shopping experience.

Expanding access to WIC online shopping may increase participant access to WIC-authorized vendors. A 2018 USDA survey of three WIC State agencies found that, among former participants who had a negative shopping or vendor experience, 15 percent reported that they lacked convenient access to a WIC-approved vendor.[21] According to estimates from the USDA Economic Research Service (ERS), nearly 40 million people, or 14 percent of the U.S. population, lived in low-income and low-access (LILA) census tracts in 2015.[22] LILA measures define a low-access census tract as one where a significant number (at least 500 people) or share (at least 33 percent) of the population has limited access to a food store (supermarket, supercenter, or large grocery store), which is defined as living more than 1 mile from a food store in urban areas or more than 10 miles in rural areas. A recent study found that among the initial eight States participating in the SNAP Online Purchasing Pilot, online grocery delivery systems reached around 90 percent of LILA census tracts, though this varied substantially between urban and rural areas.[23]

As noted in the previous section, even WIC participants who are able to travel to WIC-authorized vendors report difficulties using their WIC benefits. Data discussed earlier from a recent USDA study indicate that a majority of WIC shoppers in the 12 State agencies covered by the study reported

[19] See latest ''WIC EBT Detail Status Report'' for more information: *https://www.fns.usda.gov/wic/wic-ebt-activities.*

[20] The estimate of $8.26 million is based on a cost of $90,000 each for 82 State agencies, adjusted annually for inflation. This assumes that these start-up costs would not be needed in the 7 State agencies that are developing internet-based transactions while participating in the Gretchen Swanson Center for Nutrition WIC online shopping sub-grant projects.

[21] The survey did not define what participants meant by ''convenient'' so this could be inclusive of factors other than geography (*e.g.,* hours of operation). Source: Gleason, S., Wroblewska, K., Trippe, C., Kline, N., Meyers Mathieu, K., Breck, A., Marr, J., Bellows, D. (2022). WIC Food Cost-Containment Practices Study. Prepared by Insight Policy Research, Contract No. AG–3198–C–15–0022. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Ruth Morgan. Available online at: *https://www.fns.usda.gov/wic/wic-food-cost-containment-practices-study.*

[22] USDA Economic Research Service. ''State-Level Estimates of Low Income and Low Access Populations.'' Last updated September 30, 2019. Available online at: *https://www.ers.usda.gov/data-products/food-access-research-atlas/state-level-estimates-of-low-income-and-low-access-populations/.*

[23] Brandt EJ, Silvestri DM, Mande JR, Holland ML, et al. Availability of grocery delivery to food deserts in states participating in the online purchase pilot. *JAMA Netw Open.* 2019;2:e1916444.

having difficulty locating WIC-approved foods in stores.[24] Another study, which collected qualitative data through focus groups and in-depth interviews of participants across four State agencies, found that difficulty identifying WIC-approved items as well as perceived stigma during checkout were the primary complaints participants reported about the WIC shopping experience.[25] Online shopping may address some of these barriers. For example, an online shopping system could be designed to allow WIC shoppers to filter to only display items approved for WIC by their State agency or to only show the items available to them based on their WIC benefit balance.[26] Participants that find stigma to be a barrier to using their WIC benefits may also find more comfort and privacy in transacting benefits online. Finally, online shopping may also improve the shopping experience for WIC participants that report transportation challenges. Data from a nationally representative sample of WIC participants indicate that in 2019 around 21 percent of WIC participants used some means of transportation other than a personal car to travel to a vendor to transact their WIC benefits.[27] Individuals unable to drive themselves to a WIC-authorized vendor may prefer transacting WIC benefits online for delivery rather than transporting heavier items, such as milk and juice, by foot or on public transit. By addressing these barriers, this proposed rule is expected to increase benefit redemptions, as described in the previous section, and thus increase the amount of nutritious supplemental foods consumed by WIC participants.

Enabling WIC participants to use their benefits online is also expected to improve equity in access to online grocery shopping enabling WIC participants greater access to the convenience and potential time savings allowed by online grocery shopping. Data published in 2020 and 2021 by IRI indicate that low-income shoppers are less likely than middle- and high-income shoppers to purchase groceries online.[28] A recent systematic review of online grocery shopping among low-income populations found that price and the inability to use nutrition assistance benefits like SNAP and WIC are barriers to equitable access to online grocery services.[29] While this gap is likely to narrow as the SNAP Online Purchasing Pilot continues to expand, this proposed rule would ensure that WIC participants will also able to transact their WIC benefits online. Recent evidence also suggests that shoppers may make fewer unhealthy purchases when shopping online compared to in-stores specifically making fewer ''impulse'' purchases on items like sweets and candy.[30] [31] Therefore, expanding equitable access to online grocery shopping for WIC participants may have spillover effects into the rest of their grocery shopping if those shoppers move their non-WIC grocery shopping online as well.

Effect on Vendors

The provisions included in the proposed rule are expected to increase opportunities for innovation in the retail grocery industry and may provide opportunities for increased revenue for vendors that offer online shopping for WIC participants using WIC benefits. For some WIC vendors, the opportunity to transact WIC electronic benefits online could expand their customer base by reaching WIC shoppers who had not previously shopped at the vendor's brick-and-mortar locations. Other vendors may see an increase in revenue from existing WIC shoppers who prefer to use their online shopping platforms and increase their purchases of supplemental foods, as described in the previous section. However, the expansion of WIC online shopping is not expected to have the same impact on all vendors. The Distributive Impacts section of this analysis includes further discussion around potential disparate impacts for certain types of vendors.

The overall national increase in online grocery shopping is expected to impact the number and types of jobs employed in the retail food industry. Specifically, one group of university researchers estimates a shift towards fewer cashier positions and an increase in jobs associated with assembling, fulfilling, and delivering online grocery orders.[32] Because WIC redemptions accounted for only about 0.6 percent of total U.S. food at home expenditures in 2019, the Department does not expect this proposed rule to have a significant impact on the food retail employment landscape beyond what is already projected in the market as a whole.[33]

Under the proposed rule, providing online shopping to WIC participants would be optional to vendors, and therefore the Department only expects vendors to participate in WIC online shopping if the vendor believes it to be in their best interest. Aside from the benefits described above, there may also be some upfront development costs for vendors who choose to update their online grocery platforms to be compatible with transacting WIC benefits online. The Department does not have the necessary data to provide even approximate estimates of these costs. To the extent possible, the Department intends to use development cost data collected in the GSCN sub-grant projects described above to better understand potential costs to vendors. The Department also recognizes that recent industry reporting suggests lower profit margins for grocery sales online compared to in-store and that vendors continue to explore ways to minimize the cost of fulfilling online orders to improve these margins.[34] So while improving equitable access to online shopping for WIC participants is expected to bring some WIC redemptions from in-store to online, because WIC redemptions account for such a small share of total U.S. food at home expenditures (as cited above) the Department does not expect this proposed rule to be meaningfully disruptive to the trajectory of e-commerce in the grocery industry as a whole.

Effect on State Agencies

In addition to the State agency costs discussed above, the provisions in the proposed rule related to implementing online shopping in WIC are expected to create some additional, short-term actions as State agencies elect to participate. Initially, the rollout of online ordering systems is likely to require increased State agency staff time devoted to establishing contract changes with EBT processors, processing any necessary updates to State agency MIS data and systems, developing expertise in monitoring and oversight of internet-based transactions and vendors, and communicating the

[24] Gleason, S., Wroblewska, K., Trippe, C., Kline, N., Meyers Mathieu, K., Breck, A., Marr, J., Bellows, D. (2022). WIC Food Cost-Containment Practices Study. Prepared by Insight Policy Research, Contract No. AG–3198–C–15–0022. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Ruth Morgan. Available online at: *https://www.fns.usda.gov/wic/wic-food-cost-containment-practices-study.*

[25] Chauvenet C, De Marco M, Barnes C, Ammerman AS. WIC Recipients in the Retail Environment: A Qualitative Study Assessing Customer Experience and Satisfaction. *J Acad Nutr Diet.* 2019;119(3):416–424.e2. doi:10.1016/j.jand.2018.09.003.

[26] Gretchen Swanson Center for Nutrition. ''Blueprint for WIC Online Ordering Projects,'' 2021. Available online at: *https://www.centerfor nutrition.org/wic-online-ordering.*

[27] Magness, A., Williams, K. Gordon, E., Morrissey, N., Papa, F., Garza, A., Okyere, D., Nisar, H., Bajowski, F., & Singer, B. (2021). Third National Survey of WIC Participants: WIC Participant Satisfaction and Shopping Experience: Brief Report #6. Prepared by Capital Consulting Corporation and 2M Research Services. Contract No. AG–3198–K–15–0077. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Karen Castellanos-Brown. Available online at: *https://www.fns.usda.gov/research-and-analysis.*

[28] Information Resources, Inc. ''Winning in CPG e-Commerce: Part 4,'' March 26, 2021. Available online at: *https://www.iriworldwide.com/IRI/media/Library/IRI-TL-Demand-Pockets-Part-4-CPG-E-Commerce-03-29-21.pdf.*

[29] Trude, A., Lowery, C., Ali, S., Vedovato, G. An equity-oriented systematic review of online grocery shopping among low-income populations: implications for policy and research, *Nutrition Reviews,* 2022; nuab122, *https://doi.org/10.1093/nutrit/nuab122.*

[30] Harris-Lagoudakis, K. (2022). '' Online shopping and the healthfulness of grocery purchases.'' American Journal of Agricultural Economics 104(3): 1050–1076. *https://doi.org/10.1111/ajae.12262.*

[31] Zatz, L.Y., Moran, A.J., Franckle, R.L., Block, J.P., Hou, T., Blue, D., Greene, J.C., Gortmaker, S., Bleich, S.N., Polacsek, M., Thorndike, A.N., & Rimm, E.B. (2021). Comparing Online and In-Store Grocery Purchases. *Journal of Nutrition Education and Behavior, 53*(6). *https://doi.org/10.1016/j.jneb.2021.03.001.*

[32] Benner, C., Mason, S., Carré, F., and Tilly, C. Delivering Insecurity: E-commerce and the Future of Work in Food Retail. Berkeley: UC Berkeley Labor Center and Working Partnerships USA. 2020. *https://laborcenter.berkeley.edu/delivering-insecurity/.*

[33] Based the sum of WIC food costs and rebates issued in FY 2019 (*https://www.fns.usda.gov/pd/wic-program*) as a share of USDA ERS Food at Home expenditures, nominal dollars, in 2019 (*https://www.ers.usda.gov/data-products/food-expenditure-series/food-expenditure-series/#Current%20Food%20Expenditure%20Series*).

[34] McKinsey. ''Achieving profitable online grocery order fulfillment.'' May 18, 2022. Available online at: *https://www.mckinsey.com/industries/retail/our-insights/achieving-profitable-online-grocery-order-fulfillment.*

program changes to WIC participants. However, the Department does not expect these up-front efforts to be significant and they would be far outweighed by reductions in burden discussed later in this analysis. The additional staffing standards discussed later in this analysis would also help State agencies to adapt to online shopping.

Over time, the provisions allowing for remote vendor oversight are expected to decrease staff burden and travel costs. The Department does not specifically track State agency expenses associated with travel and on-site monitoring or investigative activities and cannot provide an estimate for the level of savings. Internal data from a survey of WIC State agencies that utilized the Vendor Preauthorization Visits waiver, authorized under the Families First Coronavirus Response Act of 2020 (FFCRA, Pub. L. 116–127), found that over half of State agencies reported saving staff time by using the waiver to conduct preauthorization visits remotely.[35]

• Streamline and Modernize WIC Food Delivery

Discussion

Current WIC regulations were written within the context of a paper-based voucher environment (prior to the advent of EBT), that envisioned a WIC participant traveling to a WIC clinic to pick up a paper voucher and then traveling to a WIC vendor to use their paper voucher in person. In the past two decades, much has changed in terms of technology, security, innovation, and WIC participant preferences to make these paper-based voucher assumptions obsolete. The proposed rule complements the Program's near-complete transition to EBT by modernizing and streamlining WIC food delivery regulations to reflect recent technological innovations in electronic benefit issuance, transaction, and redemption, and food delivery options to promote further innovation; to decrease burden on WIC participants, WIC vendors, and State and local agencies; to increase WIC participant choice; to improve program equity; and to reduce stigma experienced by WIC participants, while maintaining the WIC Program's high standards of program services and program accountability.

Specifically, the proposed rule would:

• Permit the remote issuance of electronic benefits to a participant's benefit balance (*e.g.,* load electronic benefits on to an EBT card, or other access device or technology, without requiring the participant to travel to a clinic). To clarify how remote issuance applies to food instruments, cash-value vouchers, and electronic benefits, associated provisions would add definitions for ''electronic benefits'' and ''cash-value benefit'' that are separate and distinct from the paper food instruments.

• Add ''other electronic benefit access device or technology'' to the definition of ''food instrument'' to support innovation in benefit delivery methods and enable WIC State agencies to explore and adopt new technologies beyond the EBT card (*e.g.,* mobile payment) while ensuring that key program integrity requirements apply to these new technologies.

• Allow State agencies to develop and test new WIC food instrument types by eliminating a provision that only allows one type of food instrument to be used within a State agency's jurisdiction at a time.

• Streamline food delivery operations by recognizing that EBT data are a sufficient replacement for routine shelf price collection and eliminating certain collection requirements.

• Extend vendor agreement periods to reduce the application burden on potential WIC vendors and State agencies. The revisions would extend the maximum vendor authorization period from three to five years, consistent with SNAP.

• Allow State agencies using a home food delivery system (non-retail) to ship supplemental foods to a location designated by participants to better serve participants in remote areas (*e.g.,* Alaska Natives who do not have at-home mail service).

The benefits of these proposed revisions extend to WIC participants, State agencies, and WIC vendors. Remote issuance of electronic benefits would save some WIC participants time and money by decreasing the number of trips they must make to their local WIC clinic, which may prove particularly beneficial to those WIC participants who face transportation barriers. If WIC participants are able to purchase and consume more of their WIC foods, and/or if more WIC-eligible individuals are able to participate in WIC for longer periods of time, then more participants will receive the health benefits offered by consumption of the nutritious supplemental foods provided by the WIC Program.

Extending vendor application and agreement periods would decrease administrative burden on both WIC vendors and WIC State agencies. The other proposed provisions either decrease the burden on State agencies or promote innovation in the WIC benefit delivery space while maintaining the Program's high standards for transaction authentication, program services and program accountability, and participant privacy.

Cost

Remote Issuance of Electronic Benefits

Remote electronic benefit issuance would decrease transportation, childcare, and/or other costs (*e.g.,* loss of work hours) currently borne by WIC participants in the process of picking up their WIC food instruments in person at a WIC clinic. As explained in the burden adjustment estimates published with this proposed rule, the Department estimates that remotely issuing benefits would save WIC participants a combined 1,049,335 hours per year in time spent traveling to and waiting to receive WIC benefits in person.

Remote issuance of electronic benefits may slightly increase WIC participation by retaining some WIC participants who may have otherwise dropped off the Program due to transportation, or other access challenges, but would now be able to receive their benefits remotely and shop online. If WIC participation increases, there will be a related increase in Federal costs to provide these participants with their WIC benefits. However, the Department expects the participation impact of this particular provision to be relatively small, and any increase in participation solely attributable to this provision is extremely difficult to disentangle from the expected increase in WIC participation as a result of the $390 million in additional WIC funding made available in the American Rescue Plan Act of 2021 (ARPA, Pub. L. 117–2) to carry out outreach, innovation, and program modernization efforts to increase participation and redemption of benefits. Therefore, the Department does not provide a separate estimate of the cost of this provision as a result of increased participation, but the public will have the opportunity to provide feedback on participation impacts due to remote issuance during the comment period. See below for additional discussion of participation impacts of this proposed rule.

Decrease in State Agency and Vendor Burden

As explained in the annual burden adjustment estimates published with this proposed rule, the Department expects the proposed rule would substantially decrease reporting and recordkeeping burden hours on both WIC State agencies and WIC vendors. The Department estimates a net decrease in reporting burden hours to State agencies of approximately 159,354 hours per year, which is almost entirely attributable to the proposed provision to remove shelf price collection requirements for State agencies operating an EBT system. State agency recordkeeping burden is also expected to decrease by an estimated 5,074 hours per year, primarily as a result of the proposed extension of vendor application and agreement periods. Reductions in State agency reporting and recordkeeping burden are collectively expected to result in a 5-year savings to State agencies of $51.5 million in administrative costs.[36] Removing shelf price collection requirements in State agencies with EBT systems and extending vendor application and agreement periods are expected to have a similar effect on WIC vendor burden. The Department estimates a net decrease in reporting burden hours to WIC vendors of 143,401 hours per year, resulting in a 5-year savings to WIC vendors of $18.4 million in administrative costs.[37]

[35] Unpublished data collected in March 2021 to fulfill FFCRA waiver reporting requirements. For more information: *https://www.fns.usda.gov/programs/fns-disaster-assistance/fns-responds-covid-19/wic-covid-19-waivers.*

[36] Cost savings associated with State agency burden hours are calculated using the hourly total compensation for all State and Local workers from the Bureau of Labor and Statistics (BLS) for FY 2021 and inflated according to the CPI–W increase in OMB's economic assumptions for the FY2023 President's Budget for years FY2024–FY2028 (*https://data.bls.gov/timeseries/CMU3010000000000D*).

[37] Cost savings associated with vendor burden hours are calculated using the hourly total compensation for all retail workers from the Bureau of Labor and Statistics (BLS) for FY 2021 and inflated according to the CPI–W increase in OMB's economic assumptions for the FY2023 President's Budget for years FY2024–FY2028 (*https://data.bls.gov/timeseries/CMU2014120000000D*).

Effect on WIC Participants

The provisions in this proposed rule are expected to decrease the burden on WIC participants and would make participating in the Program more convenient. Remote issuance of electronic benefits would decrease the number of visits that participants must make to their WIC clinics, saving these participants time and money as described above. A recent USDA study found that among surveyed participants with children who left WIC before age 5, around 40 percent reported inconvenience as a reason for leaving WIC early.[38] In an unpublished USDA study, 52 percent of surveyed WIC clinic staff reported that ''difficulty being physically present for appointments'' was a reason that child participants leave the Program between ages 2 to 4.[39] Remote issuance of electronic benefits may result in a small number of child participants who might otherwise drop off of the Program as they age to remain on the Program for longer, enabling these participants to receive more supplemental foods and nutrition education.

The provisions that provide State agencies with additional flexibility in the exact type of food instruments used would allow State agencies to innovate with service delivery, enabling them to provide the best experience to WIC participants at the lowest cost as technological advancements and WIC participant preferences continue to evolve in future years.

Effect on Vendors

Extending vendor application and agreement periods would decrease the administrative burden on vendors to provide this information to State agencies. WIC vendor error is already very low (estimated at 0.30 percent of total WIC food outlays).[40] EBT technology allows State agencies to receive current data about vendor prices at least daily, eliminating the need for additional burdensome reporting. Removing the requirement to collect shelf prices would result in a substantial decrease in administrative costs to vendors, as noted above.

Effect on State Agencies

The proposed revisions would streamline and modernize WIC food delivery regulations to reflect current EBT technologies and provide space for future innovation by State agencies. Adding ''other electronic benefit access device or technology'' to the definition of ''food instrument'' would enable WIC State agencies to explore and adopt new technologies beyond the EBT card (*e.g.,* mobile payment) while ensuring that key program integrity requirements apply to these new technologies. This revision would allow State agencies to deliver WIC benefits in a secure, cost-effective, and convenient manner. Similarly, updating the uniform food delivery systems provision would provide State agencies the ability to test new food instrument types that align with innovations in the retail market, and to smoothly transition to new types of food instruments.

Removing the requirement to collect shelf prices, or obtain an exemption, for State agencies that use EBT would decrease their administrative burden while allowing them to continue to meet the requirements of the vendor authorization and cost containment provisions. Receiving price information via EBT transaction data serves as a substitute for the burdensome practice of collecting shelf prices from WIC vendors. As discussed above, extending vendor application and agreement periods would also decrease burden on State agencies without sacrificing program accountability, as time periods for vendor monitoring, training, and investigations would remain unchanged.

• Meet the Needs of a Modern, Data-Driven Program

Discussion

The Department proposes several provisions that are intended to meet the needs of a modern, data-driven program that uses current technologies for food delivery. Specifically, the proposed rule would:

• Update reporting requirements for Federal oversight to align with the transition in reporting systems from TIP to FDP, which is now the system of record for WIC vendor management data.

• Create two new WIC State agency staff positions to reflect the staffing needs of a modern, innovative program. The revisions include staffing standards for WIC Food Delivery and WIC Customer Service coordinators. These proposed staff would be in addition to the minimum number of staff currently required by regulations. As State agencies move to adopt new technologies and modern food delivery methods, these provisions are necessary to ensure State agencies have staff capable of meeting those demands.

Under current rules, WIC State agencies are required to have at least one full-time or equivalent Program Specialist for each 10,000 participants above 1,500, but not more than eight Program Specialists, unless the State agency considers it necessary.

The proposed rule would require that, in addition to current requirements for Program Specialists, State agencies must create two new staff positions: a WIC Food Delivery Coordinator and a WIC Customer Service Coordinator, based on the below monthly participation thresholds. The Department proposes to develop stronger standards for the position of the WIC Food Delivery Coordinator to manage the State agency's food delivery system, which likely includes the management and oversight of WIC-authorized vendors in a retail food delivery system, to ensure that WIC State agencies have the staff in place to make the data-driven decisions necessary for a modern, efficient WIC Program that uses current technologies for food delivery. The Department also proposes adding standards to create a WIC Customer Service Coordinator to support program improvements related to participant-facing activities, particularly those that involve emergent technologies and future innovations. These staffing requirements would vary depending on the State agency's participant caseload:

• State agencies with monthly participation above 7,000 would be required to employ one full-time or equivalent WIC Food Delivery Coordinator and one full-time or equivalent WIC Customer Service Coordinator.

• State agencies with monthly participation above 500, but less than 7,001, would be required to employ a half-time or equivalent WIC Food Delivery Coordinator (if the State agency manages its own vendor cost containment system) and a half-time or equivalent WIC Customer Service Coordinator.

Cost

New State Agency Staff Positions

The provisions creating new WIC State agency staff positions are expected to increase WIC State agency costs by a total of $55 million during FY 2024 to FY 2028. Based on current State agency monthly participation and staffing estimates, the Department estimates that a total of 108 new staff positions would be created. As State agencies would have 18 months from publication of the final rule to implement these requirements, this estimate assumes a phased implementation where 50 percent of the positions are filled in FY 2024 and the remainder filled by FY 2025.

Currently there are 51 State agencies with more than 7,000 monthly participants, and each of these State agencies would be required to employ one full-time or equivalent WIC Food Delivery Coordinator and one full-time or equivalent WIC Customer Service Coordinator who meet the new staffing standards. However, the Department estimates that 13 State agencies already meet the proposed WIC Food Delivery Coordinator requirements and that 3 State agencies already meet the proposed WIC Customer Service Coordinator requirements with current staff and will not need to make new hires to fill these full-time roles. Therefore, the proposed rule would result in 38 new full-time or equivalent WIC Food Delivery Coordinator positions and 48 new full-time or equivalent WIC Customer Service Coordinator positions.

There are 22 State agencies, including some ITOs and smaller State agencies, with monthly participation greater than 500 but not exceeding 7,000, and each of these State agencies would be required to employ a half-time or equivalent WIC Food Delivery Coordinator and a half-time or equivalent WIC Customer Service Coordinator, which is equivalent to 11 new full-time WIC.

[38] Borger, C., Zimmerman, T., Vericker, T., et al. (2022). WIC Infant and Toddler Feeding Practices Study-2: Fifth Year Report. Prepared by Westat, Contract No. AG–3198–K–15–0033 and AG–3198–K–15–0050. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Courtney Paolicelli. Available online at: *https://www.fns.usda.gov/resource/wic-infant-and-toddler-feeding-practices-study-2-itfps-2-fifth-year-report.*

[39] Unpublished data from a USDA survey of clinic-level WIC staff from a nationally representative sample of local agencies, collected in March 2020.

[40] See the 2021 Annual Improper Payment Dataset, available at *https://www.cfo.gov/payment-accuracy/FY2021%20Payment%20Accuracy%20Dataset_3_1_2022.xlsx* (accessed March 8. 2022).

TABLE 9—ESTIMATED COST OF CREATING TWO NEW STAFF POSITIONS
[FY 2024–2028]

	Fiscal year					
	2024 [a]	2025	2026	2027	2028	Total
Hourly Total Compensation [b]	$ 59.02	$60.79	$62.61	$64.49	$66.42	N/A
Total Annual Compensation [c]	104,283	107,412	110,634	113,953	117,372	N/A
Cost of 108 New State agency Staff Positions (Millions)	5.6	11.6	11.9	12.3	12.7	$54.2
Cost of Hiring and Recruitment (Millions)	0.3	0.3	0.0	0.0	0.0	0.5
Total New Staffing Costs (Millions)	5.9	11.9	11.9	12.3	12.7	54.7

Notes: Numbers may not sum due to rounding.

[a] Because the proposed staffing standards will not be required until 18 months after the final rule is published, estimates assume a phasing in effect with only 50 percent of positions filled in FY 2024 and increasing to 100 percent by FY 2025.

[b] The hourly total compensation for FY 2024–FY 2028 are calculated by taking the hourly total compensation for all State and Local workers from BLS for FY 2021 (*https://data.bls.gov/timeseries/CMU3010000000000D*) and inflating that hourly total compensation figure according to the CPI–W increase in OMB's economic assumptions for the FY 2023 President's Budget for years FY 2024–FY 2028.

[c] Total annual compensation for a full-time position is calculated by multiplying hourly compensation by 1,767 hours (OECD Labour Force Statistics, 2020 average annual hours actually worked per worker in United States, *https://stats.oecd.org/index.aspx?DataSetCode=ANHRS*). Total compensation includes holidays, vacation and sick leave, and the cost of taxes and benefits.

Food Delivery Coordinator positions (assuming each State agency manages its own vendor cost containment system) and 11 new WIC Customer Service Coordinator positions. The remaining 16 State agencies with monthly participation not exceeding 500 would not be required to create any new positions. See Table 9 for detailed costs for hourly compensation, full-time annual salary, and annual total costs.

In addition to the total cost of compensation associated with the new staffing requirements, State agencies are also expected to incur some costs routinely associated with recruiting and hiring new staff. The Society for Human Resource Management estimates that in 2022, organizations spent on average around $4,700 in hiring and recruitment costs per hire.[41] Applying CPI–W inflation projects the Department estimates about $5,000 in hiring and recruitment costs per hire for the new positions—amounting to around $300,000 in total hiring and recruitment costs each year in FY 2024 and FY 2025 (assuming half of the 108 positions are filled in each of these years as described above).

Effect on WIC Participants

The proposal to create two new WIC State agency staff positions would formalize both the staffing requirement and the expected education and experience levels needed for the WIC Customer Service Coordinator and the WIC Food Delivery Coordinator, enabling WIC State agencies to hire qualified staff to support a modern, participant-centered program.

The WIC Customer Service Coordinator specifically would play a key role in future State agency efforts to design and implement innovative strategies and participant-facing technologies to increase participation in the WIC Program and the redemption of WIC benefits (see the below section on Participation Effects for more information on these efforts).

Effect on Vendors

The proposed revisions to update State agency reporting requirements and to create two new WIC State agency staff positions would improve vendor management and oversight, which has grown in complexity over the past decade. Vendor management and oversight relies on data analysis and statistical assessments to ensure the State agency can operate the Program effectively and efficiently. While these changes are expected to improve State agency vendor management operations, the Department does not expect that these provisions would have a measurable impact on vendors themselves.

Effect on State Agencies

These proposed provisions may initially increase burden on State agencies. First, the proposed revision to update reporting requirements for Federal oversight would streamline State agency reporting to FNS and ensure that State agencies report to FDP on all business entities authorized and monitored by WIC State agencies. This provision is meant to align WIC regulations with the information that State agencies are already required to report in the new FDP system. While the system is designed to be less burdensome for State agency reporting, some up-front work will be necessary to develop procedures to comply with the requirements of FDP.

Second, the proposal to create two new WIC State agency staff positions would require some State agencies to hire new staff with the qualifications outlined in the staffing standards, which some State agencies may find challenging. On the other hand, the provision may assist some State agencies already seeking support to increase staffing. Despite potential up-front need of recruiting and filling these positions, the Department expects these new roles to be instrumental in supporting State agency efforts to oversee an increasingly modern and complex WIC Program. The Department is specifically requesting comments on whether the proposed staffing standards would support State agencies' search for qualified personnel, including a discussion of the State agency's ability to recruit and fill these positions as described (considering both the recruitment and hiring of staff with the proposed credentials), an assessment of any challenges and costs associated with the adoption of these provisions, necessary timeline to operationalize such requirements, and any recommendations for changes to the standards along with related rationale.

- **Participation Impacts**

The baseline and revised costs presented in this analysis both assume a change in WIC participation from historical participation trends as a result of the $390 million in additional WIC funding made available in ARPA to carry out outreach, innovation, and program modernization efforts to increase participation and redemption of benefits. Implementation of projects made possible by this ARPA funding assume that participation will remain at current levels among infants and women, despite further declines in the birth rate, and an eventual increase in participation among children followed by a leveling off at the higher rate of child participation.

Given planned efforts to increase participation and retention under ARPA, as described above, the Department is uncertain at this time how much of an increase in participation may be attributable solely to the proposed rule.

- **Distributive Impacts**

Differences Among Vendors

The largest retailers may be more likely than independent grocers or smaller stores to initially benefit from a shift to WIC online shopping. However, due to the recent sales growth of independent grocers and the relatively small share of small vendor revenue attributable to WIC, the Department does not expect the proposed rule to have a lasting or significant negative impact on these firms.

In 2020, the National Grocers Association reported that independent grocers accounted for 33 percent of total U.S. grocery sales, up

[41] Navarra, Katie. ''The Real Costs of Recruitment.'' *SHRM,* 12 Apr. 2022, *www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/the-real-costs-of-recruitment.aspx.*

from 25 percent in 2012.[42] This trend suggests a resilience among independent grocers to shifts in the retail landscape as many independent grocers utilized online shopping platforms when Americans turned to online grocery shopping in 2020 during the first year of the COVID–19 pandemic. However, data from IRI estimate that Walmart, Amazon, Instacart,[43] Target, and major grocery firms claimed over 82 percent of the grocery e-commerce market share in 2021, suggesting that the largest retailers and fulfillment platforms still likely hold a larger stake in the online retail space than independent grocers do relative to their share in the total grocery market.[44] The Department does not routinely track data necessary to determine how WIC benefit redemptions vary by most vendor characteristics, including indicators for whether the store is a small business or independent grocer. USDA's ERS estimated, by merging WIC and SNAP redemption databases, that 76 percent of WIC retail redemptions occurred in larger stores (super stores, supermarkets, or large grocery stores) in FY 2012; however, the study's definition of supermarkets and large grocery stores is inclusive of many independent grocers.[45] The Department does not have data on the extent to which small businesses and independent grocers have implemented online shopping to date, but is aware of products on the market being employed by independent grocers to provide online ordering currently for WIC participants (with in-store or curbside transactions).

If smaller WIC vendors (such as convenience stores or small and medium grocery stores) do not adopt online shopping solutions, then they may see some of their WIC revenues lost to larger retailers that provide online shopping. According to ERS data, in FY 2012, small grocery stores, medium grocery stores, and convenience stores accounted for 2.9 percent, 3.5 percent, and 3.8 percent of WIC retail redemptions, respectively. As WIC sales make up a relatively small fraction of the total revenue of smaller stores, and especially convenience stores, the Department expects any lost revenue for smaller vendors that do not adopt an online shopping solution to be relatively minor. For example, the 3.8 percent of total WIC benefits transacted at convenience stores in FY 2012 amounts to about $228 million. U.S. convenience stores reported an estimated $193 billion in total in-store sales, not including fuel, in 2012, suggesting that WIC redemptions represented only about 0.12 percent of non-fuel sales for convenience stores that year.[46] As mentioned earlier, the Department also projects a relatively small portion of WIC transactions to move online even when fully implemented in FY 2027 and FY 2028.[47]

The Department will continue to collect more timely information to better understand the potential impacts of this proposed rule on independent grocers and smaller vendors. Specifically, the Department will examine lessons learned from the SNAP Online Purchasing Pilot and GSCN sub-grant projects and will consider recommendations related to small vendor challenges published in the Task Force's Recommendations Report.

Differences Among State Agencies

The Department does not expect the proposed rule to have an uneven or disproportionate impact on certain WIC State agencies over others. Many of the provisions in the proposed rule are written as State agency options, which would allow State agencies to tailor their approach to innovation around the issuance and redemption of WIC benefits to best fit their circumstances. The proposed changes to staffing standards to add new positions for a WIC Food Delivery Coordinator and WIC Customer Service Coordinator have the potential to put more strain on smaller State agencies with fewer resources to dedicate towards staffing. However, the Department is attempting to alleviate this in part by tiering the proposed staffing standards to adjust new hiring requirements by WIC caseload. The Department is specifically requesting comments on whether the proposed staffing standards would support State agencies' search for qualified personnel, including a discussion of the State agency's ability to recruit and fill these positions as described (considering both the recruitment and hiring of staff with the proposed credentials), an assessment of any challenges and costs associated with the adoption of these provisions, necessary timeline to operationalize such requirements, and any recommendations for changes to the standards along with related rationale.

Differences Among Participant Subgroups

Early data from research conducted on the implementation of the SNAP Online Purchasing Pilot in eight States in 2019 suggest that many individuals living in rural LILA census tracts may fall outside the service area of online grocery delivery services.[48] Although the study found that delivery systems reached around 90 percent of LILA census tracts, as discussed earlier in this analysis, this varied substantially between urban and rural areas. Using data from the eight States, the researchers estimated that grocery delivery services were available in only 39 percent of rural LILA census tracts, compared to 94 percent of urban LILA census tracts. Although online grocery services may have expanded in rural communities since this data was collected, and particularly following the onset of the COVID–19 pandemic, these findings suggest that WIC online shopping may not reach all participants equally, especially at first.

Allowing State agencies to adopt online shopping in WIC would also be less useful for households without internet access. According to data from the 2019 American Community Survey (ACS), between 78 to 85 percent of Americans in metro areas and 70 to 79 percent of Americans in non-metro areas between ages 18 to 64 living below 199 percent of the Federal poverty line had access to internet at home.[49] This leaves a significant number of families out of reach from online shopping services.

- **Uncertainties**

Use of WIC Online Shopping

The impact of the proposed rule provisions that enable online shopping in WIC will depend largely on how many participants transact any WIC electronic benefits online. In this impact analysis, the Department projects that, within State agencies offering online shopping, 12 percent of participants will transact benefits online in FY 2024, increasing gradually to reach 20 percent of participants in FY 2028. These estimates are largely based on the uptake of the SNAP Online Purchasing Pilot and project outward based on the predicted growth rate of online grocery shopping among the general population.

If usage is 5 percentage points higher, starting at 17 percent in FY 2024, and continues to increase by about 2 percentage points each year, then the total cost impact would be estimated to be $504 million over 5 years. If usage is 5 percentage points lower, starting at 7 percent in FY 2024, and maintains a 2-percentage point increase each year, then the total cost impact would be estimated to be $280 million over 5 years (see Table 10).

[42] Redman, R., ''Independent supermarkets drive one-third of U.S. grocery sales.'' *Supermarket News,* 15 June 2021. Available online at: *https://www.supermarketnews.com/retail-financial/independent-supermarkets-drive-one-third-us-grocery-sales.*

[43] Note that Instacart is an e-commerce platform and not generally a direct retailer, therefore IRI data for Instacart sales likely represents a mix of retailer sizes. Although much of Instacart's sales are through large chains, the platform also provides an opportunity for many independent grocers to participate in e-commerce without developing a platform themselves.

[44] Information Resources, Inc. ''Winning in CPG e-Commerce: Part 4,'' March 26, 2021. Available online at: *https://www.iriworldwide.com/IRI/media/Library/IRI-TL-Demand-Pockets-Part-4-CPG-E-Commerce-03-29-21.pdf.*

[45] Tiehen, L. and Frazão, E. Where Do WIC Participants Redeem Their Food Benefits? An Analysis of WIC Food Dollar Redemption Patterns by Store Type, EIB–152, U.S. Department of Agriculture, Economic Research Service, April 2016. Available online at: *https://www.ers.usda.gov/webdocs/publications/44073/57246_eib152.pdf?v=0.*

[46] Statista. ''Sales of the convenience store industry in the United States from 2011 to 2020, by format'' 27 January 2022. Available online at: *https://www.statista.com/statistics/308767/sales-of-the-us-convenience-store-industry-by-format/.*

[47] The Department projects that about 18 and 20 percent of WIC participants will transact any WIC electronic benefits online in FY 2027 and 2028, respectively. Among those transacting any WIC electronic benefits online, only about half of their redemptions are expected to be online those years. See Table 6 for more details.

[48] Brandt EJ, Silvestri DM, Mande JR, Holland ML, et al. Availability of grocery delivery to food deserts in states participating in the online purchase pilot. *JAMA Netw Open.* 2019;2:e1916444.

[49] Swenson, K. and Ghertner, R. People in Low-Income Households Have Less Access to internet Services—2019 Update. U.S. Department of Health & Human Services, Office of the Assistant Secretary for Planning & Evaluation. March 2021. Available online at: *https://aspe.hhs.gov/sites/default/files/2021-07/internet-access-among-low-income-2019.pdf.*

TABLE 10—PROJECTED COST OF ONLINE SHOPPING AT DIFFERENT USAGE LEVELS

[Fiscal year (millions)]

	2024	2025	2026	2027	2028	Total
Higher (+ 5%): Percentage of participants making at least one WIC purchase online, within participating State agencies	17%	19%	21%	23%	25%	
Increase in total WIC food costs due to online shopping	$7.9	$59.2	$103.7	$155.7	$177.5	$504.0
Current: Percentage of participants making at least one WIC purchase online, within participating State agencies	12%	14%	16%	18%	20%	
Increase in total WIC food costs due to online shopping	$5.6	$43.7	$79.0	$121.9	$142.0	$392.1
Lower (−5%): Percentage of participants making at least one WIC purchase online, within participating State agencies	7%	9%	11%	13%	15%	
Increase in total WIC food costs due to online shopping	$3.2	$28.1	$54.3	$88.0	$106.5	$280.1

Notes: All monetary estimates are adjusted for annual inflation.

Impact of WIC Online Shopping on Redemption

The overall cost impact of enabling online shopping in WIC will also depend on how much the added convenience leads to an increase in overall redemptions. As described above, the benefits of online shopping are expected to address some of the barriers and challenges that WIC participants report about the current shopping experience. This analysis expects about a 10 percent increase in WIC electronic benefit redemptions among participants that transact at least some WIC electronic benefits online. As shown in Table 11, a 5-percentage point variation in this effect is estimated to amount to around a $120 million difference in the 5-year estimate for WIC food costs. If benefit redemptions do not increase at all under the proposed rule, then the Department still estimates nearly a $149 million increase in Federal WIC food costs attributed solely to the expected 13 percent increase in online food prices described earlier in this analysis.

TABLE 11—PROJECTED COST OF ONLINE SHOPPING AT DIFFERENT REDEMPTION LEVELS

[Millions]

	Fiscal year					
	2024	2025	2026	2027	2028	Total
Higher: 15% Increase in Benefit Redemption for Online Shoppers	$7.3	$57.2	$103.5	$159.7	$186.1	$513.8
Current: 10% Increase in Benefit Redemption for Online Shoppers	5.6	43.7	79.0	121.9	142.0	392.1
Lower: 5% Increase in Benefit Redemption for Online Shoppers	3.8	30.1	54.5	84.0	97.9	270.3
Zero: 0% Increase in Benefit Redemption for Online Shoppers	2.1	16.5	29.9	46.2	53.8	148.6

Notes: All monetary estimates are adjusted for annual inflation.

Difference in Prices of Online WIC Foods

The overall cost impact of enabling online shopping in WIC would also be affected by differences in the retail prices consumers pay online. As described earlier in this analysis, the Department uses current market estimates to project that WIC shoppers will pay an average of 13 percent higher retail prices for WIC foods when transacting benefits online. An increase or decrease in retail prices of 5 percentage points, relative to in-store prices, would amount to over a $60 million impact on the overall Federal WIC food costs associated with this provision of the proposed rule over 5 years (see Table 12). If there is no difference between in-store and online retail prices of WIC foods, then the proposed rule is still expected to increase WIC food costs by around $229 million over 5 years attributed solely to the projected 10 percent increase in redemptions for online WIC shoppers, as described earlier in this analysis.

TABLE 12—PROJECTED COST OF ONLINE SHOPPING AT DIFFERENT RETAIL PRICE VARIATIONS

[Millions]

	Fiscal year					
	2024	2025	2026	2027	2028	Total
Higher: 18% Increase in Retail Prices for Online Shoppers	$6.5	$50.7	$91.6	$141.4	$164.8	$455.0
Current: 13% Increase in Retail Prices for Online Shoppers	5.6	43.7	79.0	121.9	142.0	392.1
Lower: 8% Increase in Retail Prices for Online Shoppers	4.7	36.7	66.3	102.3	119.2	329.2

TABLE 12—PROJECTED COST OF ONLINE SHOPPING AT DIFFERENT RETAIL PRICE VARIATIONS—Continued

[Millions]

	Fiscal year					
	2024	2025	2026	2027	2028	Total
Zero: 0% Increase in Retail Prices for Online Shoppers	3.2	25.5	46.0	71.1	82.8	228.6

Notes: All monetary estimates are adjusted for annual inflation.

Number of State Agencies That Already Meet New Staffing Requirements

The overall cost of creating new staff positions based on the provisions of this proposed rule depend on the Department's estimate for current State agency staffing capacity. However, it is difficult to estimate how many State agencies already fulfill the proposed requirements because the Department does not routinely track State agencies' staffing qualifications. If an additional 5 percent of larger State agencies (those with more than 7,000 monthly participants) already meet the new requirements respectively for each new staff position, and do not need to hire new staff, only 36 State agencies would be required to hire a full-time WIC Food Delivery Coordinator and 46 State agencies would be required to hire a full-time WIC Customer Service Coordinator. Under these conditions, the above estimate of $55 million for creating 108 new staff positions during FY 2024 to FY 2028 would decrease to nearly $53 million for creating 104 new staff positions (including both costs of total compensation and costs associated with hiring and recruitment). If an additional 5 percent of larger State agencies are required to hire new staff for each new staff position, then 41 State agencies would be required to hire a full-time WIC Food Delivery Coordinator and all 51 larger State agencies would be required to hire a full-time WIC Customer Service Coordinator. This increase in hiring would bring the 5-year cost estimate up to $58 million for 114 new staff positions during FY 2024 through FY 2028 (including both costs of total compensation and costs associated with hiring and recruitment). See Table 13 for annual and total cost estimates based on the number of new staff positions required.

TABLE 13—ESTIMATED COST OF CREATING TWO NEW STAFF POSITIONS

[FY 2024–2028, Variations]

	Fiscal year (millions)					
	2024	2025	2026	2027	2028	Total
Higher (+5% of State agencies): 114 New State agency Staff Positions	$6.2	$12.5	$12.6	$13.0	$13.4	$57.7
Current: 108 New State agency Staff Positions	5.9	11.9	11.9	12.3	12.7	54.7
Lower (−5% of State agencies): 104 New State agency Staff Positions	5.7	11.4	11.5	11.9	12.2	52.7

Notes: All monetary estimates are adjusted for annual inflation. Staffing costs include both total cost of compensation and costs associated with recruitment and hiring in FY 2024 and FY 2025.

Alternatives

State Agencies Pay for Delivery Fees

The Department is requesting public comment on whether State agencies should have the option to pay for fees associated with online shopping in a retail food delivery system with either (1) non-Federal funding at State agency discretion or (2) Federal funding in situations where it is deemed necessary to meet special needs (*e.g.,* participant access or other needs as identified by the State agency). If State agencies were to pay for these fees for all WIC online grocery orders using Federal funds, then the cost of the proposed rule would increase. These additional costs would be a function of two related cost streams: (1) payments made to cover the cost of delivery fees, and (2) new costs associated with a projected increase in usage of online shopping as WIC participants would no long face a barrier of out-of-pocket delivery fees for WIC orders. The cost impact of the increase in online shopping is expected to be the same whether State agencies pay for the delivery fees using Federal or non-Federal funds.

To analyze the cost impact of this policy alternative, this analysis focuses on fees associated with grocery delivery services from internet-based grocery retailers and, in this model, assumes that all State agencies opt to pay for delivery fees for all WIC online shopping delivery orders. The Department averaged the typical delivery and service fees of six of the largest online grocery firms. After adjusting for annual inflation, the Department estimates that an average online grocery order in 2024 will be assessed $9.59 in delivery and service fees, increasing to $10.51, adjusting for inflation, in FY 2028.

The Department expects an increase in the use of online shopping in WIC if participants do not have to pay delivery fees. Based on data from a recent Mercatus report, the Department estimates that, when faced with delivery fees, 33 percent of WIC online shopping orders will be placed for home delivery while the remaining 67 percent will opt for in-store or curbside pickup.[50] While many shoppers prefer curbside pickup regardless of the fees associated with delivery, this analysis estimates the share of online WIC shoppers choosing home delivery will increase from 33 percent to 45 percent if State agencies pay for delivery fees on behalf of participants. Paying delivery fees on behalf of participants is also expected to attract more in-store only shoppers to purchase WIC foods online. While the Department expects about 12 percent of WIC participants to transact their food benefits online in FY 2024, this figure is expected to increase slightly to 14 percent if State agencies pay for delivery fees and continue to steadily increase to 22 percent in FY 2028 (up from the 20 percent projected in Table 6 of this analysis). As discussed previously, the Department expects the average online WIC shopper would transact about 50 percent of the WIC food benefits they use online and the other 50 percent in brick-and-mortar stores. Data from four States in 2012 indicate that the average WIC participant in those States made 3.2 WIC shopping trips each month to use their WIC benefits.[51] National polling data suggest that individuals who buy groceries online do so less frequently than in-

[50] Mercatus. ''eGrocery Transformed: Market projections and insight into online grocery's elevated future,'' 2021.

[51] Phillips, D., Bell, L., Morgan, R., & Pooler, J. (2014). Transition to EBT in WIC: Review of impact and examination of participant redemption patterns: Final report. Retrieved from *https://altarum.org/sites/default/files/uploaded-publication-files/Altarum_Transition%20to%20WIC%20EBT_Final%20Report_071614.pdf.*

store shopping trips.[52] Accordingly, the Department estimates that the average online WIC shopper will make one online WIC order each month and that the average WIC household will order benefits for two WIC participants in a single order (*e.g.,* formula for a partially breastfeeding infant and WIC-approved foods for their partially breastfeeding parent).[53]

Given these assumptions, the Department estimates that total delivery fees paid will amount to $124 million between FY 2024 and FY 2028 (Table 14). The slight expected increase in online shopping if State agencies pay for delivery fees on behalf of participants is expected to result in a total 5-year increase of $437 million in Federal WIC food costs, approximately $45 million higher than the estimated $392 million increase to food costs over 5 years attributed to the proposed rule as currently written (Table 7). Between the projected increase in food costs and the new costs incurred for delivery fees, the Department estimates that using Federal funds to pay delivery fees on behalf of participants would increase the cost of this proposed rule by around $169 million over 5 years (Table 14). If State agencies use only non-Federal funds to pay for the delivery fees, then the increase to Federal transfers would only reflect the increase in food costs driven by the increased uptake in online shopping described above—increasing 5-year costs by about $45 million.

TABLE 14—ESTIMATED IMPACT ON COST OF PROPOSED RULE IF STATE AGENCIES PAY DELIVERY FEES
[FY 2024–2028]

	Fiscal year (millions)					
	2024	2025	2026	2027	2028	Total
Alternative:						
Projected increase in Federal food costs due to online shopping if State agencies pay delivery fees ..	$6.5	$49.9	$88.8	$135.4	$156.2	$436.9
Projected total cost of delivery fees (paid by State agencies)	1.9	14.5	25.8	38.4	43.3	123.9
Current:						
Projected increase in Federal food costs due to online shopping if participants pay delivery fees out-of-pocket (Current)	5.6	43.7	79.0	121.9	142.0	392.1
Increase in cost of proposed rule if State agencies pay delivery fees with Federal funds	2.8	20.7	35.7	52.0	57.5	168.7

Notes: All monetary estimates are adjusted for annual inflation.

Requiring All 89 State Agencies To Create Two New Full-Time Staff Positions

The Department proposes to adjust the staffing standards based on the caseload size of the State agency. As an alternative, the Department could have proposed to require all 89 State agencies to create two new full-time staffing positions. Under the alternative, the total number of new staff positions required would be 178, and the total estimated cost would be $90 million (including both costs of total compensation and costs associated with hiring and recruitment). However, the Department ultimately decided to adjust the staffing requirements based on each State agency's participant caseload due to resource constraints and to avoid undue burden on smaller States, Territories, and ITOs. See the Table 15 for annual and total cost estimates if all State agencies were required to employ two new full-time staff.

TABLE 15—ESTIMATED COST OF ALL STATE AGENCIES CREATING TWO NEW STAFF POSITIONS
[FY 2024–2028]

	Fiscal year (millions)					
	2024	2025	2026	2027	2028	Total
Current:						
108 New State agency Staff Positions	$5.9	$11.9	$11.9	$12.3	$12.7	$54.7
Alternative:						
178 New State agency Staff Positions (requiring all State agencies to hire new staff)	9.7	19.6	19.7	20.3	20.9	90.2

Notes: All monetary estimates are adjusted for annual inflation. Staffing costs include both total cost of compensation and costs associated with recruitment and hiring in FY 2024 and FY 2025.

[52] Brenan, M. ''More in U.S. Grocery Shopping Online, Fewer Dining Out.'' *Gallup,* 10 August 2021. Available online at: *https://news.gallup.com/poll/353090/grocery-shopping-online-fewer-dining.aspx.*

[53] According to data reported by 80 State agencies in the Supplemental Data Set of the WIC Participant and Program Characteristics 2020 Final Report, the average WIC household includes around 2 individuals receiving WIC benefits.

Accounting Statement

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*), the Department has prepared an accounting statement summarizing the annualized estimates of benefits and costs associated with the provisions of this proposed rule.

The benefits of the proposed rule include decreasing burden on WIC participants, WIC vendors, and State agencies; encouraging innovation by State agencies; and allowing WIC participants to transact benefits in new and innovative ways.

The net costs or savings (*i.e.,* negative costs) and transfers associated with provisions of the proposed rule are incurred by the Federal government, WIC State Agencies, and/or WIC vendors. These include the following, as described in the full regulatory impact analysis text:

- Costs for new staff positions
- Costs associated with updating State agency systems for online transactions
- Decreased administrative burden
- Increased WIC food spending

TABLE 16—UNDISCOUNTED COST AND TRANSFER STREAM

[$ millions]

	Fiscal year					
	2024	2025	2026	2027	2028	Total
Nominal Federal transfer stream	$5.6	$43.7	$79.0	$121.9	$142.0	$392.1
Nominal State Agency cost stream	−2.7	9.4	7.7	8.8	6.9	30.1
Nominal WIC Vendor cost stream	−3.5	−3.6	−3.7	−3.8	−3.8	−18.4

Applying 3 percent and 7 percent discount rates to these undiscounted streams gives present values (in 2022 dollars):

TABLE 17—DISCOUNTED COST AND TRANSFER STREAMS

[$ Millions, 2022 Dollars]

	Fiscal year					
	2024	2025	2026	2027	2028	Total
Discounted Federal transfer stream						
3 percent	$5.0	$37.4	$64.3	$94.3	$104.4	$305.5
7 percent	4.7	33.5	55.4	78.3	83.5	255.3
Discounted State Agency cost stream						
3 percent	−2.4	7.9	6.1	6.6	4.8	23.0
7 percent	−2.2	7.0	5.2	5.5	3.9	19.4
Discounted WIC Vendor cost stream						
3 percent	−3.3	−3.3	−3.3	−3.2	−3.2	−16.3
7 percent	−3.1	−2.9	−2.8	−2.7	−2.6	−14.1

Table 18 takes the discounted streams from Table 17 and computes annualized values in FY 2022 dollars.

TABLE 18—ACCOUNTING STATEMENT

Benefits	Range	Estimate	Year dollar	Discount rate	Period covered
Qualitative: Improved shopping experience, increased flexibility and convenience, and decreased burden on WIC participants; increased flexibility for WIC State Agencies; and increased opportunity for innovation by WIC State Agencies and WIC vendors.					
State Agencies, WIC Vendors, and WIC Participants					
Annualized Monetized ($millions/year)	n.a.	n.a.	n.a.	n.a.	FY2024–2028
Transfers	Range	Estimate	Year dollar	Discount rate	Period covered
Federal Government					
Quantitative: Impact of online shopping on Federal transfers for WIC food spending.					
Annualized Monetized ($millions/year)	n.a	$51.1 $61.1	2022 2022	7% 3%	FY2024–2028

TABLE 18—ACCOUNTING STATEMENT—CONTINUED

Costs	Range	Estimate	Year dollar	Discount rate	Period covered
State Agencies					
Quantitative: Net impact of online purchasing system and maintenance, increased staffing costs, and decreased administrative costs.					
Annualized Monetized ($millions/year)	n.a	$3.9 $4.6	2022 2022	7% 3%	FY2024–2028
WIC Vendors (Negative Costs = Savings)					
Quantitative: Impact of decreased administrative costs.					
Annualized Monetized ($millions/year)	n.a	−$2.8 −$3.3	2022 2022	7% 3%	FY2024–2028

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Part III

Environmental Protection Agency

40 CFR Parts 60 and 63
New Source Performance Standards Review for Lead Acid Battery Manufacturing Plants and National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery Manufacturing Area Sources Technology Review; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 63

[EPA–HQ–OAR–2021–0619; FRL–8602–02–OAR]

RIN 2060–AV43

New Source Performance Standards Review for Lead Acid Battery Manufacturing Plants and National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery Manufacturing Area Sources Technology Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action finalizes the results of the Environmental Protection Agency's (EPA's) review of the New Source Performance Standards (NSPS) for Lead Acid Battery Manufacturing Plants and the technology review for the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Lead Acid Battery Manufacturing Area Sources as required under the Clean Air Act (CAA). The EPA is finalizing revised lead emission limits for grid casting, paste mixing, and lead reclamation operations for both the area source NESHAP and under a new NSPS subpart (for lead acid battery manufacturing facilities that begin construction, reconstruction, or modification after February 23, 2022). In addition, the EPA is finalizing the following amendments for both the area source NESHAP and under the new NSPS subpart: performance testing once every 5 years to demonstrate compliance; work practices to minimize emissions of fugitive lead dust; increased inspection frequency of fabric filters; clarification of activities that are considered to be lead reclamation activities; electronic reporting of performance test results and semiannual compliance reports; and the removal of exemptions for periods of startup, shutdown, and malfunctions (SSM). The EPA is also finalizing a revision to the applicability provisions in the area source NESHAP such that facilities which make lead-bearing battery parts or process input material, including but not limited to grid casting facilities and lead oxide manufacturing facilities, will be subject to the area source NESHAP. In addition, the EPA is finalizing a requirement in the new NSPS for new facilities to operate bag leak detection systems for emission points controlled by a fabric filter that do not include a secondary fabric filter.

DATES: This final rule is effective on February 23, 2023. The incorporation by reference (IBR) of certain publications listed in the rule is approved by the Director of the Federal Register as of February 23, 2023.

ADDRESSES: The U.S. Environmental Protection Agency (EPA) has established a docket for this action under Docket ID No. EPA–HQ–OAR–2021–0619. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *https://www.regulations.gov/,* or in hard copy at the EPA Docket Center, WJC West Building, Room Number 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions about this action, contact Amanda Hansen, Sector Policies and Programs Division (D243–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–3165; and email address: *hansen.amanda@epa.gov*.

SUPPLEMENTARY INFORMATION:

Preamble acronyms and abbreviations. Throughout this preamble the use of ''we,'' ''us,'' or ''our'' is intended to refer to the EPA. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

ANSI American National Standards Institute
BCI Battery Council International
BSER best system of emissions reduction
CAA Clean Air Act
DCOT digital camera opacity technique
EJ Environmental Justice
EPA Environmental Protection Agency
ERT Electronic Reporting Tool
FR Federal Register
GACT generally available control technology
HAP hazardous air pollutant(s)
HEPA high efficiency particulate air
µm microns
mg/dscm milligrams per dry standard cubic meters
NAAQS National Ambient Air Quality Standards
NAICS North American Industry Classification System
NEI National Emissions Inventory
NESHAP national emission standards for hazardous air pollutants
NSPS new source performance standards
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
Pb lead
RACT reasonably available control technology
SIC Standard Industrial Classification
SSM startup, shutdown, and malfunction
the court the United States Court of Appeals for the District of Columbia Circuit
tpd tons per day
tpy tons per year
TR technology review
TRI Toxics Release Inventory
µg/m^3 microgram per cubic meter
UPL upper prediction limit
VCS voluntary consensus standards

Background information. On February 23, 2022 (87 FR 10134), the EPA proposed revisions to the Lead Acid Battery Manufacturing Area Source NESHAP based on our technology review (TR) and proposed a new NSPS subpart based on the best systems of emission reduction (BSER) review. In this action, we are finalizing decisions and revisions for the rules. We summarize some of the more significant comments we timely received regarding the proposed rules and provide our responses in this preamble. A summary of all other public comments on the proposal and the EPA's responses to those comments is available in the *New Source Performance Standards for Lead Acid Battery Manufacturing Plants and National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery Manufacturing Area Sources Summary of Public Comments and Responses on Proposed Rules* (hereafter referred to as the ''Comment Summary and Response Document'') in the docket for this action, Docket ID No. EPA–HQ–OAR–2021–0619. A ''track changes'' version of the regulatory language that incorporates the changes in this action is also available in the docket.

Organization of this document. The information in this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

The source category that is the subject of this final action is lead acid battery manufacturing regulated under CAA section 111 New Source Performance Standards (NSPS) and under CAA section 112 National Emission Standards for Hazardous Air Pollutants (NESHAP). The North American Industry Classification System (NAICS) code for the lead acid battery manufacturing industry is 335911. The NAICS code serves as a guide for readers outlining the type of entities that this final action is likely to affect. As defined in the *Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990* (see 57 FR 31576; July 16, 1992) and *Documentation for Developing the Initial Source Category List, Final Report* (see EPA–450/3–91–030, July 1992), the Lead Acid Battery Manufacturing source category for purposes of CAA section 112 includes any facility engaged in producing lead acid or lead acid storage batteries, including, but not limited to, starting-lighting-ignition batteries and industrial storage batteries. The category includes, but is not limited to, the following lead acid battery manufacturing steps: lead oxide production, grid casting, paste mixing, and three-process operation (plate stacking, burning, and assembly). Lead acid battery manufacturing was identified as a source category under CAA section 111 in the *Priorities for New Source Performance Standards Under the Clean Air Act Amendments of 1977* (see EPA–450/3–78–019, April 1978), and added to the priority list in the *Revised Prioritized List of Source Categories for NSPS Promulgation* (see EPA–450/3–79–023, March 1979). Federal, state, local and tribal government entities would not be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, you should carefully examine the applicability criteria found in 40 CFR part 60, subpart KKa, and 40 CFR part 63, subpart PPPPPP, or consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble, your state air pollution control agency with delegated authority for NSPS and NESHAP, or your EPA Regional Office.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final action will also be available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this final action at: *https://www.epa.gov/stationary-sources-air-pollution/lead-acid-battery-manufacturing-new-source-performance-standards* and *https://www.epa.gov/stationary-sources-air-pollution/lead-acid-battery-manufacturing-area-sources-national-emission*. Following publication in the **Federal Register** (FR), the EPA will post the **Federal Register** version and key technical documents at this same website.

C. Judicial Review and Administrative Reconsideration

Under Clean Air Act (CAA) section 307(b)(1), judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit (the court) by April 24, 2023. Under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

Section 307(d)(7)(B) of the CAA further provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment, (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. Environmental Protection Agency, Room 3000, WJC West Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

II. Background

A. What is the statutory authority for this final action?

1. NSPS

The EPA's authority for this final NSPS rule is CAA section 111, which governs the establishment of standards of performance for stationary sources. Section 111(b)(1)(A) of the CAA requires the EPA Administrator to list categories of stationary sources that in the Administrator's judgment cause or contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare. The EPA must then issue performance standards for new (and modified or reconstructed) sources in each source category pursuant to CAA section 111(b)(1)(B). These standards are referred to as new source performance standards, or NSPS. The EPA has the authority to define the scope of the source categories, determine the pollutants for which standards should be developed, set the emission level of the standards, and distinguish among classes, types, and sizes within categories in establishing the standards.

CAA section 111(b)(1)(B) requires the EPA to ''at least every 8 years review and, if appropriate, revise'' NSPS. However, the Administrator need not review any such standard if the ''Administrator determines that such review is not appropriate in light of readily available information on the efficacy'' of the standard. When conducting a review of an existing performance standard, the EPA has the discretion and authority to add emission limits for pollutants or emission sources not currently regulated for that source category.

In setting or revising a performance standard, CAA section 111(a)(1) provides that performance standards are to reflect ''the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.'' The term ''standard of performance'' in CAA section 111(a)(1) makes clear that the EPA is to determine both the best system of emission reduction (BSER) for the regulated sources in the source category and the degree of emission limitation achievable through application of the BSER. The EPA must then, under CAA section 111(b)(1)(B), promulgate standards of performance for new sources that reflect that level of stringency. CAA section 111(h)(1) authorizes the Administrator to promulgate ''a design, equipment, work practice, or operational standard, or combination thereof'' if in his or her judgment, ''it is not feasible to prescribe or enforce a standard of performance.'' CAA section 111(h)(2) provides the circumstances under which prescribing or enforcing a standard of performance is ''not feasible,'' such as, when the pollutant cannot be emitted through a conveyance designed to emit or capture the pollutant, or when there is no practicable measurement methodology for the particular class of sources.

CAA section 111(b)(5) precludes the EPA from prescribing a particular technological system that must be used to comply with a standard of performance. Rather, sources can select any measure or combination of measures that will achieve the standard.

Pursuant to the definition of new source in CAA section 111(a)(2), standards of performance apply to facilities that begin construction, reconstruction, or modification after the date of publication of the proposed standards in the **Federal Register**. Under CAA section 111(a)(4), ''modification'' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted. Changes to an existing facility that do not result in an increase in emissions are not considered modifications. Under the provisions in 40 CFR 60.15, reconstruction means the replacement of components of an existing facility such that: (1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility; and (2) it is technologically and economically feasible to meet the applicable standards. Pursuant to CAA section 111(b)(1)(B), the standards of performance or revisions thereof shall become effective upon promulgation.

2. NESHAP

The statutory authority for this NESHAP action is provided by sections 112 and 301 of the CAA, as amended (42 U.S.C. 7401 *et seq.*). Section 112(d)(6) requires the EPA to review standards promulgated under CAA section 112(d) and revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less often than every 8 years following promulgation of those standards. This is referred to as a ''technology review'' and is required for all standards established under CAA section 112(d) including generally available control technology (GACT) standards that apply to area sources.[1] This action finalizes the 112(d)(6) technology review for the Lead Acid Battery Manufacturing Area Source NESHAP.

Several additional CAA sections are relevant to this action as they specifically address regulation of hazardous air pollutant emissions from area sources. Collectively, CAA sections 112(c)(3), (d)(5), and (k)(3) are the basis of the Area Source Program under the Urban Air Toxics Strategy, which provides the framework for regulation of area sources under CAA section 112.

Section 112(k)(3)(B) of the CAA requires the EPA to identify at least 30 HAP that pose the greatest potential health threat in urban areas with a primary goal of achieving a 75 percent reduction in cancer incidence attributable to HAP emitted from stationary sources. As discussed in the Integrated Urban Air Toxics Strategy (64 FR 38706, 38715; July 19, 1999), the EPA identified 30 HAP emitted from area sources that pose the greatest potential health threat in urban areas, and these HAP are commonly referred to as the ''30 urban HAP.''

Section 112(c)(3), in turn, requires the EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. The EPA implemented these requirements through the Integrated Urban Air Toxics Strategy by identifying and setting standards for categories of area sources including the lead acid battery manufacturing source category that is addressed in this action.

CAA section 112(d)(5) provides that for area source categories, in lieu of setting maximum achievable control technology (MACT) standards (which are generally required for major source categories), the EPA may elect to promulgate standards or requirements for area sources ''which provide for the use of generally available control technology or management practices [GACT] by such sources to reduce emissions of hazardous air pollutants.'' In developing such standards, the EPA evaluates the control technologies and management practices that reduce HAP emissions that are generally available

[1] For categories of area sources subject to GACT standards, CAA sections 112(d)(5) and (f)(5) provide that the EPA is not required to conduct a residual risk review under CAA section 112(f)(2). However, the EPA is required to conduct periodic technology reviews under CAA section 112(d)(6).

for each area source category. Consistent with the legislative history, we can consider costs and economic impacts in determining what constitutes GACT.

GACT standards were set for the lead acid battery manufacturing source category on July 16, 2007 (72 FR 38864). As noted above, this action finalizes the required CAA 112(d)(6) technology review for that source category.

B. How does the EPA perform the NSPS and NESHAP reviews?

1. NSPS

As noted in section II.A, CAA section 111 requires the EPA, at least every 8 years to review and, if appropriate revise the standards of performance applicable to new, modified, and reconstructed sources. If the EPA revises the standards of performance, they must reflect the degree of emission limitation achievable through the application of the BSER taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements (see CAA section 111(a)(1)).

In reviewing an NSPS to determine whether it is ''appropriate'' to revise the standards of performance, the EPA evaluates the statutory factors, which may include consideration of the following information:

- Expected growth for the source category, including how many new facilities, reconstructions, and modifications may trigger NSPS in the future.
- Pollution control measures, including advances in control technologies, process operations, design or efficiency improvements, or other systems of emission reduction, that are ''adequately demonstrated'' in the regulated industry.
- Available information from the implementation and enforcement of current requirements indicates that emission limitations and percent reductions beyond those required by the current standards are achieved in practice.
- Costs (including capital and annual costs) associated with implementation of the available pollution control measures.
- The amount of emission reductions achievable through application of such pollution control measures.
- Any nonair quality health and environmental impact and energy requirements associated with those control measures.

In evaluating whether the cost of a particular system of emission reduction is reasonable, the EPA considers various costs associated with the air pollution control measure or level of control, including capital costs and operating costs, and the emission reductions that the control measure or level of control can achieve. The Agency considers these costs in the context of the industry's overall capital expenditures and revenues. The Agency also considers cost effectiveness analysis as a useful metric, and a means of evaluating whether a given control achieves emission reduction at a reasonable cost. A cost effectiveness analysis allows comparisons of relative costs and outcomes (effects) of two or more options. In general, cost effectiveness is a measure of the outcomes produced by resources spent. In the context of air pollution control options, cost effectiveness typically refers to the annualized cost of implementing an air pollution control option divided by the amount of pollutant reductions realized annually.

After the EPA evaluates the statutory factors, the EPA compares the various systems of emission reductions and determines which system is ''best,'' and therefore represents the BSER. The EPA then establishes a standard of performance that reflects the degree of emission limitation achievable through the implementation of the BSER. In doing this analysis, the EPA can determine whether subcategorization is appropriate based on classes, types, and sizes of sources, and may identify a different BSER and establish different performance standards for each subcategory. The result of the analysis and BSER determination leads to standards of performance that apply to facilities that begin construction, reconstruction, or modification after the date of publication of the proposed standards in the **Federal Register**. Because the new source performance standards reflect the best system of emission reduction under conditions of proper operation and maintenance, in doing its review, the EPA also evaluates and determines the proper testing, monitoring, recordkeeping and reporting requirements needed to ensure compliance with the emission standards.

2. NESHAP

For the NESHAP area source GACT standards, we perform a technology review that primarily focuses on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the standards were promulgated. Where we identify such developments, we analyze their technical feasibility, estimated costs, energy implications, and non-air environmental impacts. We also consider the emission reductions associated with applying each development. This analysis informs our decision of whether it is ''necessary'' to revise the emissions standards. In addition, we consider the appropriateness of applying controls to new sources versus retrofitting existing sources. For this exercise, we consider any of the following to be a ''development'':

- Any add-on control technology or other equipment that was not identified and considered during development of the original GACT standards;
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the original GACT standards) that could result in additional emissions reduction;
- Any work practice or operational procedure that was not identified or considered during development of the original GACT standards;
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the original GACT standards; and
- Any significant changes in the cost (including cost effectiveness) of applying controls (including controls the EPA considered during the development of the original GACT standards).

In addition to reviewing the practices, processes, and control technologies that were considered at the time we originally developed the NESHAP, we review a variety of data sources in our investigation of potential practices, processes, or controls to consider.

C. What is the source category regulated in this final action?

The lead acid battery manufacturing source category consists of facilities engaged in producing lead acid batteries. The EPA first promulgated new source performance standards for lead acid battery manufacturing on April 16, 1982. These standards of performance are codified in 40 CFR part 60, subpart KK, and are applicable to sources that commence construction, modification, or reconstruction after January 14, 1980 (47 FR 16564). The EPA also set GACT standards for the lead acid battery manufacturing source category on July 16, 2007. These standards are codified in 40 CFR part 63, subpart PPPPPP, and are applicable to existing and new affected facilities.

Under 40 CFR 60, subpart KK, and 40 CFR 63, subpart PPPPPP, a lead acid battery manufacturing plant is defined

as any plant that produces a storage battery using lead and lead compounds for the plates and sulfuric acid for the electrolyte. The batteries manufactured at these facilities include starting, lighting, and ignition batteries primarily used in automobiles as well as industrial and traction batteries. Industrial batteries include those used for uninterruptible power supplies and other backup power applications, and traction batteries are used to power electric vehicles such as forklifts.

The lead acid battery manufacturing process begins with grid casting operations, which entails stamping or casting lead into grids. Next, in paste mixing operations, lead oxide powder is mixed with water and sulfuric acid to form a stiff paste, which is then pressed onto the lead grids, creating plates. Lead oxide may be produced by the battery manufacturer, as is the case for many larger battery manufacturing plants or may be purchased from a supplier. The plates are cured, stacked, and connected into groups that form the individual elements of a lead acid battery. This stacking, connecting, and assembly of the plates into battery cases is generally performed in one operation termed the ''three-process operation.'' At some facilities, lead reclamation may be performed, in which relatively clean lead scrap from these processes is collected and remelted into blocks, called ingots, for reuse in the process.

The NSPS applies to all lead acid battery manufacturing plants constructed, reconstructed, or modified since January 14, 1980, if they produce or have the design capacity to produce batteries containing 5.9 megagrams (6.5 tons) or more of lead in one day. The NSPS contains emission limits for lead and opacity limits for grid casting, paste mixing, three-process operations, lead oxide manufacturing, other lead emitting sources, and lead reclamation at lead acid battery manufacturing plants. The NESHAP applies to all lead acid battery manufacturing facilities that are area sources regardless of production capacity. The GACT standards include the same emissions and opacity limits as those in the NSPS as well as some additional monitoring requirements.

The EPA estimates that, of the 40 existing lead acid battery manufacturing facilities in the U.S., all are subject to the NSPS, and 39 facilities are subject to the NESHAP. One facility is a major source as defined under CAA section 112 and is therefore not subject to the area source GACT standards. In addition to these 40 facilities, we estimate that there are four facilities that perform one or more processes (*e.g.,* grid casting or lead oxide production) involved in the production of lead acid batteries but that do not manufacture the final product (*i.e.,* lead acid batteries). These four facilities have not previously been subject to either the NSPS or the area source NESHAP. The EPA does not expect any new lead acid battery manufacturing facilities nor any facilities that conduct a lead acid battery manufacturing process without producing the final lead acid battery product to be constructed in the foreseeable future. However, we do expect that some existing facilities of both types could undergo modifications or reconstruction.

D. What changes did we propose for the lead acid battery manufacturing source category in our February 23, 2022, proposal?

On February 23, 2022, the EPA published proposed rules in the **Federal Register** (87 FR 10134) for the NSPS for Lead Acid Battery Manufacturing Plants (40 CFR part 60, subpart KKa) and the NESHAP for Lead Acid Battery Manufacturing Area Sources (40 CFR part 63, subpart PPPPPP) that were based on the BSER review for the NSPS and the technology review for the NESHAP. The EPA proposed revised lead emission limits for grid casting, paste mixing, and lead reclamation operations for both the area source NESHAP (for new and existing sources) and under a new NSPS subpart (for lead acid battery manufacturing facilities that begin construction, reconstruction, or modification after February 23, 2022). In addition, the Agency proposed the following amendments for both the area source NESHAP (for new and existing sources) and under the new NSPS subpart: performance testing once every 5 years to demonstrate compliance; work practices to minimize emissions of fugitive lead dust; increased inspection frequency of fabric filters; bag leak detection systems for facilities above a certain size (*i.e.,* facilities with capacity to process greater than 150 tons per day (tpd) of lead); clarification of activities that are considered to be lead reclamation activities; electronic reporting of performance test results and semiannual compliance reports; and the removal of exemptions for periods of SSM. The EPA also proposed a revision to the applicability provisions in the area source NESHAP such that facilities which make lead-bearing battery parts or process input material, including but not limited to grid casting facilities and lead oxide manufacturing facilities, will be subject to the area source NESHAP. For additional information regarding the proposed rule, please see the February 23, 2022, proposal (87 FR 10134).

E. What outreach and engagement did the EPA conduct with environmental justice communities?

As part of this rulemaking and pursuant to multiple Executive Orders addressing environmental justice (EJ), the EPA engaged and consulted with the public, including populations of people of color and low-income populations, by sending out listserv notifications to EJ representatives regarding the publication of the proposed rule and providing the opportunity for members of the public to speak at a public hearing regarding the proposed rule amendments. While no one requested to speak at a public hearing, these opportunities gave the EPA a chance to hear directly from the public, especially communities potentially impacted by this final action. To identify pertinent stakeholders for engaging discussions of the rule, we used information available to the Agency, such as lists of EJ community representatives and activists, and information from the EJ analysis conducted for this rule and summarized in section IV.F. of this preamble.

Although most of the comments received following the proposal were technical in nature, some commenters remarked on issues regarding the rule's effectiveness in protecting health and welfare in EJ communities, such as the need to close rule loopholes and the need for the EPA to conduct health risk assessments. Responses to several of the technical related comments are summarized, and responded to, in this preamble. All other comments and the EPA's responses are provided in the Comment Summary and Response Document, available in the docket for this action, and section III of the preamble provides a description of how the Agency considered these comments in the context of regulatory development.

III. What actions are we finalizing and what is our rationale for such decisions?

The EPA proposed the current review of the lead acid battery manufacturing NSPS (40 CFR part 60, subpart KK) and NESHAP (40 CFR part 63, subpart PPPPPP) on February 23, 2022. We proposed to create a new NSPS subpart at 40 CFR part 60, subpart KKa, to include the proposed revisions to the NSPS for affected sources that are new, modified, or reconstructed following the date of the proposal, and we proposed revisions to the NESHAP within 40 CFR part 63, subpart PPPPPP. We received

eight comments from industry, environmental groups, and private individuals during the comment period. A summary of the more significant comments we timely received regarding the proposed rule and our responses are provided in this preamble. A summary of all other public comments on the proposal and the EPA's responses to those comments is available in the Comment Summary and Response Document in the docket for this action, (Docket ID No. EPA–HQ–OAR–2021–0619). In this action, the EPA is finalizing decisions and revisions pursuant to CAA section 111(b)(1)(B) and CAA section 112(d)(6) review for lead acid battery manufacturing after our considerations of all the comments received.

A. NSPS

As mentioned above, the EPA is finalizing revisions to the NSPS for lead acid battery manufacturing pursuant to the CAA section 111(b)(1)(B) review. The EPA is promulgating the NSPS revisions in a new subpart, 40 CFR part 60, subpart KKa. The new NSPS subpart is applicable to affected sources constructed, modified, or reconstructed after February 23, 2022.

This action finalizes standards of performance in 40 CFR part 60, subpart KKa, for paste mixing operations, grid casting, and lead reclamation, as well as work practice standards to reduce fugitive dust emissions in the lead oxide unloading and storage area. The standards of performance and work practice standards finalized in 40 CFR part 60, subpart KKa, will apply at all times, including during periods of SSM. The EPA is also finalizing in the new 40 CFR part 60, subpart KKa, the requirements for electronic reporting, monitoring, and other compliance assurance measures such as performance testing every 5 years, quarterly fabric filter inspections, and recording pressure drop or visible emissions readings twice a day for fabric filter systems without a secondary filter or bag leak detection system requirements.

The EPA notes that we are not amending 40 CFR part 60, subpart KK, to add electronic reporting requirements in this action. While it is generally the EPA's practice to implement electronic reporting requirements in each prior NSPS as we conduct reviews and promulgate each new NSPS, 40 CFR part 60, subpart KK, does not impose any regular, ongoing reporting requirements. However, facilities are expected to comply with the applicable electronic reporting requirements that the EPA is finalizing under the new NSPS, 40 CFR part 60, subpart KKa, and the NESHAP.

1. Revised NSPS for Grid Casting Facilities

The standards in 40 CFR part 60, subpart KK, for grid casting, which were established in 1982, are 0.4 milligrams per dry standard cubic meters (mg/dscm) and 0 percent opacity which were based on what was then determined to be the BSER of impingement scrubbers with an estimated 90 percent lead emissions control efficiency. Through the BSER review conducted for the source category, which is documented in the memorandum *Technology Review and NSPS Review for Lead Acid Battery Manufacturing* (hereafter referred to as the ''Technology Review Memorandum''), available in the docket for this action, we found that since the promulgation of the NSPS in 1982, it has become feasible and common for lead acid battery manufacturing plants to control lead emissions from grid casting processes with fabric filters. Through this review, we discovered that at least 30 of the 40 facilities currently subject to 40 CFR part 60, subpart KK, are now using fabric filters and these are also sometimes combined with other controls, such as high efficiency particulate air (HEPA) filters or a scrubber to control emissions from grid casting. Furthermore, we did not identify any facilities using only a wet scrubber. Therefore, we concluded at proposal that fabric filters are clearly feasible and well demonstrated as an appropriate control technology for grid casting operations. With regard to control efficiency of a fabric filter, for the February 2022 proposed rule, we assumed control efficiency would be 99 percent, which was based on estimates presented in the background document for the proposed rule in 1980 (45 FR 2790) and in the 1989 EPA technical document titled *Review of New Source Performance Standards for Lead-Acid Battery Manufacture, Preliminary Draft,* October 1989, which is available in the docket for this rulemaking.

At proposal, to assess whether fabric filters are the BSER for controlling lead emissions from grid casting, we examined the costs and emission reductions from installing and operating fabric filters with assumed 99 percent control efficiency at new large facilities (*i.e.,* facilities with capacity to process 150 tons or more of lead per day) and new small facilities (*i.e.,* facilities with capacity to process less than 150 tons of lead per day).[2] We estimated that the cost effectiveness of achieving a 99 percent reduction of lead through the use of fabric filters, as compared to the costs of maintaining the 40 CFR part 60, subpart KK, requirement of a 90 percent reduction of lead through the use of wet scrubbers, would be $333,000 per ton of lead reduced for a new large facility and $524,000 per ton of lead reduced for a new small facility. We found that both of these values are within the range of what the EPA has considered in other rulemakings to be cost-effective for control of lead emissions. Based on this information, we proposed that fabric filters (with an assumed 99 percent control efficiency) represent the new BSER for grid casting, and we proposed to revise the lead emissions limit for grid casting from 0.4 milligrams of lead per dry standard cubic meter of process exhaust (mg/dscm) to 0.04 mg of lead per dscm of process exhaust to reflect the degree of emission limitation achievable through the application of the proposed BSER (*i.e.,* a fabric filter, with assumed improved efficiency of 99 percent versus 90 percent). We also proposed to retain the opacity standard of 0 percent for grid casting.

The EPA received one comment regarding this proposed BSER determination and proposed standard of performance. There were no comments regarding our proposal to retain the opacity standard of 0 percent. The commenter (Battery Council International [BCI]) claimed that the EPA's calculations of the benefits of moving from scrubbers to fabric filters for grid casting and for adding secondary HEPA filters to paste mixing operations (discussed later in this preamble) are flawed because the EPA incorrectly models these filters as control devices with constant, rather than variable, efficiency. The commenter relates that when the amount of lead emissions entering these devices is low, the removal efficiency is far lower than their nominal removal efficiency and that only at the extreme high end of inlet loading concentrations is the nominal removal efficiency obtained. Due to this factor, the commenter states that the EPA's assumed removal efficiency from these devices is unrealistically high. The commenter also states that the removal efficiency can fall below 90 percent compared to the nominal removal efficiency of 99 percent for fabric filters.

The commenter also claimed that the EPA's costs for a new baghouse (also

[2] At proposal, we split the analysis into two size categories that would better represent the source category because of the range in facility size.

referred to as fabric filter system or fabric filters in other parts of this preamble) were underestimated and provided both a cost analysis for a new baghouse in which they assumed the same 99 percent removal efficiency as the EPA did in its analysis of cost effectiveness but used increased equipment costs, and another analysis in which the commenter assumed a removal efficiency of 95 percent along with the increased equipment costs. The claimed results of BCI's analyses showed higher costs per ton of lead emissions removed compared with the results of the EPA analyses.

Considering the available data at the time of proposal, we proposed a limit of 0.04 mg/dscm, which represented the emissions reduction thought possible with the proposed BSER technology (*i.e.,* a fabric filter, assumed to achieve an estimated 99 percent emissions removal efficiency instead of the estimated 90 percent efficiency of the wet scrubber). Based on the commenter's suggestion that emissions removal efficiencies are lower than what the EPA estimated at proposal, we obtained additional stack test data for several facilities to determine what emissions levels are currently achieved by fabric filters. From this data gathering effort, we examined stack test data for eight facilities using fabric filters to control emissions from grid casting, with data for four facilities having stacks that service only grid casting and the other four stacks that service multiple processes. The stack test results show that the four facilities with primary fabric filter systems controlling just grid casting emissions have emissions ranging from 0.011 mg/dscm to 0.1 mg/dscm. More information on the data used in our analysis is detailed in the memorandum *Revised Emission Limits for the Lead Acid Battery Manufacturing Final Rule-Grid Casting and Paste Mixing Operations,* available in the docket for this action. Using these data, we calculated the 99 percent upper prediction limit (UPL) of 0.08 mg/dscm.

The UPL value is the result of the statistical methodology the EPA uses to account for the variability and uncertainty in emissions that occurs over time and over expected varying operating conditions. The EPA has used the UPL to address the variability of emission data in in other rulemakings (*e.g.,* setting MACT standards). The UPL is a value, calculated from a dataset, that identifies the average emissions level that a source or group of sources is meeting and would be expected to meet a specified percent of the time that the source is operating. That percent of time is based on the confidence level used in the UPL equation. The 99 percent UPL is the emissions level that the sources would be predicted to emit below during 99 out of 100 performance tests, including emissions tests conducted in the past, present and future, based on the short-term stack test data available for that source. For more information about this analysis, see the *Upper Prediction Limit for Grid Casting and Paste Mixing Operations at Lead Acid Battery Facilities* (hereafter referred to as ''UPL Memorandum'') available in the rulemaking docket for this action.

The intent of the EPA at proposal was to set the emissions standard at the level that would reflect the application of the BSER (*i.e.,* a fabric filter). At proposal, we assumed an improved efficiency of the standard of performance reflected the application of fabric filters with 99 percent efficiency to control emissions. We used the control efficiency of 99 percent based on the analysis conducted in the background document for the proposed rule in 1980 (45 FR 2790) to derive the proposed limit of 0.04 mg/dscm. However, based on the comments received and the results of the UPL analysis, we are now analyzing the use of a fabric filter that would achieve an emissions level of 0.08 mg/dscm for our final BSER determination.

We updated our cost analysis for a new source to install a fabric filter system versus a wet scrubber based on comments received from BCI. We agree with the cost estimates provided by the commenter and have used those in an updated cost effectiveness analysis. We estimate that the updated incremental annualized costs of using a fabric filter system are $52,000 for a small plant and $88,000 for a large plant.

We do not agree that a fabric filter system would achieve only 95 percent efficiency for grid casting emissions. Based on the available stack test data, the calculated UPL which accounts for variability, and the calculations described above, the emission limit of 0.08 mg/dscm reflects the use of fabric filters controlling grid casting emissions. To estimate the incremental emissions reductions that would be achieved, we estimated the current limit of 0.4 mg/dscm reflects a 90 percent reduction compared to baseline (uncontrolled) based on the background document for the 1980 proposed rule (45 FR 2790) and in the 1989 EPA technical document cited above, and therefore we estimate that the revised limit (of 0.08 mg/dscm) based on the UPL would represent a 98 percent reduction. As we described in the proposed rule preamble, we estimate lead emissions for a small and large uncontrolled grid casting facility are 0.5 tons per year (tpy) and 1.3 tpy, respectively. We estimate lead emissions for a small and large baseline grid casting facility which is complying with 40 CFR part 60, subpart KK, emission limit of 0.4 mg/dscm which is based on a wet scrubber (with assumed 90 percent efficiency) would be 0.05 tpy and 0.13 tpy, respectively. We estimate lead emissions for a small and large model facility that will comply with an emission limit of 0.08 mg/dscm based on the application of a fabric filter (using the derived 98 percent efficiency described above) are 0.01 tpy and 0.026 tpy, respectively. The incremental lead reduction (from 90 percent to 98 percent) is 0.04 tpy for small facilities and 0.104 tpy for large facilities. We estimate that for a hypothetical new small plant, cost effectiveness is approximately $1.23M/ton of lead reduced and for a hypothetical new large plant, cost effectiveness is $846,000/ton of lead reduced. These cost effectiveness values are within the range of what we have historically accepted in the past for lead. Details regarding our cost estimates are in the *Estimated Cost Impacts of Best System of Emission Reduction Review of 40 CFR Part 60, Subpart KK and 40 CFR Part 63, Subpart PPPPPP Technology Review-Final Rule,* hereafter referred to as ''Cost Impacts Memorandum,'' available in the docket for this action. We conclude that the application of fabric filters to control grid casting emissions is cost-effective and has been adequately demonstrated at existing sources. We have also learned, there may be additional advantages for facilities to use fabric filters instead of wet scrubbers to control grid casting emissions. Some advantages of using fabric filters include: the potential for higher collection efficiency; less sensitivity to gas stream fluctuations; availability in large number of configurations, and that collected material is recovered dry and can be sent to a secondary lead facility for recycling, lowering the hazardous waste disposal costs for facilities. Therefore, based on our analysis and the information above, we have determined that the BSER for grid casting operations is fabric filter systems with an estimated 98 percent control efficiency.

Based on the UPL analysis presented we find that the emission level that appropriately reflects the BSER is 0.08 mg/dscm. In addition, we find that the proposed emissions limit of 0.04 mg/dscm (that reflected an estimated control efficiency of 99 percent efficiency) would go beyond the level of emission limitation generally achievable

through the application of BSER. Based on our analyses, we conclude that additional controls beyond BSER would be needed to meet the proposed limit of 0.04 mg/dscm. Additional controls, such as a secondary HEPA filter, to meet the proposed limit of 0.04 mg/dscm were determined to not be cost-effective at proposal. Based on the revised UPL analysis that considers the data available to the EPA regarding grid casting emissions and accounts for variability within the data, we have determined that the final standard of performance which reflects the BSER (use of a fabric filter system) is a lead emission limit of 0.08 mg/dscm. We are also retaining the 0 percent opacity standard from 40 CFR part 60, subpart KK, for grid casting as proposed.

2. Revised NSPS for Lead Reclamation Facilities

Similar to the standards for grid casting, the standards in 40 CFR part 60, subpart KK, for lead reclamation, which were established in 1982, are 4.5 mg/dscm for lead and 5 percent opacity and were based on impingement scrubbers with an estimated 90 percent lead emissions control efficiency. Through the BSER review conducted for the source category, we found that since the promulgation of the NSPS in 1982, it has become feasible and common for lead acid battery manufacturing plants to control lead emissions from several processes with fabric filters. Through this review, we discovered that no lead acid battery manufacturing facilities currently conduct lead reclamation as the process is defined in 40 CFR part 60, subpart KK. However, there was mention of lead reclamation equipment in the operating permits for two facilities, and that equipment is controlled with fabric filters. In the proposal, we estimated that fabric filters were capable of achieving lead emissions control efficiencies of at least 99 percent. Therefore, we concluded at proposal that fabric filters are feasible and an appropriate control technology for lead reclamation. Like in the analysis for grid casting, to assess whether fabric filters are the BSER for controlling lead emissions from lead reclamation, we examined the costs and emission reductions from installing and operating fabric filters at large and small facilities. In the proposal, we determined that the cost effectiveness of achieving a 99 percent reduction of lead through the use of fabric filters, as compared to the costs of achieving 90 percent reduction of lead through the use of wet scrubbers, would be $130,000 per ton of lead reduced for a large facility and $236,000 per ton of lead reduced for a small facility. We found that both of these values are within the range of what the EPA has considered in other rulemakings to be cost-effective for control of lead emissions. Based on this information, we proposed that fabric filters (with an estimated 99 percent control efficiency) represent the new BSER for lead reclamation, and we proposed to revise the lead emissions limit for lead reclamation to 0.45 mg/dscm to reflect the degree of emission limitation achievable through the application of the proposed BSER. We also proposed to retain in 40 CFR part 60, subpart KKa, the opacity standard of 5 percent.

In addition, under 40 CFR part 60, subpart KK, a lead reclamation facility is defined as a facility that remelts lead scrap and casts it into ingots for use in the battery manufacturing process, and which is not an affected secondary lead smelting furnace under 40 CFR part 60, subpart L. To ensure that emissions are controlled from any lead that is recycled or reused, without being remelted and cast into ingots, the EPA proposed to revise the definition of ''lead reclamation facility'' in 40 CFR part 60, subpart KKa, to clarify that the lead reclamation facility subject to 40 CFR part 60, subpart KKa, does not include recycling of any type of finished battery or recycling lead-bearing scrap that is obtained from non-category sources or from any offsite operation. Any facility recycling these materials through a melting process would be subject to another NSPS (*i.e.,* Secondary Lead Smelting NSPS, 40 CFR part 60 subpart L, or the recently proposed new 40 CFR part 60, subpart La, once finalized).

For the Lead Acid Battery Manufacturing NSPS, 40 CFR part 60, subpart KKa, we also proposed that the remelting of lead metal scrap is considered part of the process where the lead is remelted and used (*e.g.,* grid casting). We also proposed to clarify that recycling of any type of finished battery or recycling lead-bearing scrap that is obtained from non-category sources or from any offsite operations are prohibited at any lead acid battery manufacturing affected facility.

We did not receive any comments on the proposed BSER or lead emission limit for lead reclamation and therefore are promulgating in 40 CFR part 60, subpart KKa, a final standard of performance of 0.45 mg/dscm, which reflects the final BSER for lead reclamation. We are also finalizing in 40 CFR part 60, subpart KKa, as proposed, the opacity standard of 5 percent and the requirement that a facility must use EPA Method 9 to demonstrate compliance with the daily and weekly visible emission observations for lead reclamation as well as during the performance tests required every 5 years.

3. Revised NSPS for Paste Mixing Facilities

The standards in 40 CFR part 60, subpart KK, for paste mixing, which were established in 1982, are 1 mg/dscm for lead and 0 percent opacity and were based on fabric filters with an estimated 99 percent lead emissions control efficiency. Through the current BSER review conducted for the source category, we found that since the promulgation of the NSPS in 1982, high efficiency particulate air (HEPA) filters capable of removing at least 99.97 percent of particles with a size of 0.3 microns (μm) have become readily available. Through this review, we also discovered that at least 16 of the 40 facilities currently subject to 40 CFR part 60, subpart KK, are now using fabric filters with a HEPA filter as a secondary device to control lead emissions from paste mixing processes. Therefore, we concluded at proposal that fabric filters with secondary HEPA filters are clearly feasible and well demonstrated as an appropriate control technology for paste mixing operations. To assess whether fabric filters with secondary HEPA filters are the BSER for controlling lead emissions from paste mixing, we examined the estimated costs and emission reductions that would be achieved by installing and operating HEPA filters as secondary control devices to fabric filters at large facilities and small facilities. We estimated that the cost effectiveness of secondary HEPA filters achieving an additional 99.97 percent reduction of lead, as compared to the costs of a primary fabric filter system able to maintain the current limit of 1 mg/dscm (based on an estimated 99 percent reduction of lead), would be $888,000 per ton of lead reduced for a large facility and $1.68 million per ton of lead reduced for a small facility. At proposal, we determined that the cost effectiveness estimate for large facilities is within the range of what the EPA has considered in other rulemakings to be cost-effective for control of lead emissions, while the estimate for small facilities is not within this range. Based on this information, we proposed that fabric filters with secondary HEPA filters with 99.97 percent control efficiency represent the new BSER for paste mixing at large facilities, and we proposed to revise the lead emissions limit for paste mixing at large facilities to 0.1 mg/dscm to reflect the degree of emission limitation achievable through

the application of the proposed BSER. For small facilities we proposed to retain in 40 CFR part 60, subpart KKa, the standard of performance of 1 mg/dscm based on the application of fabric filters (with estimated 99 percent control efficiency). We also proposed to retain the 0 percent opacity standard from 40 CFR part 60, subpart KK, for paste mixing facilities in 40 CFR part 60, subpart KKa.

We received three comments regarding the proposed revised emission limit of 0.1 mg/dscm for large facilities and the proposal to retain the lead standard of 1.0 mg/dscm from 40 CFR part 60, subpart KK, for small facilities. We did not receive any comments on the proposal to retain the opacity standard of 0 percent. The three commentors, including environmental groups, Clarios, and BCI, asked that the EPA reconsider allowing smaller pasting lines to emit significantly more lead than large pasting lines and asked that the EPA require all pasting lines to achieve the same stringent level of control.

One commenter (Clarios) stated that the EPA did not evaluate the use of modern fabric filter materials in existing primary filter systems when it performed its analysis of control technologies, and asserted that, since all pasting lines already have primary fabric filter systems in place, there would essentially be no capital costs other than the cost for higher quality bags for both large and small existing facilities to meet the 0.1 mg/dscm (0.0000437 gr/dscf) limit for paste mixing that was proposed for large facilities. The commenter stated that modern filtration materials used in baghouses today, especially those coupled with engineered membranes, provide warranted removal efficiencies of 99.995% of lead at 1 micron. The commenter provided test results reported by one filter manufacturer to demonstrate this removal rate. The commenter also stated that it has found that modern primary filter substrates, such as expanded polytetrafluoroethylene (ePTFE) lined polyester bags, achieve emission reductions equal to or greater than that of secondary filters, including those designated as high efficiency particulate air (HEPA) filters. The commenter provided the results of 23 stack tests performed over 21 years for its one pasting line in the U.S., which is controlled by a primary dust collector using the ePTFE filters. The stack test results show that lead emissions are consistently below the proposed limit of 0.1 mg/dscm using this emission control configuration. The commenter stated that secondary systems, such as HEPA, are not needed to meet the proposed limit and will come at a much higher cost, but they may provide additional benefit as a control redundancy for facilities where multiple levels of protection are appropriate. The commenter provided example prices from a vendor of different types of filter bags, showing a range in price from $14.60 to $29.64 per bag. The commenter requested that the EPA consider the cost of facilities using primary systems alone, with modern fabric filters, as an effective method of controlling emissions at both small and large facilities.

BCI stated that the proposal to distinguish between small and large facilities is problematic for several reasons. First, the commenter claims, there is insufficient guidance about how to calculate the plant capacity to process lead, which will lead to different interpretations by state enforcement agencies. The commenter adds that there is no rationale presented as to why the capacity of the plant, rather than the paste mixing operation, is the driver for varying emission limits for the paste mixing facility. According to the commenter, another problem is that plants near the capacity limit would be disincentivized to make capital improvements or consolidate operations if it would put them over the limit. The commenter also states that paste mixing sources have the highest moisture among the facility processes and often must be blended with other sources if they are to be controlled by a fabric filter. They stated that there are facilities that use wet scrubbers to control paste mixing that the EPA has not considered. The commenter says that a revised limit of 0.1 mg/dscm will also complicate testing and require more implementation of the rule provision that allows for the calculation of an equivalent standard for the total exhaust from commonly controlled affected facilities when two or more facilities at the same plant (except the lead oxide manufacturing facility) are ducted to a common control device). The commenter asserts that in view of these considerations, the EPA should abandon the two-tier approach, and if it is intent on altering the emissions standards for paste mixing, the EPA should have a single standard that applies to all facilities that reasonably reflects the actual emissions reductions achieved using secondary HEPA.

In reference to the proposed standard for small facilities, the environmental group commenters asserted that the EPA must eliminate what they refer to as emission control exemptions for small facilities and require all facilities to add secondary HEPA filters on the paste mixing process. Their comment states that the EPA's reliance on outdated information from the 1989 draft NSPS review to exempt facilities from pollution control is arbitrary and capricious. The comment adds that, because the EPA did not engage in new data collection efforts for this rulemaking, it is unclear whether the data used to determine whether a facility is ''small'' or ''large'' and the following control technology examples are outdated. The commenters remarked that the EPA's decision to aggregate the ''small'' and ''medium'' sized facility categories included in the 1989 draft NSPS review into a single ''small'' facility category for this action without providing an explanation of the basis for this decision is arbitrary and capricious. The commenters also assert that, by combining small and medium facilities in one group, the EPA artificially reduced the incremental cost effectiveness of requiring this group of facilities to adopt secondary HEPA filter on the paste mixing process, thus arbitrarily exempting certain medium facilities from this requirement. The commenter adds that due to the harmfulness of lead at low exposure levels, the EPA should not use cost as the sole justification for not requiring additional health protections.

We agree that modern filter media are capable of achieving emissions levels achieved by more traditional filter media with the addition of HEPA filters. Considering these comments, the EPA has re-evaluated the BSER and the emissions limit for paste mixing. As discussed above, at proposal, we determined that many facilities are controlling emissions from paste mixing using HEPA filters, which reduce emissions much beyond the requirements of the current standards. However, at proposal we found that it was not cost-effective for all facilities to add HEPA filters, depending on their existing emissions and emissions controls in place. In an attempt to distinguish which facilities could apply this technology in a cost-effective manner, at proposal we divided the facilities into classes determined by the amount of lead processed daily at the facility. We then proposed that the use of HEPA filters represented the BSER for large facilities, while continuing to determine that the application of primary fabric filter systems represented BSER for small facilities. We did not propose any exemptions for small facilities as the commenter claimed.

Based on the comments received, we have updated our analysis and our cost

estimates to reflect the use of expanded polytetrafluoroethylene (ePTFE) bags in a primary fabric filter system (*i.e.,* baghouse) without the addition of a secondary filter. Details regarding the assumptions made in our cost estimates are in the Cost Impacts Memorandum available in the docket for this action. We estimate that the incremental initial (*e.g.,* capital) costs for typical small facilities (those that process less than 150 tpd of lead) to replace their current standard polyester bags with ePTFE bags would be $18,000 per facility and the incremental annualized costs would be $9,000 per facility. For a large facility, the estimated incremental initial costs are $60,000 per facility and the incremental annualized costs are estimated to be $30,000 per facility. The estimated lead reductions are the same as those we found for the use of a secondary HEPA filter at proposal, at 0.1 tpy for a large source and 0.03 tpy for a small source, and therefore cost effectiveness for both a typical small and large facilities is $300,000 per ton of lead reduced. This cost effectiveness is well within what the EPA had historically accepted in past rules addressing lead. As a commenter noted, a few facilities use wet scrubbers to control paste mixing emissions or they mix gas streams with the paste mixing emissions to control them with fabric filtration. If a new facility would choose to install a wet scrubber to control their paste mixing operation, there are models of wet scrubbers capable of achieving 99.9 percent removal efficiency, and it has been shown to be feasible to add a secondary HEPA filter on a primary wet scrubber. In addition, wet scrubber technology to control paste mixing emissions has been adequately demonstrated to be capable of achieving the 0.1 mg/dscm emission limit, as discussed in section III.B.3.

As discussed above, high efficiency filters such as ePTFE filters have been demonstrated and are a feasible control technology for paste mixing. In addition, the estimated cost effectiveness for both large and small facilities is within the range of values accepted previously by the EPA addressing lead. Furthermore, we have not identified any significant non-air environmental impacts and energy requirements. Therefore, the EPA has determined that ePTFE filters (or other effective control devices) that are capable of meeting a limit of 0.1 mg/dscm represent the new BSER for most paste mixing facilities. One exception is for very small facilities with very low flow rates, which is described in more detail below.

We used the UPL to assist in informing the appropriate lead emission limit for the paste mixing process based on the updated BSER of high efficiency bags (or other effective control devices) that are capable of meeting a limit of 0.1 mg/dscm (with estimated 99.995% efficiency). We calculated a 99 percent UPL using stack test data for units with only a fabric filter (*i.e.,* no secondary filter) controlling emissions from paste mixing processes. We excluded stack tests for fabric filters controlling emissions from multiple processes. The EPA's methodology of the UPL for establishing the limits is reasonable and represents the average emissions achieved by sources with consideration of the variability in the emissions of those sources. The resulting UPL is 0.095 mg/dscm, which is very close to the proposed limit of 0.1 mg/dscm and therefore provides further support that an emissions limit of 0.1 mg/dscm is appropriate for most facilities. Details on the methodology used in determining the UPL for this process are found in the UPL Memorandum available in the docket for this action. Based on the limited stack test data and taking comments into consideration, we are promulgating in 40 CFR part 60, subpart KKa, an emission limit of 0.1 mg/dscm for paste mixing at all facilities (both large and small). In consideration of the comments provided on the proposed rule, as well as the information provided by the commenters and further investigation by the EPA, we have determined that secondary HEPA filters, although could be used to meet the proposed emission limit, are not necessary to meet an emission limit of 0.1 mg/dscm for paste mixing for all facilities (both large and small). As required by CAA section 111, the EPA prescribes requisite emission limitations that apply to the affected facilities rather than specific technologies that must be used. Facilities will have the option to meet the limit in any manner they choose, including the use of modern primary filter media in a primary filter system or application of a secondary filter. Given that our analyses indicate that the proposed emission level can be achieved at lower costs than we estimated at proposal for all paste mixing facilities, we are promulgating a requirement that paste mixing operations, regardless of daily lead throughput, comply with a limit of 0.1 mg/dscm.

However, in our analysis of existing facilities (as discussed in section III.B.3 below), we found that it may be particularly costly for very small facilities with very low flow rates and already low lead emissions to comply with the revised concentration-based emission limit of 0.1 mg/dscm. For example, we know of one very small facility that, based on its most recent stack tests, emits an estimated 4 lbs/year (0.002 tpy) of lead from its paste mixing operations using standard fabric filters. However, based on the available data, that facility had one test result (0.11 mg/dscm) indicating it may not be able to comply with a 0.1 mg/dscm limit without improving the control device (a fabric filter). In our assessment, we assume this facility would have to replace its current filters with high efficiency filters in order to meet the 0.1 mg/dscm limit. We estimate annualized costs would be approximately $9,000 and would achieve 0.0019 tpy (3.7 lbs) of lead reductions, for a cost effectiveness of $4.7M/ton. This is considerably higher than cost effectiveness values we have historically accepted for lead. Similarly, as discussed at proposal, the use of secondary filters is also not cost-effective for these very small facilities. Accordingly, the EPA has determined that the BSER for these facilities continues to be the use of a standard fabric filter.

Based on available information, these very small facilities with already low lead emissions typically have very low flow rates, and therefore meeting a concentration-based limit of 0.1 mg/dscm is not cost-effective even though their emissions rate of lead (*e.g.,* in lbs/hr) is quite low. Therefore, the EPA is also promulgating an alternative, mass-per-time based lead emissions limit of 0.002 lbs/hr, which is the rate that the EPA has determined is achievable from the use of a standard fabric filter at these types of very small facilities, for total paste mixing operations. By total paste mixing operations, we mean that in order to meet this alternative limit a facility must show compliance by summing emissions from each stack that emits lead from paste mixing operations. More information on the data used in our analysis is detailed in the memorandum *Revised Emission Limits for the Lead Acid Battery Manufacturing Final Rule-Grid Casting and Paste Mixing Operations,* available in the docket for this action. This alternative lead emission limit only applies to devices controlling paste mixing emissions and may not apply to a control device with multiple gas streams from other processes. Therefore, lead acid battery manufacturing facilities can demonstrate compliance with the paste mixing standards by

either meeting a concentration-based limit of 0.1 mg/dscm from all paste mixing emissions sources at that facility, or demonstrate that the total lead emissions from all paste mixing operations at that facility are less than 0.002 lbs/hr. This alternative mass-rate-based emission limit of 0.002 lb/hour will provide additional compliance flexibility for very small facilities with low emissions and low flow rates to comply with the paste mixing emissions standards.

We anticipate that the vast majority of facilities will choose to comply with the 0.1 mg/dscm emission limit because the alternative limit is a paste mixing facility-wide emission limit and would likely be difficult to meet for stacks with higher flow rates. We further anticipate that only very small facilities with very low-flow rates (and already low emissions) will choose to comply by demonstrating compliance with the alternative emission limit because larger facilities with higher flow rates would likely need additional controls to comply with this alternative limit. We determined that the alternative limit of 0.002 lbs/hr is cost-effective for these very small facilities with low flow rates. Therefore, for very small facilities with very low flow rates and already low emissions we have determined that the BSER is a standard fabric filter, and 0.002 lbs/hour is the emission level achievable for these types of facilities reflecting the BSER. We are also finalizing, as proposed, the opacity limit of 0 percent for paste mixing operations.

4. Revised NSPS for Fugitive Dust Emissions

The standards in 40 CFR part 60, subpart KK, do not include requirements to reduce or minimize fugitive lead dust emissions. These fugitive dust emissions would include particulate lead that becomes airborne and is deposited to outdoor surfaces at or near the facilities and that may become airborne again via wind or surface disturbance activities, such as vehicle traffic. Through the BSER review conducted for the source category, we found that since the promulgation of the NSPS in 1982, other rules, including the NESHAPs for primary lead smelting and secondary lead smelting, have required new and existing sources to minimize fugitive dust emissions at regulated facilities through the paving of roadways, cleaning roadways, storing lead oxide and other lead bearing materials in enclosed spaces or containers, and other measures. Through this review, we also discovered that several facilities currently subject to 40 CFR part 60, subpart KK, have requirements to reduce fugitive dust emissions through similar, specific work practices in their operating permits. Because these fugitive lead dust emissions from the lead acid battery manufacturing source category emissions are not ''emitted through a conveyance designed to emit or capture the pollutant,'' pursuant to CAA section 111(h), we considered whether a work practice requirement to develop and implement a fugitive dust minimization plan, including certain elements, would be appropriate for the lead acid battery manufacturing source category. Such elements could include the following:

i. Clean or treat surfaces used for vehicular material transfer activity at least monthly;

ii. Store dust-forming material in enclosures; and

iii. Inspect process areas daily for accumulating lead-containing dusts and wash and/or vacuum the surfaces accumulating such dust with a HEPA vacuum device/system.

We estimated at proposal that the cost burden associated with a requirement to develop and implement a fugitive dust plan, including the elements described above, would be $13,000 per facility per year and would prevent significant releases of fugitive dust emissions. Based on our review of permit requirements, the requirements of other regulations for lead emissions, and the estimated costs of a fugitive dust minimization program, we proposed to include a new requirement for lead acid battery manufacturing facilities to develop and implement a fugitive dust minimization plan that included, at a minimum, the elements listed above.

We received three comments regarding the proposed fugitive dust minimization work practice standard. Environmental groups generally supported the proposal, but they commented that the EPA must require the use of fenceline monitoring and corrective action tied to that monitoring as well as full enclosure negative pressure requirements. We disagree that the use of fenceline monitoring and corrective action tied to that monitoring is an appropriate work practice standard for this source category. The EPA's response to these comments is in the Comment Summary and Response Document, available in the docket for this rulemaking.

One commenter (Clarios) stated that the EPA included several undefined terms and concepts for its proposed fugitive dust minimization plan that introduce uncertainty and the potential for misinterpretation. The commenter recommends that the EPA adopt definitions and parameters similar in approach to those included in the fugitive dust plan requirements for the Secondary Lead Smelting NESHAP. The commenter notes that such definitions and parameters should be designed to address the configuration of battery manufacturing facilities, which may have multiple process lines with different controls and control systems. The commenter mentions that there are areas of the plants that are lead-free production zones, where lead is not used or handled, and these areas should not be included in the scope of a fugitive dust minimization plan. The commenter adds that including lead-free areas in a fugitive dust minimization plan would add to the costs of implementing the plan, such that costs are likely to exceed $200,000 per plant in the first year alone. The commenter remarks that in plants where negative air pressure is used as an emissions control, the air systems are designed and balanced to protect lead-free areas and isolate areas where negative pressure is used. The commenter also cautions that adding negative pressure or fugitive dust control in lead-free areas may thwart the design and operation of existing process emission control equipment by changing air balances and flows. The commenter suggests that lead-free process areas (*i.e.,* areas where fugitive lead dust is controlled to concentrations less than the controlled emission limits in Table 1 of the proposed revisions to 40 CFR part 63, subpart PPPPPP) should be excluded from the requirements of the fugitive emission work practices requirements in the NSPS and NESHAP.

BCI also commented on the EPA's proposed cost estimates stating that they cannot be fully estimated because the EPA is proposing minimum requirements that must be reviewed and approved by ''the Administrator or delegated authority.'' They provided estimates for the basic requirements and claim that costs for developing the fugitive dust plan would be between $25,000 and $35,000 per facility and estimate $250,000 per facility to implement the plan. They also claim the EPA's proposal is arbitrary and capricious because the proposal did not estimate expected emissions reductions that will result from the fugitive emissions work practices it is proposing.

We do not agree with the commenter (BCI) that our proposal to require fugitive dust minimization work practices is arbitrary and capricious. For this rule, we learned through discussions with states, regions, and industry that there is a potential for

fugitive dust emissions from this source category. In addition, during the technology review it was found that nine states have fugitive dust minimization requirements in the permits for 15 different lead acid battery facilities. Furthermore, based on the modeling screening analysis completed and described in the proposal, in comparing modeled concentrations at monitor locations to ambient lead measurements at monitors, emissions from a subset of facilities were underestimated. The memorandum, *Assessment of Potential Health Impacts of Lead Emissions in Support of the 2022 Lead Acid Battery Manufacturing Technology Review of Area Sources Proposed Rule,* available in the docket for this action, discusses that un-reported fugitive emissions and re-entrainment of historical lead dust are two factors, among others, at lead acid battery facilities that may cause the model to underpredict when compared to the ambient lead measurement. Generally, it is difficult to quantify emissions from fugitive dust emission sources because they are not released at a common point, such as a stack and therefore they cannot easily be measured. However, for the reasons discussed above, we have determined work practice standards to minimize fugitive dust emissions at lead acid battery manufacturing facilities are appropriate to address an important source of lead pollution.

In consideration of the other comments, we have reviewed the regulatory language and agree with the commenters (BCI and Clarios) that further explanation should be provided to clarify the areas that are required to be included in the fugitive dust minimization plan. As it was our intent at proposal to include only the areas of the facilities that were most likely to have fugitive dust that would contribute to lead emissions from the facility, we reviewed information on the facilities, their processes, and facility configurations to determine the likely areas where such fugitive dust emissions would occur. Processes such as grid casting, paste mixing operations, and three-process operations (as described above in section II.C) are enclosed. In order to maintain Occupational Safety and Health Administration (OSHA) requirements for ambient lead concentrations inside a facility and worker safety, fugitive emissions are already controlled at lead acid battery manufacturing facilities in these process areas. In addition, we are finalizing in 40 CFR part 60, subpart KKa, an opacity limit of 0 percent which minimizes fugitive emissions from the primary processes (grid casting, paste mixing, three-process operations and other-lead emitting sources) as proposed. Available information, including information provided by Clarios, indicates that the area at a lead acid battery manufacturing facility with the highest potential for fugitive lead dust emissions is the lead oxide unloading and storage operations area. When lead oxide is purchased from a third party, it is transported by truck and conveyed by pipe directly into storage silos. As stated in the memorandum *Estimating and Controlling Fugitive Lead Emissions from Industrial Sources* (EPA–452/R–96–006), on rare occasions, these pipe connections may fail which results in a release of lead oxide. From this review and from discussion of the matter with the commenter, we determined that lead oxide loading and unloading areas (including lead oxide storage operations) are the areas at a facility where such fugitive dust emissions would most likely occur. Therefore, we have revised the regulatory language to specify that facilities must develop and operate according to a fugitive dust minimization plan that applies to lead oxide unloading areas and the storage of dust-forming materials containing lead.

We agree with the commenters regarding the costs to develop and implement a fugitive dust minimization plan for all process areas. Thus, taking the comments into consideration and appropriately narrowing the areas where fugitive dust minimization work practices are required, we re-evaluated the costs of developing and implementing a fugitive dust minimization plan in the lead oxide unloading and storage areas only. We estimate the initial costs to develop a fugitive dust minimization plan are $7,900 per facility. We estimate that the costs to implement the fugitive dust plan in the lead oxide unloading area includes the purchase of a ride-on HEPA vacuum and a portable HEPA vacuum, as well as the labor costs for performing the required cleaning tasks. We estimate the total costs for new sources to develop and implement a fugitive dust plan for the lead oxide unloading and storage area will be $22,000 during the year the facility develops the plan. Then, once the plan has been developed, the estimated annualized cost to implement the plan is approximately $14,000 per facility per year. The total costs are slightly higher than at proposal because, based on discussions with the commenter, we added additional costs for managerial oversight of the fugitive dust minimization plan and its implementation. But the costs of fugitive dust minimization work practices are less than 1 percent of each facility's annual revenues and are considered to be reasonable.

The final BSER for minimizing fugitive dust emissions is lead dust minimizing work practices in the lead oxide unloading and storage area. The work practices include cleaning or treating surfaces traversed during vehicular lead oxide transfer activity at least monthly; storing dust-forming material in enclosures; and examining process areas daily for accumulating lead-containing dusts and wash and/or vacuum the surfaces accumulating such dust with a HEPA vacuum device/system. The work practices also include a requirement that if an accidental leak, spill or breakage occurs during the unloading process, the area needs to be washed and/or vacuumed immediately to collect all the spilled or leaked material. As stated above, pursuant to CAA section 111(h), these fugitive lead dust emissions from the lead acid battery manufacturing source category emissions are not ''emitted through a conveyance designed to emit or capture the pollutant.'' Therefore, since it is not possible to set a numerical emission limit, we are finalizing a work practice standard to develop and implement a fugitive dust minimization plan.

5. NSPS 40 CFR Part 60, Subpart KKa, Without Startup, Shutdown, and Malfunctions Exemptions

Consistent with *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), the EPA has established standards in this rule that apply at all times. We are finalizing in 40 CFR part 60, subpart KKa, specific requirements at 40 CFR 60.372a(a) that override the 40 CFR part 60 general provisions for SSM requirements. In finalizing the standards in this rule, the EPA has taken into account startup and shutdown periods and, for the reasons explained below, has not finalized alternate standards for those periods. The main control devices used in this industry are fabric filters. We have determined that these control devices are effective in controlling emissions during startup and shutdown events. Prior to proposal, we discussed this issue with industry representatives and asked them if they expect any problems with meeting the standards at all times, including periods of startup and shutdown. The lead acid battery manufacturing industry did not identify (and there are no data or public comments indicating) any specific problems with meeting the standards at

all times including periods of startup or shutdown.

In addition, this final action requires compliance with the standards at all times including periods of malfunction. Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead, they are, by definition, sudden, infrequent, and not reasonably preventable failures of emissions control, process, or monitoring equipment. (40 CFR 60.2). The EPA interprets CAA section 111 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 111 standards. Nothing in CAA section 111 or in case law requires that the EPA consider malfunctions when determining what standards of performance reflect the degree of emission limitation achievable through ''the application of the best system of emission reduction'' that the EPA determines is adequately demonstrated. While the EPA accounts for variability in setting emissions standards, nothing in CAA section 111 requires the Agency to consider malfunctions as part of that analysis. The EPA is not required to treat a malfunction in the same manner as the type of variation in performance that occurs during routine operations of a source. A malfunction is a failure of the source to perform in a ''normal or usual manner'' and no statutory language compels the EPA to consider such events in setting CAA section 111 standards of performance. The EPA's approach to malfunctions in the analogous circumstances (setting ''achievable'' standards under CAA section 112) has been upheld as reasonable by the court in *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016).

6. Testing and Monitoring Requirements

a. Performance Tests

The regulations in 40 CFR part 60, subpart KK, only include a requirement to conduct an initial performance test to demonstrate compliance with the emissions standards for each type of equipment at lead acid battery manufacturing plants. Through the BSER review conducted for the source category, we found that since the promulgation of the NSPS in 1982, the EPA has proposed and promulgated periodic performance testing in other recent rulemakings. Through this review, we also discovered that almost half of the 40-lead acid battery manufacturing facilities currently subject to 40 CFR part 60, subpart KK, are required by state and local agencies to conduct periodic performance tests on a schedule that varies from annually to once every 5 years. Therefore, we determined at proposal that periodic performance testing is a development in operational procedures that will help ensure continued compliance with the requirements in 40 CFR part 60, subpart KKa. At proposal, we determined that the incremental costs of requiring performance tests of lead emissions on this 5-year schedule would be approximately $23,000 to test one stack and an additional $5,500 for each additional stack testing during the same testing event. We also determined that to minimize these costs, it would be possible, as allowed for in some other EPA NESHAP regulations with periodic testing requirements, that in some instances where a facility has more than one stack that exhausts emissions from similar equipment and with similar control devices, one representative stack could be tested to demonstrate compliance with the similar stacks. For this, a stack testing plan demonstrating stack representativeness and a testing schedule would be required for approval by the EPA or the delegated authority. Based on the costs and the importance of periodic testing to ensure continuous compliance, we proposed to require periodic testing for each emissions source once every 5 years, with the ability for facilities to test representative stacks if a stack testing plan and schedule is approved by the EPA or delegated authority.

We received three comments on this proposal, which did not cause the Agency to change course from what was proposed. We respond fully to these comments in the Comment Summary and Response Document, available in the docket for this rulemaking.

As explained in the Comment Summary and Response Document, after considering these comments, the Agency is finalizing the additional performance testing as proposed. Facilities subject to 40 CFR part 60, subpart KKa, will be required to test stacks and/or representative stacks every 5 years.

b. Fabric Filter and Scrubber Monitoring, Reporting, and Recordkeeping Requirements That Are Consistent With the Requirements in 40 CFR Part 63, Subpart PPPPPP

We proposed to add monitoring, reporting, and recordkeeping requirements associated with the use of fabric filters to the new NSPS, 40 CFR part 60, subpart KKa, consistent with the area source GACT requirements in the Lead Acid Battery Manufacturing NESHAP at 40 CFR part 63, subpart PPPPPP. This was proposed because many of the lead acid battery manufacturing facilities use fabric filter controls, and the 1982 NSPS 40 CFR part 60, subpart KK, does not include compliance requirements for these devices. We also proposed to add an additional requirement to monitor and record liquid flow rate across each scrubbing system at least once every 15 minutes. The regulations in 40 CFR part 60, subpart KK, only require monitoring and recording pressure drop across the scrubber system every 15 minutes. We received no comments on this issue. Therefore, we are promulgating what was proposed as the final compliance assurance measures.

We expect that there would be no costs associated with the requirement for new, modified, and reconstructed sources to monitor and record liquid flow rate across each scrubbing system at least once every 15 minutes because this is standard monitoring equipment in scrubbing systems.

In addition, to reduce the likelihood of malfunctions that result in excess lead emissions, the EPA also proposed to increase the frequency of fabric filter inspections and maintenance operations to monthly for units that do not have a secondary filter, and to retain the requirement for semi-annual inspections for units that do have a secondary filter. We received one public comment from environmental groups in support of additional inspections and one comment from Clarios against monthly inspections. More details on these comments and our responses are in the Comment Summary and Response Document available in the docket for this action. After consideration of public comments on this issue, we are finalizing increased fabric filter inspections to quarterly for all fabric filter systems (both primary and secondary). We expect that there would be no additional costs to add fabric filter monitoring, reporting and recordkeeping requirements that are consistent with the NESHAP beyond what is discussed in section III.A.6.c for bag leak detection requirements and section III.B.6.b for additional fabric filter inspections.

c. Bag Leak Detection Systems

The standards in 40 CFR part 60, subpart KK, do not include requirements to install or operate bag leak detection systems. These systems typically include an instrument that is capable of monitoring particulate matter loadings in the exhaust of a baghouse to detect bag failures (*e.g.,* tears) and an alarm to alert an operator of the failure.

These bag leak detection systems help ensure continuous compliance and detect problems early on so that damaged fabric filters can be quickly inspected and repaired as needed to minimize or prevent the release of noncompliant emissions. Through the BSER review conducted for the source category, we found that since the promulgation of the NSPS in 1982, other rules, including the 40 CFR part 60, subpart Y, Coal Preparation and Processing Plants NSPS (74 FR 51950), and 40 CFR part 60, subparts LLLL and MMMM, New Sewage Sludge Incinerator Units NSPS (81 FR 26039), have required new sources to have bag leak detection systems for fabric filter-controlled units. Through this review, we also discovered that at least eight facilities currently subject to 40 CFR part 60, subpart KK, have bag leak detection systems. Therefore, we determined at proposal that the use of bag leak detection systems is a development in operational procedures that will help ensure continued compliance with the NSPS by identifying and allowing for correction of bag leak failures earlier than would occur through daily visual emissions inspections or pressure drop monitoring. We considered whether a requirement to install and operate a bag leak detection system would be appropriate for the lead acid battery manufacturing source category. We examined the costs of installing and operating bag leak detection systems at large and small facilities and estimated that the capital costs of a system at a new facility would be approximately $400,000 for a large facility and $200,000 for a small facility, with annual costs of approximately $84,000 for a large facility and $42,000 for a small facility. We found that the costs for small facilities could impose significant negative economic impacts to those companies. Based on this information, to help ensure continuous compliance with the emission limits without imposing significant economic impacts on small facilities, we proposed to require bag leak detection systems only for large facilities.

We received comments from environmental groups on this proposed requirement. They are generally supportive of requiring bag leak detection systems but ask that we also require small facilities to install bag leak detection systems. The commenter asserted that the EPA arbitrarily exempted small facilities from the bag leak detection system requirements because an analysis of cost effectiveness was not performed, and the EPA's finding that bag leak detection systems are not cost efficient for ''small'' facilities is unsupported by facts in the record. The commenter adds that due to the harmfulness of lead at low exposure levels, the EPA should not use cost as the sole justification for not requiring additional health protections. We also received a comment from BCI regarding the cost estimates used in the proposal claiming that they are outdated and underestimated, but BCI did not provide any data to support this claim. We conducted additional research on the costs of bag leak detection, and we did not find evidence that our estimates at proposal are outside the range of expected values. We therefore have not revised our estimated costs for bag leak detection except to update the value of inflation. We have, however, as discussed below, reconsidered the proposal to require bag leak detection at only large new, modified and reconstructed sources.

Based on consideration of comments, we are finalizing a requirement that new sources of all sizes under 40 CFR part 60, subpart KKa, that do not have a secondary filter must install and operate bag leak detection systems on baghouses. While the cost of bag leak detection systems can be substantial for existing facilities, it is easier and less expensive for a new facility to incorporate bag leak detection in their construction design than it is for a facility to retrofit their current devices. Therefore, for new sources, we consider the cost of bag leak detection reasonable. For modified and reconstructed sources, we are adding the use of bag leak detection systems as an option and provide operating limits and monitoring parameters as well as recordkeeping and reporting requirements for facilities that choose to install bag leak detection, but we are not requiring these systems for modified or reconstructed facilities. As discussed in the proposal, the costs of retrofitting an existing facility with bag leak detection on baghouses with no secondary filter could be especially burdensome for smaller facilities and could impose significant economic impacts (greater than 1 percent of their annual revenues) on some of those companies. We estimate the capital costs for a facility with four fabric filter systems are $281,000 and annual costs are $56,000 per year. We estimate that capital costs for a facility with 12 fabric filter systems are $842,000 and annual costs are $169,000 per year. While considering the number of fabric filter systems at existing facilities subject to 40 CFR part 60, subpart KK, are as high as 100 fabric filter systems, and after further consideration of the costs and taking comments into consideration, we conclude that the cost to retrofit existing lead acid battery manufacturing sources, both large and small facilities, with bag leak detection would be burdensome. Therefore, we are not requiring bag leak detection systems for existing sources that modify or reconstruct.

After consideration of comments on bag leak detection, because we have determined not to require existing sources that may modify or reconstruct to install bag leak detection, we have also examined the other fabric filter monitoring requirements. As proposed, new, modified and reconstructed sources under 40 CFR part 60, subpart KKa, must follow the other fabric filter monitoring requirements which include pressure drop recording, visible emission observations and inspections. We are finalizing an increased frequency of fabric filter inspections as discussed in section III.A.6.b. In addition, as an outgrowth of comments, we are finalizing an increase in fabric filter monitoring requirements (*i.e.,* pressure drop and visible emissions readings) from once per day to twice per day for fabric filters without a secondary filter. Specifically, we are promulgating a requirement that for fabric filters without a secondary filter, facility operators must do one of the following measurements daily if the results of the most recent performance test is greater than 50 percent of the applicable lead emission limit: (1) record pressure drop two times per day with a minimum of 8 hours between the recordings; or (2) conduct visible emission observations two times per day with a minimum of 6 hours between observations. For fabric filters without a secondary filter that have performance test results less than 50 percent of the applicable emissions limit, we are maintaining the requirement that facilities must do one of the following: (1) record pressure drop at least one time per day; or (2) conduct visible emission observations at least one time per day. We are also retaining as proposed the requirement for fabric filter systems with a secondary filter to record pressure drop weekly and conduct weekly visible emission observations. The costs for the additional pressure drop recording requirement for new, modified and reconstructed sources under the new NSPS subpart are the same as estimates for the NESHAP and are discussed in section III.B.6.c.

7. Other Actions

a. Clarification of Lead Oxide Manufacturing Emission Limit

We proposed to retain the lead oxide manufacturing emission limit. However, we received two comments asking the EPA to address apparent issues with the emission limit. As discussed below, we are modifying the proposal after taking the comments summarized here into consideration. One commenter (Clarios) noted that the lead oxide production process emission limits in both the NSPS and NESHAP are production based, while all the other lead acid battery production process emission limits are concentration based. The commenter opined that the EPA set the production-based limit for lead oxide production because only one production-based data point was available when the NSPS was developed in 1982. The commenter suggested that the limit be changed to a concentration-based limit to match the format of the other battery production process limits. The commenter stated that this would allow facilities more flexibility to apply control strategies in a cost-effective manner by being better able to plan and coordinate their operations, especially in multi-process facilities; simplify the environmental management process; and allow for better operational options. The commenter provided summaries of emissions testing data for three of its facilities, which the commenter says demonstrate that dramatically lower emissions levels than the current production-based emission limit are achievable with commonly available filter technologies. The commenter noted that each facility for which data were provided controls emissions by way of a process dust collector equipped with primary filters and a secondary bank of filters to provide system redundancy. The commenter hopes that by providing this information, the EPA can consider the level of control that is available today with modern lead oxide production facilities and use this information to evaluate an appropriate emission limit for lead oxide production processes and transition to a concentration-based limit.

Another commenter (BCI) requests that the EPA clarify that the lead oxide production facility 5.0 mg/kg production-based standard should be applied only to the direct product collector baghouses and that any other local exhaust ventilation or building ventilation exhausts serving lead oxide production areas should be considered ''other lead-emitting operations'' subject to the 1.0 mg/dscm concentration-based standards. The commenter suggests the EPA could clarify this in the preamble to the final rule or revise the definition of ''lead oxide manufacturing facility'' to apply only to the direct process baghouse exhausts. The commenter explained that at the time of the original promulgation of the NSPS in the 1980s, it was typical that the only ventilation and emission points from lead oxide production operations was the exhaust from the lead oxide production baghouses. The commenter further explained that these baghouses are integral to the process, in that the lead oxide captured in these baghouses is the intended product of that operation and are part of the production process rather than being systems intended to reduce indoor lead exposures and minimize exterior emissions. The commenter adds that as such, it was reasonable that the performance limitation on the direct process baghouse exhausts in lead oxide production areas were expressed in units of mg/kg or lb/ton. However, the commenter notes that since the 1980's, it has become increasingly common for facilities to have installed local exhaust ventilation hooding on some material transfer points and other sources in the lead oxide production areas and may also now direct room air from lead oxide production areas to baghouses for exhaust control. The commenter states that these emission sources should not be assessed with or against the 5.0 mg/kg standard for the direct process baghouse exhausts.

We agree with the commenter that the lead oxide manufacturing emissions limit was intended to apply only to the primary emissions sources and their emission control devices (*i.e.,* lead oxide production fabric filter baghouses). In the final rule, we are clarifying that the lead oxide manufacturing facility limit only applies to the primary emissions sources, and that other sources associated with the lead oxide production sources, such as building ventilation, would be ''other lead emitting operations'' subject to the 1.0 mg/dscm emission limit. We also agree with the comment that the lead oxide production process emissions limit was developed as a production-based limit because only one production-based data point was available when the NSPS was developed. However, a new limit was not proposed and the process-based emission standard accounts for variability with production rate and flow rate. It is difficult to establish an equivalent concentration-based limit, due to the variability in process conditions, such as production volume and flow rate, that must be considered on an individual unit basis. Therefore, as facilities are already familiar with how to comply with the production-based limit, we are retaining the current production-based limit.

b. Electronic Reporting

To increase the ease and efficiency of data submittal and data accessibility, the EPA is finalizing, as proposed, that owners and operators of lead acid battery manufacturing subject to the new NSPS at 40 CFR part 60, subpart KKa, submit electronic copies of required performance test reports and the semiannual excess emissions and continuous monitoring system performance and summary reports, through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). We did not receive any comments regarding these requirements. A description of the electronic data submission process is provided in the memorandum *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* available in the docket for this action. The final rule requires that performance test results collected using test methods that are supported by the EPA's Electronic Reporting Tool (ERT) as listed on the ERT website [3] at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website and that other performance test results be submitted in portable document format using the attachment module in the ERT. For the semiannual excess emissions and continuous monitoring system performance and summary reports, the final rule requires that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. The final version of the template for these reports will be located on the CEDRI website.[4]

Furthermore, the EPA is finalizing, as proposed, provisions that allow owners and operators the ability to seek extensions for submitting electronic reports for circumstances beyond the control of the facility, *i.e.,* for a possible outage in CDX or CEDRI or for a *force majeure* event, in the time just prior to a report's due date, as well as the process to assert such a claim.

[3] *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.*

[4] *https://www.epa.gov/electronic-reporting-air-emissions/cedri.*

B. NESHAP

For each issue, this section provides a description of what we proposed and what we are finalizing for the issue, the EPA's rationale for the final decisions and amendments, and a summary of key comments and responses. For all comments not discussed in this preamble, comment summaries and the EPA's responses can be found in the Comment Summary and Response Document available in the docket.

1. Technology Review for Grid Casting Facilities

As discussed in section III.A.1 above, the emission limit promulgated in the 1982 NSPS was 0.4 mg/dscm and the opacity standard finalized was 0 percent and these standards were based on an impingement scrubber (with an estimated 90 percent control efficiency). In the 2007 NESHAP final rule, the EPA adopted that same limit (0.4 mg/dscm based on impingent scrubbers) as the limit for grid casting in the NESHAP, and also adopted the 0 percent opacity standard. Based on our technology review, the majority of existing area source facilities (at least 29 of the 39 facilities subject to the NESHAP) use fabric filters. At the time of proposal, we were missing permits for three facilities; one in California, one in Indiana, and one in Tennessee, and did not have enough information for the other seven facilities. Some facilities are also using secondary control devices such as a wet scrubber or HEPA filter in addition to the primary fabric filters to achieve further emissions control. Furthermore, we did not identify any facilities using only a wet scrubber. Based on our review of permits and other information, we assumed all existing facilities use fabric filters to control their grid casting emissions. Therefore, we concluded that fabric filters are clearly feasible and well demonstrated as an appropriate control technology for grid casting operations. Based on our technology review pursuant to CAA section 112(d)(6), we proposed a lead emission limit of 0.04 mg/dscm that was thought to reflect the use of a fabric filter system with an estimated 99 percent efficiency.

We received one comment against the proposed amendment to the grid casting emission limit, which is summarized above in section III.A.1. The commenters did not comment on the EPA's assumption that no existing facilities are using only a wet scrubber to control grid casting emissions. Based on the comment regarding fabric filter efficiencies, we analyzed stack test data and calculated a UPL as described in section III.A.1 above. Based on this additional analysis, we are promulgating a revised lead emission limit of 0.08 mg/dscm for grid casting which reflects the use of a fabric filter to control emissions. Based on our technology review and information obtained since the proposal, we can now state that 36 of 39 facilities currently subject to the NESHAP use fabric filters to control their grid casting emissions. Although, we are missing three permits, since we did not receive comment on our assumption that all existing facilities use fabric filters for grid casting, we estimate that all existing sources are currently using fabric filters to control their grid casting emissions. Therefore, there will be no additional costs to existing sources to comply with the revised limit. We are retaining the 0 percent opacity standard for grid casting as proposed.

2. Technology Review for Lead Reclamation Facilities

We did not find any facilities currently conducting lead reclamation operations as they are defined in the NESHAP during our technology review. In the NESHAP, lead reclamation facilities are defined as facilities that remelt lead and reform it into ingots, and as discussed above in section III.A.2, we identified two facilities with lead reclamation equipment in their permit, and that equipment is controlled by fabric filters. Although, it is unclear from the permit if the two facilities are using this equipment to remelt lead and form it into ingots as the definition in the NESHAP specifies. We concluded in the technology review that fabric filters represented a development in technology since the 2007 NESHAP and therefore, we proposed to revise the lead emission limit of 4.5 mg/dscm (which was developed in 1980 based on a scrubber with estimated 90 percent efficiency and adopted by the NESHAP in 2007) to 0.45 mg/dscm (based on application of fabric filters) for lead reclamation operations at lead acid battery manufacturing facilities. We also proposed to retain the 5 percent opacity standard. The EPA received no comments on the proposed emission limit or opacity standard for lead reclamation process in this rulemaking. For these reasons, the EPA is promulgating a revised lead emission limit of 0.45 mg/dscm for the lead reclamation process in the NESHAP. We are also retaining the opacity standard of 5 percent and we retain that a facility must use EPA Method 9 to demonstrate compliance with the daily and weekly visible emission observations as well as during the performance tests required every 5 years as proposed.

As discussed above in section III.A.7.a, we are also finalizing, as proposed, to revise the definition of lead reclamation facility to clarify that the lead reclamation facility does not include recycling of any type of finished battery or recycling lead-bearing scrap that is obtained from non-category sources or from any offsite operations, and these activities are prohibited. We are also finalizing, as proposed, to clarify that lead reclamation facilities also do not include the remelting of lead metal scrap (such as unused grids or scraps from creating grids) from on-site lead acid battery manufacturing processes and that any such remelting is considered part of the process where the lead is remelted and used (*i.e.,* grid casting).

3. Technology Review for Paste Mixing Facilities

During the technology review, we identified 15 paste mixing facilities subject to the NESHAP (38 percent of the total) that currently have secondary filters to achieve much higher control efficiency on their paste mixing operations. As discussed in section III.A.3 above, the results of the cost analyses at proposal for existing large facilities indicated that the estimated cost effectiveness of adding a secondary HEPA filter on the paste mixing process was within the range of what the EPA has considered to be a cost-effective level of control for lead emissions, but it was not cost-effective for existing small facilities to add secondary HEPA filters to their paste mixing processes. Therefore, we proposed that large sources would need to comply with a revised paste mixing emission limit of 0.1 mg/dscm, and we proposed to retain the standard of 1 mg/dscm for small sources.

Based on the comments we received after proposal regarding the use of high efficiency filters, as discussed in section III.A.3 above, we have conducted further analysis for existing facilities, and we agree with the commenter that ePTFE (high efficiency) filters can be used to achieve the revised paste mixing emission limit of 0.1 mg/dscm. We estimate that 24 (out of 39 existing facilities that have paste mixing operations) can comply with the proposed 0.1 mg/dscm emission limit because they already use secondary HEPA filters or have stack tests/permit limits that indicate they could comply with the emission limit of 0.1 mg/dscm. Further, as the available information shows that paste mixing operations are already controlled by fabric filters at

most facilities, it is possible that instead of adding HEPA filters, most facilities could switch from traditional filter materials to more modern higher efficiency filter materials and achieve the same emissions levels as those achieved by a secondary filter at a lower cost. However, as a commenter noted, as discussed in section III.A.3, some facilities use wet scrubbers to control paste mixing emissions. We are aware of five existing facilities that use wet scrubbers to control their paste mixing operations. Three of these facilities currently have secondary HEPA filters following their scrubbers. Based on the data available to the EPA at the time of this rulemaking, four of the five facilities using scrubbers to control paste mixing operations can comply with the revised emission limit of 0.1 mg/dscm. One of these five facilities has three wet scrubbers to control paste mixing. Based on stack test data we obtained from the state agency, we estimate that this facility might need to add a secondary HEPA filter on one of these devices, which will result in slightly higher costs for this one facility. We conservatively estimate that the remaining 14 facilities will need to upgrade their bags to comply with the revised emission limit. The incremental initial costs to replace current bags at these facilities with the high efficiency PTFE bags ranges from $6,000 to $36,000 per facility, and the incremental annualized costs range from $3,000 to $18,000 per facility per year. We estimate that a typical large facility would have annual costs of about $30,000 per year and achieve about 0.1 tpy reduction of lead emissions with estimated cost effectiveness of $300,000 per ton and that a typical small facility would have annual costs of about $18,000 per year and achieve about 0.03 tpy reduction of lead emissions, with estimated cost effectiveness of $300,000 per ton, which is well within the range of cost effectiveness that the EPA has historically accepted. Therefore, we conclude that for most facilities, this limit of 0.1 mg/dscm is cost-effective.

However, based on available information, for at least one very small facility with already very low paste mixing emissions, replacing current bags with ePTFE bags would not be cost-effective. We estimate that to meet the 0.1 mg/dscm lead emission limit, its initial costs would be $18,000 and its incremental annualized costs would be $9,000, and would achieve a 0.002 tpy lead reduction with estimated cost effectiveness of $4.7M/ton. This estimated cost effectiveness (for a very small facility with very low emissions) of $4.7M/ton is higher than what the EPA has historically accepted as cost-effective. Therefore, because we estimate it is cost-effective for all other existing facilities except for one, in order to ensure that emission reductions can be achieved in a cost-effective manner for the source category, we are also promulgating an alternative lead emission limit of 0.002 lb/hour as described in section III.A.3. This alternative emission limit of 0.002 lbs/hr is more stringent than the 0.1 mg/dscm for most facilities, and is significantly more stringent than the proposed emission limit of 1 mg/dscm for very small facilities with very low flow rates and will ensure emissions are limited to low levels in the future. With the alternative lead limit, we estimate that one of 14 facilities noted above would be able to comply with the alternative limit with no additional control costs. Therefore, we estimate that with the revised limit of 0.1 mg/dscm along with the option to comply with the alternative limit (0.002 lbs/hr) that 13 existing facilities could be affected by these rule requirements and that total estimated costs to the source category are estimated to be $384,000 in incremental initial costs and $96,000 incremental annual costs. We estimate a total lead reduction for the source category of 0.64 tpy. More details on the costs are available in the Costs Impacts Memorandum, in the docket for this rulemaking.

Based on this analysis, for new and existing sources under the NESHAP, we are promulgating the revised emission limit of 0.1 mg/dscm, which we conclude reflects developments in technology under section 112(d)(6) for most facilities and the alternative lead emission limit of 0.002 lbs/hr, which we conclude reflects developments under section 112(d)(6) for very small facilities with fabric filter systems with very low flow rates, applicable to all facilities regardless of production capacity. We are also retaining the opacity limit of 0 percent but are promulgating an option to use EPA Method 22 to demonstrate compliance with the daily and/or weekly visible emissions as discussed above in section III.A.6.c.

4. Technology Review for Fugitive Dust Emissions

The same requirements proposed for 40 CFR part 60, subpart KKa, as described in section III.A.4 above, were proposed as amendments to the NESHAP. During the technology review, we discovered that several facilities currently subject to the NESHAP already had requirements to reduce fugitive dust emissions through similar work practices in their operating permits including in the lead oxide unloading and storage areas. Other rules, including the NESHAPs for primary lead smelting and secondary lead smelting, have required new and existing sources to minimize fugitive dust emissions at the facilities, such as through the paving of roadways, cleaning roadways, storing lead bearing materials in enclosed spaces or containers, and other measures.

As discussed under section III.A.4, we received three comments regarding the proposed fugitive dust minimization work practices. In consideration of these comments and after additional research, described in section III.A.4 above, under the NESHAP, we are finalizing the same requirements as discussed in section III.A.4 above for 40 CFR part 60, subpart KKa. As a change to the proposal, we are promulgating a requirement that existing sources must develop and implement a fugitive dust minimization plan for the lead oxide unloading and storage area, which represents GACT. Based on the comments, we revised our cost estimates and estimate that the cost burden will be mostly labor to develop and implement the dust plan, and that most facilities would already own the equipment necessary, such as a HEPA vacuum, to carry out these work practices. Total estimated costs range from $0 (for facilities that already have a fugitive dust plan and are implementing it) to $22,000 per facility per year. As discussed under section III.A.4, we have not quantified emission reductions as a result of implementing the work practices. It is difficult to quantify fugitive dust emissions since they are not released through a point, such as a stack, and cannot easily be measured. Therefore, for the reason discussed in section III.A.4, we have determined these costs are reasonable and are finalizing work practices to minimize fugitive dust in the lead oxide unloading and storage areas. The costs are discussed in more detail in the Cost Impacts Memorandum, available in the docket for this rulemaking.

5. Expanded Facility Applicability

The original definition of the lead acid battery manufacturing source category stated that lead acid battery manufacturing facilities include any facility engaged in producing lead acid batteries and explained that the category includes, but is not limited to, facilities engaged in the manufacturing steps of lead oxide production, grid casting, paste mixing, and three-process operations (plate stacking, burning, and assembly). The EPA is aware of some facilities that conduct one or more of

these lead acid battery manufacturing processes but do not produce the final product of a battery. Thus, these facilities were not previously considered to be in the lead acid battery source category, and those processes were not subject to the lead acid battery NESHAP. To ensure these processes that are producing certain battery parts or input materials (such as grids or lead oxide) are regulated to the same extent as those that are located at facilities where the final battery products are produced, the EPA proposed to revise the applicability provisions in the NESHAP such that facilities that process lead to manufacture battery parts or input material would be subject to the NESHAP even if they do not produce batteries. Information from the technology review indicates that lead emissions from the processes at such facilities are controlled and can meet the emissions limits in the Lead Acid Battery Manufacturing Area Source NESHAP. However, the facilities would also need to comply with the compliance assurance measures and work practices of the proposed NESHAP, including the proposed fugitive dust mitigation plan requirements, improved monitoring of emission points with fabric filters, performance testing, reporting, and recordkeeping. We estimated the costs for compliance testing would be $23,000 to $34,000 per facility once every 5 years; and annual costs for the fugitive dust work practices would be $0 to $13,000 per facility.

We received two comments on this proposed action. Hammond Group, a lead oxide manufacturer, and BCI commented that the EPA did not consider that some of these facilities could be subject to other NESHAP. BCI also commented that this amendment would bring in ''*de minimus*'' sources such as those that manufacturer cable and wires not necessarily used for lead acid batteries. A summary of these comments and the Agency's response is found in the Comment Summary and Response Document, available in the docket for this action.

The EPA's intent with the proposed applicability amendment was to ensure that facilities involved in the primary lead acid battery manufacturing processes (grid casting, paste mixing, lead oxide manufacturing and three-process operations) but that do not make the end-product of a lead acid battery are subject to Federal regulations that limit their lead emissions. After consideration of the comments, we are finalizing the applicability provisions such that battery component facilities that are involved in the primary processes (grid casting, paste mixing, lead oxide manufacturing and three-process operations) and manufacturing battery parts or input material (*i.e.,* grids and lead oxide) used in the manufacturing of lead acid batteries will be subject to the NESHAP. However, we are also finalizing a provision that if a facility is already subject to another NESHAP that controls relevant lead emissions, it is exempt from complying with the Lead Acid Battery Manufacturing Area Source NESHAP, 40 CFR part 63, subpart PPPPPP.

After proposal, we became aware that the existing Clarios facilities in Florence, Kentucky and West Union, South Carolina do not make battery grids or any lead-bearing battery parts. These facilities are involved in making the plastic battery cases. Therefore, we have removed them from our facilities list. There are four facilities that we are aware of (and included in the proposal analysis) that will become subject to 40 CFR part 63, subpart PPPPPP, due to this applicability expansion: a battery grid producing facility, Clarios in Red Oak, Iowa; and three lead oxide manufacturers, Doe Run Fabricated Metals in Vancouver, Washington; and Powerlab, Inc. in Terrell, Texas, and Savanna, Illinois. The estimated costs for these facilities to comply with the Lead Acid Battery Manufacturing Area Source NESHAP range between $23,000 and $47,000 per facility once every 5 years for performance testing, and between $20,000 and $24,000 per year for all other requirements above what these facilities are already doing to comply with their state regulations.

6. Testing and Monitoring Requirements

a. Performance Tests

We proposed a requirement to conduct performance testing at least once every 5 years for all existing and new area sources. To reduce some of the cost burden, the EPA proposed to allow facilities that have two or more processes and stacks that are very similar, and have the same type of control devices, to test just one stack as representative of the others as approved by the delegated authority. We proposed that the NESHAP would include the same testing requirements that the EPA proposed under the new NSPS, as discussed above in section III.A.6.a. As explained in the proposed rule, the EPA has been adding requirements to NESHAP when other amendments are being made to the rules to include periodic performance tests to help ensure continuous compliance.

As explained in section III.A.6.a., we received comments on testing from three stakeholders. More details regarding these comments, and the EPA's responses are provided in the Comment Summary and Response Document, available in the docket for this rulemaking.

We are promulgating the performance testing requirements as proposed. Costs for existing facilities are estimated to range from $23,000 to $181,000 per facility every 5 years, depending on the total number of stacks to be tested. We conclude performance testing costs are reasonable and necessary to ensure the emission standards in 40 CFR part 63, subpart PPPPPP, are continuously met and enforceable.

b. Improved Monitoring of Emission Points Controlled by Fabric Filters and Scrubbers

The 2007 area source NESHAP required facilities to conduct semiannual inspections and maintenance for emission points controlled by a fabric filter to ensure proper performance of the fabric filter. In addition, pressure drop or visible emission observations had to be conducted for the fabric filter daily (or weekly if the fabric filter has a secondary HEPA filter) to ensure the fabric filter was functioning properly. To reduce the likelihood of malfunctions that result in excess lead emissions, the EPA proposed to increase the frequency of fabric filter inspections and maintenance operations to monthly for units that do not have a secondary filter and retain the requirement for semi-annual inspections for units that do have a secondary filter. After consideration of the public comments, summarized in the Comment Summary and Response Document available in the docket for this action, we are finalizing quarterly inspections for all fabric filter systems (both primary and secondary). The estimated costs for the additional inspections range from $0 (for facilities already doing at least quarterly inspections) to $6,300 per facility per year which we have determined is reasonable.

As discussed above in section III.A.6.b., standard monitoring of scrubbing systems includes measuring liquid flow rate across the scrubbing system. We proposed to add a requirement to measure and record the liquid flow rate across each scrubbing system (that is not followed by a fabric filter) at least once every 15 minutes in the NESHAP, in addition to monitoring pressure drop across each scrubbing system.

We received no comments on this issue, and therefore we are finalizing a requirement to measure and record the

liquid flow rate across each scrubbing system that is not followed by a fabric filter at least once every 15 minutes. Based on our review, we only identified three facilities that have a scrubber system that is not followed by a fabric filter, and at least one of these facilities already has this requirement in their permit. We expect the other two facilities likely already have the capability to measure liquid flow rate since it is a standard requirement to ensure a scrubbing system is operating properly. Therefore, we estimate these facilities will not have any capital costs to comply with this requirement but may have a small unquantified increase in annual costs due to recordkeeping requirements.

c. Bag Leak Detection Systems

As discussed above in section III.A.6.c, the EPA found several lead acid battery manufacturing facilities that have bag leak detection systems during the technology review, and we proposed the use of bag leak detection systems for new and existing large lead acid battery manufacturing facilities as a development in operational procedures that would assure compliance with the area source NESHAP by identifying and correcting fabric filter failures. Taking the comments we received into consideration as well as the substantial costs to the industry for this requirement, we are not requiring existing facilities to install and operate bag leak detection systems. However, we are promulgating bag leak detection as an option and are finalizing operating limits and monitoring parameters for bag leak detection systems if they are used at a facility. The same operating limits and monitoring parameters that were proposed are being finalized. The rationale for this decision is the same as described above in section III.A.6.c.

Considering comments received on the proposed provisions for fabric filter monitoring and inspections, and to reduce the likelihood of malfunctions that result in excess lead emissions, we are also finalizing an increase in fabric filter monitoring requirements (*i.e.,* pressure drop and visible emissions readings) from once per day to twice per day for fabric filters without a secondary filter. Specifically, we are promulgating a requirement that for fabric filters without a secondary filter, facility operators must do one of the following measurements daily if the results of the most recent performance test is greater than 50 percent of the applicable lead emission limit: (1) record pressure drop two times per day with a minimum of 8 hours between the recordings; or (2) conduct visible emission observations two times per day with a minimum of 6 hours between observations. For fabric filters without a secondary filter that have performance test results less than 50 percent of the applicable emissions limit, we are retaining the requirement that facilities must do one of the following: (1) record pressure drop at least one time per day; or (2) conduct visible emission observations at least one time per day. We are also retaining as proposed the requirement for fabric filter systems with a secondary filter to record pressure drop weekly or conduct weekly visible emission observations.

The estimated cost of the additional recording varies depending on whether or not a facility has the capability for automated data recordings or if they do manual recordings. The estimated cost ranges from approximately $8,000 to $80,000 per year per facility for manual data recording, and an estimated $200 to update software for automated data recording. For smaller facilities with multiple fabric filter baghouses that may record the pressure drop reading by hand, this requirement could be burdensome in addition to the other new requirements in the amended rules. To offset the potential additional costs for additional visible emission recordings, we are also promulgating an amendment to the method for conducting visible emission observations for fabric filters. The 2007 NESHAP required that EPA Method 9 be used for the daily and/or weekly visible emission observations. EPA Method 9 is a test that quantifies opacity, while EPA Method 22 is a qualitative test to determine the absence of visual emissions (*i.e.,* 0 percent opacity). We are revising the regulations to allow for the use of EPA Method 22 as an alternative to EPA Method 9 for the daily and weekly visible emission observations of the processes with 0 percent opacity standards. We are retaining the opacity standards in the rule of 0 percent for grid casting, paste mixing, three-process operations, lead oxide manufacturing and other lead emitting operations and we are retaining the opacity standard of 5 percent for lead reclamation. Because we have retained the opacity standards of 0 percent for the applicable processes in the final rule, EPA Method 22, in the case of lead acid battery manufacturing processes, will be sufficient to demonstrate compliance with the 0 percent opacity standard during the daily/weekly visible emissions observations. EPA Method 9 must still be used for daily and/or weekly visible emission observations for the lead reclamation process if a facility conducts these operations, and EPA Method 9 must still be used to determine compliance with the opacity standards in the rule during performance tests.

We estimate that there are 19 facilities that may be required to record pressure drop twice a day or record observations of visible emissions twice a day. For facilities that record pressure drop daily to comply with the NESHAP, we estimate that the total cost to the industry for one additional pressure drop recording is approximately $71,000 per year with facility costs ranging from $0 to $12,100 per year, which we conclude is reasonable. The costs and assumptions are discussed in more detail in the Cost Impacts Memorandum available in the docket.

For facilities that conduct visible emission observations daily to comply with the NESHAP, we have estimated costs for one additional observation and recording of each fabric filter system with no secondary filter or bag leak detection system. We estimate that providing EPA Method 22 as an option for the daily and/or weekly visible emission observations, as discussed above, will be a cost savings for facilities. It is estimated that the net costs for an additional visible emission observation and recording using EPA Method 22 are $95,300 for the entire industry and an average net cost of $2,400 per year per facility, which we conclude is reasonable. The costs and assumptions are discussed in more detail in the Cost Impacts Memorandum available in the docket.

7. Other Actions

a. Lead Oxide Manufacturing Emission Limit

As discussed above in section III.A.7.a, we proposed to retain the lead oxide manufacturing emission limit. Based on public comments (described above) we are finalizing a clarification that this emission limit applies to the primary emissions sources and their emission control devices (*i.e.,* lead oxide production fabric filter baghouses), and that other sources associated with the lead oxide production source, such as building ventilation, would be ''other lead-emitting operations'' subject to the 1.0 mg/dscm emission limit.

b. Electronic Reporting Requirements

The EPA is finalizing, as proposed, that owners and operators of lead acid battery manufacturing facilities subject to the NESHAP at 40 CFR part 63, subpart PPPPPP, submit electronic copies of required performance test

reports and the semiannual excess emissions and continuous monitoring system performance and summary reports, through the EPA's CDX using the CEDRI. A description of the electronic data submission process is provided in the memorandum *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* available in the docket for this action. The final rule requires that performance test results collected using test methods that are supported by the EPA's Electronic Reporting Tool (ERT) is listed on the ERT website [5] at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website and other performance test results be submitted in portable document format (PDF) using the attachment module in the ERT. For semiannual excess emissions and continuous monitoring system performance and summary reports, the final rule requires that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. The final version of the template for these reports will be located on the CEDRI website.[6]

8. Startup, Shutdown, and Malfunction Requirement

We have eliminated the SSM exemption in this rule. Consistent with *Sierra Club* v. *EPA,* 551 F. 3d 1019 (D.C. Cir. 2008), the EPA has established standards in this rule that apply at all times. We have also revised Table 3 (the General Provisions Applicability Table) in several respects as is explained in more detail below. For example, we have eliminated the incorporation of the General Provisions' requirement that the source develops an SSM plan. We have also eliminated and revised certain recordkeeping and reporting that is related to the SSM exemption as described in detail in the proposed rule and summarized again here.

In establishing the standards in this rule, the EPA has taken into account startup and shutdown periods and, for the reasons explained below, has not established alternate standards for those periods.

We discussed this issue with industry representatives and asked them if they expect any problems with the removal of the SSM exemptions. The lead acid battery manufacturing industry did not identify (and there are no data indicating) any specific problems with removing the SSM provisions. The main control devices used in this industry are fabric filters. We expect that these control devices are effective in controlling emissions during startup and shutdown events.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead, they are by definition, sudden, infrequent, and not reasonably preventable failures of emissions control, process, or monitoring equipment. (40 CFR 63.2) (Definition of malfunction). The EPA interprets CAA section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 112 standards. This reading has been upheld as reasonable by the court in *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016).

As noted in the proposal for the amendments to the Lead Acid Battery Manufacturing Area Source NESHAP, under this decision, the court vacated two provisions that exempted sources from the requirement to comply with otherwise applicable CAA section 112(d) emission standards during periods of SSM. We proposed and are finalizing revisions to the NESHAP at 40 CFR 63.11421 through 63.11427 that remove the SSM exemption under the Lead Acid Battery Manufacturing Area Source NESHAP and any references to SSM-related requirements.

C. What are the effective and compliance dates of the standards?

1. NSPS

Pursuant to CAA section 111(b)(1)(B), the effective date of the final rule requirements in 40 CFR part 60, subpart KKa, will be the promulgation date. Affected sources that commence construction, or reconstruction, or modification after February 23, 2022, must comply with all requirements of 40 CFR part 60, subpart KKa, no later than the effective date of the final rule or upon startup, whichever is later.

2. NESHAP

Pursuant to CAA section 112(d)(10) the effective date of the final rule requirements in 40 CFR part 63, subpart PPPPPP, is the promulgation date.

For existing affected lead acid battery manufacturing facilities (*i.e.,* facilities that commenced construction or reconstruction on or before February 23, 2022), there are specific compliance dates for each amended standard, as specified below. For the removal of the SSM exemptions, we are finalizing that facilities must comply by the effective date of the final rule. For the following final revisions, we are promulgating a compliance date of no later than 180 days after the effective date of the final rule: Clarifications to the definition of lead reclamation; requirements for electronic reporting of performance test results and semiannual excess emissions and continuous monitoring system performance and summary reports; increased fabric filter inspection frequency; additional pressure drop recording; revisions to the applicability provisions to include battery production processes at facilities that do not produce the final end product (*i.e.,* batteries); and bag leak detection provisions.

For the removal of the SSM exemptions, we proposed a compliance date of no later than 180 days after the effective date of the final rule, including for the proposed changes to the NESHAP being made to ensure that the regulations are consistent with the decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008) in which the court vacated portions of two provisions in the EPA's CAA section 112 regulations governing the emissions of hazardous air pollutants during periods of SSM. Specifically, the court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and (h)(1). The EPA removed these SSM exemptions from the CFR in March 2021 to reflect the court's decision (86 FR 13819). In this action, we are changing the cross-reference to those General Provisions for the applicability of these two requirements from a ''yes'' to ''no'' and adding rule-specific language at 40 CFR 63.11423(a)(3) to ensure the rule applies as all times, and 40 CFR 63.11423(a)(3) will be effective upon promulgation of this action. In addition, we do not expect additional time is necessary generally for facilities to comply with changes to SSM provisions because we have concluded that the sources can meet the otherwise applicable standards that are in effect at all times, as described in section III.B.7. We are therefore finalizing that facilities must comply with this requirement no later than the effective date of this final rule, with the exception of recordkeeping provisions. For recordkeeping under the SSM provisions, we are finalizing that facilities must comply with this requirement 90 days after the effective date of the final rule. Recordkeeping provisions associated with malfunction events (40 CFR 63.11424(a)(7)(ii) and (iii)) shall be effective no later than 90

[5] *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.*

[6] *https://www.epa.gov/electronic-reporting-air-emissions/cedri.*

days after the effective date of this action. The EPA is requiring additional information under 40 CFR 63.11424 for recordkeeping of malfunction events, so the additional time is necessary to permit sources to read and understand the new requirements and adjust record keeping systems to comply. Reporting provisions are in accordance with the reporting requirements during normal operations and the semi-annual report of excess emissions.

For the following final revisions, we are finalizing a compliance date of 3 years after the publication date of the final rule: Revised emission limits for paste mixing, grid casting, and lead reclamation; requirements to develop and follow a fugitive dust mitigation plan; and requirements that performance testing be conducted at least once every 5 years.

After the effective date of the final rule and until the applicable compliance date of the amended standards, affected existing lead acid battery manufacturing facilities must comply with either the current requirements of 40 CFR part 63, subpart PPPPPP, or the amended standards.

For existing affected lead acid battery component manufacturing facilities that become subject to 40 CFR part 63, subpart PPPPPP, the compliance date for all applicable requirements is 3 years after the publication date of the final rule. Newly affected lead acid battery manufacturing facilities and newly affected lead acid battery component manufacturing facilities (*i.e.,* facilities that commence construction or reconstruction after February 23, 2022) must comply with all requirements of 40 CFR part 63, subpart PPPPPP, including the final amendments, by the effective date of the final rule, or upon startup, whichever is later.

IV. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected facilities?

1. NSPS

The EPA has found through the BSER review for this source category that there are 40 existing lead acid battery manufacturing facilities subject to the NSPS for Lead-Acid Battery Manufacturing Plants at 40 CFR part 60, subpart KK. We are not currently aware of any planned or potential new lead acid battery manufacturing facilities, but it is possible that some existing facilities could be modified or reconstructed in the future. At this time, and over the next 3 years, the EPA anticipates that no facilities will become subject to the new NSPS for Lead Acid Battery Manufacturing Plant at 40 CFR part 60, subpart KKa.

2. NESHAP

Through the technology review for the source category, the EPA found that there are 39 existing facilities subject to the NESHAP for Lead Acid Battery Manufacturing Area Sources at 40 CFR part 63, subpart PPPPPP. These facilities will be affected by the amendments to the NESHAP and four additional facilities will become subject to the NESHAP upon promulgation of the amendments.

B. What are the air quality impacts?

1. NSPS

We are not expecting any new facilities to be built in the foreseeable future, but if any new facilities are built or any existing facility is modified or reconstructed in the future, the requirements in the new NSPS, 40 CFR part 60, subpart KKa, would achieve an estimated 0.03 tpy to 0.1 tpy reduction of allowable lead emissions for each new facility from the source category compared to that of the current NSPS 40 CFR part 60, subpart KK. We are also promulgating additional compliance assurance measures and work practices to minimize fugitive dust emissions, which will reduce the likelihood of excess emissions of lead. The reductions of lead from these compliance assurance measures are unquantified.

2. NESHAP

The revised lead emission standard for paste mixing operations will achieve an estimated 0.6 tpy reduction of lead emissions. The revised lead emission standards for grid casting and lead reclamation facilities are not expected to result in additional lead emission reductions, as it is estimated that all facilities in the source category are already meeting the revised emissions limits. However, the new standards will reduce the allowable emissions from those sources and ensure that the emissions remain controlled and minimized moving forward. In addition, the Agency is finalizing work practices to minimize fugitive lead dust emissions and expects these will achieve some unquantified lead emission reductions. We are also finalizing several compliance assurance requirements which will help ensure continuous compliance with the NESHAP and help prevent noncompliant emissions of lead. The final amendments also include removal of the SSM exemptions. While we are unable to quantify the emissions that occur during periods of SSM or the specific emissions reductions that would occur due to this action, eliminating the SSM exemption has the potential to reduce emissions by requiring facilities to meet the applicable standard during SSM periods.

C. What are the cost impacts?

1. NSPS

The costs for a new, reconstructed, or modified affected facility to comply with the final regulatory requirements discussed above are described in detail in section III.A and are summarized below. As mentioned previously in this action, we do not expect any brand-new affected facilities in the foreseeable future. However, we do expect that some existing facilities could undergo modifications or reconstruction, and these facilities would incur the costs summarized below.

Revised Emission Limit for Grid Casting: Estimated incremental capital costs for a new, reconstructed, or modified source to install and operate a fabric filter (BSER) compared to an impingement scrubber (baseline) on grid casting operations are $230,500, with estimated incremental annual costs of $52,000 for a small facility, and are $374,000, with estimated incremental annual costs of $88,000 for a large facility.

Revised Emission Limit for Lead Reclamation: Estimated incremental capital costs for a new, reconstructed, or modified source to install and operate a fabric filter (BSER) compared to an impingement scrubber (baseline) on lead reclamation operations are $17,000 for both small and large facilities, with estimated incremental annual costs of $8,500 for small facilities and $13,000 for large facilities.

Revised Emission Limit for Paste Mixing Operations: Estimated incremental capital costs for a new, reconstructed, or modified source to meet the revised emission limit through the use of higher efficiency bags (BSER) or inclusion of secondary filters (BSER) in the facility design compared to only including traditional primary fabric filters (baseline) are $18,000, with estimated incremental annual costs of $9,000 for a small facility, and are $60,000 capital, with estimated incremental annual costs of $30,000 for a large facility.

Work Practices to Minimize Fugitive Lead Dust: Estimated incremental costs for a new, reconstructed, or modified source to develop and implement a fugitive dust minimization plan (BSER) compared to no fugitive dust minimization requirements (baseline) is $7,900 in initial costs to develop the

plan, with estimated annual costs to implement the plan of approximately $14,000 per facility.

Bag Leak Detection Requirements: Estimated incremental capital costs for a new facility to install and operate bag leak detection systems on emissions control systems that do not have secondary filters (BSER) compared to no bag leak detection requirements (baseline) are $802,000, with estimated incremental annual costs of $161,000 per facility.

Performance Testing Requirements: Estimated incremental costs for a new, reconstructed, or modified source to meet the revised testing frequency of once every 5 years (BSER) compared to only once for initial compliance (baseline) are $23,000 for the first stack and $5,500 for each additional stack tested at a facility during the same testing event. The costs per facility are estimated to be $0 to $181,000 once every 5 years, or an annual average cost of $0 to $36,000, depending on number of stacks and the current frequency of testing.

Fabric Filter Inspection Requirements: Estimated incremental costs for a new, reconstructed, or modified source to meet the revised fabric filter inspection frequency of once per quarter (BSER) compared to once every 6 months (baseline) are $6,300 annually per facility.

The total estimated incremental capital costs per new facility are approximately $898,000 for a small facility and $973,000 for a large facility, with estimated incremental annual costs of $251,000 per small facility and $300,000 per large facility. The total estimated incremental capital costs per modified or reconstructed facility (which would not have bag leak detection requirements) are approximately $96,000 for a small facility and $171,000 for a large facility, with estimated incremental annual costs of $90,000 per small facility and $140,000 per large facility.

2. NESHAP

The estimated costs for an affected source to comply with the amended NESHAP are the same as the costs described above (in section IV.C.1) for modified or reconstructed facilities under the NSPS, 40 CFR part 60, subpart KKa. Costs for performance testing are estimated to be $0 to $180,000 per facility once every 5 years depending on number of stacks (equates to an average annual cost of about $0 to $36,000 per facility). Total costs for all other amendments for the entire source category (43 facilities) are an estimated $740,000 capital costs and annual costs of $570,000 (equates to an average cost per facility of $17,000 capital and $13,000 annualized). More detailed information on cost impacts on existing sources is available in the Cost Impacts Memorandum available in the docket for this action.

D. What are the economic impacts?

The EPA conducted economic impact analyses for these final rules, as detailed in the memorandum *Economic Impact and Small Business Analysis for the Lead Acid Battery Manufacturing NSPS Review and NESHAP Area Source Technology Review: Final Report,* which is available in the docket for this action. The economic impacts of the final rules are calculated as the percentage of total annualized costs incurred by affected ultimate parent owners to their revenues. This ratio provides a measure of the direct economic impact to ultimate parent owners of facilities while presuming no impact on consumers. We estimate that none of the ultimate parent owners affected by these final rules will incur total annualized costs of 0.7 percent or greater of their revenues. Thus, these economic impacts are low for affected companies and the industries impacted by these final rules, and there will not be substantial impacts on the markets for affected products. The costs of the final rules are not expected to result in a significant market impact, regardless of whether they are passed on to the purchaser or absorbed by the firms.

E. What are the benefits?

1. NSPS

The new standards for grid casting, lead reclamation and paste mixing will reduce the allowable emissions of lead from new, reconstructed, or modified sources and ensure emissions remain controlled and minimized moving forward.

2. NESHAP

As described above, the final amendments are expected to result in a reduction of lead emissions of 0.6 tpy for the industry. We are also finalizing several compliance assurance requirements which help prevent noncompliant emissions of lead, and the final amendments also revise the standards such that they apply at all times, which includes SSM periods. In addition, the final requirements to submit reports and test results electronically will improve monitoring, compliance, and implementation of the rule. While we did not perform a quantitative analysis of the health impacts expected due to the final rule amendments, we qualitatively characterize the health impacts in the memorandum *Economic Impact and Small Business Analysis for the Lead Acid Battery Manufacturing NSPS Review and NESHAP Area Source Technology Review: Final Report,* which is available in the docket for this action.

F. What analysis of environmental justice did we conduct?

Consistent with the EPA's commitment to integrating EJ in the Agency's actions, and following the directives set forth in multiple Executive orders, the Agency has conducted an analysis of the demographic groups living near existing facilities in the lead acid battery manufacturing source category. For the new NSPS, we are not aware of any future new, modified, or reconstructed facilities that will be become subject to the NSPS in the foreseeable future. For the NESHAP, we anticipate a total of 43 facilities to be affected by this rule. For the demographic proximity analysis, we analyzed populations living near existing facilities to serve as a proxy of potential populations living near future facilities that may be impacted by the NSPS. We have also updated the analysis conducted at proposal by including one additional existing facility. The results of this addition do not change the findings that some communities around existing sources are above the national average in the demographic categories of Hispanic/Latino, linguistically isolated, and 25 years of age and over without a high school diploma. Executive Order 12898 directs the EPA to identify the populations of concern who are most likely to experience unequal burdens from environmental harms; specifically, minority populations (*i.e.,* people of color), low-income populations, and indigenous peoples (59 FR 7629; February 16, 1994). Additionally, Executive Order 13985 is intended to advance racial equity and support underserved communities through Federal government actions (86 FR 7009; January 20, 2021). The EPA defines EJ as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and

commercial operations or programs and policies.'' In recognizing that people of color and low-income populations often bear an unequal burden of environmental harms and risks, the EPA continues to consider ways of protecting them from adverse public health and environmental effects of air pollution.

This action finalizes the NSPS for new, modified, and reconstructed sources that commence construction after February 23, 2022, and the NESHAP for existing and new sources. Since the locations of the construction of any new lead acid battery manufacturing facilities are not known, and it is not known which of the existing facilities will be modified or reconstructed in the future, the demographic analysis was conducted for existing facilities as a characterization of the demographics in areas where these facilities are located. The demographic analysis includes an assessment of individual demographic groups of the populations living within 5 km and within 50 km of the facilities. We then compared the data from the analysis to the national average for each of the demographic groups.

1. NSPS

For the NSPS, we have updated the analysis presented in the proposed rulemaking to include one additional existing source. However, the conclusions presented at proposal and in this final rule remain the same. For the NESHAP, we have updated the analysis presented in the proposed rulemaking to include this additional existing facility and three other facilities that will become subject to the NESHAP upon promulgation of the amendments to the rule.

The results of the demographics analysis for the NSPS (see Table 1) indicate that for populations within 5 km of the 40 existing facilities, the percent of the population that is Hispanic/Latino is above the national average (43 percent versus 19 percent) and the percent of people living in linguistic isolation is above the national average (9 percent versus 5 percent). The category average for these populations is primarily driven by five facilities with Hispanic/Latino populations within 5 km that were at least 3 times the national average. The percent of the population over 25 without a high school diploma is above the national average (19 percent versus 12 percent). While on average across all 40 facilities, the African American population living within 5 km is below the national average (10 percent versus 12 percent), four facilities did have African American populations within 5 km that were at least three times the national average.

The results of the demographic analysis (see Table 1) indicate that for populations within 50 km of the 40 existing facilities, the average percentages for most demographic groups are closer to the national averages. However, the average percent of the population that is Hispanic/Latino (25 percent) and in linguistic isolation (7 percent) are still above the national averages (19 percent and 5 percent, respectively). In addition, the average percent of the population within 50 km of the facilities that is Other/Multiracial is above the national average (11 percent versus 8 percent). The percent of the population over 25 without a high school diploma is above the national average (14 percent versus 12 percent).

TABLE 1—PROXIMITY DEMOGRAPHIC ASSESSMENT RESULTS FOR LEAD ACID BATTERY MANUFACTURING NSPS FACILITIES

Demographic group	Nationwide	Population within 50 km of 40 existing facilities	Population within 5 km of 40 existing facilities
Total Population	328,016,242	47,911,142	2,245,359
	Race and Ethnicity by Percent		
White	60	52	37
African American	12	12	10
Native American	0.7	0.3	0.2
Hispanic or Latino (includes white and nonwhite)	19	25	43
Other and Multiracial	8	11	9
	Income by Percent		
Below Poverty Level	13	12	14
Above Poverty Level	87	88	86
	Education by Percent		
Over 25 and without a High School Diploma	12	14	19
Over 25 and with a High School Diploma	88	86	81
	Linguistically Isolated by Percent		
Linguistically Isolated	5	7	9

Notes:

• The nationwide population count and all demographic percentages are based on the Census' 2015–2019 American Community Survey 5-year block group averages and include Puerto Rico. Demographic percentages based on different averages may differ. The total population counts within 5 km and 50 km of all facilities are based on the 2010 Decennial Census block populations.

• To avoid double counting, the ''Hispanic or Latino'' category is treated as a distinct demographic category for these analyses. A person is identified as one of five racial/ethnic categories above: White, African American, Native American, Other and Multiracial, or Hispanic/Latino. A person who identifies as Hispanic or Latino is counted as Hispanic/Latino for this analysis, regardless of what race this person may have also identified as in the Census.

The EPA expects that the Lead Acid Battery Manufacturing NSPS and NESHAP will ensure compliance via their requirements for performance testing, inspections, monitoring, recordkeeping, and reporting and by complying with the standards at all times (including periods of SSM). The rule will also increase data transparency through electronic reporting. Therefore, effects of emissions on populations in proximity to any future affected sources, including in communities potentially overburdened by pollution, which are often people of color, low-income and indigenous communities, will be minimized at future new, modified, and reconstructed facilities through implementation of controls, work practices, and compliance assurance measures discussed in section III.A of this preamble to meet the NSPS.

The methodology and the results of the demographic analysis are presented in a technical report, *Analysis of Demographic Factors for Populations Living Near Lead Acid Battery Manufacturing Facilities,* available in the docket for this action (Docket ID No. EPA–HQ–OAR–2021–0619).

2. NESHAP

For the NESHAP, we updated the analysis conducted at proposal by analyzing four additional facilities that will be subject to the rule (from 39 to 43 facilities total). The results of the demographics analysis for the NESHAP (see Table 2) indicate that for populations within 5 km of the 43 facilities subject to the NESHAP, the percent of the population that is Hispanic/Latino is above the national average (43 percent versus 19 percent) and the percent of people living in linguistic isolation is above the national average (9 percent versus 5 percent). The category average for these populations is primarily driven by five facilities that had percent Hispanic/Latino populations within 5 km that were at least 3 times the national average. The percent of the population over 25 years of age without a high school diploma is above the national average (18 percent versus 12 percent). Although the category average population within 5 km was below the national average for African American populations (10 percent versus 12 percent), four facilities did have African American populations within 5 km that were at least 3 times the national average.

The results of the demographic analysis (see Table 2) indicate that for populations within 50 km of the 43 facilities subject to the NESHAP, the category average percentages for most demographic groups are closer to the national averages. However, the average percent of the population that is Hispanic/Latino (25 percent) and in linguistic isolation (7 percent) are still above the national averages (19 percent and 5 percent, respectively). In addition, the average percent of the population within 50 km of the facilities that is Other/Multiracial is above the national average (11 percent versus 8 percent). The percent of the population over 25 without a high school diploma is above the national average (14 percent versus 12 percent).

The EPA expects that the Lead Acid Battery Manufacturing Area Source NESHAP will result in HAP emissions reductions at 14 of the 43 facilities. We examined the demographics within 5 km and 50 km of these 14 facilities to determine if differences exist from the larger universe of 43 facilities subject to the NESHAP (see Table 2). In contrast to the broader set of NESHAP facilities, the population within 5 km and 50 km of the 14 facilities for which we expect emissions reductions, is above the national average for the percent African American population (20 and 22 percent versus 12 percent). This higher average percent African American population is largely driven by the populations surrounding three facilities, which range from 2 to 8 times the national average. The other 11 facilities are below the national average for the African American population. Also, the average percent Hispanic/Latino (13 and 21 percent versus 19 percent) and the average percent Linguistic Isolation (3 and 4 percent versus 5 percent) demographic category are near or below the national average for these 14 facilities.

TABLE 2—PROXIMITY DEMOGRAPHIC ASSESSMENT RESULTS FOR LEAD ACID BATTERY MANUFACTURING AREA SOURCE NESHAP FACILITIES

Demographic group	Nationwide	All existing NESHAP facilities (43 facilities)		NESHAP facilities for which emissions reductions are expected (14 facilities)	
		Population within 5 km	Population within 50 km	Population within 50 km	Population within 5 km
Total Population	328,016,242	49,508,055	2,293,170	12,320,826	420,432
	Race and Ethnicity by Percent				
White	60	52	38	51	57
African American	12	12	10	20	22
Native American	0.7	0.3	0.3	0.4	0.4
Hispanic or Latino (includes white and nonwhite)	19	25	43	21	13
Other and Multiracial	8	11	9	8	8
	Income by Percent				
Below Poverty Level	13	12	14	14	15
Above Poverty Level	87	88	86	86	85
	Education by Percent				
Over 25 and without a High School Diploma	12	14	18	13	11
Over 25 and with a High School Diploma	88	86	82	87	89
	Linguistically Isolated by Percent				

TABLE 2—PROXIMITY DEMOGRAPHIC ASSESSMENT RESULTS FOR LEAD ACID BATTERY MANUFACTURING AREA SOURCE NESHAP FACILITIES—Continued

Demographic group	Nationwide	All existing NESHAP facilities (43 facilities)		NESHAP facilities for which emissions reductions are expected (14 facilities)	
		Population within 5 km	Population within 50 km	Population within 50 km	Population within 5 km
Linguistically Isolated	5	7	9	4	3

Notes:
• The nationwide population count and all demographic percentages are based on the Census' 2015–2019 American Community Survey 5-year block group averages and include Puerto Rico. Demographic percentages based on different averages may differ. The total population counts within 5 km and 50 km of all facilities are based on the 2010 Decennial Census block populations.
• To avoid double counting, the ''Hispanic or Latino'' category is treated as a distinct demographic category for these analyses. A person is identified as one of five racial/ethnic categories above: White, African American, Native American, Other and Multiracial, or Hispanic/Latino. A person who identifies as Hispanic or Latino is counted as Hispanic/Latino for this analysis, regardless of what race this person may have also identified as in the Census.

The methodology and the results of the demographic analysis are presented in a technical report, *Analysis of Demographic Factors for Populations Living Near Lead Acid Battery Manufacturing Facilities,* available in the docket for this action (Docket ID No. EPA–HQ–OAR–2021–0619).

As explained in the proposal preamble (87 FR 10140), current ambient air quality monitoring data and modeling analyses indicate that ambient lead concentrations near the existing lead acid battery manufacturing facilities are all below the NAAQS for lead. The CAA identifies two types of NAAQS: primary and secondary standards. Primary standards provide public health protection, including protecting the health of ''sensitive'' populations such as asthmatics, children, and the elderly. Secondary standards provide public welfare protection including protection against decreased visibility and damage to animals, crops, vegetation, and buildings. With ambient concentrations below the NAAQS prior to the finalization of these standards, we conclude that the emissions from lead acid battery manufacturing area source facilities are not likely to pose significant risks or impacts to human health in the baseline prior to these regulations. The review and update of the NSPS and NESHAP in this action will further reduce lead exposures and HAP emissions to provide additional protection to human health and the environment. The EPA expects that the Lead Acid Battery Manufacturing NSPS and NESHAP will reduce future lead emissions due to the more stringent standards finalized for the grid casting, paste mixing, and lead reclamation processes. We expect lead emission reductions of 0.64 tpy from paste mixing facilities at existing lead acid battery manufacturing plants as discussed in sections III.A.3 and III.B.3. We also expect to provide additional protection to human health and the environment by finalizing compliance assurance measures such as requirements for performance testing, inspections, monitoring, recordkeeping, and reporting and by requiring compliance with the standards at all times (including periods of SSM), and by expanding the applicability provisions to certain battery component facilities. The rules will also increase data transparency through electronic reporting. Therefore, the level of HAP emissions to which populations in proximity to the affected sources are exposed will be reduced by the NESHAP requirements being finalized in this action and will be minimized at any future new, modified, or reconstructed source under the NSPS.

V. Statutory and Executive Order Reviews

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

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

This action is not a significant regulatory action and was, therefore, not submitted to OMB for review.

B. Paperwork Reduction Act (PRA)

The information collection activities in the final rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) documents that the EPA prepared have been assigned EPA ICR number 2739.01 and OMB control number 2060–NEW for 40 CFR part 60, subpart KKa, and EPA ICR number 2256.07 and OMB control number 2060–0598 for the NESHAP. You can find a copy of the ICRs in the docket for this rule, and they are briefly summarized here. The ICRs are specific to information collection associated with the lead acid battery manufacturing source category, through the new 40 CFR part 60, subpart KKa, and amendments to 40 CFR part 63, subpart PPPPPP. We are finalizing changes to the testing, recordkeeping and reporting requirements associated with 40 CFR part 63, subpart PPPPPP, in the form of requiring performance tests every 5 years and including the requirement for electronic submittal of reports. In addition, the number of facilities subject to the standards changed. The number of respondents was revised from 41 to 43 for the NESHAP based on our review of operating permits and consultation with industry representatives and state/local agencies. We are finalizing recordkeeping and reporting requirements associated with the new NSPS, 40 CFR part 60, subpart KKa, including notifications of construction/reconstruction, initial startup, conduct of performance tests, and physical or operational changes; reports of opacity results, performance test results and semiannual reports if excess emissions occur or continuous emissions monitoring systems are used; and keeping records of performance test results and pressure drop monitoring.

Respondents/affected entities: The respondents to the recordkeeping and reporting requirements are owners or operators of lead acid battery manufacturing sources subject to 40 CFR part 60, subpart KKa, and 40 CFR part 63, subpart PPPPPP.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart KKa, and 40 CFR part 63, subpart PPPPPP).

Estimated number of respondents: 43 facilities for 40 CFR part 63, subpart

PPPPPP, and 0 facilities for 40 CFR part 60, subpart KKa.

Frequency of response: The frequency of responses varies depending on the burden item. Responses include onetime review of rule amendments, reports of performance tests, and semiannual excess emissions and continuous monitoring system performance reports.

Total estimated burden: The annual recordkeeping and reporting burden for responding facilities to comply with all of the requirements in the new NSPS, 40 CFR part 60, subpart KKa, and the NESHAP, averaged over the 3 years of this ICR, is estimated to be 2,490 hours (per year). The average annual burden to the Agency over the 3 years after the amendments are final is estimated to be 60 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: The annual recordkeeping and reporting cost for responding facilities to comply with all of the requirements in the new NSPS and the NESHAP, averaged over the 3 years of this ICR, is estimated to be $168,000 (rounded, per year). There are no estimated capital and operation and maintenance costs. The total average annual Agency cost over the first 3 years after the amendments are final is estimated to be $3,070.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities subject to the requirements of this action are small businesses that own lead acid battery manufacturing facilities or facilities that do not make lead acid batteries but have a lead acid battery grid casting process or a lead oxide production process. The Agency has determined that there are nine small businesses subject to the requirements of this action, and that eight of these small businesses are estimated to experience impacts of less than 1 percent of their revenues. The Agency estimates that one small business may experience an impact of approximately 1.6 percent of their annual revenues once every 5 years mainly due to the compliance testing requirements, with this one small business representing approximately 11 percent of the total number of affected small entities. The other 4 of the 5 years, we estimate the costs would be less than 1 percent of annual revenues for this one small business. Details of this analysis are presented in *Economic Impact and Small Business Analysis for the Lead Acid Battery Manufacturing NSPS Review and NESHAP Area Source Technology Review: Final Report,* which is available in the docket for this action.

D. Unfunded Mandates Reform Act (UMRA)

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

E. Executive Order 13132: Federalism

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

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

This action does not have tribal implications as specified in Executive Order 13175. No tribal facilities are known to be engaged in the industries that would be affected by this action nor are there any adverse health or environmental effects from this action. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The EPA's assessment of the potential impacts to human health from emissions at existing sources were discussed at proposal (87 FR 10140). The newly required work practices to minimize fugitive dust containing lead and the revised emission limits described in sections III.A.4 and III.B.4 will reduce actual and/or allowable lead emissions, thereby reducing potential exposure to children, including the unborn.

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

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

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This rulemaking involves technical standards. Therefore, the EPA conducted searches through the Enhanced NSSN Database managed by the American National Standards Institute (ANSI) to determine if there are voluntary consensus standards (VCS) that are relevant to this action. The Agency also contacted VCS organizations and accessed and searched their databases. Searches were conducted for the EPA Methods 9, 12, 22, and 29 of 40 CFR part 60, appendix A. No applicable VCS were identified for EPA Methods 12, 22, and 29 for lead.

During the search, if the title or abstract (if provided) of the VCS described technical sampling and analytical procedures similar to the EPA's reference method, the EPA considered it as a potential equivalent method. All potential standards were reviewed to determine the practicality of the VCS for this rule. This review requires significant method validation data which meets the requirements of the EPA Method 301 for accepting alternative methods or scientific, engineering and policy equivalence to procedures in the EPA reference methods. The EPA may reconsider determinations of impracticality when additional information is available for particular VCS.

One VCS was identified as an acceptable alternative to an EPA test method for the purposes of this rule; ASTM D7520–16, ''Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere''. ASTM D7520–16 is a test method describing the procedures to determine the opacity of a plume using digital imagery and associated hardware and software. The opacity of a plume is determined by the application of a Digital Camera Opacity Technique (DCOT) that consists of a Digital Still Camera, Analysis Software, and the Output Function's content to obtain and interpret digital images to determine and report plume opacity. ASTM

D7520–16 is an acceptable alternative to EPA Method 9 with the following conditions:

1. During the DCOT certification procedure outlined in section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand).

2. You must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in section 8.1 of ASTM D7520–16.

3. You must follow the record keeping procedures outlined in 40 CFR 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination.

4. You or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of anyone reading and the average error must not exceed 7.5 percent opacity.

5. This approval does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software and operator in accordance with ASTM D7520–16 and the VCS memorandum is on the facility, DCOT operator, and DCOT vendor.

The search identified one other VCS that was a potentially acceptable alternative to an EPA test method for the purposes of this rule. However, after reviewing the standards, the EPA determined that the candidate VCS ASTM D4358–94 (1999), ''Standard Test Method for Lead and Chromium in Air Particulate Filter Samples of Lead Chromate Type Pigment Dusts by Atomic Absorption Spectroscopy,'' is not an acceptable alternative to EPA Method 12 due to lack of equivalency, documentation, validation data, and other important technical and policy considerations. Additional information for the VCS search and determinations can be found in the memorandum *Voluntary Consensus Standard Results for Review of Standards of Performance for Lead Acid Battery Manufacturing Plants and National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery,* which is available in the docket for this action.

The ASTM standards (methods) are reasonably available for purchase individually through ASTM, International (see 40 CFR 60.17 and 63.14) and through the American National Standards Institute (ANSI) Webstore, *https://webstore.ansi.org.* Telephone (212) 642–4980 for customer service.

We are also incorporating by reference the EPA guidance document ''Fabric Filter Bag Leak Detection Guidance'' (EPA–454/R–98–015). This document provides guidance on fabric filter and monitoring systems including monitor selection, installation, set up, adjustment, and operation. The guidance also discusses factors that may affect monitor performance as well as quality assurance procedures.

The EPA guidance document ''Fabric Filter Bag Leak Detection Guidance'' (EPA–454/R–98–015) is reasonably available at *https://www3.epa.gov/ttnemc01/cem/tribo.pdf* or by contacting the National Technical Information Service (NTIS) at 1–800–553–6847.

Under 40 CFR 63.7(f) and 68.3(f), a source may apply to the EPA to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures in the final rule or any amendments.

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

Executive Order 12898 (59 FR 7629; February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make EJ part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or indigenous peoples) and low-income populations.

The EPA anticipates that the human health and environmental conditions that exist prior to this action have the potential to result in disproportionate and adverse human health or environmental effects on people of color, low-income populations, and/or indigenous peoples. However, as we explained in the proposed rule preamble, based on analyses of emissions and available ambient monitoring data (as described in section IV.A of the proposal preamble (87 FR 10140)), ambient lead concentrations near the facilities are all below the NAAQS for lead prior to these regulations. Therefore, we concluded that the emissions from lead acid battery area source facilities are not likely to pose significant risks or impacts to human health if facilities are complying with the NESHAP (see 87 FR 10134 at 10140).

The EPA anticipates that this action is likely to reduce the existing potential disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples. The documentation for this decision is contained in section IV.F of this preamble. As discussed in section IV.F of this preamble, the demographic analysis indicates that the following groups are above the national average within 5 km of the 43 existing facilities: Hispanics/Latino, people living below the poverty level, 25 years old or greater without a high school diploma, and people living in linguistic isolation. Populations within 5 km of the 14 facilities that the EPA expects that the Lead Acid Battery Manufacturing NESHAP will result in HAP emissions reductions are above the national average for African Americans and people living below the poverty level. This action further reduces lead and other criteria and HAP emissions to provide additional protection to human health and the environment.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report for this action to each House of the Congress and to the Comptroller General of the United States. Neither the NSPS nor the NESHAP amended by this action constitute a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Parts 60 and 63

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Michael S. Regan,

Administrator.

For the reasons cited in the preamble, title 40, chapter I, parts 60 and 63 of the Code of Federal Regulations are amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 4701 *et seq.*

Subpart A—General Provisions

■ 2. Section 60.17 is amended by:
■ a. Redesignating paragraphs (h)(196) through (212) as paragraphs (h)(197) through (213);
■ b. Adding new paragraph (h)(196); and
■ c. Revising paragraph (j)(1).

The addition and revision read as follows:

§ 60.17 Incorporations by reference.

* * * * *

(h) * * *

(196) ASTM D7520–16, Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere, approved April 1, 2016; IBR approved for § 60.374a(d).

* * * * *

(j) * * *

(1) EPA–454/R–98–015, Office of Air Quality Planning and Standards (OAQPS), Fabric Filter Bag Leak Detection Guidance, September 1997, *https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=2000D5T6.PDF;* IBR approved for §§ 60.373a(b); 60.2145(r); 60.2710(r); 60.4905(b); 60.5225(b).

* * * * *

■ 3. The heading for subpart KK is revised to read as follows:

Subpart KK—Standards of Performance for Lead-Acid Battery Manufacturing Plants for Which Construction, Reconstruction, or Modification Commenced After January 14, 1980, and On or Before February 23, 2022

■ 4. Section 60.370 is amended by revising paragraph (c) to read as follows:

§ 60.370 Applicability and designation of affected facility.

* * * * *

(c) Any facility under paragraph (b) of this section the construction or modification of which is commenced after January 14, 1980, and on or before February 23, 2022, is subject to the requirements of this subpart.

■ 5. Subpart KKa is added to read as follows:

Subpart KKa—Standards of Performance for Lead Acid Battery Manufacturing Plants for Which Construction, Modification or Reconstruction Commenced After February 23, 2022

Sec.

§ 60.370a Applicability and designation of affected facility.

(a) The provisions of this subpart are applicable to the affected facilities listed in paragraph (b) of this section at any lead acid battery manufacturing plant that produces or has the design capacity to produce in one day (24 hours) batteries containing an amount of lead equal to or greater than 5.9 Mg (6.5 tons).

(b) The provisions of this subpart are applicable to the following affected facilities used in the manufacture of lead acid storage batteries:

(1) Grid casting facility.
(2) Paste mixing facility.
(3) Three-process operation facility.
(4) Lead oxide manufacturing facility.
(5) Lead reclamation facility.
(6) Other lead-emitting operations.

(c) Any facility under paragraph (b) of this section for which the construction, modification, or reconstruction is commenced after February 23, 2022, is subject to the requirements of this subpart.

§ 60.371a Definitions.

As used in this subpart, the definitions in paragraphs (a) through (i) of this section apply. All terms not defined in this subpart have the meaning given them in the Act and in subpart A of this part.

(a) *Bag leak detection system* means a system that is capable of continuously monitoring particulate matter (dust) loadings in the exhaust of a fabric filter (baghouse) in order to detect bag leaks and other upset conditions. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other effect to continuously monitor relative particulate matter loadings.

(b) *Lead acid battery manufacturing plant* means any plant that produces a storage battery using lead and lead compounds for the plates and sulfuric acid for the electrolyte.

(c) *Grid casting facility* means the facility which includes all lead melting pots that remelt scrap from onsite lead acid battery manufacturing processes, and machines used for casting the grid used in lead acid batteries.

(d) *Lead oxide manufacturing facility* means a facility that produces lead oxide from lead for use in lead acid battery manufacturing, including lead oxide production and product recovery operations. Local exhaust ventilation or building ventilation exhausts serving lead oxide production areas are not part of the lead oxide manufacturing facility.

(e) *Lead reclamation facility* means the facility that casts remelted lead scrap generated by onsite lead acid battery manufacturing processes into lead ingots for use in the battery manufacturing process, and which is not a furnace affected under subpart L of this part. Lead scrap remelting processes that are used directly (not cast into an ingot first) in a grid casting facility or a three-process operation facility are parts of those facilities and are not part of a lead reclamation facility.

(f) *Other lead-emitting operation* means any lead acid battery manufacturing plant operation from which lead emissions are collected and ducted to the atmosphere and which is not part of a grid casting, lead oxide manufacturing, lead reclamation, paste mixing, or three-process operation facility, or a furnace affected under subpart L of this part. These operations also include local exhaust ventilation or building ventilation exhausts serving lead oxide production areas.

(g) *Paste mixing facility* means the facility including lead oxide storage, conveying, weighing, metering, and charging operations; paste blending, handling, and cooling operations; and plate pasting, takeoff, cooling, and drying operations.

(h) *Three-process operation facility* means the facility including those processes involved with plate stacking, burning or strap casting, and assembly of elements into the battery case.

(i) *Total enclosure* means a containment building that is completely enclosed with a floor, walls, and a roof to prevent exposure to the elements and that has limited openings to allow access and egress for people and vehicles.

§ 60.372a Standards for lead.

(a) On and after the date on which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart may cause the emissions listed in paragraphs (a)(1) through (8) of this section to be discharged into the atmosphere. The emission limitations and opacity limitations listed in paragraphs (a)(1) through (8) of this section apply at all times, including periods of startup, shutdown and malfunction. As provided in § 60.11(f), this paragraph (a) supersedes the exemptions for periods of startup, shutdown, and malfunction in the general provisions in subpart A of this part. You must also comply with

the requirements in paragraphs (b) and (c) of this section.

(1) From any grid casting facility, any gases that contain lead in excess of 0.08 milligram of lead per dry standard cubic meter of exhaust (0.000035 gr/dscf).

(2) From any paste mixing facility, any gases that contain in excess of 0.10 milligram of lead per dry standard cubic meter of exhaust (0.0000437 gr/dscf) or emit no more than 0.9 gram of lead per hour (0.002 lbs/hr) total from all paste mixing sources. If a facility is complying with the 0.9 gram of lead per hour, you must sum the emission rate from all the paste mixing sources.

(3) From any three-process operation facility, any gases that contain in excess of 1.00 milligram of lead per dry standard cubic meter of exhaust (0.000437 gr/dscf).

(4) From any lead oxide manufacturing facility, any gases that contain in excess of 5.0 milligrams of lead per kilogram of lead feed (0.010 lb/ton).

(5) From any lead reclamation facility, any gases that contain in excess of 0.45 milligrams of lead per dry standard cubic meter of exhaust (0.000197 gr/dscf).

(6) From any other lead-emitting operation, any gases that contain in excess of 1.00 milligram of lead per dry standard cubic meter of exhaust (0.000437 gr/dscf).

(7) From any affected facility other than a lead reclamation facility, any gases with greater than 0 percent opacity (measured according to EPA Method 9 of appendix A to this part and rounded to the nearest whole percentage or measured according to EPA Method 22 of appendix A to this part).

(8) From any lead reclamation facility, any gases with greater than 5 percent opacity (measured according to EPA Method 9 of appendix A to this part and rounded to the nearest whole percentage).

(b) When two or more facilities at the same plant (except the lead oxide manufacturing facility) are ducted to a common control device, an equivalent standard for the total exhaust from the commonly controlled facilities must be determined using equation 1 to this paragraph (b) as follows:

Equation 1 to paragraph (b): $$S_e = \sum_{a=1}^{N} S_a \left(\frac{Q_{sd_a}}{Q_{sd_T}} \right)$$

Where:

S_e = is the equivalent standard for the total exhaust stream, mg/dscm (gr/dscf).

S_a = is the actual standard for each exhaust stream ducted to the control device, mg/dscm (gr/dscf).

N = is the total number of exhaust streams ducted to the control device.

Q_{sda} = is the dry standard volumetric flow rate of the effluent gas stream from each facility ducted to the control device, dscm/hr (dscf/hr).

Q_{sdT} = is the total dry standard volumetric flow rate of all effluent gas streams ducted to the control device, dscm/hr (dscf/hr).

(c) The owner or operator must prepare, and at all times operate according to, a fugitive dust mitigation plan that describes in detail the measures that will be put in place and implemented to control fugitive dust emissions in the lead oxide unloading and storage areas. You must prepare a fugitive dust mitigation plan according to the requirements in paragraphs (c)(1) and (2) of this section.

(1) The owner or operator must submit the fugitive dust mitigation plan to the Administrator or delegated authority for review and approval when initially developed and any time changes are made.

(2) The fugitive dust mitigation plan must at a minimum include the requirements specified in paragraphs (c)(2)(i) through (iv) of this section.

(i) *Lead oxide unloading and storage areas.* Surfaces used for vehicular material transfer activity must be cleaned at least once per month, by wet wash or a vacuum equipped with a filter rated by the manufacturer to achieve 99.97 percent capture efficiency for 0.3 micron particles in a manner that does not generate fugitive lead dust, except when sand or a similar material has been spread on the area to provide traction on ice or snow.

(ii) *Spills in lead oxide unloading and storage areas.* For any leak or spill that occurs during the unloading and storage process, complete washing or vacuuming the area to remove all spilled or leaked lead bearing material within 2 hours of the leak or spill occurrence.

(iii) *Materials storage.* Dust forming materials (that contain lead or lead compounds) must be stored in sealed, leak-proof containers or in a total enclosure.

(iv) *Records.* The fugitive dust mitigation plan must specify that records be maintained of all cleaning performed under paragraph (c)(2)(i) and (ii) of this section.

§ 60.373a Monitoring of emissions and operations.

(a) The owner or operator of any lead acid battery manufacturing facility subject to the provisions of this subpart and controlled by a scrubbing system(s) must install, calibrate, maintain, and operate a monitoring device(s) that measures and records the liquid flow rate and pressure drop across the scrubbing system(s) at least once every 15 minutes. The monitoring device must have an accuracy of ±5 percent over its operating range. The operating liquid flow rate must be maintained within ±10 percent of the average liquid flowrate during the most recent performance test. If a liquid flow rate or pressure drop is observed outside of the normal operational ranges as determined during the most recent performance test, you must record the incident and take immediate corrective actions. You must also record the corrective actions taken. You must submit an excess emissions and monitoring systems performance report and summary report required under § 60.375a(c).

(b) Emissions points controlled by a fabric filter without a secondary filter must meet the requirements of paragraphs (b)(1) and (2) of this section and either paragraph (b)(3) or (4) of this section. New lead acid battery plants with emission points controlled by a fabric filter without a secondary filter must meet the requirements of paragraph (b)(5) of this section. Fabric filters equipped with a high efficiency particulate air (HEPA) filter or other secondary filter must comply with the requirements specified in paragraphs (b)(1) and (6) of this section.

(1) You must perform quarterly inspections and maintenance to ensure proper performance of each fabric filter. This includes inspection of structural and filter integrity.

(2) If it is not possible for you to take the corrective actions specified in paragraph (b)(3)(iii) or (iv) of this section for a process or fabric filter control device, you must keep at least one replacement fabric filter onsite at all times for that process or fabric filter control device. The characteristics of the

replacement filters must be the same as the current fabric filters in use or have characteristics that would achieve equal or greater emission reductions.

(3) Install, maintain, and operate a pressure drop monitoring device to measure the differential pressure drop across the fabric filter during all times when the process is operating. The pressure drop must be recorded at least twice per day (at least 8 hours apart) if the results of the most recent performance test indicate that emissions from the facility are greater than 50 percent of the applicable lead emissions limit in § 60.372a(a)(1) through (6). The pressure drop must be recorded at least once per day if the results of the most recent performance test indicate that emissions are less than or equal to 50 percent of the applicable lead emissions limit in § 60.372a(a)(1) through (6). If a pressure drop is observed outside of the normal operational ranges as specified by the manufacturer, you must record the incident and take immediate corrective actions. You must submit an excess emissions and continuous monitoring system performance report and summary report required under § 60.375a(c). You must also record the corrective actions taken and verify pressure drop is within normal operational range. These corrective actions may include but not be limited to those provided in paragraphs (b)(3)(i) through (iv) of this section.

(i) Inspecting the filter and filter housing for air leaks and torn or broken filters.

(ii) Replacing defective filter media, or otherwise repairing the control device.

(iii) Sealing off a defective control device by routing air to other control devices.

(iv) Shutting down the process producing the lead emissions.

(4) Conduct a visible emissions observation using EPA Method 9 (6 minutes) or EPA Method 22 (5 minutes) of appendix A to this part while the process is in operation to verify that no visible emissions are occurring at the discharge point to the atmosphere from any emissions source subject to the requirements of § 60.372a(a) or (b). The visible emissions observation must be conducted at least twice daily (at least 6 hours apart) if the results of the most recent performance test indicate that emissions are greater than 50 percent of the applicable lead emissions limit in § 60.372a(a)(1) through (6). The visible emissions observation must be conducted at least once per day if the results of the most recent performance test indicate that emissions are less than or equal to 50 percent of the applicable lead emissions limit in § 60.372a(a)(1) through (6). If visible emissions are detected, you must record the incident and submit this information in an excess emissions and continuous monitoring system performance report and summary report required under § 60.375a(c) and take immediate corrective action. You must also record the corrective actions taken. These corrective actions may include, but are not limited to, those provided in paragraphs (b)(3)(i) through (iv) of this section.

(5) If the lead acid battery manufacturing plant was constructed after February 23, 2022, and have emissions points controlled by a fabric filter, you must install and operate a bag leak detection system that meets the specifications and requirements in paragraphs (b)(5)(i) through (ix) of this section. For any other affected facility listed in § 60.370a(b) that was constructed, modified, or reconstructed after February 23, 2022, that operates a bag leak detection system, the bag leak detection system must meet the specifications and requirements in paragraphs (b)(5)(i) through (ix) of this section. Emission points controlled by a fabric filter that is equipped with, and monitored with, a bag leak detection system meeting the specifications and requirements in paragraphs (b)(5)(i) through (ix) of this section may have the inspections required in paragraph (b)(1) of this section performed semiannually.

(i) The bag leak detection system must be certified by the manufacturer to be capable of detecting particulate matter as lead emissions at concentrations at or below the values in § 60.372a(a), as applicable to the process for which the fabric filter is used to control emissions. Where the fabric filter is used as a control device for more than one process, the lowest applicable value in § 60.372a(a) must be used.

(ii) The bag leak detection system sensor must provide output of relative particulate matter loadings.

(iii) The bag leak detection system must be equipped with an alarm system that will alarm when an increase in relative particulate loadings is detected over a preset level.

(iv) You must install and operate the bag leak detection system in a manner consistent with the guidance provided in ''Office of Air Quality Planning and Standards (OAQPS) Fabric Filter Bag Leak Detection Guidance'' (EPA–454/R–98–015) (incorporated by reference, see § 60.17) and the manufacturer's written specifications and recommendations for installation, operation, and adjustment of the system.

(v) The initial adjustment of the system must, at a minimum, consist of establishing the baseline output by adjusting the sensitivity (range) and the averaging period of the device and establishing the alarm set points and the alarm delay time.

(vi) Following initial adjustment, you must not adjust the sensitivity or range, averaging period, alarm set points, or alarm delay time, except as detailed in the approved standard operating procedures manual required under paragraph (b)(2)(ix) of this section. You cannot increase the sensitivity by more than 100 percent or decrease the sensitivity by more than 50 percent over a 365-day period unless such adjustment follows a complete fabric filter inspection that demonstrates that the fabric filter is in good operating condition.

(vii) For negative pressure, induced air baghouses, and positive pressure baghouses that are discharged to the atmosphere through a stack, you must install the bag leak detector downstream of the fabric filter.

(viii) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(ix) You must develop a standard operating procedures manual for the bag leak detection system that includes procedures for making system adjustments and a corrective action plan, which specifies the procedures to be followed in the case of a bag leak detection system alarm. The corrective action plan must include, at a minimum, the procedures that you will use to determine and record the time and cause of the alarm as well as the corrective actions taken to minimize emissions as specified in paragraphs (b)(5)(ix)(A) and (B) of this section.

(A) The procedures used to determine the cause of the alarm must be initiated within 30 minutes of the alarm.

(B) The cause of the alarm must be alleviated by taking the necessary corrective action(s) that may include, but not be limited to, those listed in paragraphs (b)(5)(ix)(B)(*1*) through (*6*) of this section.

(*1*) Inspecting the baghouse for air leaks, torn or broken filter elements, or any other malfunction that may cause an increase in emissions.

(*2*) Sealing off defective bags or filter media.

(*3*) Replacing defective bags or filter media, or otherwise repairing the control device.

(*4*) Sealing off defective baghouse compartment.

(*5*) Cleaning the bag leak detection system probe, or otherwise repairing the bag leak detection system.

(*6*) Shutting down the process producing the lead emissions.

(6) Emissions points controlled by a fabric filter equipped with a secondary filter, such as a HEPA filter, are exempt from the requirement in paragraph (b)(5) of this section to be equipped with a bag leak detection system. You must meet the requirements specified in paragraph (b)(6)(i) of this section and either paragraph (b)(6)(ii) or (iii) of this section.

(i) If it is not possible for you to take the corrective actions specified in paragraph (b)(3)(iii) or (iv) of this section for a process or fabric filter control device, you must keep at least one replacement primary fabric filter and one replacement secondary filter onsite at all times for that process or fabric filter control device. The characteristics of the replacement filters must be the same as the current fabric filters in use or have characteristics that would achieve equal or greater emission reductions.

(ii) You must perform the pressure drop monitoring requirements in paragraph (b)(3) of this section. You may perform these requirements once per week rather than once or twice daily.

(iii) You must perform the visible emissions observation requirements in paragraph (b)(4) of this section. You may perform these requirements once per week rather than once or twice daily.

§ 60.374a Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator must use as reference methods and procedures the test methods in appendix A to this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(b) After the initial performance test required in § 60.8(a), you must conduct subsequent performance tests to demonstrate compliance with the lead and opacity standards in § 60.372a. Performance testing must be conducted for each affected source subject to lead and opacity standards in § 60.372a, that has not had a performance test within the last 5 years, except as described in paragraph (c) of this section. Thereafter, subsequent performance tests for each affected source must be completed no less frequently than every 5 years from the date the emissions source was last tested.

(c) In lieu of conducting subsequent performance tests for each affected source, you may elect to group similar affected sources together and conduct subsequent performance tests on one representative affected source within each group of similar affected sources. The determination of whether affected sources are similar must meet the criteria in paragraph (c)(1) of this section. If you decide to test representative affected sources, you must prepare and submit a testing plan as described in paragraph (c)(3) of this section.

(1) If you elect to test representative affected sources, the affected sources that are grouped together must be of the same process type (*e.g.,* grid casting, paste mixing, three-process operations) and also have the same type of air pollution control device (*e.g.,* fabric filters). You cannot group affected sources from different process types or with different air pollution control device types together for the purposes of this section.

(2) The results of the performance test conducted for the affected source selected as representative of a group of similar affected sources will represent the results for each affected source within the group. In the performance test report, all affected sources in the group will need to be listed.

(3) If you plan to conduct subsequent performance tests on representative emission units, you must submit a test plan. This test plan must be submitted to the Administrator or delegated authority for review and approval no later than 90 days prior to the first scheduled performance test. The test plan must contain the information specified in paragraphs (c)(3)(i) through (iii) of this section.

(i) A list of all emission units. This list must clearly identify all emission units that have been grouped together as similar emission units. Within each group of emission units, you must identify the emission unit that will be the representative unit for that group and subject to performance testing.

(ii) A list of the process type and type of air pollution control device on each emission unit.

(iii) The date of last test for each emission unit and a schedule indicating when you will conduct performance tests for each emission unit within the representative groups.

(4) If you conduct subsequent performance tests on representative emission units, the unit with the oldest test must be tested first, and each subsequent performance test must be performed for a different unit until all units in the group have been tested. The order of testing for each subsequent test must proceed such that the unit in the group with the least recent performance test is the next unit to be tested.

(5) You may not conduct performance tests during periods of malfunction. You must record the process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. You must make available to the Administrator in the test report, records as may be necessary to determine the conditions of performance tests.

(d) The owner or operator must determine compliance with the lead and opacity standards in § 60.372a, as follows:

(1) EPA Method 12 or EPA Method 29 of appendix A to this part must be used to determine the lead concentration (CPb) and the volumetric flow rate (Qsda) of the effluent gas. The sampling time and sample volume for each run must be at least 60 minutes and 0.85 dscm (30 dscf).

(2) EPA Method 9 of appendix A to this part and the procedures in § 60.11 must be used to determine opacity during the performance test. For EPA Method 9, the opacity numbers must be rounded off to the nearest whole percentage. ASTM D7520–16 (incorporated by reference, see § 60.17) is an acceptable alternative to EPA Method 9 with the specified conditions in paragraphs (d)(2)(i) through (v) of this section.

(i) During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand).

(ii) You must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16.

(iii) You must follow the record keeping procedures outlined in § 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination.

(iv) You or the DCOT vendor must have a minimum of four (4) independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of any

one reading and the average error must not exceed 7.5 percent opacity.

(v) This approval does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software and operator in accordance with ASTM D7520–16 and this letter is on the facility, DCOT operator, and DCOT vendor.

(3) When different operations in a three-process operation facility are ducted to separate control devices, the lead emission concentration (C) from the facility must be determined using equation 1 to this paragraph (d)(3) as follows:

$$\text{Equation 1 to paragraph (d)(3):} \quad C = \frac{\sum_{a=1}^{n}(C_a Q_{sda})}{\sum_{a=1}^{n} Q_{sda}}$$

Where:

C = concentration of lead emissions for the entire facility, mg/dscm (gr/dscf).

C_a = concentration of lead emissions from facility ''a,'' mg/dscm (gr/dscf).

Q_{sda} = volumetric flow rate of effluent gas from facility ''a,'' dscm/hr (dscf/hr).

n = total number of control devices to which separate operations in the facility are ducted.

(4) The owner or operator of lead oxide manufacturing facility must determine compliance with the lead standard in § 60.372a(a)(5) as follows:

(i) The emission rate (E) from lead oxide manufacturing facility must be computed for each run using equation 2 to this paragraph (d)(4)(i) as follows:

$$\text{Equation 2 to paragraph (d)(4)(i):} \quad E = \frac{\sum_{i=1}^{M} C_{Pbi} Q_{sdi}}{PK}$$

Where:

E = emission rate of lead, mg/kg (lb/ton) of lead charged.

C_{Pbi} = concentration of lead from emission point ''i,'' mg/dscm (gr/dscf).

Q_{sdi} = volumetric flow rate of effluent gas from emission point ''i,'' dscm/hr (dscf/hr).

M = number of emission points in the affected facility.

P = lead feed rate to the facility, kg/hr (ton/hr).

K = conversion factor, 1.0 mg/mg (7000 gr/lb).

(ii) The average lead feed rate (P) must be determined for each run using equation 3 to this paragraph (d)(4)(ii) as follows:

$$\text{Equation 3 to paragraph (d)(4)(ii):} \quad P = N * \frac{W}{\Theta}$$

Where:

N = number of lead ingots charged.

W = average mass of the lead ingots, kg (ton).

Θ = duration of run, hr.

§ 60.375a Recordkeeping and reporting requirements.

(a) The owner or operator must keep the records specified in paragraphs (a)(1) through (7) of this section and maintain them in a format readily available for review onsite for a period of 5 years.

(1) Records of pressure drop values and liquid flow rate from the monitoring required in § 60.373a(a) for scrubbing systems.

(2) Records of fabric filter inspections and maintenance activities required in § 60.373a(b)(1).

(3) Records required under § 60.373a(b)(3) or (b)(6)(ii) of fabric filter pressure drop, pressure drop observed outside of normal operating ranges as specified by the manufacturer, and corrective actions taken.

(4) Records of the required opacity measurements in § 60.373a(b)(4) or (b)(6)(iii).

(5) If a bag leak detection system is used under § 60.373a(b)(5), for a period of 5 years, keep the records specified in paragraphs (a)(5)(i) through (iii) of this section.

(i) Electronic records of the bag leak detection system output.

(ii) An identification of the date and time of all bag leak detection system alarms, the time that procedures to determine the cause of the alarm were initiated, the cause of the alarm, an explanation of the corrective actions taken, and the date and time the cause of the alarm was corrected.

(iii) All records of inspections and maintenance activities required under § 60.373a(b)(5).

(6) Records of all cleaning required as part of the practices described in the fugitive dust mitigation plan required under § 60.372a(c) for the control of fugitive dust emissions.

(7) You must keep the records of failures to meet an applicable standard in this part as specified in paragraphs (a)(7)(i) through (iii) of this section.

(i) In the event that an affected unit fails to meet an applicable standard in this part, record the number of failures. For each failure record the date, time, the cause and duration of each failure.

(ii) For each failure to meet an applicable standard in this part, record and retain a list of the affected sources or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit and a description of the method used to estimate the emissions.

(iii) Record actions taken to minimize emissions and any corrective actions taken to return the affected unit to its normal or usual manner of operation.

(b) Beginning on April 24, 2023, within 60 days after the date of completing each performance test or demonstration of compliance required by this subpart, you must submit the results of the performance test following the procedures specified in paragraphs (b)(1) through (3) of this section.

(1) *Data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert) at the time of the test.* Submit the results of the performance test to the EPA via

the Compliance and Emissions Data Reporting Interface (CEDRI), which can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). The data must be submitted in a file format generated using the EPA's ERT. Alternatively, you may submit an electronic file consistent with the extensible markup language (XML) schema listed on the EPA's ERT website.

(2) *Data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test.* The results of the performance test must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3) *Data collected containing confidential business information (CBI).*

(i) The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information submitted under paragraph (b)(1) or (2) of this section, you must submit a complete file, including information claimed to be CBI, to the EPA.

(ii) The file must be generated using the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website.

(iii) Clearly mark the part or all of the information that you claim to be CBI. Information not marked as CBI may be authorized for public release without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

(iv) The preferred method for CBI submittal is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services. Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address *oaqpscbi@epa.gov,* and as described in this paragraph (b)(3), should include clear CBI markings and be flagged to the attention of the Group Leader, Measurement Policy Group. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link.

(v) If you cannot transmit the file electronically, you may send CBI information through the postal service to the following address: OAQPS Document Control Officer (C404–02), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention: Lead Acid Battery Sector Lead and Group Leader, Measurement Policy Group. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer wrapping.

(vi) All CBI claims must be asserted at the time of submission. Anything submitted using CEDRI cannot later be claimed CBI. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(vii) You must submit the same file submitted to the CBI office with the CBI omitted to the EPA via the EPA's CDX as described in paragraphs (a)(1) and (2) of this section.

(c) You must submit a report of excess emissions and monitoring systems performance report and summary report according to § 60.7(c) and (d) to the Administrator semiannually. Report the number of failures to meet an applicable standard in this part. For each instance, report the date, time, cause, and duration of each failure. For each failure, the report must include a list of the affected sources or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit, and a description of the method used to estimate the emissions. You must use the appropriate spreadsheet template on the CEDRI website (*https://www.epa.gov/electronic-reporting-air-emissions/cedri*) for this subpart. The date report templates become available will be listed on the CEDRI website. The report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted. Submit all reports to the EPA via CEDRI, which can be accessed through the EPA's CDX (*https://cdx.epa.gov/*). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. As stated in paragraph (b)(3) of this section, do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. If you claim CBI, submit the report following description in paragraph (b)(3) of this section. The same file with the CBI omitted must be submitted to CEDRI as described in this section.

(d) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with that reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (d)(1) through (7) of this section.

(1) You must have been or will be precluded from accessing CEDRI and submitting a required report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(2) The outage must have occurred within the period of time beginning five business days prior to the date that the submission is due.

(3) The outage may be planned or unplanned.

(4) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(5) You must provide to the Administrator a written description identifying:

(i) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to EPA system outage;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(6) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(7) In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved.

(e) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of *force majeure* for failure to timely comply with that reporting requirement. To assert a claim of *force majeure,* you must meet the requirements outlined in paragraphs (e)(1) through (5) of this section.

(1) You may submit a claim if a *force majeure* event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this section, a *force majeure* event is defined as an event that will be or has been caused by

circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (*e.g.,* hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (*e.g.,* large scale power outage).

(2) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(3) You must provide to the Administrator:

(i) A written description of the *force majeure* event;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to the *force majeure* event;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(4) The decision to accept the claim of *force majeure* and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(5) In any circumstance, the reporting must occur as soon as possible after the *force majeure* event occurs.

(f) Any records required to be maintained by this subpart that are submitted electronically via the EPA's CEDRI may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated air agency or the EPA as part of an on-site compliance evaluation.

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 6. The authority citation for part 63 continues to read as follows:

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

Subpart A—General Provisions

■ 7. Section 63.14 is amended by:
■ a. Revising paragraph (h)(109);
■ b. Removing and reserving paragraph (h)(110);
■ c. Removing and reserving paragraph (n)(3); and
■ d. Revising paragraph (n)(4).

The revisions read as follows:

§ 63.14 Incorporations by reference.

* * * * *

(h) * * *

(109) ASTM D7520–16, Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere, approved April 1, 2016; IBR approved for §§ 63.1625(b); table 3 to subpart LLLLL; 63.7823(c) through (e), 63.7833(g); 63.11423(c).

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(n) * * *

(4) EPA–454/R–98–015, Office of Air Quality Planning and Standards (OAQPS), Fabric Filter Bag Leak Detection Guidance, September 1997, *https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=2000D5T6.PDF;* IBR approved for §§ 63.548(e); 63.864(e); 63.7525(j); 63.8450(e); 63.8600(e); 63.9632(a); 63.9804(f); 63.11224(f); 63.11423(e).

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Subpart PPPPP—National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery Manufacturing Area Sources

■ 8. Section 63.11421 is revised and republished to read as follows:

§ 63.11421 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate a lead acid battery manufacturing plant or a lead acid battery component manufacturing plant that is an area source of hazardous air pollutants (HAP) emissions.

(b) This subpart applies to each new or existing affected source. The affected source is each plant that is either a lead acid battery manufacturing plant or a lead acid battery component manufacturing plant. For each lead acid battery manufacturing plant, the affected source includes all grid casting facilities, paste mixing facilities, three-process operation facilities, lead oxide manufacturing facilities, lead reclamation facilities, and any other lead-emitting operation that is associated with the lead acid battery manufacturing plant. For each lead acid battery component manufacturing plant, the affected source includes all grid casting facilities, paste mixing facilities, three-process operation facilities, and lead oxide manufacturing facilities.

(1) A lead acid battery manufacturing plant affected source is existing if you commenced construction or reconstruction of the affected source on or before April 4, 2007.

(2) A lead acid battery manufacturing plant affected source is new if you commenced construction or reconstruction of the affected source after April 4, 2007.

(3) A lead acid battery component manufacturing plant affected source is existing if you commenced construction or reconstruction of the affected source on or before February 23, 2022.

(4) A lead acid battery component manufacturing plant affected source is new if you commenced construction or reconstruction of the affected source after February 23, 2022.

(c) This subpart does not apply to research and development facilities, as defined in section 112(c)(7) of the Clean Air Act (CAA).

(d) You are exempt from the obligation to obtain a permit under 40 CFR part 70 or 71, provided you are not otherwise required by law to obtain a permit under 40 CFR 70.3(a) or 71.3(a). Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart.

(e) For lead acid battery component manufacturing plants, you are exempt from the requirements of §§ 63.11422 through 63.11427 if the conditions of paragraphs (e)(1) through (3) of this section are met.

(1) The grid casting facility, paste mixing facility, three-process operation facility, or lead oxide manufacturing facility is subject to another subpart under this part.

(2) You control lead emissions from the grid casting facility, paste mixing facility, three-process operation facility, or lead oxide manufacturing facility in compliance with the standards specified in the applicable subpart.

(3) The other applicable subpart under this part does not exempt the grid casting facility, paste mixing facility, three-process operation facility, or lead oxide manufacturing facility from the emission limitations or work practice requirements of that subpart. This means you comply with all applicable emissions limitations and work practice standards under the other subpart (*e.g.,* you install and operate the required air pollution controls or have implemented the required work practice to reduce lead emissions to levels specified by the applicable subpart).

■ 9. Section 63.11422 is revised to read as follows:

§ 63.11422 What are my compliance dates?

(a) If you own or operate a lead acid battery manufacturing plant existing affected source, you must achieve compliance with the applicable provisions in this subpart by no later than July 16, 2008, except as specified

in paragraphs (e) through (h) of this section.

(b) If you start up a new lead acid battery manufacturing plant affected source on or before July 16, 2007, you must achieve compliance with the applicable provisions in this subpart not later than July 16, 2007, except as specified in paragraphs (e) through (h) of this section.

(c) If you start up a new lead acid battery manufacturing plant affected source after July 16, 2007, but on or before February 23, 2022, you must achieve compliance with the applicable provisions in this subpart upon startup of your affected source, except as specified in paragraphs (e) through (h) this section.

(d) If you start up a new lead acid battery manufacturing plant or lead acid battery component manufacturing plant affected source after February 23, 2022, you must achieve compliance with the applicable provisions in this subpart not later than February 23, 2023, or upon initial startup of your affected source, whichever is later.

(e) Until February 23, 2026, lead acid battery manufacturing plant affected sources that commenced construction or reconstruction on or before February 23, 2023, must meet all the standards for lead and opacity in 40 CFR 60.372 and the requirements of § 63.11423(a)(1).

(f) Lead acid battery manufacturing plant affected sources that commenced construction or reconstruction on or before February 23, 2023, must comply with the requirements in § 63.11423(a)(2) by February 23, 2026. All affected sources that commence construction or reconstruction after February 23, 2023, must comply with the requirements in § 63.11423(a)(2) by initial startup or February 23, 2023, whichever is later.

(g) Lead acid battery manufacturing plant affected sources that commenced construction or reconstruction on or before February 23, 2023, must comply with the requirements of § 63.11423(a)(3) by August 22, 2023. All affected sources that commence construction or reconstruction after February 23, 2023, must comply with the requirements of § 63.11423(a)(3) by initial startup or February 23, 2023, whichever is later.

(h) After February 23, 2023, lead acid battery manufacturing plant affected sources must comply with the startup, shutdown, and malfunction requirements specified in table 3 to this subpart except that you must comply with the recordkeeping requirements that table 3 refers to in § 63.11424(a)(5) by May 24, 2023.

(i) If you own or operate a lead acid battery component manufacturing plant existing affected source, you must achieve compliance with the applicable provisions in this subpart by no later than February 23, 2026.

■ 10. Section 63.11423 is revised and republished read as follows:

§ 63.11423 What are the standards and compliance requirements for new and existing sources?

(a) You must meet all the standards for lead and opacity as specified in paragraphs (a)(1) through (3) of this section.

(1) Until the compliance date specified in § 63.11422(e), lead acid battery manufacturing plant affected sources must comply with paragraph (a)(1)(i) or (ii) of this section.

(i) You meet all the standards for lead and opacity in 40 CFR 60.372 and the requirements of paragraphs (a)(4) and (5), (b), and (c)(1) through (3) of this section.

(ii) You comply with paragraph (a)(2) of this section.

(2) Beginning no later than the applicable compliance date specified in § 63.11422(f) or (i), you must meet each emission limit in table 1 to this subpart and each opacity standard in table 2 to this subpart that applies to you; you must meet the requirements of paragraphs (a)(4) and (5), (c), and (d) of this section; and you must also comply with the recordkeeping and electronic reporting requirements in § 63.11424(a)(6) and (7) and (b).

(3) Beginning no later than the applicable compliance date specified in § 63.11422(g) or (i), you must comply with the monitoring requirements in paragraph (e) of this section, the recordkeeping and electronic reporting requirements in § 63.11424(a)(1) through (5) and (c) through (f), and the definition of lead reclamation in § 63.11426.

(4) At all times, you must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. The general duty to minimize emissions does not require you to make any further efforts to reduce emissions if levels required by the applicable standard in this part have been achieved. Determination of whether a source is operating in compliance with operation and maintenance requirements will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

(5) When two or more facilities at the same plant (except the lead oxide manufacturing facility) are ducted to a common control device, an equivalent standard for the total exhaust from the commonly controlled facilities must be determined using equation 1 to this paragraph (a)(5) as follows:

Equation 1 to paragraph (a)(5): $$S_e = \sum_{a=1}^{N} S_a \left(\frac{Q_{sd_a}}{Q_{sd_T}} \right)$$

Where:

S_e = is the equivalent standard for the total exhaust stream, mg/dscm (gr/dscf).

S_a = is the actual standard for each exhaust stream ducted to the control device, mg/dscm (gr/dscf).

N = is the total number of exhaust streams ducted to the control device.

Q_{sda} = is the dry standard volumetric flow rate of the effluent gas stream from each facility ducted to the control device, dscm/hr (dscf/hr).

Q_{sdT} = is the total dry standard volumetric flow rate of all effluent gas streams ducted to the control device, dscm/hr (dscf/hr).

(b) As specified in paragraph (a) of this section, you must meet the monitoring requirements in paragraphs (b)(1) and (2) of this section.

(1) For any emissions point controlled by a scrubbing system, you must meet the requirements in 40 CFR 60.373.

(2) For any emissions point controlled by a fabric filter, you must meet the requirements of paragraph (b)(2)(i) of this section and either paragraph (b)(2)(ii) or (iii) of this section. Fabric filters equipped with a high efficiency particulate air (HEPA) filter or other secondary filter are allowed to monitor less frequently, as specified in paragraph (b)(2)(iv) of this section.

(i) You must perform semiannual inspections and maintenance to ensure proper performance of each fabric filter. This includes inspection of structural and filter integrity. You must record the results of these inspections.

(ii) You must install, maintain, and operate a pressure drop monitoring device to measure the differential pressure drop across the fabric filter during all times when the process is operating. The pressure drop must be recorded at least once per day. If a pressure drop is observed outside of the normal operational ranges as specified by the manufacturer, you must record the incident and take immediate corrective actions. You must also record the corrective actions taken. You must submit a monitoring system performance report in accordance with § 63.10(e)(3).

(iii) You must conduct a visible emissions observation at least once per day while the process is in operation to verify that no visible emissions are occurring at the discharge point to the atmosphere from any emissions source subject to the requirements of paragraph (a) of this section. If visible emissions are detected, you must record the incident and conduct an opacity measurement in accordance with 40 CFR 60.374(b)(3). You must record the results of each opacity measurement. If the measurement exceeds the applicable opacity standard in 40 CFR 60.372(a)(7) or (8), you must submit this information in an excess emissions report required under § 63.10(e)(3).

(iv) Fabric filters equipped with a HEPA filter or other secondary filter are allowed to monitor less frequently, as specified in paragraph (b)(2)(iv)(A) or (B) of this section.

(A) If you are using a pressure drop monitoring device to measure the differential pressure drop across the fabric filter in accordance with paragraph (b)(2)(ii) of this section, you must record the pressure drop at least once per week. If a pressure drop is observed outside of the normal operational ranges as specified by the manufacturer, you must record the incident and take immediate corrective actions. You must also record the corrective actions taken. You must submit a monitoring system performance report in accordance with § 63.10(e)(3).

(B) If you are conducting visible emissions observations in accordance with paragraph (b)(2)(iii) of this section, you must conduct such observations at least once per week and record the results in accordance with paragraph (b)(2)(iii) of this section. If visible emissions are detected, you must record the incident and conduct an opacity measurement in accordance with 40 CFR 60.374(b)(3). You must record the results of each opacity measurement. If the measurement exceeds the applicable opacity standard in 40 CFR 60.372(a)(7) or (8), you must submit this information in an excess emissions report required under § 63.10(e)(3).

(c) As specified in paragraph (a) of this section, you must meet the performance testing requirements in paragraphs (c)(1) through (6) of this section.

(1) Existing sources are not required to conduct an initial performance test if a prior performance test was conducted using the same methods specified in this section and either no process changes have been made since the test, or you can demonstrate that the results of the performance test, with or without adjustments, reliably demonstrate compliance with this subpart despite process changes.

(2) Sources without a prior performance test, as described in paragraph (c)(1) of this section, must conduct an initial performance test using the methods specified in paragraphs (c)(2)(i) through (iv) of this section.

(i) EPA Method 12 or EPA Method 29 of appendix A to 40 CFR part 60 must be used to determine the lead concentration (CPb) and the volumetric flow rate (Qsda) of the effluent gas. The sampling time and the sample volume for each run must be at least 60 minutes and 0.85 dscm (30 dscf).

(ii) EPA Method 9 of appendix A to 40 CFR part 60 and the procedures in § 63.6(h) must be used to determine opacity. The opacity numbers must be rounded off to the nearest whole percentage. Or, as an alternative to Method 9, you may use ASTM D7520–16 (incorporated by reference, see § 63.14) with the caveats in paragraphs (c)(4)(ii)(A) through (E) of this section.

(A) During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand).

(B) You must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16.

(C) You must follow the recordkeeping procedures outlined in § 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination.

(D) You or the DCOT vendor must have a minimum of four (4) independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of any one reading and the average error must not exceed 7.5 percent opacity.

(E) This approval does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software, and operator in accordance with ASTM D7520–16 and this letter is on the facility, DCOT operator, and DCOT vendor.

(iii) When different operations in a three-process operation facility are ducted to separate control devices, the lead emission concentration (C) from the facility must be determined using equation 2 to this paragraph (c)(2)(iii) as follows:

$$\text{Equation 2 to paragraph (c)(2)(iii):} \quad C = \frac{\sum_{a=1}^{n}(C_a Q_{sda})}{\sum_{a=1}^{n} Q_{sda}}$$

Where:

C = concentration of lead emissions for the entire facility, mg/dscm (gr/dscf).

Ca = concentration of lead emissions from facility ''a,'' mg/dscm (gr/dscf).

Q_{sda} = volumetric flow rate of effluent gas from facility ''a,'' dscm/hr (dscf/hr).

n = total number of control devices to which separate operations in the facility are ducted.

(iv) For a lead oxide manufacturing facility, the lead emission rate must be determined as specified in paragraphs (c)(2)(iv)(A) and (B) of this section.

(A) The emission rate (E) from lead oxide manufacturing facility must be

computed for each run using equation 3 to this paragraph (c)(2)(iv)(A) as follows:

$$\text{Equation 3 to paragraph (c)(2)(iv)(A):} \quad E = \frac{\sum_{i=1}^{M} C_{Pbi} Q_{sdi}}{PK}$$

Where:

E = emission rate of lead, mg/kg (lb/ton) of lead charged.

C_{Pbi} = concentration of lead from emission point ''i,'' mg/dscm (gr/dscf).

Q_{sdi} = volumetric flow rate of effluent gas from emission point ''i,'' dscm/hr (dscf/hr).

M = number of emission points in the affected facility.

P = lead feed rate to the facility, kg/hr (ton/hr).

K = conversion factor, 1.0 mg/mg (7000 gr/lb).

(B) The average lead feed rate (P) must be determined for each run using equation 4 to this paragraph (c)(2)(iv)(B) as follows:

$$\text{Equation 4 to paragraph (c)(2)(iv)(B):} \quad P = N * \frac{W}{\Theta}$$

Where:

N = number of lead ingots charged.

W = average mass of the lead ingots, kg (ton).

Θ = duration of run, hr.

(3) In conducting the initial performance tests required in § 63.7, you must use as reference methods and procedures the test methods in appendix A to 40 CFR part 60 or other methods and procedures as specified in this section, except as provided in § 63.7(f).

(4) After the initial performance test described in paragraphs (c)(1) through (3) of this section, you must conduct subsequent performance tests every 5 years to demonstrate compliance with each applicable emissions limitations and opacity standards. Within three years of February 23, 2023, performance testing must be conducted for each affected source subject to an applicable emissions limitation in tables 1 and 2 to this subpart that has not had a performance test within the last 5 years, except as described in paragraph (c)(6) of this section. Thereafter, subsequent performance tests for each affected source must be completed no less frequently than every 5 years from the date the emissions source was last tested.

(5) In lieu of conducting subsequent performance tests for each affected source, you may elect to group similar affected sources together and conduct subsequent performance tests on one representative affected source within each group of similar affected sources. The determination of whether affected sources are similar must meet the criteria in paragraph (c)(5)(i) of this section. If you decide to test representative affected sources, you must prepare and submit a testing plan as described in paragraph (c)(5)(iii) of this section.

(i) If you elect to test representative affected sources, the affected sources that are grouped together must be of the same process type (*e.g.,* grid casting, paste mixing, three-process operations) and also have the same type of air pollution control device (*e.g.,* fabric filters). You cannot group affected sources from different process types or with different air pollution control device types together for the purposes of this section.

(ii) The results of the performance test conducted for the affected source selected as representative of a group of similar affected sources will represent the results for each affected source within the group. In the performance test report, all affected sources in the group will need to be listed.

(iii) If you plan to conduct subsequent performance tests on representative emission units, you must submit a test plan. This test plan must be submitted to the Administrator or delegated authority for review and approval no later than 90 days prior to the first scheduled performance test. The test plan must contain the information specified in paragraphs (c)(5)(iii)(A) through (C) of this section.

(A) A list of all emission units. This list must clearly identify all emission units that have been grouped together as similar emission units. Within each group of emission units, you must identify the emission unit that will be the representative unit for that group and subject to performance testing.

(B) A list of the process type and type of air pollution control device on each emission unit.

(C) A date of last test for each emission unit and a schedule indicating when you will conduct performance tests for each emission unit within the representative groups.

(iv) If you conduct subsequent performance tests on representative emission units, the unit with the oldest test must be tested first, and each subsequent performance test must be performed for a different unit until all units in the group have been tested. The order of testing for each subsequent test must proceed such that the unit in the group with the least recent performance test is the next unit to be tested.

(6) You may not conduct performance tests during periods of malfunction. You must record the process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. You must make available to the Administrator in the test report, records as may be necessary to determine the conditions of performance tests.

(d) Beginning no later than the applicable compliance date specified in § 63.11422(f) or (i), you must prepare and, at all times, operate according to a fugitive dust mitigation plan that describes in detail the measures that will be put in place and implemented to control fugitive dust emissions in the lead oxide unloading and storage areas. You must prepare a fugitive dust mitigation plan according to the requirements in paragraphs (d)(1) and (2) of this section.

(1) You must submit the fugitive dust mitigation plan to the Administrator or delegated authority for review and approval when initially developed and any time changes are made.

(2) The fugitive dust mitigation plan must at a minimum include the requirements specified in paragraphs (d)(2)(i) through (iv) of this section.

(i) *Cleaning lead oxide unloading and storage areas.* Surfaces traversed during vehicular material transfer activity in

lead oxide unloading and storage areas must be cleaned at least once per month, by wet wash or a vacuum equipped with a filter rated by the manufacturer to achieve 99.97 percent capture efficiency for 0.3 micron particles in a manner that does not generate fugitive lead dust, except when sand or a similar material has been spread on the area to provide traction on ice or snow.

(ii) *Spills in lead oxide unloading and storage areas.* For any leak or spill that occurs during the unloading and storage process, complete washing or vacuuming the area to remove all spilled or leaked lead bearing material within 2 hours of the leak or spill occurrence.

(iii) *Materials storage.* Dust forming materials (that contain lead or lead compounds) must be stored in sealed, leak-proof containers or in a total enclosure.

(iv) *Records.* The fugitive dust mitigation plan must specify that records be maintained of all cleaning performed under paragraph (d)(2)(i) and (ii) of this section.

(e) Beginning no later than the applicable compliance date specified in § 63.11422(g) or (i), you must meet the monitoring requirements in paragraphs (e)(1) through (5) of this section.

(1) For any emissions point controlled by a scrubbing system, you must install, calibrate, maintain, and operate a monitoring device(s) that measures and records the liquid flow rate and pressure drop across the scrubbing system(s) at least once every 15 minutes. The monitoring device must have an accuracy of ±5 percent over its operating range. The operating liquid flow rate must be maintained within ±10 percent of the average liquid flow rate during the most recent performance test. If a liquid flow rate or pressure drop is observed outside of the normal operational ranges as you must record the incident and take immediate corrective actions. You must also record the corrective actions taken. You must submit an excess emissions and continuous monitoring system performance report and summary report required under § 63.11424(c).

(2) Emissions points controlled by a fabric filter without a secondary filter must meet the requirements of paragraphs (e)(2)(i) and (ii) of this section and either paragraph (e)(2)(iii) or (iv) of this section.

(i) You must perform quarterly inspections and maintenance to ensure proper performance of each fabric filter. This includes inspection of structural and filter integrity.

(ii) If it is not possible for you to take the corrective actions specified in paragraph (e)(2)(iii)(C) or (D) of this section for a process or fabric filter control device, you must keep at least one replacement fabric filter onsite at all times for that process or fabric filter control device. The characteristics of the replacement filters must be the same as the current fabric filters in use or have characteristics that would achieve equal or greater emission reductions.

(iii) Install, maintain, and operate a pressure drop monitoring device to measure the differential pressure drop across the fabric filter during all times when the process is operating. The pressure drop must be recorded at least twice per day (at least 8 hours apart) if the results of the most recent performance test indicate that emissions are greater than 50 percent of the lead emissions limit in table 1 to this subpart. The pressure drop must be recorded at least once per day if the results of the most recent performance test indicate that emissions are less than or equal to 50 percent of the lead emissions limit in table 1. If a pressure drop is observed outside of the normal operational ranges, you must record the incident and take immediate corrective actions. You must submit an excess emissions and continuous monitoring system performance report and summary report required under § 63.11424(c). You must also record the corrective actions taken and verify pressure drop is within normal operational range. These corrective actions may include but are not limited to those provided in paragraphs (e)(2)(iii)(A) through (D) of this section.

(A) Inspecting the filter and filter housing for air leaks and torn or broken filters.

(B) Replacing defective filter media, or otherwise repairing the control device.

(C) Sealing off a defective control device by routing air to other control devices.

(D) Shutting down the process producing the lead emissions.

(iv) Conduct a visible emissions observation using EPA Method 9 or EPA Method 22 of appendix A to 40 CFR part 60 while the process is in operation to verify that no visible emissions are occurring at the discharge point to the atmosphere from any emissions source subject to the requirements of paragraph (a) of this section. The visible emissions observation must be conducted at least twice daily (at least 6 hours apart) if the results of the most recent performance test indicate that emissions are greater than 50 percent of the lead emissions limit in table 1 to this subpart. The visible emissions observation must be conducted at least once per day if the results of the most recent performance test indicate that emissions are less than or equal to 50 percent of the lead emissions limit in table 1. If visible emissions are detected, you must record the incident and submit this information in an excess emissions and continuous monitoring system performance report and summary report required under § 63.11424(c) and take immediate corrective action. You must also record the corrective actions taken. These corrective actions may include but are not limited to those provided in paragraphs (e)(2)(iii)(A) through (D) of this section.

(3) Emissions points controlled by a fabric filter equipped with a secondary filter, such as a HEPA filter, must meet the requirements of paragraphs (e)(3)(i) and (ii) of this section and either paragraph (e)(3)(iii) or (iv) of this section.

(i) You must perform the inspections required in paragraph (e)(2)(i) of this section quarterly.

(ii) If it is not possible for you to take the corrective actions specified in paragraph (e)(2)(iii)(C) or (D) of this section for a process or fabric filter control device, you must keep at least one replacement primary fabric filter and one replacement secondary filter onsite at all times for that process or fabric filter control device. The characteristics of the replacement filters must be the same as the current fabric filters in use or have characteristics that would achieve equal or greater emission reductions.

(iii) You must perform the pressure drop monitoring requirements in paragraph (e)(2)(iii) of this section. You may perform these requirements once weekly rather than once or twice daily.

(iv) You must perform the visible emissions observation requirements in paragraph (e)(2)(iv) of this section. You may perform these requirements weekly rather than once or twice daily.

(4) Beginning no later than the applicable compliance date specified in § 63.11422(g) or (i), if you operate a bag leak detection system, that system must meet the specifications and requirements in paragraphs (e)(4)(i) through (ix) of this section. Emission points controlled by a fabric filter equipped that are monitored with a bag leak detection system meeting the specifications and requirements in paragraphs (e)(4)(i) through (ix) of this section may have the inspections required in paragraph (e)(2)(i) of this section performed semiannually.

(i) The bag leak detection system must be certified by the manufacturer to be

capable of detecting particulate matter as lead emissions at concentrations at or below the values in table 1 to this subpart, as applicable to the process for which the fabric filter is used to control emissions. Where the fabric filter is used as a control device for more than one process, the lowest applicable value in table 1 must be used.

(ii) The bag leak detection system sensor must provide output of relative particulate matter loadings.

(iii) The bag leak detection system must be equipped with an alarm system that will alarm when an increase in relative particulate loadings is detected over a preset level.

(iv) You must install and operate the bag leak detection system in a manner consistent with the guidance provided in ''Office of Air Quality Planning and Standards (OAQPS) Fabric Filter Bag Leak Detection Guidance'' (EPA–454/R–98–015) (incorporated by reference, see § 63.14) and the manufacturer's written specifications and recommendations for installation, operation, and adjustment of the system.

(v) The initial adjustment of the system must, at a minimum, consist of establishing the baseline output by adjusting the sensitivity (range) and the averaging period of the device and establishing the alarm set points and the alarm delay time.

(vi) Following initial adjustment, you must not adjust the sensitivity or range, averaging period, alarm set points, or alarm delay time, except as detailed in the approved standard operating procedures manual required under paragraph (e)(4)(ix) of this section. You cannot increase the sensitivity by more than 100 percent or decrease the sensitivity by more than 50 percent over a 365-day period unless such adjustment follows a complete fabric filter inspection that demonstrates that the fabric filter is in good operating condition.

(vii) For negative pressure, induced air baghouses, and positive pressure baghouses that are discharged to the atmosphere through a stack, you must install the bag leak detector downstream of the fabric filter.

(viii) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(ix) You must develop a standard operating procedures manual for the bag leak detection system that includes procedures for making system adjustments and a corrective action plan, which specifies the procedures to be followed in the case of a bag leak detection system alarm. The corrective action plan must include, at a minimum, the procedures that you will use to determine and record the time and cause of the alarm as well as the corrective actions taken to minimize emissions as specified in paragraphs (e)(4)(ix)(A) and (B) of this section.

(A) The procedures used to determine the cause of the alarm must be initiated within 30 minutes of the alarm.

(B) The cause of the alarm must be alleviated by taking the necessary corrective action(s) that may include, but not be limited to, those listed in paragraphs (e)(4)(ix)(B)(*1*) through (*6*) of this section.

(*1*) Inspecting the baghouse for air leaks, torn or broken filter elements, or any other malfunction that may cause an increase in emissions.

(*2*) Sealing off defective bags or filter media.

(*3*) Replacing defective bags or filter media, or otherwise repairing the control device.

(*4*) Sealing off defective baghouse compartment.

(*5*) Cleaning the bag leak detection system probe, or otherwise repairing the bag leak detection system.

(*6*) Shutting down the process producing the lead emissions.

(5) For continuous monitoring subject to the requirements of § 63.8(d)(2) to develop and implement a continuous monitoring system quality control program, you must keep these written procedures on record for the life of the affected source or until the affected source is no longer subject to the provisions of this part, to be made available for inspection, upon request, by the Administrator. If the performance evaluation plan is revised, you must keep previous (*i.e.,* superseded) versions of the performance evaluation plan on record to be made available for inspection, upon request, by the Administrator, for a period of 5 years after each revision to the plan. The program of corrective action should be included in the plan required under § 63.8(d)(2).

■ 11. Section 63.11424 is added to read as follows:

§ 63.11424 What are the recordkeeping and reporting requirements for this subpart?

(a) You must keep the records specified in this section according to the applicable compliance date in § 63.11422(f) and (g) or (i) and maintain them in a format readily available for review onsite for a period of 5 years.

(1) Records of pressure drop values and the liquid flow rate from the monitoring required in § 63.11423(e)(1) for scrubbing systems.

(2) Records of fabric filter inspections and maintenance activities required in § 63.11423(e)(2)(i) or (e)(3)(i).

(3) Records required under § 63.11423(e)(2)(iii) or (e)(3)(iii) of fabric filter pressure drop, pressure drop observed outside of normal operating ranges as specified by the manufacturer, and corrective actions taken.

(4) Records of the required visible emissions observations in § 63.11423(e)(2)(iv) or (e)(3)(iv).

(5) You must keep the records of failures to meet an applicable standard in this part as specified in paragraphs (a)(5)(i) through (iii) of this section.

(i) In the event that an affected unit fails to meet an applicable standard in this part, record the number of failures. For each failure record the date, time, cause, and duration of each failure.

(ii) For each failure to meet an applicable standard in this part, record and retain a list of the affected sources or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit and a description of the method used to estimate the emissions.

(iii) Record actions taken to minimize emissions and any corrective actions taken to return the affected unit to its normal or usual manner of operation.

(6) If a bag leak detection system is used under § 63.11423(e)(4), for a period of 5 years keep the records, specified in paragraphs (a)(6)(i) through (iii) of this section.

(i) Electronic records of the bag leak detection system output.

(ii) An identification of the date and time of all bag leak detection system alarms, the time that procedures to determine the cause of the alarm were initiated, the cause of the alarm, an explanation of the corrective actions taken, and the date and time the cause of the alarm was corrected.

(iii) All records of inspections and maintenance activities required under § 63.11423(e)(4).

(7) Records of all cleaning required as part of the practices described in the fugitive dust mitigation plan required under § 63.11423(d)(2)(iii) for the control of fugitive dust emissions.

(b) Beginning on April 24, 2023, within 60 days after the date of completing each performance test or demonstration of compliance required by this subpart, you must submit the results of the performance test following the procedures specified in § 63.9(k) and paragraphs (b)(1) through (3) of this section.

(1) *Data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (https://*

www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert) at the time of the test. Submit the results of the performance test to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI), which can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). The data must be submitted in a file format generated using the EPA's ERT. Alternatively, you may submit an electronic file consistent with the extensible markup language (XML) schema listed on the EPA's ERT website.

(2) *Data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test.* The results of the performance test must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI. If a performance test consists only of opacity measurements, reporting using the ERT and CEDRI is not required.

(3) *Data collected containing confidential business information (CBI).* All CBI claims must be asserted at the time of submission. Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information submitted under paragraph (b)(1) or (2) of this section, you must submit a complete file, including information claimed to be CBI, to the EPA. The file must be generated using the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. The preferred method to submit CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.,* Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address *oaqpscbi@epa.gov,* and as described in this paragraph (b)(3), should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the postal service, submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Lead Acid Battery Manufacturing Sector Lead, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described in paragraphs (b)(1) and (2) of this section. Under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(c) Beginning on February 23, 2024, or once the report template for this subpart has been available on the CEDRI website for one year, whichever date is later, you must submit a report of excess emissions and monitoring systems performance report and summary report according to §§ 63.9(k) and 63.10(e)(3) to the Administrator semiannually. Report the number of failures to meet an applicable standard in this part. For each instance, report the date, time, cause, and duration of each failure. For each failure, the report must include a list of the affected sources or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit, and a description of the method used to estimate the emissions. You must use the appropriate electronic report template on the CEDRI website (*https://www.epa.gov/electronic-reporting-air-emissions/cedri*) or an alternate electronic file consistent with the XML schema listed on the CEDRI website for this subpart. The date report templates become available will be listed on the CEDRI website. Unless the Administrator or delegated state agency or other authority has approved a different schedule for submission of reports, the report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted. Submit all reports to the EPA via CEDRI, which can be accessed through the EPA's CDX (*https://cdx.epa.gov/*). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. The report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim, follow the requirements specified in paragraph (b)(3) of this section. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (c).

(d) Any records required to be maintained by this subpart that are submitted electronically via the EPA's CEDRI may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated air agency or the EPA as part of an on-site compliance evaluation.

■ 12. Section 63.11425 is amended by revising paragraph (a) to read as follows:

§ 63.11425 What General Provisions apply to this subpart?

(a) The provisions in subpart A of this part, that are applicable to this subpart are specified in table 3 to this subpart.

* * * * *

■ 13. Section 63.11426 is revised to read as follows:

§ 63.11426 What definitions apply to this subpart?

The terms used in this subpart are defined in the CAA, in § 63.2 for terms used in the applicable provisions of subpart A of this part, and in this section as follows:

Bag leak detection system means a system that is capable of continuously monitoring particulate matter (dust) loadings in the exhaust of a fabric filter (baghouse) in order to detect bag leaks and other upset conditions. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other effect to continuously monitor relative particulate matter loadings.

Grid casting facility means a facility which includes all lead melting pots, pots that remelt scrap from onsite lead acid battery manufacturing processes, and machines used for casting the grid used in lead acid batteries.

Lead acid battery component manufacturing plant means any plant that does not produce a final lead acid battery product but at which one or more of the following processes is conducted to develop a product for use in lead acid batteries: grid casting, paste mixing, three-process operations, and lead oxide manufacturing.

Lead acid battery manufacturing plant means any plant that produces a storage battery using lead and lead compounds for the plates and sulfuric acid for the electrolyte.

Lead oxide manufacturing facility means a facility that produces lead oxide from lead for use in lead acid batteries, including lead oxide production and product recovery

operations. Local exhaust ventilation or building ventilation exhausts serving lead oxide production areas are not part of the lead oxide manufacturing facility.

Lead reclamation facility means a facility that casts remelted lead scrap generated by onsite lead acid battery manufacturing processes into lead ingots for use in the battery manufacturing process, and which is not a furnace affected under subpart X of this part. Lead scrap remelting processes that are used directly (not cast into an ingot first) in a grid casting facility or a three-process operations facility are parts of those facilities and are not part of a lead reclamation facility.

Other lead-emitting operation means any operation at a plant involved in the manufacture of lead acid batteries from which lead emissions are collected and ducted to the atmosphere and which is not part of a grid casting, lead oxide manufacturing, lead reclamation, paste mixing, or three-process operation facility, or a furnace affected under subpart X of this part. These operations also include local exhaust ventilation or building ventilation exhausts serving lead oxide production areas.

Paste mixing facility means a facility including lead oxide storage, conveying, weighing, metering, and charging operations; paste blending, handling, and cooling operations; and plate pasting, takeoff, cooling, and drying operations.

Three-process operation facility means a facility including those processes involved with plate stacking, burning or strap casting, and assembly of elements into the battery case.

Total enclosure means a containment building that is completely enclosed with a floor, walls, and a roof to prevent exposure to the elements and that has limited openings to allow access and egress for people and vehicles.

■ 14. Section 63.11427 is amended by revising paragraph (b) introductory text and adding paragraph (b)(5) to read as follows:

§ 63.11427 Who implements and enforces this subpart?

* * * * *

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or tribal agency under subpart E of this part, the approval authorities contained in paragraphs (b)(1) through (5) of this section are retained by the Administrator of the U.S. EPA and are not transferred to the State, local, or tribal agency.

* * * * *

(5) Approval of an alternative to any electronic reporting to the EPA required by this subpart.

■ 15. Table 1 to subpart PPPPPP of part 63 is revised to read as follows:

Table 1 to Subpart PPPPPP of Part 63—Emission Limits

As stated in § 63.11423(a)(2), you must comply with the emission limits in the following table:

For . . .	You must . . .
1. Each new or existing grid casting facility	Emit no more than 0.08 milligram of lead per dry standard cubic meter of exhaust (0.000035 gr/dscf).
2. Each new or existing paste mixing facility	Emit no more than 0.1 milligram of lead per dry standard cubic meter of exhaust (0.0000437 gr/dscf); or emit no more than 0.9 gram of lead per hour (0.002 lbs/hr) total from all paste mixing operations.
3. Each new or existing three-process operation facility.	Emit no more than 1.0 milligram of lead per dry standard cubic meter of exhaust (0.000437 gr/dscf).
4. Each new or existing lead oxide manufacturing facility.	Emit no more than 5.0 milligram of lead per kilogram of lead feed (0.010 lb/ton).
5. Each new or existing lead reclamation facility	Emit no more than 0.45 milligram of lead per dry standard cubic meter of exhaust (0.000197 gr/dscf).
6. Each new or existing other lead-emitting operation.	Emit no more than 1.0 milligram of lead per dry standard cubic meter of exhaust (0.000437 gr/dscf).

■ 16. Table 2 to subpart PPPPPP of part 63 is added to read as follows:

Table 2 to Subpart PPPPPP of Part 63—Opacity Standards

As stated in § 63.11423(a)(2), you must comply with the opacity standards in the following table:

For . . .	Any gases emitted must not exceed . . .
1. Each new or existing facility other than a lead reclamation facility.	0 percent opacity (measured according to EPA Method 9 of appendix A to 40 CFR part 60 and rounded to the nearest whole percentage or measured according to EPA Method 22 of appendix A to 40 CFR part 60).
2. Each new or existing lead reclamation facility	5 percent opacity (measured according to EPA Method 9 and rounded to the nearest whole percentage).

■ 17. Table 3 to subpart PPPPPP of part 63 is added to read as follows:

Table 3 to Subpart PPPPPP of Part 63—Applicability of General Provisions to This Subpart

As required in § 63.11425, you must comply with the requirements of the NESHAP General Provisions (subpart A of this part) as shown in the following table.

Citation	Subject	Applies to this subpart?	Explanation
63.1	Applicability	Yes	
63.2	Definitions	Yes	
63.3	Units and Abbreviations		
63.4	Prohibited Activities and Circumvention	Yes	
63.5	Preconstruction Review and Notification Requirements.	No	
63.6(a) through (d)	Compliance with Standards and Maintenance Requirements.	Yes	
63.6(e)(1)(i)	General Duty to Minimize Emissions	No	Section 63.11423(a)(3) specifies general duty requirements.
63.6(e)(1)(ii)	Requirement to correct malfunctions as soon as possible.	No	
63.6(e)(1)(iii)	Enforceability of requirements independent of other regulations.	Yes	
63.6(e)(3)	SSM Plans	No	This subpart does not require a startup, shutdown, and malfunction plan.
63.6(f)(1)	Compliance Except During SSM	No	
63.6(f)(2) and (3)	Methods for determining compliance	Yes	
63.6(g)	Use of an alternative nonopacity emission standard.	Yes	
63.6(h)(1)	SSM Exemption	No	
63.6(h)(2) through (9), (i) through (j)	Compliance with opacity/visible emission standards, compliance extensions and exemptions.	Yes	
63.7(a) through (d), (e)(2) and (3), (f) through (h).	Performance Testing Requirements	Yes	
63.7(e)(1)	Conditions for conducting performance tests.	No	Requirements for performance test conditions are found in § 63.11423(c)(7).
63.8(a), (b), (c)(1)(ii), (d)(1) and (2), (e) through (g).	Monitoring Requirements	Yes	
63.8(c)(1)(i)	General duty to minimize emissions and CMS operation.	No	Section 63.11423(a)(3) specifies general duty requirements.
63.8(c)(1)(iii)	Requirement to develop SSM Plan for CMS.	No	
63.8(d)(3)	Written procedures for CMS	No	
63.9	Notification Requirements	Yes	
63.10(a), (b)(1), (b)(2)(iii), (b)(2)(vi) through (ix), (b)(3), (c)(1) through (14), (d)(1) through (4), (e), (f).	Recordkeeping and Reporting Requirements.	Yes	
63.10(b)(2)(i)	Recordkeeping of occurrence and duration of startups and shutdowns.	No	
63.10(b)(2)(ii)	Recordkeeping of failures to meet a standard.	No	Section 63.11424(a)(5) specifies these requirements.
63.10(b)(2)(iv) and (v)	Actions taken to minimize emissions during SSM.	No	
63.10(c)(15)	Use of SSM Plan	No	
63.10(d)(5)		No	This subpart does not require a startup, shutdown, and malfunction plan. See § 63.11424(c) for excess emissions reporting requirements.
63.11	Control Device Requirements	No	This subpart does not require flares.
63.12	State Authorities and Delegations	Yes	
63.13	Addresses	Yes	
63.14	Incorporations by Reference	Yes	
63.15	Availability of Information and Confidentiality.	Yes	
63.16	Performance Track Provisions	Yes	
63.1(a)(5), (a)(7) through (9), (b)(2), (c)(3), (d), 63.6(b)(6), (c)(3) and (4), (d), (e)(2), (e)(3)(ii), (h)(3), (h)(5)(iv), 63.8(a)(3), 63.9(b)(3), (h)(4), 63.10(c)(2) through (4), (c)(9).	Reserved	No	

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; California Spotted Owl; Endangered Status for the Coastal-Southern California Distinct Population Segment and Threatened Status With Section 4(d) Rule for the Sierra Nevada Distinct Population Segment; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2022–0166; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BG64

Endangered and Threatened Wildlife and Plants; California Spotted Owl; Endangered Status for the Coastal-Southern California Distinct Population Segment and Threatened Status With Section 4(d) Rule for the Sierra Nevada Distinct Population Segment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list two distinct population segments (DPSs) of the California spotted owl (*Strix occidentalis occidentalis*), a bird species from California and Nevada, under the Endangered Species Act of 1973, as amended (Act). This determination also serves as our 12-month finding on a petition to list the California spotted owl. After a review of the best available scientific and commercial information, we find that listing the Coastal-Southern California DPS as endangered is warranted, and that listing the Sierra Nevada DPS as threatened is warranted. Accordingly, we propose to list the Coastal-Southern California DPS as an endangered species under the Act and the Sierra Nevada DPS as a threatened species with a rule issued under section 4(d) of the Act (''4(d) rule''). If we finalize this rule as proposed, it will add these two DPSs to the List of Endangered and Threatened Wildlife and extend the Act's protections to them.

DATES: We will accept comments received or postmarked on or before April 24, 2023. 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 April 10, 2023.

ADDRESSES:

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–R8–ES–2022–0166, 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–R8–ES–2022–0166, 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: Supporting materials, such as the species status assessment report, are available at *https://www.regulations.gov* under Docket No. FWS–R8–ES–2022–0166.

FOR FURTHER INFORMATION CONTACT: Michael Fris, Field Supervisor, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Sacramento, CA 95825; telephone 916–414–6700. 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 warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the Sierra Nevada DPS of the California spotted owl meets the definition of a threatened species, and the Coastal-Southern California DPS of the California spotted owl meets the definition of an endangered species; therefore, we are proposing to list them as such. Listing a species as an endangered or threatened species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We propose the listing of the Sierra Nevada DPS of the California spotted owl as a threatened species with a rule under section 4(d) of the Act and the Coastal-Southern California DPS of the California spotted owl as an endangered species under the Act.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

We have determined that both the Sierra Nevada population and the coastal-southern California population of the California spotted owl are discrete and significant under our DPS policy and are, therefore, listable entities under the Act. The Sierra Nevada DPS is found in the Sierra Nevada Mountain Ranges and foothills in California and western Nevada. The Coastal-Southern California DPS is found in the Coast, Transverse, and Peninsular Ranges of California. These two DPSs together represent the entirety of the California spotted owl's range.

The Sierra Nevada DPS of the California spotted owl is currently being impacted by high-severity fire, tree mortality, drought, and barred owls. This DPS still has resiliency throughout its range, and some areas remain in stable condition; however, we expect the magnitude of impacts from high-severity fire, tree mortality, drought, climate change, and other threats to increase into the future. Because the Sierra Nevada DPS is likely to become in danger of extinction within the foreseeable future, we propose to list it as threatened.

The Coastal-Southern California DPS has low resiliency, redundancy, and representation. The entirety of the range of this DPS is at extremely high risk of fire, and available habitat is fragmented. All areas of the Coastal-Southern California DPS are currently declining, and the DPS faces additional threats from tree mortality and drought. Because the Coastal-Southern California DPS is currently in danger of extinction, we propose to list it as endangered.

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

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

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns and the locations of any additional populations of this species;

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

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

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

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

(4) Additional information concerning the historical and current status of this species.

(5) Information on regulations that may be necessary and advisable to provide for the conservation of the Sierra Nevada DPS of the California spotted owl and that we can consider in developing a 4(d) rule for the species. In particular, information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether we should consider any additional exceptions from the prohibitions in the 4(d) rule.

(6) Whether we should include in our 4(d) rule for the Sierra Nevada DPS the provision at 50 CFR 17.7 for raptors in captivity.

(7) Which areas may be appropriate as critical habitat for the species and why areas should or should not be proposed for designation as critical habitat in the future, including whether there are threats to the species from human activity that would be expected to increase due to the designation and whether that increase in threat would outweigh the benefit of designation such that the designation of critical habitat may not be prudent.

(8) Specific information on:

(a) The amount and distribution of habitat for the Sierra Nevada DPS and the Coastal-Southern California DPS of the California spotted owl which should be considered for proposed critical habitat;

(b) What may constitute the physical or biological features essential to the conservation of the species within the geographical range currently occupied by the species;

(c) Where these features are currently found;

(d) Whether any of these features may require special management considerations or protection;

(e) What areas are currently occupied and contain features essential to the conservation of the species that should be included in the designation and why; and

(f) What unoccupied areas may be essential for the conservation of the species and why.

Please include sufficient information, 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, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act (16 U.S.C. 1533(b)(1)(A)) directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov*.

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the Coastal-Southern California DPS is threatened instead of endangered, or that the Sierra Nevada DPS is endangered instead of threatened, or we may conclude that neither DPS warrants listing as either an endangered species or a threatened species. In addition, we may change the parameters of the prohibitions or the exceptions to those prohibitions in the 4(d) rule for the Sierra Nevada DPS if we conclude it is appropriate in light of comments and new information received. For example, we may expand the incidental-take prohibitions or the exceptions to those prohibitions in the 4(d) rule for the Sierra Nevada DPS to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the DPS. Conversely, we may establish additional exceptions to the incidental-take prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the DPS.

Public Hearing

Section 4(b)(5) of the Act (16 U.S.C. 1533(b)(5)) 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. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

List of Abbreviations and Acronyms

We use many abbreviations and acronyms in this proposed rule. For the convenience of the reader, we define some of them here:

ac = acres
BLM = Bureau of Land Management

CAL FIRE = California Department of Forestry and Fire Protection
CDWR = California Department of Water Resources
CI = confidence interval
cm = centimeters
dbh = diameter at breast height
DPS = distinct population segment
ft = feet
HCP = habitat conservation plan
ha = hectares
in = inches
km = kilometers
IPCC = Intergovernmental Panel on Climate Change
m = meters
mi = miles
MOU = memorandum of understanding
NPS = National Park Service
PAC = protected activity center
RCP = representative concentration pathway
SPI = Sierra Pacific Industries
SSA = species status assessment
USFS = U.S. Forest Service

Previous Federal Actions

For a detailed history of prior petitions, listing actions, and litigation, please see the 12-month finding published on May 24, 2006 (71 FR 29886). Subsequent to that finding, we were petitioned twice to list the California spotted owl as endangered or threatened and to designate its critical habitat under the Act (16 U.S.C. 1531 *et seq.*). The first petition was submitted in December 2014, by the Wild Nature Institute and John Muir Project of Earth Island Institute, and the second in August 2015, by Sierra Forest Legacy and Defenders of Wildlife. On September 18, 2015, we published a 90-day finding that the petitions presented substantial scientific or commercial information indicating that listing may be warranted for the California spotted owl (80 FR 56423). On November 8, 2019, we published a 12-month finding that listing the California spotted owl was not warranted at that time (84 FR 60371).

In August 2020, Sierra Forest Legacy, Defenders of Wildlife, and the Center for Biological Diversity filed a complaint challenging our 12-month not-warranted finding. By stipulated settlement agreement approved by the court on November 30, 2021, we agreed to submit to the **Federal Register** a new 12-month finding for the California spotted owl on or before February 15, 2023 (*Sierra Forest Legacy, et al.* v. *U.S. Fish and Wildlife Service, et al.,* No. 5:20–cv–05800–BLF (N.D. Cal.)). This document serves as our 12-month finding and completes our obligations under that settlement agreement.

Peer Review

In 2022, a species status assessment (SSA) team prepared an SSA report for the California spotted owl. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the California spotted owl SSA report. The Service sent the SSA report to four independent peer reviewers and received one response. Results of this structured peer review process can be found at *https://www.regulations.gov.* In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this proposed rule.

Summary of Peer Reviewer Comments

We received comments from one peer reviewer on the draft SSA report. We reviewed all comments we received from the peer reviewer for substantive issues and new information regarding the information contained in the SSA report. The peer reviewer generally provided additional references, clarifications, and suggestions, including further definitions of some of the terms used. We updated the SSA report based on the peer reviewer's comments, including changing the approach to our scoring system for the current and future habitat analyses, clarifying specific points where appropriate, and adding additional details and suggested references where needed. Peer reviewer comments are addressed in the following summary and were incorporated into the SSA report as appropriate.

Comment 1: The peer reviewer stated that there was not enough discussion in the SSA report about how habitat factors have been observed to impact owls, particularly in regards to the existing studies analyzing demographic trends of California spotted owls. Further, the peer reviewer stated that the SSA report should discuss the methodology used in the demography studies.

Our response: We acknowledge that habitat factors and demographic factors are interrelated, and that understanding the relation between those two issues is crucial. We discuss how habitat factors influence demographic factors, and vice versa, in sections 3.1 and 3.2 of the SSA report (Service 2022, pp. 14–24). We have also incorporated all available information on how the two are related. Additionally, not all of the demographic studies discuss the relationship between vital rates or population trends and habitat factors, but we incorporated the information into the SSA report where available.

Regarding the methodology used in the demography studies, we added a paragraph to the SSA report that discusses different methodologies used in the different types of population studies available in the literature (Service 2022, p. 24). We will provide a list of all literature cited should any readers wish to review those studies in more detail, and we will provide any studies not readily available on *https://www.regulations.gov.*

Comment 2: The peer reviewer further questioned the assumption in the SSA report that high-quality habitat is equivalent to population stability, or vice versa.

Our response: While we recognize that data are limited, the best available scientific and commercial data, including all available information on habitat use and species needs for the California spotted owl, concluded that the relationship between high-quality habitat and population stability is sufficiently certain to rely upon for our analysis of species viability.

Comment 3: While recognizing that some protected activity center (PAC) information is out of date, the peer reviewer suggested adding the amount of PAC area to the analysis units in section 5.3 of the SSA report.

Our response: The detailed analysis unit descriptions describe the current condition of each unit. Because PAC information does not provide insight on the current condition of each analysis unit, it would not be appropriate to include in section 5.3 of the SSA report (a PAC is a designation made by the USFS to protect the best available 121 ha (300 ac) of habitat in as compact of a unit as possible around a nest tree). We do, however, incorporate information from PACs throughout the SSA report and this proposed rule to understand the impact, breadth, and distribution of threats across the landscape.

Comment 4: The peer reviewer questioned whether we should use the same criteria to analyze conditions in the Sierra Nevada and in coastal/southern California.

Our response: In order to present a standardized comparison across all analysis units, we used the same scoring criteria for the Sierra Nevada and

coastal/southern California. However, we recognize that California spotted owls may use different-sized trees in the coastal-southern California population than in the Sierra Nevada population. We presented a separate analysis acknowledging this, and we included the difference in tree sizes found in the two geographic areas (Service 2022, tables 9, 13, and 18).

I. Proposed Listing Determination

Background

A thorough review of the taxonomy, life history, and ecology of the California spotted owl (*Strix occidentalis occidentalis*) is presented in the SSA report (version 2.0; Service 2022, pp. 8–14).

California spotted owls are medium-sized brown owls measuring 46.6–48.3 cm (18.3–19.0 in) with a mottled appearance, round face, large pale brown facial disks, dark brown eyes, and a yellowish green bill (Verner et al. 1992, p. 55; Gutiérrez et al. 2020, ''Appearance'' section). Females are generally slightly larger than males (Verner et al. 1992, p. 55).

The American Ornithological Society (formerly the American Ornithologists' Union (AOU)) currently recognizes three distinct subspecies of spotted owls: northern spotted owl (*Strix occidentalis caurina*), California spotted owl, and Mexican spotted owl (*Strix occidentalis lucida*) (AOU 1957). Given similarities between the subspecies of spotted owls, the SSA report and this proposed rule use available relevant literature for both the northern spotted owl and the Mexican spotted owl as necessary and appropriate and clearly identify when we refer to those entities. The term ''spotted owl'' is used when talking about *Strix occidentalis* as a whole. Additionally, under the Act, the term ''species'' includes any subspecies of fish or wildlife or plants. For the purposes of this proposed rule, we in general use ''species'' to refer to the California spotted owl rather than ''subspecies.''

There is some overlap in range between northern spotted owls and the California spotted owl, and interbreeding between the two subspecies occasionally occurs (Haig et al. 2004, p. 690; Barrowclough et al. 2011, pp. 581, 583–586; Miller et al. 2017, pp. 6871, 6875–6877; Hanna et al. 2018, pp. 3947–3948, 3950–3951). California spotted owls have the lowest genetic diversity among the subspecies compared to northern and Mexican spotted owls, suggesting that the California spotted owl is of more recent origin than the other spotted owl subspecies or that populations of the California spotted owl are much smaller than the northern and Mexican spotted owl populations (Barrowclough et al. 1999, pp. 919, 927; Haig et al. 2004, p. 683). Within the California spotted owl, genetic differences between individuals found in the Sierra Nevada and individuals found in mountain ranges throughout southern California suggest limited interbreeding between these two areas (Barrowclough et al. 2005, pp. 1113–1114; Hanna et al. 2018, pp. 3947–3948, 3950). However, these genetic studies are limited by sample size and sampling locations. We are only aware of one study that includes California spotted owls from coastal California; this study shows gene flow between geographically adjacent spotted owl samples, with some evidence of asymmetrical gene flow between California spotted owls in Carmel, California (coastal California), and the Sierra Nevada (Barrowclough et al. 2005, p. 1114).

California spotted owls are distributed across habitat in California and Nevada including the Sierra Nevada, coastal California, and southern California. The California spotted owl has also been documented in the Sierra San Pedro Martir mountains in Baja California Norte, Mexico, with a few scattered records of the spotted owl in Baja California between 1887 and 1972 (Grinnell 1928, p. 242; Wilbur 1987, p. 170). However, many researchers now question whether the species ever actually occurred in Baja California (Erickson in litt. 2022; Unitt in litt. 2022). There are only a few accounts of the species, with none of those accounts mentioning breeding or evidence of breeding pairs. Therefore, we consider the California spotted owl to be only a rare visitor of Mexico, and do not consider Baja California as its own population.

California spotted owls are continuously distributed throughout the forests of the western side of the Sierra Nevada from Shasta County south to the Tehachapi Pass in Kern County (Gutiérrez et al. 2017, pp. 13–14). They are sparsely distributed on the eastern side of the Sierra Nevada into western Nevada (GBBO 2012, p. Spp-47–4). Outside of the Sierra Nevada, the species' range is not contiguous. Along the California coast and into southern California, the species is found in the Coast, Transverse, and Peninsular mountain ranges from Monterey County in the north to San Diego County in the south (Gutiérrez et al. 2020, ''Distribution'' section). However, there is a large break in the species' range around San Luis Obispo County, where the species is not known to occur. The Tehachapi Pass between the Sierra Nevada to the east and the Transverse Range to the west represents a gap between California spotted owls in the Sierra Nevada and California spotted owls in coastal and southern California (Verner et al. 1992, p. 4). California spotted owls are absent from the Santa Cruz Mountains (part of the Coast Range) in California, where suitable habitat appears to be present (Gutiérrez et al. 2017, p. 240).

California spotted owls are currently found throughout their known historical range, although there is evidence of a decrease in abundance in parts of the range including both the Sierra Nevada and southern California (Franklin et al. 2004, pp. 23–42; Tempel et al. 2014b, pp. 90–94; Conner et al. 2016, pp. 7–18; Hanna et al. 2018, pp. 3947–3949; Tempel et al. 2022, p. 18). The majority of California spotted owls are found in mid-elevation, mixed-conifer forest on the west slope of the Sierra Nevada (Gutiérrez et al. 2017, p. xviii).

California spotted owls are long-lived (approximately 16–23 years) with high adult survival and low reproductive output (Seamans and Gutiérrez 2007, p. 57; Gutiérrez et al. 2020, ''Demography and Populations'' section). Pairs exhibit high territory fidelity (Gutiérrez et al. 2020, ''Sounds and Vocal Behavior'' and ''Behavior'' sections). Territories—the area actively defended by a breeding pair—can overlap with neighboring pairs and are smaller than home ranges (Gutiérrez et al. 2017, pp. xvi, 294). Estimates of territory size have varied from 203 ha (502 ac) to 813 ha (2,009 ac), with higher estimates in the northern Sierra Nevada and lower estimates in southern California (Bingham and Noon 1997, p. 136; Blakesley et al. 2005, p. 1556; Seamans and Gutiérrez 2007b, p. 568; Tempel et al. 2014b, p. 2091). Higher quality territories measured in adult survival, territory colonization, and territory extinction, tend to have a greater proportion of higher canopy cover (Tempel et al. 2014b, p. 2089; Gutiérrez et al. 2017, pp. 271–273). Home ranges, or areas used by a pair to meet requirements for survival and reproduction, are about 400–1,200 hectares (ha) (1,000–3,000 acres (ac)) in size (Gutiérrez et al. 2017, p. xviii). Home ranges are typically larger in the northern portion of the range (>1,000 ha (2,470 ac)) and smaller in the southern portion of the range (<1,000 ha (2,470 ac)) due to differences in selected prey species (Gutiérrez et al. 2017, p. xviii).

Breeding season begins in mid-February, and the juvenile dependency period can last through mid-September;

nesting generally starts earlier at lower elevations (Gutiérrez et al. 2020, ''Breeding'' section). During the breeding season, California spotted owls tend to spend the majority of their time at activity centers of around 121 ha (299 ac) (Verner et al. 1992, p. 87; Berigan et al. 2012, p. 299). Activity centers are the areas where California spotted owls they nest, roost, and forage (Verner et al. 1992, p. 87; Gutiérrez et al. 2017, pp. 270–271). Spotted owls typically have only one nest per breeding season, and they rarely re-nest if the first nests fails (Gutiérrez et al. 2020, ''Breeding'' section). Females typically lay 1–3 eggs, with survival of offspring into adulthood highest when two young fledge in comparison to singletons and triplets (Peery and Gutiérrez 2013, p. 132; Gutiérrez et al. 2020, ''Demography and Populations'' section). Although difficult to estimate due to dispersal, juvenile survival in California spotted owls is low (Blakesley et al. 2001, p. 667; LaHaye et al. 2004, p. 1056).

Spotted owls always disperse from their natal areas in the year they hatch. Natal dispersal occurs during the fall, after juveniles have reached adult weight and parental care stops (Gutiérrez et al. 2020, ''Breeding'' section). Average juvenile dispersal in southern California is 9.7–11.3 km (6–7 mi), and ranges from 3.2–37.0 km (2–23 mi) (LaHaye et al. 2001, p. 691). Larger dispersal distances, up to 177 km (110 mi), have been documented in both northern and Mexican subspecies (Gutiérrez and Carey 1985, p. 60; Ganey et al. 1998, p. 206; Hollenbeck et al. 2018, p. 533). Adult California spotted owls typically do not shift territories or undergo breeding dispersal from an established territory (Blakesley et al. 2006, p. 76; Zimmerman et al. 2007, p. 963; Gutiérrez et al. 2011, p. 592); however, some breeding dispersal occurs in adults or pairs that have been unsuccessful in mating or if habitat is altered (Blakesley et al. 2006, p. 71).

Breeding only occurs once a pair is formed and settled into a territory (Gutiérrez et al. 2017, p. 15). Pairs can breed in consecutive years, but in certain conditions may postpone reproduction until temporarily poor environmental conditions improve (Stearns 1976, pp. 4, 15–26; Franklin et al. 2000, p. 539; Gutiérrez et al. 2017, p. xvi). The number of young fledged annually per territorial California spotted owl female in several areas within the Sierra Nevada ranged from 0.478–0.988 (Blakesley et al. 2010, pp. 1, 18).

In general, California spotted owls nest in areas of mature, multistoried forests with complex structure, larger trees, multi-layered high canopy cover, and large amounts of coarse woody debris, while areas with higher heterogeneity of forest types and the edges between them are important for foraging (Gutiérrez et al. 2017, p. xvii). In the Sierra Nevada, a majority of California spotted owls occur within mid-elevation ponderosa pine (*Pinus ponderosa*), mixed-conifer, white fir (*Abies concolor*), and mixed-evergreen forest types, with few occurring in the lower elevation oak woodlands of the western foothills (Gutiérrez et al. 2017, p. 109). In coastal and southern California, California spotted owls are found in riparian/hardwood forests and woodlands, live oak/big cone fir forests, and redwood/California laurel forests (Gutiérrez et al. 2017, p. xxvi). In southern California, vegetation types differ relative to the Sierra Nevada, and what is considered a large tree in southern California may not be comparable to what is considered a large tree in the Sierra Nevada. However, California spotted owls in southern California still select for territories containing larger trees (LaHaye et al. 1997, pp. 42, 47) and predominantly closed canopy cover (Smith et al. 2002, pp. 137, 142, 144).

California spotted owls can use a variety of habitat types for nesting. At higher elevations, the species primarily uses conifers, and as elevations decrease, they increasingly use hardwoods (Gutiérrez et al. 2020, ''Habitat'' section). Important components of nesting habitat include high canopy cover, larger trees, and high habitat heterogeneity. For nest trees, California spotted owls use a subset of larger trees or snags, with the average nest tree measuring 124 cm (49 in) diameter at breast height (dbh) and 31 m (103 ft) tall in the Sierra Nevada (Gutiérrez et al. 2017, p. 50). In southern California, California spotted owls use cavity, broken-top, and platform nests with different characteristics (LaHaye et al. 1997, pp. 42, 47; Tanner 2022, pers. comm.). In southern California, California spotted owl use of platform or old raptor nests is more common; thus, owls with these types of nests were observed using smaller trees than used in other nest types (LaHaye et al. 1997, p. 45). Within their nesting territory, California spotted owls select for nest sites farther away from the forest edge (Phillips et al. 2010, p. 312). Overall, California spotted owl occupancy, colonization, adult survival, and reproductive success are all positively associated with an increasing amount of structurally complex habitat on the landscape (Franklin et al. 2000, p. 578; Blakesley et al. 2005, p. 1562; Tempel et al. 2014a, pp. 2103–2104).

California spotted owls can also use a variety of habitats to forage. California spotted owls primarily prey upon a variety of small to medium-sized mammals, including, but not limited to, flying squirrels, woodrats, and pocket gophers, as well as birds, lizards, and insects (Gutiérrez et al. 2017, p. 28). In the Sierra Nevada, above approximately 1,200 m (3,937 ft) in coniferous forests, California spotted owls most commonly consume Humboldt's flying squirrels (*Glaucomys oregonensis*) (Laymon 1988, pp. 130–154; Verner et al. 1992, pp. 4, 65–69; Munton et al. 2002, pp. 99, 101–104). Preferred habitat conditions of Humboldt's flying squirrels include cool, moist, mature forest with abundant standing and down snags where they can forage on mostly fungi and lichens (Cassola 2016, p. 3). In lower elevation oak woodlands and riparian-deciduous forests in the Sierra Nevada and southern California, California spotted owls select for woodrats (*Neotoma* spp.) (Verner et al. 1992, pp. 4, 65, 68–69; Smith et al. 1999, pp. 22, 24–28; Munton et al. 2002, pp. 99, 101–104). Due to this elevational gradient in prey distribution, California spotted owls select foraging sites characteristic of flying squirrel habitats at higher elevations and woodrat habitats at lower elevations (Kramer et al. 2021b, pp. 12–14). Some individuals have smaller home ranges where woodrats are the primary prey source, presumably because woodrats have a higher caloric gain per successful foraging event and are found in higher densities than northern flying squirrels (Zabel et al. 1995, pp. 433, 435–438). There is some evidence that California spotted owl diet may shift following wildfires. In national parks in the Sierra Nevada that have implemented longstanding fire management efforts (*i.e.,* prescribed fire and managed wildfire), the California spotted owl diet contains a higher proportion of woodrats and pocket gophers relative to flying squirrels (Hobart et al. 2021, pp. 254, 256).

In regard to foraging habitat, important components include the presence of larger trees, high canopy cover, and coarse woody debris. California spotted owls tend to forage in larger trees, likely due to the canopy cover provided by larger trees and the important resources such as shelter and food that larger trees provide for prey species (Laymon 1988, pp. 47, 71, 77, 100; Verner et al. 1992, pp. 9–10, 60, 88; Moen and Gutiérrez 1997, pp. 1281, 1284). However, California spotted owls use medium-size trees (defined by the authors as >25 cm dbh (9 in)) for

foraging while avoiding areas dominated by small trees (<25 cm dbh (9 in)) (Kramer et al. 2021a, pp. 4, 6). Coarse woody debris is also an important habitat feature for California spotted owls because it provides food, shelter, and protection for prey species, especially woodrats (Waters and Zabel 1995, pp. 861–862; Pyare and Longland 2002, pp. 1016–1017; Innes et al. 2007, pp. 1523, 1526; Kelt et al. 2013, p. 1208). Heterogeneous forests, such as those found on private lands, may provide more habitat for California spotted owls than was previously understood (Atuo et al. 2019, p. 295), as some privately owned study areas have higher numbers of occupied sites than adjacent USFS study areas (Roberts et al. 2017, p. 113).

California spotted owl roosting habitat is very similar to nesting habitat. Specific components of roosting habitat include multi-layered high canopy cover and presence of large trees. It is believed that such forests provide young California spotted owls with protection from predators and from high temperatures. California spotted owls have a low heat tolerance in comparison to other bird species, beginning to show heat stress at 30–34 degrees Celsius (°C) (86–93 degrees Fahrenheit (°F)). The cooler microclimates that multi-layered high canopy cover provides are important for both juveniles and adults during warm summers (Weathers 1981, pp. 358–359; Barrows 1981, pp. 303–305; Weathers et al. 2001, pp. 678–679). Presence of large trees is also important for California spotted owl roosting, as individuals tend to roost in large trees, likely due to the canopy cover provided by large trees and the resources they provide for prey species (Laymon 1988, pp. 47, 71, 77, 100; Verner et al. 1992, pp. 9–10, 60, 88; Moen and Gutiérrez 1997, pp. 1281–1284).

Within the SSA report and this proposed rule, we define a population as a group of interbreeding California spotted owls that are more likely to breed among that group than outside of that group. We use information from genetic studies and habitat features to identify two California spotted owl populations: one in the Sierra Nevada, and another in coastal and southern California (hereafter referred to as the coastal-southern California population).

In the western Sierra Nevada, habitat is relatively continuous, without significant gaps in distribution (Gutiérrez et al. 2017, p. xviii); however, in the eastern Sierra Nevada, habitat is more discontinuous with disjunct patches (Dilts 2022, pp. 5–9). Despite this fragmentation, California spotted owls still have substantial gene flow within the Sierra Nevada. However, there is limited gene flow to coastal or southern California, and large-scale fragmentation of suitable habitat divides the Sierra Nevada from this other population (Barrowclough et al. 2005, pp. 1114–1116). We are not aware of specific information about individual California spotted owls moving between these two population areas.

In coastal and southern California, the California spotted owl population consists of subpopulations distributed among discrete mountain ranges, resulting in habitat ''islands'' surrounded by unsuitable habitat (Verner et al. 1992, p. 187). Areas between these habitat islands are typically lowland desert scrub and chaparral that is unsuitable for California spotted owls, or substantially modified by human-induced development and fragmentation (Verner et al. 1992, p. 187). Some of the subpopulations are separated by relatively narrow gaps, such as the gap between the San Gabriel and San Bernardino Mountains, while other gaps are more significant, such as the gap between the Northern and Southern Santa Lucia Mountains. California spotted owls in coastal and southern California are less well-studied than those in the Sierra Nevada, but there is a notable lack of documented California spotted owl movement between the coastal and southern subpopulations, and we are not aware of any dispersal between them. This population is also described in the literature as being a presumed metapopulation (Verner et al. 1992, pp. 187–206; LaHaye et al. 1994, entire; Gutiérrez et al. 2017, p. 241) despite the documented lack of connectivity, even though dispersal among populations is a defining characteristic of a metapopulation (see Hanski and Gilpin 1991 for more on metapopulation theory). However, spatial structure of a metapopulation within and among subpopulations is critical for metapopulation functioning, and available evidence does not document successful dispersal between the San Bernardino, San Gabriel, and San Jacinto Mountains, which are adjacent mountain ranges, indicating that if mixing does occur it is very rare (LaHaye et al. 2001, entire; LaHaye et al. 2004, entire; Gutiérrez et al. 2017, pp. 242, 250). Further, not all subpopulations within the metapopulation have equal likelihood of ''blinking out'' or being rescued/recolonized by other subpopulations, which are important components of metapopulation theory (Gutiérrez et al. 2017, pp. 241–242, 250). Within the coastal-southern California population, the subpopulation inhabiting the San Bernardino and San Gabriel mountains is the largest subpopulation and is the subject of most ecological studies. The persistence of this subpopulation has been identified as important for persistence of the coastal-southern California population (Verner et al. 1992, pp. 197–206).

To conduct a more focused analysis of how different portions of each of the populations' ranges contribute to that population's overall resiliency, we further divided the Sierra Nevada and southern California populations into analysis units (see figure 1, below). We chose analysis units roughly based on public land management boundaries because of varying demographic data and management strategies across the range. Dividing the population up into analysis units based on land management boundaries allows a better assessment of the varying conditions across the range. We identified a total of 15 analysis units: Lassen, Plumas, Tahoe, Eldorado, Humboldt-Toiyabe, Stanislaus, Yosemite, Sierra, Sequoia-Kings Canyon, Sequoia, Inyo, Las Padres, Las Padres-Angeles, San Bernardino, and Cleveland.

BILLING CODE 4333–15–P

Figure 1—Populations and Analysis Units of the California Spotted Owl (CSO)

BILLING CODE 4333–15–C

Distinct Population Segment Evaluation

Under the Act, the term ''species'' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)). To guide the implementation of the DPS provisions of the Act, we and the National Marine Fisheries Service (National Oceanic and Atmospheric Administration—Fisheries), published the Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy) in the **Federal Register** on February 7, 1996 (61 FR 4722). Under our DPS Policy, we use two elements to assess whether a population segment under consideration for listing may be recognized as a DPS: (1) The population segment's discreteness from the remainder of the species to which it belongs, and (2) the significance of the population segment to the species to which it belongs. If we determine that a population segment being considered for listing is a DPS, then the population

segment's conservation status is evaluated based on the five listing factors established by the Act to determine if listing it as either endangered or threatened is warranted.

As discussed above in Previous Federal Actions, we were petitioned to list the California spotted owl subspecies throughout its range. In response to the petitions, we divided the species into two populations and our analysis covers the full range of the species. Under the Act, we have the authority to consider for listing any species, subspecies, or, for vertebrates, any distinct populations segment of these taxa if there is sufficient information to indicate that such action may be warranted. Therefore, we considered whether the two populations of the California spotted owl (the Sierra Nevada portion of the California spotted owl's range, and the coastal and southern California portions of the California spotted owl's range) meet the DPS criteria under the Act. These two populations comprise the entirety of the California spotted owl's range (and thus the entirety of the petitioned entity), and we have determined that it is appropriate to analyze them individually under our DPS policy.

Discreteness

Under our DPS Policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation; or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

We conclude the two segments satisfy the ''markedly separate'' condition. The Sierra Nevada part of the range is separated from the coastal and southern California parts of the range by large-scale fragmentation of suitable habitat, with the Tehachapi Pass in Kern County identified as the dividing line between these areas (Verner et al. 1992, p. 4; Barrowclough et al. 2005, pp. 1114–1116). The distance between suitable habitat in the closest parts of the Sierra Nevada and the Transverse Range of southern California is only 40 km (25 mi). Although this distance is near the known average dispersal of juvenile California spotted owls, we are not aware of specific information about individual California spotted owls moving between the Sierra Nevada and California spotted owl habitat in coastal and southern California (Service 2022, p. 18).

As discussed above in Background, there are few genetic studies on the California spotted owl. However, existing analyses provide evidence that gene flow between the two parts of the range is limited and may have been restricted to historical asymmetrical gene flow from areas in the central California coast to the Sierra Nevada (Barrowclough et al. 2005, p. 1113), although the study acknowledges that more data are needed to inform this conclusion. Our DPS policy notes that we do not consider it appropriate to require absolute reproductive isolation as a prerequisite to recognizing a distinct population segment. As the policy states, this would be an impracticably stringent standard, and one that would not be satisfied even by some recognized species that are known to sustain a low frequency of interbreeding with related species.

Therefore, because the two populations are markedly separated from each other, we have determined that both the Sierra Nevada and the coastal and southern California parts of the range both individually meet the condition for discreteness under our DPS Policy.

Significance

Under our DPS Policy, once we have determined that a population segment is discrete, we consider its biological and ecological significance to the larger taxon to which it belongs. This consideration may include, but is not limited to: (1) Evidence of the persistence of the discrete population segment in an ecological setting that is unusual or unique for the taxon, (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon, (3) evidence that the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range, or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

For the California spotted owl, we first considered evidence that loss of a population segment would result in a significant gap in the range of the taxon. As discussed above, the southwestern and northeastern parts of the range are separated by approximately 40 km (25 mi). The loss of the coastal and southern California parts of the range would result in the loss of the entire southwestern part of the species' range and decrease species redundancy and ecological and genetic representation, thus decreasing the species' ability to withstand demographic and environmental stochasticity. The loss of the Sierra Nevada range would result in the loss of 70 percent of the species' range, also reducing the species' ability to withstand demographic and environmental stochasticity. Therefore, the loss of either part of the range would result in a significant gap in the range of the California spotted owl.

We then considered evidence whether either of the discrete population segments occur in an ecological setting that is unusual or unique for the taxon. In the Sierra Nevada, a majority of California spotted owls occur within mid-elevation mixed-conifer and mixed-evergreen forest types, with few occurring in the lower elevation oak woodlands of the western foothills (Gutiérrez et al. 2017, p. 109). As described above, in coastal and southern California, California spotted owls are found in riparian/hardwood forests and woodlands, live oak/big cone fir forests, and redwood/California laurel forests, more so than the mixed-conifer communities (Gutiérrez et al. 2017, p. xxvi). Use of these other communities is specific and unique to owls in these areas. What is considered a large tree in southern California may not be comparable to what is considered a large tree in the Sierra Nevada. California spotted owls use a subset of larger trees or snags as their nest trees, with the average nest tree measuring 124 cm (49 in) dbh and 31 m (103 ft) tall in the Sierra Nevada (Gutiérrez et al. 2017, p. 50). In southern California, use of platform or old raptor nests is more common; thus, owls with these types of nests were observed using trees as small as 33 cm (13 in) dbh (Tanner 2022, pers. comm.) with mean values of 75.0 cm (29.5 in) dbh (LaHaye et al. 1997, p. 45). Therefore, we conclude that, for the two populations of California spotted owls, each persists in a unique ecological setting for the species.

The evidence that a significant gap in the range of the taxon would result from the loss of either discrete population segment meets the significance criterion of the DPS Policy. Additionally, there is evidence that the coastal and southern California and the Sierra Nevada parts of the range have persisted in a unique ecological setting for the species. Therefore, under the Service's DPS Policy, we find that the Sierra Nevada and the coastal and southern California parts of the California spotted owl's

range are significant to the taxon as a whole.

Distinct Population Segment Conclusion

Our DPS Policy directs us to evaluate the significance of a discrete population in the context of its biological and ecological significance to the remainder of the species to which it belongs. Based on an analysis of the best available scientific and commercial data, we conclude that both parts of the California spotted owl's range are significant, because loss of either part would result in a significant gap in the range of the taxon, and because the population segments represent evidence that both parts of the range have persisted in a unique ecological setting for the species. Therefore, we conclude that both the Sierra Nevada and the coastal and southern California parts of the California spotted owl's range are both discrete and significant under our DPS Policy and are, therefore, uniquely listable entities under the Act.

Based on our DPS Policy (61 FR 4722; February 7, 1996), if a population segment of a vertebrate species is both discrete and significant relative to the taxon as a whole (*i.e.,* it is a distinct population segment), its evaluation for endangered or threatened status will be based on the Act's definition of those terms and a review of the factors enumerated in section 4(a) of the Act. Having found that both parts of the California spotted owl's range meet the definition of a distinct population segment, we evaluate the status of both the Sierra Nevada DPS and the Coastal-Southern California DPS of the California spotted owl to determine whether either meets the definition of an endangered or threatened species under the Act.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the 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 the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act

and its implementing regulations and policies.

To assess California spotted owl viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report (Service 2022, entire); the full SSA report can be found at Docket No. FWS–R8–ES–2022–0166 on *https://www.regulations.gov.*

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the California spotted owl 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.

We note that the California spotted owl SSA report discusses California spotted owls at the individual, population, and species level. The SSA does not make any analysis or conclusions with regard to policy decisions, such as DPS findings, and does not include mention of the two populations of the subspecies as DPSs. Instead, the SSA report provides the biological information that our decisionmakers can then use to inform those policy decisions. This proposed rule and its supporting record contain the policy decisions and rationale. Throughout this Summary of Biological Status and Threats discussion, we discuss the coastal-southern California population of California spotted owl, which we identify as the Coastal-Southern California DPS, and the Sierra Nevada population of California spotted owl, which we identify as the Sierra Nevada DPS.

California Spotted Owl Needs

Individual Needs

In this section, we assess the best available information to identify the specific habitat components needed to support individual fitness at all life stages for California spotted owls. Individual owls must have adequate nesting, foraging, and roosting habitat to be successful. For the purpose of the SSA report and this proposed rule, the components of nesting, foraging, and roosting habitat that we considered most significant include canopy cover, larger trees, and habitat heterogeneity. Habitat heterogeneity is important to California spotted owls as it provides protection from predators and extreme weather conditions, variable microclimates, and habitat for different prey species.

We acknowledge that these habitat components are not all-inclusive and there may be other components of nesting, foraging, and roosting habitat that are not being considered (such as prey). We also acknowledge that a history of fire suppression in the western United States, including throughout the range of both the Sierra Nevada DPS and the Coastal-Southern California DPS, has caused many ecological changes that are not fully understood (Mallek et al. 2013, p. 2). However, we chose to focus on habitat components for which there are available spatial data across the range of the species. Further, prey is indirectly considered in our analysis since the primary California spotted owl prey species also select for high canopy cover and coarse woody debris (Waters and Zabel 1995, p. 858), which are considered here as components of habitat heterogeneity. Populations of California spotted owls require the same habitat components as individuals but at larger scales.

Multi-layered, or complex, high canopy cover is considered an important resource for spotted owls because it provides cool shaded microclimates, camouflage and cover for protection from predators and extreme weather conditions, and habitat for prey species (Forsman 1975, pp. 4, 90, 105; Barrows 1981, p. 302; Forsman et al. 1984, p. 5). High canopy cover from tall trees is associated with higher probability of successful prey capture by California spotted owls (Zulla et al. 2022, p. 8) and is an important predictor for California spotted owl nesting habitat (North et al. 2017, pp. 166, 172–175). Multi-layered high canopy cover around the nest tree and in territories is an important factor associated with California spotted owl reproductive success (Hunsaker et al. 2002, pp. 693–699; Blakesley et al. 2005, pp. 1554, 1558–1562). Areas with canopy cover greater than 70 percent are considered optimal for California spotted owl nest sites and occupancy sharply declines when canopy cover is less than 40 percent (Blakesley et al. 2005, p. 1559; Seamans 2005, pp. iii, 90, 100; Seamans and Gutiérrez 2007b, pp. 566, 568; Tempel et al. 2014a, pp. 2089, 2091, 2101; Tempel et al. 2016, pp. 747, 759). Even in southern California where the habitat is naturally more fragmented with less canopy cover available, California spotted owls still select for areas with higher canopy cover relative to what is available (Smith et al. 2002, pp. 142–143). Further, California spotted owls in Yosemite National Park had territory centers with average values of 40 percent canopy cover in burned forests (Schofield et al. 2020, pp. 4–5).

The presence of large trees, defined as trees that are greater than 61 cm (24 in) dbh (Seamans and Gutiérrez 2007b, pp. 566, 571–574; Tempel et al. 2014b, p. 2094; Jones et al. 2018, p. 344), is important for California spotted owl foraging, roosting, and nesting. California spotted owls tend to forage and roost in large trees, likely due to the canopy cover provided by large trees and the important resources such as shelter and food that large trees provide for prey species (Laymon 1988, pp. 47, 71, 77, 100; Verner et al. 1992, pp. 9–10, 60, 88; Moen and Gutiérrez 1997, pp. 1281, 1284). The presence of tall (>48 m (157 ft)) trees, and the canopy cover they provide, is the best predictor for California spotted owl occupancy, and areas with a high density of large trees are considered high-quality habitat (Blakesley et al. 2005, pp. 1554, 1558–1562; North et al. 2017, pp. 166, 171–176). California spotted owls use a

subset of large trees or snags as their nest trees (LaHaye et al. 1997, pp. 42, 47; Blakesley et al. 2005, pp. 1554, 1558–1562; Gutiérrez et al. 2017, p. 50), and the nest tree itself is critical for California spotted owl reproductive success because it provides the space and structure needed for nests, along with protection from predators and inclement weather. California spotted owls do not build their own nests but rely on larger trees that provide multi-layered high canopy cover with open cavities (created as a result of fallen branches, woodpeckers, etc.), broken tops, platforms, and old raptor nests (Gutiérrez et al. 2020, ''Habitat'' and ''Breeding'' sections). The nest tree chosen within a territory is typically one of the oldest and largest live or dead trees within the nesting territory with many defects like cracks, disease scars, or decaying wood (Verner et al. 1992, pp. 6, 60, 71; North et al. 2000, p. 797).

The preferential use of mature forests with high canopy cover and large trees is well-known for California spotted owls (Gutiérrez et al. 2017, p. iii). However, there have been several recent studies showing the importance of other habitat types, habitat edges, and habitat heterogeneity (Atuo et al. 2019; Hobart et al. 2019; Kramer et al. 2021b; Zulla et al. 2022; Wilkinson et al., in prep.). California spotted owl occupancy, colonization, adult survival, and reproductive success are all positively associated with the proportion of structurally complex forests (Franklin et al. 2000, p. 539; Blakesley et al. 2005, p. 1562; Tempel et al. 2014b, p. 2089; Tempel et al. 2016, p. 747). The biological and physical components that create habitat heterogeneity and complex structure are areas of multi-layered high canopy cover, large trees, coarse woody debris, understory and mid-story vegetation, patches of burned habitat, riparian habitat, large diameter standing dead trees (snags), and some open areas within a California spotted owl's home range.

Coarse woody debris (fallen dead trees and the remains of large branches on the ground) is an important habitat feature for California spotted owls because it provides food, shelter, and protection for California spotted owl prey species, especially woodrats (Waters and Zabel 1995, pp. 861–862; Pyare and Longland 2002, pp. 1016–1017; Innes et al. 2007, pp. 1523, 1526; Kelt et al. 2013, p. 1208). Coarse woody debris in areas of multi-layered high canopy cover is conducive for fungal growth, a food source for many California spotted owl prey species (Verner et al. 1992, pp. 71–72; Pyare and Longland 2002, pp. 1016–1017). Rates of prey capture by California spotted owls are observed to be higher in taller multilayered forests, in areas with higher vegetation heterogeneity, and near forest-chapparal edges (Wilkinson et al. in prep., p. 2). There are a variety of habitats within a heterogeneous landscape that California spotted owls use and which may provide specific resources. The size of a California spotted owl's home range increases as the heterogeneity, or number of different vegetation patches, increase (Williams et al. 2011, p. 333); the hypothesis is that there may be an optimal point of habitat heterogeneity for California spotted owls beyond which territory quality declines (Williams et al. 2011, p. 333).

Population Needs

Populations of California spotted owls must have adequate amounts of nesting, foraging, and roosting habitat containing the habitat components described above in sufficient amounts and the appropriate configuration on the landscape to support a stable or increasing growth rate. They also need connectivity between territories and home ranges. Populations meeting these requirements are better able to withstand stochastic events. In many instances, however, data are insufficient or completely lacking regarding a population's size and growth rate. In the absence of such data, we examine other characteristics that may serve as surrogate indicators of general population health and, subsequently, resiliency. Essentially, an assessment of the availability of a species' identified needs (suitable habitat, food, breeding sites) may allow us to make assumptions about the potential resiliency of any given population. However, unless there is a documented positive correlation between the availability of species' needs and a population's known demographic condition, the uncertainty regarding such assumptions must be made clear.

In the SSA report, we describe the demographic factors that are considered important for California spotted owls, including natal dispersal, survival, fecundity, occupancy, and population growth. We describe the importance of each demographic factor to California spotted owl persistence and how the individual needs influence these factors.

There is little available information about dispersal and dispersal habitat between the defined California spotted owl populations and analysis units within the SSA report and this proposed rule. Dispersal habitat is described for northern spotted owl as 50 percent of the forest matrix outside of activity centers in stands with an average of 28 cm (11 in) dbh and 40 percent canopy closure (Thomas et al. 1990, p. 15). This contrasts with dispersal for Mexican spotted owls, which may move across large areas of unforested habitat to access suitable habitat on different mountain ranges (Gutiérrez et al. 1995, p. 5; Gutiérrez et al. 2017, p. 242). It is unknown how far California spotted owls will disperse across unsuitable habitat to find a new territory, but adult northern spotted owls have been found to occasionally move long distances if forced out of a territory (Forsman in litt. 2018, p. 22).

For dispersal to be successful, many of the individual needs must be present within the areas to which California spotted owls disperse. Canopy cover, large trees, and coarse woody debris all must be available in sufficient amounts and the appropriate configuration on the landscape (habitat heterogeneity) for juveniles or sub-adults to successfully settle into a territory to begin breeding.

Survival for California spotted owls is closely linked to population growth and is important for maintaining population resiliency (Seamans and Gutiérrez 2007a, p. 57; Blakesley et al. 2010, p. 27). Adult California spotted owls have high annual survival rates ranging from 0.796–0.814 in different study areas within analysis units in southern California (LaHaye et al. 2004, p. 1056; Franklin et al. 2004, p. 22), and 0.811–0.891 in study areas within analysis units in the Sierra Nevada (Blakesley et al. 2001, p. 671; Franklin et al. 2004, p. 22; Blakesley et al. 2010, p. 10; Tempel et al. 2014a, p. 92). In comparison, juvenile survival is difficult to estimate due to dispersal, and has been found to be low, ranging from 0.087–0.333 in study areas within analysis units in the Sierra Nevada (Blakesley et al. 2001, p. 671; Tempel et al. 2014a, p. 92), and 0.368 for southern California (LaHaye et al. 2004, p. 1056). For northern spotted owl, juveniles tend to have high mortality during the dispersal phase (Miller 1989, pp. 41–44; Forsman et al. 2002, p. 18).

All the individual needs discussed above influence survival. For example, survival is related to the amount of forest dominated by medium to large trees, high canopy cover, and habitat complexity (Blakesley et al. 2005, p. 1554; Tempel et al. 2014b, pp. 2089, 2098; McGinn et al. 2022, p. 9). In northern spotted owls, habitat heterogeneity is correlated with higher survival rates (Franklin et al. 2000, p. 539).

Fecundity is defined as the ability to produce offspring and is measured by the number of viable female offspring

that an individual can produce over a specific time period. Annual reproductive output, measured by presence or absence of offspring in a nest, for female California spotted owls in a demographic study in the Sierra Nevada was found to range from 0.478–0.988 (Blakesley et al. 2010, p. 1). Reproduction throughout all the demographic studies has ranged from no reproduction within a study area to nearly all birds reproducing in a study area in a particular year (Franklin et al. 2004, pp. 32–33; Seamans and Gutiérrez 2007a, p. 65; Blakesley et al. 2010, p. 17; MacKenzie et al. 2012, p. 597; Tempel et al. 2014a, p. 91; Stoelting et al. 2015, p. 46). Fecundity, measured as female young produced per female annually, has been found to range from 0.284–0.409 in the Sierra Nevada and to be 0.362 in southern California (Franklin et al. 2004, pp. 11, 23).

Many of the individual needs discussed above influence fecundity. Reproductive output decreases as non-forest habitat increases within the area around the nest, and nest success increases as the presence of large remnant trees within the nest stand increases (Blakesley et al. 2005, p. 1554). Reproduction is positively correlated to the foliage volume above the nest tree (North et al. 2000, p. 797), although habitat heterogeneity is also important for reproduction (Franklin et al. 2000, p. 539; Tempel et al. 2014b, p. 2089; McGinn et al. 2022, p. 9) and foraging (Zulla et al. 2022, pp. 7–8). Annual variation in weather also plays a role in reproductive success (North et al. 2000, p. 797; Seamans and Gutiérrez 2007a, p. 57; MacKenzie et al. 2012, p. 597; Stoelting et al. 2015, p. 46). For example, California spotted owls experienced increased fecundity when a dry breeding season followed a previously wet year (LaHaye et al. 2004, pp. 1056, 1062). Although survival of breeding California spotted owls is an important factor that is closely connected to population growth, reproductive output may be more influential to population growth because it varies more than adult survival (Blakesley et al. 2001, p. 667; Seamans and Gutiérrez 2007a, p. 57).

In the SSA report and this proposed rule, we define California spotted owl occupancy as the stable (not transient) presence of at least one adult within a territory. California spotted owls select and defend territories in which they spend most of their life. California spotted owl pairs will only reproduce once they have established an occupied territory. The measure of occupancy has been found to be strongly correlated with regional abundance of California spotted owls and can provide reliable inferences on population trends (Tempel and Gutiérrez 2013, pp. 1093–1093).

Many of the individual needs discussed above need to be present in order for California spotted owls to occupy a territory. Occupancy is generally higher and more consistent with an increasing proportion of the territory containing large trees and high canopy cover (Blakesley et al. 2005, p. 1554; Seamans and Gutiérrez 2007b, p. 572; Roberts et al. 2011, p. 610; Tempel et al. 2014b, p. 2089; Gutiérrez et al. 2017, p. vxii). As the proportion of forest types that are not used for nesting (smaller, similar-aged young trees) increases, occupancy tends to decrease (Blakesley et al. 2005, pp. 1554, 1560).

In the SSA report and this proposed rule, we define California spotted owl population growth as the change in the number of individuals within a particular study area, which correspond to our analysis units. Population growth is determined by the demographic factors of survival, fecundity, and occupancy, with fecundity likely the most influential because it is more variable (Blakesley et al. 2001, p. 667; Seamans and Gutiérrez 2007a, p. 57; Seamans and Gutiérrez 2007b, p. 566; Blakesley et al. 2010, p. 27; Tempel and Gutiérrez 2013, pp. 1093–1094; Gutiérrez et al. 2017, p. 99). Population growth is variable throughout study areas in the Sierra Nevada DPS where we have available information, with documented declines ranging from −50 percent to −31 percent in some study areas and a population increase of 25 percent in another (Tempel et al. 2014a, pp. 86, 90–92; Conner et al. 2016, p. 15). The only available demographic data for the Coastal-Southern California DPS is from the San Bernardino National Forest. A population decline of −9 percent was observed from 1987–1998, with more recent occupancy analyses showing further declines in population size (LaHaye et al. 2004, pp. 1056, 1064; Tempel et al. 2022, p. 20, table 5). All individual needs described above need to be present for positive California spotted owl population growth.

Species Needs

At the species level, we assess the redundancy and representation of the entire California spotted owl's range to better understand the viability of the species. For the California spotted owl, we evaluate redundancy by considering the number of resilient populations distributed across the species' range. Having resilient populations distributed across the range increases the species' ability to withstand catastrophic events.

For this species, we evaluate representation by considering the distribution of populations across their various ecological settings and whether those populations are able to maintain adequate amounts of genetic diversity. Having a variety of ecological settings that the species can occupy and a breadth of genetic diversity increases the species' ability to withstand and adapt to long-term environmental changes.

Threats

Following are summary evaluations of eight threats analyzed in the SSA report for the California spotted owl: wildfire (Factor A), tree mortality (Factor A), drought (Factor A), climate change (Factor A), fuels reduction and forest management (Factor A), competition and hybridization with barred owls (*Strix varia*) (Factor E), rodenticides (Factor E), and development (Factor A). We also evaluate existing regulatory mechanisms (Factor D) and ongoing conservation measures.

In the SSA report, we also considered four additional threats: Overutilization due to recreational, educational, and scientific use (Factor B); disease (Factor C); predation (Factor C); and recreation (Factor E). We concluded that, as indicated by the best available scientific and commercial information, these threats are currently having little to no impact on the California spotted owl and thus the overall effect of these threats now and into the future is expected to be minimal. Therefore, we will not present summary analyses of those threats in this document, but we considered them in the current and future condition assessments in the SSA report, and we will consider them in our determination of the species' status. For full descriptions of all threats and how they impact the species, please see the SSA report (Service 2022, pp. 25–68).

For the purposes of this assessment, we consider the foreseeable future to be the amount of time on which we can reasonably determine a likely threat's anticipated trajectory and the anticipated response of the species to those threats. For this proposed rule, we consider the foreseeable future to be 40–50 years. This time period represents our best professional judgment of future conditions related to climate change for California, the California spotted owl's generation time, and the regeneration time of medium to large trees.

Wildfire

Fire is a natural part of California spotted owl habitat (Verner et al. 1992, pp. 247–248) and is necessary for maintaining heterogenous forests and

overall habitat heterogeneity. Wildfire and associated tree mortality can be beneficial or detrimental for the California spotted owl depending on scale and severity. Fires with predominantly low to moderate severity burn patterns, with small patches of high-severity fire scattered throughout the fire perimeter, can increase habitat heterogeneity, ultimately result in higher prey densities, increase amounts of forest edge for California spotted owl foraging, and provide for unburned refugia within the fire perimeter that have higher tree survival and more vegetative cover during the immediate postfire years (Roberts et al. 2011, p. 610; Lee et al. 2012, p. 792; Bond et al. 2013, pp. 114, 122; Eyes et al. 2017, p. 384; Blomdahl et al. 2019, pp. 1046, 1048, 1049). There is also evidence to suggest that more pyrodiverse (spatial or temporal variability in fire effects; Jones and Tingley 2021, p. 1) landscapes support greater habitat heterogeneity, which may promote greater biodiversity (Steel et al. 2021, pp. 7–8; Stephens et al. 2021, p. 5). For example, in areas where woodrats are the primary prey species, a juxtaposition of mature forests and open canopy patches promotes higher prey diversity and abundance, and northern spotted owls preferentially select for these areas (Zabel et al. 1995, p. 433; Ward and Noon 1998, p. 79; Franklin et al. 2000, p. 539; Zabel et al. 2003, p. 1027).

Although burned areas can reduce the amount of canopy cover available, California spotted owls forage on the edge of and within areas that have been burned at a range of severities (Bond et al. 2009, p. 1116; Bond et al. 2016, p. 1290; Eyes et al. 2017, p. 375) although typically avoiding larger areas of high-severity fire (Jones et al. 2016a, p. 304; Eyes et al. 2017, p. 383). Thus, many researchers advocate for the use of ecologically beneficial fire to help sustain California spotted owl habitat and report that low to moderate severity fire minimizes the effects of future high-severity wildfire (Stephens et al. 2019, pp. 395–396; Stephens et al. 2020, entire; Stephens et al. 2021, p. 5; Taylor et al. 2022, p. 4).

In contrast, large-scale, high-severity fires have a detrimental effect on both the California spotted owl and its habitat. Large-scale high-severity fire (often referred to as a megafire) is generally defined as over 10,000 ha (24,711 ac) of area burned with 75–100 percent canopy mortality (Jones et al. 2016a, p. 300; Linley et al. 2022, pp. 6, 8). Megafires can degrade or destroy California spotted owl habitat, completely incinerating large trees and canopy cover (Eyes 2014, p. ii; Roberts et al. 2015, pp. 112–115; Jones et al. 2016a, pp. 300–305). Habitat suitability for northern spotted owls decreased postfire and depended on fire severity (higher fire severity resulted in greater declines of habitat suitability) (Wan et al. 2020, p. 7); thus, megafires have a greater potential to alter the availability of suitable habitat.

The loss of habitat from large-scale, high-severity fires also results in direct impacts to California spotted owl individuals and populations. As megafires alter the number of large trees (including nest trees), multi-layered high canopy cover, habitat heterogeneity, and patch size, California spotted owl dispersal, fecundity, and occupancy are subsequently reduced. It has been observed that large patches of high-severity fire significantly reduce colonization (dispersal), occupancy, and habitat use across the California spotted owl's range (Eyes 2014, p. 42; Tempel et al. 2014b, p. 2089; Jones et al. 2016a, pp. 300, 303–305; Eyes et al. 2017, pp. 381, 384; Jones et al. 2019, p. 26; Jones et al. 2020, entire; Schofield et al. 2020, pp. 5–6; Jones et al. 2021a, p. 5; Tempel et al. 2022, p. 13) and for other subspecies (Rockweit et al. 2017, entire; Lesmeister et al. 2019, p. 13; Duchac et al. 2021, p. 12). Fires may cause direct mortality to eggs and juveniles during the nesting season, and fast-moving fires also have the potential to cause direct mortality to adult California spotted owl individuals (Jones et al. 2016a, p. 305). No data are available on how many California spotted owls are killed annually by direct impacts of large-scale, high-severity fire. Although most birds are able to move to escape direct morality from fires, smoke from fires can impact birds by damaging their lungs (Verstappen and Dorrestein 2005, p. 139). While many species have existed with frequent fire over evolutionary time, megafires and extreme smoke events are novel influences that may act as an additional selective pressure on certain species (Nimmo et al. 2021, p. 5689). There is limited research on the effects of wildfire smoke on wildlife in general, but there is clear evidence that smoke can have both acute and chronic health impacts on a variety of taxa, which may ultimately affect demographic rates (Sanderfoot et al. 2021, p. 13).

As discussed above, high-severity fire has negative effects on individual California spotted owls and their habitat, ranging from reduced occupancy to direct mortality of individuals. However, several publications conclude that spotted owls will continue to use areas burned at high-severity and, therefore, there are no negative effects of high-severity fire for California spotted owls (Lee and Bond 2015, entire; Hanson et al. 2018, entire; Hanson et al. 2021, entire; Lee 2018, entire). We have reviewed these publications and acknowledge this disagreement in the literature. However, our review of all the best available science, including those sources that conclude no negative effects, has led us to agree with the vast majority of science, which concludes that overall spotted owls avoid large patches of high-severity fire and that high-severity fire is increasing throughout California and the western United States. For more analysis on the conflicting results of these studies and our analysis, please see the SSA report (Service 2022, pp. 27–28).

Current conditions in the California spotted owl's range may contribute to ongoing fire risk, and depending on the portion of the range and the land manager, fire management activities may vary. Decades of fire suppression have led to overall higher canopy cover from small and medium trees, higher dead biomass density, and more surface fuels in forests of the western United States (Verner et al. 1992, pp. 247–248; Agee and Skinner 2005, p. 83). The historical fire return interval for the Sierra Nevada was around 11–16 years, but fire suppression over the last 100 years has led to a change in fire behavior of larger, more severe fires in recent years (Safford and Stevens 2017, pp. v–vi). The multi-layered high canopy cover and biomass provide important habitat for California spotted owls but also tend to increase the vulnerability of forests to high-severity fire (Verner et al. 1992, pp. 251–258; Agee and Skinner 2005, p. 83) in present day fire-suppressed forests. The higher fuel loads, particularly large, dead wood (like snags and logs), tend to burn at higher severity as densities increase (Lydersen et al. 2019, p. 7). In a recent megafire, dead biomass directly contributed to the fire effects observed, as areas with high amounts of dead biomass pre-fire burned at high severity (Stephens et al. 2022, p. 8).

On top of the higher fuel loads, extended droughts and longer wildfire seasons have led to larger and more severe fires in the California spotted owl's range and throughout western North America (Miller and Safford 2012, p. 41; Mallek et al. 2013, p. 1; Nigro and Molinari 2019, p. 20; Parks and Abatzoglou 2020, p. 4; Safford et al. 2022, p. 12). In 2020 and 2021, more than 1 million ha (2.4 million ac) burned in California, resulting in more area burned over these 2 years than in the past 7 years of all California fires

combined (Safford et al. 2022, p. 5). An increase in high-severity fire changes how fire interacts with important habitat features for California spotted owls. For example, fire often killed, but left standing, trees that would subsequently serve as locations for California spotted owl nests. However, large patches of high-severity fire burn hotter and can end up entirely consuming the features important to California spotted owls. Between the years of 2000 and 2014, 7 percent of suitable California spotted owl nesting habitat (a total of 85,046 ha (210,153 ac) out of 1,166,560 ha (2,882,633 ac)) was burned either partially at moderate severity (typically 25–50 percent tree basal area mortality) or entirely at high severity (typically >75 percent tree basal area mortality), causing ≥50 percent tree basal area mortality and reducing canopy cover to <25 percent (Stephens et al. 2016, pp. 1, 9).

The size and severity of a fire determines how much it will impact California spotted owls at the population level. If a high-severity fire occurs in a large enough area, it can eliminate entire territories or home ranges of California spotted owls, displacing individuals that may or may not establish a new territory (Jones et al. 2016a, pp. 300–305). Site occupancy by California spotted owls after wildfire appears to be a function of the amount of suitable habitat remaining after the fire (Gutiérrez et al. 2017, p. xxiii). If habitat becomes unsuitable, it takes decades for large trees to reestablish on the landscape. Based on fire activity and anticipated trends over the next 75 years, the cumulative amount of nesting habitat burned at ≥50 percent tree basal area mortality will exceed the total existing habitat in the Sierra Nevada (Stephens et al. 2016, pp. 1, 12). In other words, the loss of suitable California spotted owl habitat would exceed the rate of new forest growing post-fire (Stephens et al. 2016, pp. 11–13). Thus, future habitat persistence for California spotted owls is concerning given that high-severity fire appears to be increasing across all lands (both public and private) occupied by California spotted owls and throughout the western United States (Parks and Abatzoglou 2020, pp. 4–5). When private lands are considered separately, the odds of high severity fire occurring on industrially managed forests and adjacent lands were 1.8 and 1.4 times higher, raising some concern over California spotted owl persistence on private lands (Levine et al. 2022, p. 4).

In the Sierra Nevada, the proportion of high severity fire throughout the California spotted owl's range has dramatically increased in recent years. The proportion of high-severity fire in California montane forests in 2020 was on average 43–76 percent higher than the combined average between 1984 and 2008, and was three to six times higher than the estimates of pre-Euroamerican settlement (Safford et al. 2022, p. 17). Between 1984–2019, 1,084,171 ha (2,679,044 ac; 55.7 percent) burned throughout the California spotted owl range in the Sierra Nevada with 317,605 ha (784,820 ac; 46.6 percent) burned at high severity (Keane in litt. 2022, p. 3). In contrast, between 2020 and 2021, 862,625 ha (2,131,593 ac; 44.3 percent) burned throughout the California spotted owl's range with almost 363,812 ha (899,000 ac; 53.4 percent) of that at high severity (Keane in litt. 2022, p. 3). This comparison illustrates how megafires in 2020 and 2021 burned more habitat at high severity in 2 years than fires over the past three and a half decades. In addition, between 1984 and 2021, 50 percent of California spotted owl PAC acres have been impacted by wildfire, with 56 percent of that total burned in 2020 and 2021. Further, of the 56 percent that burned between 2020 and 2021, 65 percent burned at high severity (Keane in litt. 2022, p. 5). Because California spotted owls are displaced from areas where the entire PAC or majority of the PAC has burned at high severity, it is unlikely the species will continue to persist in these areas until the habitat can recover, which can take decades.

We conducted a fire severity analysis within the entire California spotted owl's range; details of the methodology used in this analysis are available in the SSA report (Service 2022, pp. 29–30). Of the California spotted owl's range, approximately 47 percent burned between 1984 and 2021, with 15 percent at high severity. Most of the area burned at high severity occurred in 2020 and 2021, with 2 percent and 4 percent, respectively (Service 2022, table 3). Additionally, based on an existing dataset from the California Department of Forestry and Fire Protection of the potential threat of future wildfire in California, the majority of the California spotted owl's range occurs within the very high wildfire threat category (Service 2022, figure 8). Much of the coastal-southern California population of the California spotted owl falls within the extreme fire risk. This dataset contains fire information through 2014, and so does not consider how the recent fires from 2014 to 2021 affect future fire threat. Overall, we expect that the pattern of both area burned and wildfire severity will continue or increase into the future due to the effects of climate change.

Some regulatory mechanisms and conservation measures can reduce the potential severity or scale of wildfires. Wildfire fuel reduction treatments, such as prescribed fire and mechanical thinning, can reduce the amount or degree of spotted owl habitat loss from a high-severity fire, and a balanced approach to fuel reduction treatments may ensure suitable California spotted owl habitat is maintained (Jones et al. 2016a, p. 305; Service 2017, pp. 24–25; Chiono et al. 2017, p. 1; Jones et al. 2021a, entire). The 2004 USFS Sierra Nevada Forest Plan Amendment has a goal of actively restoring fire-adapted ecosystems by reducing unnaturally dense conditions, and there are also measures in place in the framework to avoid disturbance within California spotted owl PACs to the greatest extent possible (USFS 2004, pp. 34–35). Fuel reduction treatments are actively taking place on USFS land, but special considerations, including the timing of treatments to avoid the breeding season and the methods that are used, are evaluated to avoid impacts to owls within PACs. In 2017 and in 2020, an MOU was signed by Sierra Pacific Industries, California Department of Forestry and Fire Protection, National Fish and Wildlife Foundation, and the USFS to coordinate on certain actions that may contribute to forest fuel reductions and California spotted owl conservation. The purpose of the MOU is to try to minimize the threat of large-scale, high-severity fire while still providing quality habitat for California spotted owls. However, large-scale, high-severity fire cannot be completely addressed by regulatory mechanisms. Fuel reduction treatments may not prevent catastrophic damage in an extreme fire event; however, when fire is a part of the fuel reduction treatment, future fire severity can be reduced and more fire treatments should be included to achieve fuels reduction goals, including areas surrounding spotted owl nests and riparian corridors (North et al. 2021, pp. 527, 529; Taylor et al. 2022, p. 4).

High-severity fire is likely to continue to be a threat into the future for California spotted owls. Although some individuals could be harmed or killed by large fires, the primary impact of this threat is habitat-based. These habitat changes also affect demographic parameters: following high severity fires, colonization declines and territory extinction increases, leading to overall declines in occupancy (Tempel et al. 2022, pp. 13–16). Overall, large-scale, high-severity fire is currently and will

likely continue to be a threat throughout the range of the California spotted owl, including for both the Sierra Nevada and the coastal-southern California populations.

Tree Mortality

Widespread increases in tree mortality have been occurring in California due to drought, disease, and bark beetles above historical levels of mortality (van Mantgem et al. 2009, pp. 521–523; Asner et al. 2015, p. 249; McIntyre et al. 2015, p. 1458; Preisler et al. 2017, p. 166). When tree stand densities are too high compared to available resources (water, light, nutrients), trees become stressed due to competition for resources and thus are more vulnerable to mortality (USFS 2017, p. 9). Large trees are often especially prone to drought, disease, and beetle-related mortality (Smith et al. 2005, p. 266; Mueller et al. 2005, p. 1085; Allen et al. 2010, p. 668; McIntyre et al. 2015, p. 1458). Increased tree mortality may be contributing to loss of California spotted owl habitat (Gutiérrez et al. 2017, p. 137), but the magnitude of the impacts on California spotted owls is uncertain. Large-scale tree mortality reduces the availability of canopy cover and large trees, potentially resulting in California spotted owl population declines because of reduced habitat available for dispersal and occupancy. However, some tree mortality events can have some positive effects on California spotted owl habitat, as these events contribute to habitat heterogeneity and the availability of coarse woody debris for prey species.

Between 2010 and 2016, an estimated 102 million trees died across about 3,106,367 ha (7,676,000 ac) throughout California (Tree Mortality Task Force 2017, p. 2). By February 2019, total tree mortality in California increased to an estimated 147 million dead trees (Cal Fire and USFS 2019, p. 1). The latest estimate shows that between 2010 and 2021, the drought combined with subsequent beetle attacks resulted in approximately 173 million dead trees in California with approximately 3.3 percent of the surveyed forest area in 2021 showing signs of elevated mortality (USFS 2021, p. 5). The tree mortality events are particularly severe in the southern Sierra Nevada area. Most of the tree mortality observed is due to effects from the 2012–2016 drought, with less mortality occurring from 2018–2021; however, another drought period started in 2020 (USFS 2021, p. 5).

In 2015, the Governor of California declared a state of emergency due to the unprecedented number of dead and dying trees in the State. In response, the California Tree Mortality Task Force, which is now the Forest Mortality Working Group within the California Wildfire and Forest Resilience Task Force, was created to coordinate emergency protective actions and monitor ongoing conditions. The group collects and manages the tree mortality data, provides recommendations to land managers, presents grants for research funding, and provides public outreach. The task force will likely continue to provide the services listed into the future due to the ongoing and large-scale nature of the tree mortality events in California.

Regulatory mechanisms and management actions could provide some protection from the effects of tree mortality. Efforts to restore historical forest conditions and reduce stand densities through fuels reduction treatments (mechanical thinning, prescribed fire, etc.) may indirectly contribute to reducing future tree mortality by reducing competition. Further, the goal should be to eliminate the excessive levels of tree mortality currently being observed in the landscape and not limit all tree mortality, as tree mortality is a natural part of the forest ecosystem and ultimately creates features important to California spotted owls (snags, tree cavities). Tree mortality is likely to continue throughout the range of the California spotted owl due to predicted increases in drought conditions that will likely continue to weaken trees and make them susceptible to bark beetles and disease (Millar and Stephenson 2015, pp. 823–826; Young et al. 2017, pp. 78, 85). Excessive tree mortality is likely to continue to be a threat into the future for the California spotted owl.

Drought

California has experienced extreme drought conditions in 2007–2009 and 2012–2016 (Williams et al. 2015, pp. 6823–6824; CDWR 2021, p. 4), and as of May 2022, a majority of the California spotted owl's range is considered in severe to moderate drought (CDWR 2022, entire). Anthropogenic warming likely contributed to more recent drought anomalies and increases the overall likelihood of extreme droughts in California into the future (Williams et al. 2015, pp. 6819, 6826; CDWR 2022, entire).

Drought conditions can negatively impact the California spotted owl's ecological needs. As described above, drought conditions contribute to tree mortality, which reduces canopy cover, likely leading to a decline in occupancy. Further, drought conditions likely reduce the availability of prey species (Franklin et al. 2000, p. 589; Glenn et al. 2010, p. 2549; Glenn et al. 2011, p. 174). Drought and hot temperatures in the previous summer are linked to lower reproductive success in California spotted owls (LaHaye et al. 2004, p. 1066) and lower survival and recruitment in northern spotted owls in the next breeding season (Glenn et al. 2011, pp. 159, 174). Inversely, increases in precipitation either before or after the nesting season are linked to increased survival and fecundity in all three subspecies of spotted owls (Seamans et al. 2002, p. 321; LaHaye et al. 2004, pp. 1056, 1064; Glenn et al. 2011, pp. 159, 174). Thus, drought likely negatively impacts the California spotted owl's habitat components, and its demographic needs of dispersal, survival, fecundity, and occupancy. No regulatory mechanisms or conservation measures in place ameliorate the direct impacts of drought. It is likely that drought conditions will continue to be a threat into the future across the California spotted owl's range and will likely worsen due to the effects of climate change.

Climate Change

Scientific measurements spanning several decades demonstrate that changes in climate are occurring and that the rate of change has been faster since the 1950s. There is strong scientific support for projections that warming will continue through the 21st century, and that the magnitude and rate of change will be influenced substantially by the extent of greenhouse gas emissions (Meehl et al. 2007, pp. 760–764, 797–811; Ganguly et al. 2009, pp. 15555–15558; Prinn et al. 2011, pp. 527, 529; IPCC 2013, pp. 19–23).

Projected changes in climate and related impacts can vary substantially across and within different regions of the world (IPCC 2013, pp. 15–16). Therefore, we used downscaled projections from California's Fourth Climate Change Assessment, including the following four regional assessments that cover the California spotted owl's range: Sierra Nevada (Dettinger et al. 2018, entire), the Central Coast Region (Langridge 2018, entire), Los Angeles (Hall et al. 2018, entire), and San Diego (Kalansky et al. 2018, entire). Ten global climate models were used for all four regional assessments, and each model considered two different emissions scenarios, one in which greenhouse gas emissions continue to increase into the next century (RCP 8.5) and one in which greenhouse gas emissions stabilize by mid-century and then decline to levels

seen in the 1990s by the end of the century (RCP 4.5) (Dettinger et al. 2018, pp. 15, 17; Hall et al. 2018, p. 9; Kalansky et al. 2018, p. 18; Langridge 2018, p. 12).

Under both emissions scenarios, projected annual average temperatures throughout the California spotted owl's range are projected to increase. The largest increases under both emissions scenarios and timeframes are projected for the eastern portions of the Sierra Nevada (Dettinger et al. 2018, p. 17, figure 2.3). Projected changes will result in greater temperatures than historically experienced in the Sierra Nevada, and this degree of temperature change will likely result in a shift in the rain to snow transition by 1,500–3,000 feet (Dettinger et al. 2018, pp. 17, 20). Projected temperature increases are more pronounced in the inland portions of the Central Coast Region, with the ocean acting as a buffer for coastal areas (Langridge 2018, p. 14, figure 4). In addition, the average number of extremely hot days (defined as days that exceed the 98th percentile of observed, historical (1961–1990) daily maximum temperatures between April 1 and October 31) are expected to increase throughout the Central Coast Region (Langridge 2018, pp. 14–15, table 4).

Regional assessments covering southern California include the Los Angeles and San Diego Regional Assessments (Hall et al. 2018, entire; Kalansky et al. 2018, entire). Projected annual average maximum temperatures throughout the Los Angeles Region increase under both emissions scenarios (Hall et al. 2018, p. 10, figure 2). For the San Diego Region, projected annual average maximum and minimum temperatures also increase under both emissions scenarios. Similar to the Central Coast Region, these changes will be more pronounced in the interior portions of the Los Angeles and San Diego Regions (Hall et al. 2018, p. 11, figure 3).

In addition to temperature projections, the regional assessments for California's Fourth Climate Change Assessment also considered future changes in precipitation, both the amount and the timing. Within the Sierra Nevada Region, changes in precipitation are projected to be relatively small and will vary depending on the area. In general, average annual precipitation in the southern portion of the Sierra Nevada Region is projected to stay similar or decrease by 5 percent, regardless of emission scenario. In other portions of the Sierra Nevada Region, particularly along the eastern side, the amount of precipitation is projected to increase by up to 10 percent. In addition to projections showing the northern portions of the range will receive more precipitation than southern portions, areas at higher elevations are also more likely to receive an increase in precipitation. Although the average change in precipitation is projected to be small, the models show there will be an increase in extreme conditions with more dry days overall interspersed with higher intensity precipitation events, when they do occur (Dettinger et al. 2018, p. 19). Further, in some areas more precipitation will fall as rain instead of snow, as the rain to snow transition is projected to shift by 457–914 m (1,500–3,000 ft) (Dettinger et al. 2018, pp. 17, 20).

Similar to the Sierra Nevada Region, interannual variability within the Central Coast Region is expected to increase with more dry days overall, but more precipitation when rain events do occur (Langridge 2018, p. 16). In southern California, the amount of precipitation in the Los Angeles and San Diego Regions is highly variable (Hall et al. 2018, p. 12, figure 5; Kalansky et al. 2018, p. 24). Similar to other regions, projections for the Los Angeles and San Diego Regions show an increase in extreme conditions such as high-intensity precipitation events, known as atmospheric rivers, and severe drought conditions (Hall et al. 2018, pp. 13–14, figure 6; Kalansky et al. 2018, pp. 24–25, figures 7 and 9).

Because the California spotted owl has a wide geographic range and the projected changes in climate vary across the range, the effects those changes will have on the species and its habitat will vary. Future climate projections of Sierra Nevada vegetation distribution indicate that low- and mid-elevation forests are vulnerable to conversion to unsuitable habitat for California spotted owls, such as shrublands and grasslands (Gutiérrez et al. 2017, p. 215). These changes in climate may also include potential shifts in forest communities upslope, which would have impacts on both the California spotted owl's habitat and prey habitat (Gutiérrez et al. 2017, pp. 132, 215, 288). This potential upslope shift in suitable habitat may mitigate some climate-induced habitat threats over ecological time, although it would require many decades for suitable large nest trees to develop in areas where they do not currently exist (Gutiérrez et al. 2017, p. 215). These differences in net habitat loss versus net habitat gained under future climate scenarios will likely depend not only on the rate of warming but also how individual plant and prey species respond (Seamans and Gutiérrez 2007a, p. 61).

Changing climatic conditions may have direct impacts on California spotted owl physiology, survival, reproduction, recruitment, or population growth. The thermal neutral zone (the range of temperatures tolerated by a warm-blooded animal) for California spotted owls is 18.2–35.2 °C (64.8–95.4 °F) (Weathers et al. 2001, p. 682). Above this zone, California spotted owls experience heat stress (Weathers et al. 2001, p. 678). The relatively low thermal neutral zone may make California spotted owls more susceptible to increased temperatures or cause behavioral or habitat shifts to cooler microclimates on the landscape. Behaviorally, California spotted owls can select cooler microclimates for roosting, especially within warmer forest stands (McGinn et al. in review, p. 2). Changing climatic conditions may also have indirect impacts including changes in habitat and prey distribution, abundance, and quality. California spotted owls must be able to adjust to the changing climate through behavioral changes, spatial shifts, or adaptation in order to persist. Under projected warming conditions in the future, cooler microclimate refugia are likely to be critically important for the persistence of California spotted owl individuals and populations (McGinn et al. in review, p. 3). It is likely that climate change will reduce the quantity and quality of California spotted owl habitat, which would likely result in population impacts, including a decrease in dispersal, fecundity, and occupancy. Both the habitat components and demographic factors of California spotted owls will likely be impacted by climate change, but the full extent of impacts climate change may have on California spotted owls is poorly understood (Wan et al. 2018, p. 690).

Climate modeling specific to the central Sierra Nevada portion of the California spotted owl's range has shown that maintaining high canopy cover, especially at higher elevations, will be important for California spotted owls to persist into the future, as high canopy cover helps maintain future refugia for individuals to select for cooler microclimates (Jones et al. 2016b, entire). Under both a low climate change prediction scenario (RCP 2.6) and a high climate change scenario (RCP 8.5), California spotted owl occupancy decreases in comparison to baseline climate conditions (Jones et al. 2016b, p. 901). However, this model did not consider projected increases in frequency and size of high-severity fires due to climate change, which would likely result in more significant declines

in occupancy than predicted by the model (Jones et al. 2016b, p. 903). Earlier modeling of spotted owl response to projected climate changes show that different subspecies and populations of spotted owls are anticipated to respond differently across their ranges (Peery et al. 2011, p. 14).

The climate change projections described above suggest increasing interannual climate variability throughout the range of the California spotted owl. Interannual climate variability is defined as when annual weather patterns differ from historical average climate, including prolonged drought conditions, heavy rain conditions, and higher or lower than average temperatures. Interannual climate variability has been shown to have impacts on the survival and reproductive success of California spotted owls. Drought conditions and hot temperatures during the summer have been found to reduce fecundity in California spotted owls during the next breeding season (LaHaye et al. 2004, p. 1056). Increases in precipitation either before or after the nesting season are linked to increased survival and fecundity, whereas increased precipitation during the nesting season reduces reproductive success (North et al. 2000, p. 804; LaHaye et al. 2004, pp. 1056, 1064). It is hypothesized that northern spotted owls exhibit a bet-hedging reproduction strategy and that an absence of reproduction is linked to environmental conditions (Franklin et al. 2000, pp. 539, 576). California spotted owls likely have a similar bet-hedging reproductive strategy (Stoelting et al. 2015, p. 46; Gutiérrez et al. 2017, pp. 14–15). California spotted owls are sensitive to warm temperatures and, therefore, may be physiologically sensitive to weather patterns with increased temperatures (Weathers et al. 2001, p. 684). Temperature, either too hot or too cold, may affect spotted owls directly by increasing energy demands (Gutiérrez et al. 2017, p. 20). This increase may have direct impacts on the physiology of spotted owls or on breeding if mates must bring more food to the nest for the female to survive. Increased interannual climate variability due to climate change will likely impact the California spotted owl throughout its range, which would result in lower fecundity.

Regulatory mechanisms and management actions that are or could potentially provide some protection from the effects of climate change include the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the California Global Warming Solutions Act. Both address climate change by reducing greenhouse gas emissions within the United States and California, respectively. There are no regulatory mechanisms or management actions that fully address the effects of the climate change.

The effects of climate change will continue to impact California spotted owls into the future by exacerbating the negative influencing factors described above, especially extreme weather events such as prolonged drought and severe storms. The loss or reduction of suitable habitat throughout the California spotted owl's range will likely reduce the subspecies' reproduction, occupancy, survival, recruitment, and population growth.

Fuels Reduction and Forest Management

Forest management has long been a controversial topic regarding species that require old growth forest habitat, including the spotted owl (Gutiérrez 2020, p. 337). With the increasing frequency and extent of high-severity fire in California in recent decades, fire mitigation has become a key issue for spotted owl management and conservation. The goal of fuels management is to reduce the buildup of fuels in forests that contribute to these large-scale, high-severity fires, which can effectively mitigate subsequent fire behavior and their effects, even under extreme weather (Hessburg et al. 2021, p. 7; Prichard et al. 2021, p. 9). The long-term benefits of properly managed fuel treatments for reducing the risk of severe wildfire are likely to outweigh the short-term negative impacts to spotted owl habitat (Ager et al. 2007, pp. 54–55; Roloff et al. 2012, p. 7; Jones et al. 2021b, pp. 4–5). These trade-offs are complex and ultimately depend on the extent that treatments have negative impacts to owl habitat and the magnitude of effects from subsequent wildfires (Jones et al. 2021b, p. 2). Fuels reductions and forest management practices vary throughout the California spotted owl's range. Below, we discuss clearcutting, mechanical thinning, salvage logging, and prescribed fire, and the positive and negative influences that these practices can have on the species.

Clearcutting, sometimes referred to as even-aged management, is defined as an even-age regeneration or harvest method that removes all trees in the stand, producing a fully exposed microclimate for the development of a new age class in one entry (Gutiérrez et al. 2017, p. 292). The natural range of variation for forest gaps in the Sierra Nevada has been found to range from 0.03–1.17 ha (0.07–2.89 ac) (Safford and Stevens 2017, p. 140), and within the SSA report and this proposed rule, clearcutting refers to complete removal greater than the natural range of variation.

Clearcutting is a mostly historical threat to California spotted owls, although it still occurs in some areas of the Sierra Nevada. By removing entire stands of trees, clearcutting reduces the amount of large trees, high canopy cover, and coarse woody debris available for California spotted owls. Commercial timber harvest no longer occurs within the California spotted owl's range on public lands in the Coastal-Southern California DPS (Gutiérrez et al. 2017, p. 254). Clearcutting also does not occur on USFS lands on the eastern side of the Sierra Nevada range (Boatner in litt. 2022). Clearcutting still occurs on private timber harvest lands but is limited to 8.1-ha (20-ac) parcels by California State forest practice rules (California Code of Regulations (CCR), title 14, article 3 (14 CCR 913 *et seq.*)). Additionally, there must be at least 91.44 m (300 ft) of forested area between clearcuts, and adjacent lands cannot be cut for at least 5 years (14 CCR 913 *et seq.*). Even with the reduction of clearcutting in recent history, it will take decades or centuries for large trees to grow back from the past removal practices; therefore, there are residual effects that may be impacting California spotted owl populations and the habitat that is available (Jones et al. 2018, p. 1). California spotted owls may use clearcut habitat, likely for foraging activities, but these areas are used significantly less than high canopy cover and large tree areas (Atuo et al. 2019, pp. 295, 301–302).

Mechanical thinning is a forest management strategy to thin trees either in even or uneven-aged stands by removing trees in rows, strips, or by using fixed pacing intervals, usually implemented to meet forest management objectives. It can be done for commercial harvest of trees or to reduce fuel loads to decrease the likelihood of large-scale, high-severity fires (Gutiérrez et al. 2017, p. 292). Within the SSA report and this proposed rule, we use ''mechanical thinning'' to include both individual tree selection (new age classes are created in uneven-aged stands by removing individual trees of all size classes more or less uniformly throughout the stand to achieve desired stand structure) and group tree selection (treatment involves salvage harvest in a stand where small groups of trees are harvested because of tree mortality due to windstorm, wildfire, insects, disease, or other animals).

Mechanical thinning is actively used to manage forests occupied by California

spotted owls and can have positive or negative impacts on the California spotted owl's habitat and demographics depending on the specific methods used. The 2004 Sierra Nevada Forest Plan Amendment promotes reducing, using methods including mechanical thinning, unnaturally dense forest conditions on the landscape to reduce the risk of large-scale, high-severity fire (USFS 2004, pp. 34–35). Minimal area is treated mechanically, especially when compared to area burned by wildfire (566,560 ha (1,400,000 ac) burned between 2017–2020 versus 61,852 ha (152,842 ac) previously treated; North et al. 2021, p. 524). Treatments are located to avoid California spotted owl activity centers to the greatest extent possible (USFS 2004, pp. 34–35), which often leaves the PACs untreated and potentially vulnerable to stand-replacing fires (Stephens et al. 2019, p. 395). Further, strategic thinning can promote forest resiliency, but removing some large, fire-intolerant tree species like fir and cedar may be necessary to promote future resilience of forested habitat (Stephens et al. 2020, entire; North et al. 2021, p. 530).

Resilience of California spotted owl habitat results from low stand densities, which reduces competition and allows trees to grow, so more intensive fuels treatments (mechanical thinning and prescribed fire) may be needed to achieve historically lower levels of tree densities (North et al. 2022, p. 6). When conducted outside California spotted owl activity centers, mechanical thinning will likely reduce the amount of damage the habitat may experience due to high-severity fire while also minimizing short-term habitat impacts (Stephens et al. 2014, p. 904; Tempel et al. 2015, p. 1; Chiono et al. 2017, p. 1). Strategic mechanical thinning to reduce fuel loads and reduce the risk of large-scale, high-severity fire, while also maintaining the necessary forest structure components of large trees, multi-layered high canopy cover, habitat heterogeneity, and coarse woody debris, will be important for California spotted owl management into the future (Jones et al. 2016a, p. 305; Tempel et al. 2016, p. 305; Jones et al. 2019, p. 22). Strategically placed landscape fuel treatments can decrease future fire severity while also increasing seedling densities (Tubbesing et al. 2019, p. 54). Many studies emphasize the importance of scaling-up fuel reduction treatments (mechanical thinning and prescribed fire) and suggest an increased benefit of treating within California spotted owl territories for long-term persistence, although positive effects would not be observed until mid-century and treatments should still strive to maintain large trees and high canopy cover forest (Jones et al. 2021b, p. 3; Safford et al. 2022, p. 17).

This fuels management technique has little to no impact on occupancy if carried out in a strategic way (for example, maintaining some patches of high canopy cover mixed with patches of moderate canopy cover to provide for the primary habitat of California spotted owls and incorporating limited operating periods that restrict activities from occurring during the critical nesting period) (Tempel et al. 2016, p. 747). However, mechanical thinning can decrease California spotted owl occupancy and is negatively correlated with reproduction (Tempel et al. 2014a, p. 2089; Stephens et al. 2014, p. 903; Tempel et al. 2022, p. 19). Although one study detected some negative effects of fuels reduction treatments on California spotted owls in southern California, the authors suggested that occupancy declines were small compared to the potential negative effects of fire (Tempel et al. 2022, p. 22). Similarly, there is evidence of reduced foraging in fuel treatment areas that have a moderate to high proportion of forest gaps with little to no canopy cover (Gallagher et al. 2018, pp. 487, 494–499). Forest thinning has complex effects on both California spotted owls and their mammalian prey species. Thinning may have negative short-term effects on prey species by increasing the risk of predation by removing above-ground cover and reducing canopy connectivity, and thinning may remove suitable nesting substrates; however, there may be positive effects in the long term (over decades) by promoting growth of the midstory layer of trees that is favorable to certain mammalian prey species (Wilson and Forsman 2013, p. 79).

Salvage logging is a practice where damaged or dying trees are removed to recover their economic value and promote forest health (Gutiérrez et al. 2017, p. 293; Jones et al. 2020, p. 11). Salvage logging often occurs after natural disturbances such as wildfires, disease, and insect infestation (Lindenmayer et al. 2008, p. 4). Post-fire fuels treatment that includes the removal of smaller trees and surface and ladder fuels is not generally considered a threat to California spotted owls relative to the threat posed by megafires (Jones et al. 2021b, p. 7). Negative effects of salvage logging have been documented for wildlife, vegetation, and soils, but there is a paucity of literature on the subject, which may lead to inaccurate comparisons when studies occur across varied geographic regions; nevertheless, the negative effects may be mediated by altering equipment, timing of operations, and harvest prescriptions to leave more large snags (Nemens et al. 2019, entire). California spotted owls inhabit areas of low-medium severity fire, patchy high-severity fire, and areas with dead trees; therefore, salvage logging likely reduces the amount of habitat available for California spotted owls (Gutiérrez et al. 2017, p. 276). Salvage logging can result in short-term decreased vegetation regrowth (Wagenbrenner et al. 2015, p. 176), which would likely impact prey species for California spotted owls. However, salvage logging does not appear to make much difference in long-term vegetation regrowth, so salvage logged areas have the potential to again become suitable habitat after the centuries it takes to establish large trees in the area (Peterson and Dodson 2016, p. 56). Salvage logging in certain instances may also be necessary to reduce future fire severity as high levels of dead biomass are associated with high-severity fire (Lydersen et al. 2019, p. 7; Stephens et al. 2022, p. 8); salvage logging may also be required for restoration personnel to safely access an impacted site for re-planting activities (Sawyer in litt. 2022).

The California spotted owl's response to salvage logging appears to be at least partly dependent on the characteristics of the fire after which it occurs, which can make it difficult to analyze these relationships (detailed in Jones et al. 2019). For example, salvage logging that occurs within a large, burned area is less likely to negatively impact spotted owls relative to salvage logging that occurs within a smaller burned area (Jones et al. 2020, p. 12). There is some evidence that northern spotted owl (Clark et al. 2012, p. 15) and California spotted owl occupancy decreases with salvage logging (Lee et al. 2013, p. 1327; Lee and Bond 2015, p. 228; Hanson and Chi 2021, p. 5), while other evidence suggests that salvage logging has no effect on California spotted owl persistence or colonization (Jones et al. 2021b, p. 5). Salvage logging can be a threat to California spotted owls when their habitat components of large trees, coarse woody debris, and habitat heterogeneity are removed from the landscape, resulting in a decrease in occupancy at the population level. The 2004 Sierra Nevada Forest Plan Amendment prohibits salvage harvest in California spotted owl PACs unless a biological evaluation determines that the areas proposed for harvest have been rendered unsuitable for the purpose they were intended (*i.e.,* California

spotted owl habitat) by a catastrophic stand-replacing event (USFS 2004, pp. 52–53).

Prescribed fire or cultural burning as a tool for ecosystem management had been used for millennia by Native Americans; with the colonization of North America, Europeans introduced a culture of fire suppression onto the landscape (Marks-Block et al. 2021, p. 3). Wildfire suppression is still the dominant management practice over prescribed or controlled burning across much of western North America (Stephens et al. 2019, p. 391). Between 2017 and 2020, approximately 49,000 ha (120,000 ac) per year were treated with prescribed burning across Federal, State, and Tribal lands in California (Gabbert 2022, entire). The State of California recently released a report outlining a plan to increase the use of ''beneficial fire'' to 162,000 ha (400,000 ac) annually by 2025 (California Wildfire & Forest Resilience Task Force 2022, p. 3). Spotted owls can persist in low- and moderate-severity fire areas with similar probabilities to unburned landscapes (Roberts et al. 2011, p. 617), demonstrating their adaptation to a natural fire regime (Verner et al. 1992, pp. 247–248; Stephens et al. 2019, p. 394). However, studying the relationship between spotted owls and prescribed fire alone is difficult because there are usually confounding factors of past timber harvest or salvage logging (Clark et al. 2012, p. 15). Prescribed ''ecologically beneficial'' fire is an important tool for protecting nesting and roosting habitat from catastrophic fires and for maintaining diverse California spotted owl habitat throughout the landscape (Roberts et al. 2011, p. 617; Stephens et al. 2019, p. 394).

Fuels reductions and forest management practices within the California spotted owl's range include clearcutting, mechanical thinning, salvage logging, and prescribed fire. Depending on the method used and how it is implemented, fuels reductions and forest management practices can have both positive and negative influences on the species. The existing regulatory mechanisms and conservation measures do not completely ameliorate the negative impacts of fuels reductions and forest management practices to California spotted owls; however, land management direction, including the Sierra Nevada Forest Plan Amendment, includes protective standards and guidelines that must be adhered to while conducting management activities in California spotted owl habitat.

Fuels reduction in some form is necessary to ensure California spotted owl habitat persistence because long-term gains in habitat protection outweigh the short-term negative effects, especially when conservation measures are implemented appropriately (Jones et al. 2021a, p. 2; Jones et al. 2021b, entire; North et al. 2022, entire; Safford et al. 2022, entire). Differences in forest management may help explain why California spotted owl populations occurring in some mixed ownership landscapes have higher occupancy, density, and probability of reproduction compared to public land (Roberts et al. 2017, p. 113; Hobart et al. 2019, p. 198; SPI et al. 2022, pp. 9, 17). The need to increase the pace and scale of fuels reduction efforts is recognized across agencies, and, recently, the Department of the Interior announced funding through the Bipartisan Infrastructure Law (Infrastructure Investment and Jobs Act, Pub. L. 117–58, 135 Stat. 429) to increase fuels treatments across the United States (DOI 2022, entire). The USFS also identified preliminary projects to address fuel reduction projects through its wildfire crisis landscape investments, and two projects are expected in the near term within the California spotted owl's range that include mechanical thinning and prescribed fire (Tahoe National Forest and the Stanislaus National Forest; USFS 2022a, entire). Fuels reductions and forest management practices will likely continue to have varied effects on California spotted owls throughout the species' range.

Competition and Hybridization With Barred Owls

The barred owl is a closely related species to the spotted owl, native to eastern North America (Mazur and James 2000, ''Introduction'' section). Since the 1960s, the barred owl has been extending its range westward, first coming in contact with northern spotted owls and more recently moving into the California spotted owl's range (Peterson and Robins 2003, p. 1162; Livezey 2009, p. 49; Keane et al. 2018, p. 5). Barred owls were first detected in northwestern California in 1982 (Evens and LeValley 1982, p. 890), the Sierra Nevada in 1991 (Dark et al. 1998, p. 53), and along the coast as far south as Marin County in California by 2002 (Jennings et al. 2011, p. 105).

Barred owls and spotted owls have similar habitat requirements, with old forests representing high-quality habitat for both, although barred owls use a broad mix of forest types (Wiens et al. 2014, pp. 14, 32). Because barred owls have more habitat flexibility than spotted owls, there is potential for barred owls to expand into spotted owl habitat through corridors of lower quality habitat. For example, recent barred owl sightings from Davis, California (eBird 2022, entire), suggest that barred owls could expand across the Central Valley into California spotted owl habitat from the west in addition to the more likely pathway through forests in the Sierra Nevada. Although the California spotted owl's range has a gap between the Sierra Nevada DPS and the Coastal-Southern California DPS, barred owls may be able to colonize the coastal-southern California spotted owl's range because of the barred owl's ability to use other forest types. Detections of barred owls in coastal forests in the Santa Cruz Mountains in San Mateo County, California, an area without known occurrences of the California spotted owl, suggests a pathway towards connectivity to the coastal portion of the California spotted owl's range.

Barred owls are aggressively outcompeting and displacing spotted owls on the landscape (Wiens et al. 2014, p. 1; Gutiérrez et al. 2017, p. xvi; Long and Wolfe 2019, entire). Barred owls are larger than spotted owls (Gutiérrez et al. 2007, pp. 185–186) and behaviorally dominant (Van Lanen et al. 2011, pp. 2197–2198). Although diet overlaps between the two species, with both predominantly feeding on nocturnal mammals, barred owls are generalists that consume many more prey species in comparison to spotted owls (Wiens et al. 2014, pp. 24–25; Kryshak et al. 2022, pp. 12–13).

Competition between the two species results in negative effects to the survival, productivity, and recruitment of northern spotted owls (Dugger et al. 2016, pp. 69–91), and barred owls have been described as demographically superior to northern spotted owls because they have higher survival estimates and produced, on average, 4.4 times more young than northern spotted owls over a 3-year period (Wiens et al. 2014, p. 28). The presence of barred owls has caused lower detection rates and occupancy probabilities in northern spotted owls (Olson et al. 2005, p. 918; Crozier et al. 2006, p. 760; Kroll et al. 2010, p. 1264; Yackulic et al. 2012, p. 1953; Yackulic et al. 2014, p. 265). Although there is some evidence that lower detection rates may be in part due to northern spotted owls responding less frequently in the presence of barred owls (Crozier et al. 2006, p. 760), the negative effects of barred owls on spotted owls are clear.

Although there is no evidence of barred owls wounding or killing northern spotted owls (Wiens et al. 2014, p. 33), competition ultimately has

population-level effects because of impacts to occupancy and reproduction. Additionally, barred owls can hybridize with spotted owls (Gutiérrez et al. 2017, p. 211). There are likely broader impacts on the ecosystem from the barred owl's range expansion, such as an imbalance in predator/prey relationships, causing even greater impacts to spotted owl interspecific competition (Holm et al. 2016, p. 615). Because of the wide and diverse diet of barred owls in comparison to spotted owls, barred owls will not be ecological replacements to the spotted owls that they displace, and this could have widespread ecological impacts (Kryshak et al. 2022, pp. 15–16).

Barred owl detections within the California spotted owl's range have continued to increase. From 1989 to 2013, 51 barred owls and 27 barred owl/spotted owl hybrids had been detected in the Sierra Nevada (Gutiérrez et al. 2017, p. xxv). By 2017, the number of barred and barred owl/spotted owl hybrid detections in the Sierra Nevada increased to approximately 145 (Keane et al. 2018, p. 7), with another 2.6-fold increase between 2017 and 2018 (Wood et al. 2020, p. 4). Even these seemingly low numbers of barred owls in the California spotted owl's range are of concern, given that in the northern spotted owl's range, replacement of northern spotted owls began at a slow rate in the early years of the expansion, followed by a rapid rate of replacement once the barred owl population reached a critical mass (Forsman in litt. 2018, p. 1). As shown, over the last 10 years in particular, barred owl detections throughout the California spotted owl's range have increased at a higher rate (Service 2022, figure 11).

Experimental barred owl removal studies were first initiated and are currently ongoing in the northern spotted owl's range (*e.g.,* Diller et al. 2012, entire; Wiens et al. 2020, entire). In Washington and Oregon, removals successfully decreased site use by barred owls and increased northern spotted owl use within treatment areas (Wiens et al. 2021, entire). Further, successful barred owl removals can result in competitive release for spotted owls (Wiens et al. 2021, pp. 4–5) (competitive release describes a situation in which one of two similar species competing for the same resources is removed, allowing the remaining species to use more of the resources; this is generally considered beneficial for the remaining species). In another (smaller) example of barred owl removals within the northern spotted owl's range, after nine barred owls were removed from historical northern spotted owl sites, all sites were re-occupied by northern spotted owls within a year of removal: four by the original residents and five by new residents (Diller et al. 2012, p. 405). However, barred owls again replaced the northern spotted owls at three sites within 1–4 years of the northern spotted owls reoccupying those territories (Diller et al. 2012, p. 405). Overall, evidence to date indicates some measure of success for northern spotted owls related to barred owl removal efforts in at least some cases. However, species experts caution that forest conditions, densities of barred owls, and numbers of spotted owls would all factor into whether or not similar results could be obtained in other areas (Wiens et al. 2020, p. 1).

Experimental barred owl removal studies have also recently been initiated in the California spotted owl's range, specifically in the Sierra Nevada (Hofstadter et al. 2022, entire). In 2017, a California spotted owl conservation assessment concluded that control measures for barred owls in the California spotted owl's range were likely to be more successful and cost efficient while densities of barred owls are still relatively low in the California spotted owl's range, and that if control measures were not taken, barred owls would most likely replace California spotted owls on the landscape in the future (though the timescale of this replacement was uncertain) (Gutiérrez et al. 2017, pp. xxxi, xxv; see also Wood et al. 2020, pp. 5–7). Within the California spotted owl's range, barred owl removal experiments were initiated in 2018, and have continued through 2022 (Hofstadter et al. 2022, entire). Between 2018 and 2020, researchers removed 76 owls (63 barred owls and 13 hybrids) from the Sierra Nevada, decreasing barred owl occupancy by a factor of 6.3 down to 0.03 (confidence interval: 0.01–0.04). Experimental removals were guided by passive acoustic monitoring, which was also used to measure the efficacy of removals. Partnerships were crucial to the regional-scale removal, with public-private partnerships allowing access to 92 percent of the California spotted owl's range in the Sierra Nevada, including almost all known barred owls in the area and minimizing refugia for barred owls. California spotted owls rapidly colonized territories where barred owls were removed: 15 out of 27 territories were recolonized by California spotted owls within 1 year of barred owl removals, with successful breeding documented in five of these territories (Hofstadter et al. 2022, pp. 4–5). Early and effective experimental removals of barred owls within the California spotted owl's range in the Sierra Nevada has dampened the urgency of this threat, but the potential for continued and persistent expansion into the range remains. Funding is currently available to continue barred owl removal experiments in the California extent of the Sierra Nevada through 2024 (Peery in litt. 2022). However, continued barred owl monitoring and experimental removal would likely need to continue into the future (Hofstadter et al. 2022, p. 6). Management options are currently being evaluated for potential future implementation.

Regulatory mechanisms and management actions that are providing or could potentially provide some protection from the effects of barred owl expansion include management teams, management plans, and habitat conservation plans (HCPs) that coordinate, fund, and implement the experimental removals described above. However, barred owls are a significant threat to the persistence of California spotted owls, and we expect the magnitude of the threat to increase into the foreseeable future, particularly if management efforts are not continued.

Rodenticides

Exposure of nontarget wildlife to anticoagulant rodenticides threatens many species, including California spotted owls, likely because of ingestion of exposed prey animals, known as secondary exposure (Gabriel et al. 2018, p. 5; Franklin et al. 2018, p. 2). Secondary exposure to anticoagulant rodenticides in predators such as raptors can be lethal, with higher levels causing severe blood loss and internal hemorrhaging that can result in organ failure and death (Gomez et al. 2022, p. 147). Although this threat has potential impacts to individuals, the loss of just a few individuals may reduce survival and the population growth rate because the California spotted owl is a long-lived species with low reproductive rates. This threat would be particularly detrimental if a parent were exposed during the breeding season because hatchlings and juveniles rely on parental care to survive, so the loss of just one parent would likely result in the loss of offspring as well.

Rates of mortality in free-living wild birds due to anticoagulant rodenticides are often unknown due to the difficulty of linking exposure to death and the lack of understanding of toxicity thresholds in different species (Gomez et al. 2022, pp. 147–148). Documentation of anticoagulant

rodenticides in ovaries of female barred owl suggests the possibility for in-utero transfer to chicks (Hofstadter et al. 2021, pp. 7–8). Sub-lethal effects of anticoagulant rodenticides in other owl species include reduced clutch size, brood size, fledging success, slower clotting time, residual transfer to eggs, anemia, and impaired mobility; however, these impacts have not yet been documented in spotted owls (Rattner et al. 2012, p. 832; Salim et al. 2014, p. 113; Gabriel et al. 2018, p. 7; Gomez et al. 2022, p. 148).

Although there is little information specific to California spotted owls regarding the exposure rates and resulting impacts of rodenticides, available literature on other species suggests the potential for widespread exposure. Exposure of nontarget species to anticoagulant rodenticides is commonly associated with agricultural or urban settings, but exposure in forest settings in northern California is detrimental to northern spotted owls and barred owls (Gabriel et al. 2018, p. 5; Franklin et al. 2018, p. 2). Seven out of 10 northern spotted owl carcasses tested positive for anticoagulant rodenticides, and 40 percent of 84 barred owls tested in the northern spotted owl's range had been exposed (Gabriel et al. 2018, pp. 4–5). In another study using barred owls as a proxy for spotted owls, almost half of barred owls sampled (n=40) and one northern spotted owl sampled demonstrated exposure to anticoagulant rodenticides (Wiens et al. 2019, p. 4). High rates of exposure were also demonstrated in barred owls and barred owl/spotted owl hybrids in California, with females having higher rates of exposure than males (Hofstadter et al. 2021, pp. 6–7). Large amounts of rodenticides and other pesticides have been found on USFS land in the southern Sierra Nevada (Thompson et al. 2013, pp. 95–99). Approximately 85 percent of fisher (*Martes pennanti*—a carnivorous predator with similar habitat requirements as California spotted owls) carcasses tested in the Sierra National Forest had been exposed to rodenticides (Gabriel et al. 2012, pp. 1–14; Thompson et al. 2013, pp. 91).

Anticoagulant rodenticide use has increased throughout California with increases in illegal marijuana cultivation, as anticoagulant rodenticides are used to control rodent damage to the plants (Franklin et al. 2018, p. 1). A comparison of marijuana cultivation site likelihood with northern spotted owl suitable habitat found almost 50 percent overlap between the two (Wengert et al. 2021, p. 10). Although the number of illegal marijuana growing operations within the California spotted owl's range is unknown, considering the number of illegal marijuana growing operations found throughout the State, there are likely thousands within the California spotted owl's range (Gabriel et al. 2012, pp. 12–13; Thompson et al. 2013, pp. 95–99; Gabriel et al. 2018, p. 6).

In 2014, the California Department of Pesticide Regulation restricted the purchase, possession, and use of anticoagulant rodenticides in the State to purchase and use by a certified pesticide applicator with a permit issued by the county agricultural commissioner in order to protect wildlife; however, anticoagulant rodenticides associated with illegal marijuana grows are more likely the source of contaminants. If illegal marijuana grows are found, State law enforcement will shut the operations down, but there is currently no standardized clean-up protocol and a limited amount of funding to ensure removal of all rodenticides. Recently there has been an increased effort to locate and shutdown illegal marijuana grows on public lands in California called Operation Forest Watch (Department of Justice 2018, entire). Overall, anticoagulant rodenticides are likely affecting owls across their range, and we expect this threat will continue into the foreseeable future.

Development

Anthropogenic land use (including both cultivation and development) in California is expected to increase 28 percent by 2100 with a projected 3 percent decrease in overall forest land cover (Sleeter et al. 2017, pp. 1068, 1075). Urbanization is projected to be a primary driver of land use and land cover change in California over this time frame (Sleeter et al. 2017, p. 1076). Urban development is a threat throughout the range of California spotted owls; however, the threat is more substantial in the coastal and southern California population (Sleeter et al. 2017, p. 1081, figures 6 and 7). A majority of California spotted owl habitat occurs on public lands (approximately 71 percent of total range); therefore, this threat is primarily limited to a small amount of private lands.

Southern California faces high development demands with specific threats of wind farms and large reservoirs impacting connectivity within the California spotted owl's range (Gutiérrez et al. 2017, pp. 253–254). Loss of riparian areas due to water diversion in southern California has created barriers to dispersal among small populations (Gutiérrez et al. 2017, pp. 253–254). The southern California area of the California spotted owl's range is fragmented, with low dispersal between populations, so more development could further exacerbate fragmentation (LaHaye et al. 2001, p. 692; Barrowclough et al. 2005, p. 1116; Gutiérrez et al. 2017, pp. 253–254).

In the Sierra Nevada, low- to mid-elevation development is considered a threat to the California spotted owl and its habitat (Verner et al. 1992, pp. 264–265). Low- and mid-elevation zones in the Sierra Nevada continue to experience human population growth, which may increase the demand for development. Fifty percent of known California spotted owl sites on the west slope of the Sierra Nevada are considered wildland-urban interface and may be vulnerable to further development (Gutiérrez et al. 2017, p. 207). The northern Sierra Nevada is expected to have a higher level of forest harvest compared to other parts of the California spotted owl's range (Sleeter et al. 2017, p. 1081, figure 7). Overall, development is likely affecting owls across their range, and we expect this threat will continue into the foreseeable future.

Conservation Efforts and Regulatory Mechanisms

Mechanisms and actions related to the California spotted owl and its habitat include State and Federal laws and regulations, federal incidental take permits, and forest management on USFS lands. In this proposed rule, we describe the key actions related to the California spotted owl and its habitat. For a full description of all conservation efforts and regulatory mechanisms, please see the SSA report (Service 2022, pp. 57–66).

The USFS has been a part of ongoing conservation efforts for California spotted owls, including the 2004 Sierra Nevada Forest Plan Amendment, which includes USFS land in the Lassen, Plumas, Tahoe, Humboldt-Toiyabe, Eldorado, Stanislaus, Sierra, Inyo, and Sequoia California spotted owl analysis units, and the 2005 Southern California National Forest Land Management Plans, which includes the Los Padres, Angeles, San Bernardino, and Cleveland California spotted owl analysis units. In 2019, the Inyo National Forest completed its own land management plan, and revised forest plans for the Sierra and Sequoia National Forests are expected to be final in 2023 (Miller in litt. 2022). Once these plans are finalized, the Inyo, Sierra, Sequoia National Forests will follow their individual plans and no longer follow

the 2004 Sierra Nevada Forest Plan Amendment. All of these are regulatory documents that provide conservation measures for California spotted owls on USFS lands (USFS 2004, entire; USFS 2005, entire; USFS 2019a, pp. 43–47; USFS 2022b, pp. 59–68; USFS 2022c, pp. 59–68). The main goals of these conservation efforts include protection and management of California spotted owl activity centers and home range core areas, increasing the frequency of large trees on the landscape, and increasing structural habitat diversity. The goals relate to increasing the condition of the species' ecological needs to increase resiliency and provide conservation efforts related to the threats of large-scale, high-severity fire; clearcutting; mechanical thinning; and salvage logging.

The 2004 and 2005 USFS land management plans and the 2019 Inyo National Forest and 2022 draft versions of the Sierra and Sequoia National Forest plans maintain the designation of PACs for California spotted owls, which encompass the best available 121 ha (300 ac) of habitat in as compact of a unit as possible around a nest tree (USFS 2004, p. 37; USFS 2005, p. 109; USFS 2019a, p. 43; USFS 2022b, p. 61; USFS 2022c, pp. 61–62). There are special considerations for any land management activities or projects that may take place within a PAC. Depending on the plan, management standards and guidelines include conducting surveys during the planning process of vegetation treatments where appropriate (*i.e.,* in areas of suitable habitat for California spotted owls), limiting activities to reducing surface and ladder fuels through prescribed fire, limiting mechanical treatments to only allow fuel reduction treatments in some wildland urban defense zones where prescribed fire is not feasible, identifying maximum size of canopy gaps created within California spotted owl territories, requiring a limited operating period for when vegetation treatments can occur, and limiting the impacts a vegetation treatment can have on a PAC per year (USFS 2004, pp. 50–51, 54, 60–61; USFS 2005, pp. 7, 82–83; USFS 2019a, pp. 43–47; USFS 2022b, pp. 63–68; USFS 2022c, pp. 63–68).

In addition to protections, the 2004 Sierra Nevada Forest Plan Amendment and the 2022 version of the Sierra and Sequoia National Forest Plans outline desired conditions for PACs and other large habitat blocks within the home range that include at least two tree canopy layers, dominant and co-dominant trees with average diameters of at least 61 cm (24 in) dbh, at least 60 percent to 70 percent canopy cover, some very large snags (greater than 114 cm (45 in) dbh), and snag and course woody debris levels that are higher than average (USFS 2004, pp. 37, 39–40; USFS 2022b, pp. 60–61; USFS 2022c, pp. 60–61). As discussed below, in April 2019, the USFS finalized a new California spotted owl conservation strategy for the Sierra Nevada (USFS 2019b, entire). The intention of the strategy is to be used for adaptive management and to be incorporated into future forest plan updates, although it is not legally enforceable and does not commit agency action or inaction.

As described above in ''Fuels Reduction and Forest Management,'' there is disagreement about whether or not measures in these plans, such as mechanical thinning, are beneficial or detrimental to California spotted owls, and whether or not protections afforded to PACs are sufficient to ameliorate impacts to California spotted owls (John Muir Project of Earth Island Institute and The Wild Nature Institute 2014, pp. 70–71, 98, 108; Sierra Forest Legacy and Defenders of Wildlife 2015, pp. 39–40). However, a meta-analysis of California spotted owl occupancy and forest management practices indicated that mechanical thinning treatments that maintain canopy cover at 40 percent or greater would not substantially reduce California spotted owl occupancy, although canopy cover at 50 percent or above is more strongly correlated with California spotted owl occupancy (Tempel et al. 2016, pp. 761–762). Forest management practices from the 2004 Sierra Nevada Framework generally maintain at least 50 percent canopy cover as well as large trees within PACs, and in the 2005 Southern California plan, 40–50 percent canopy cover must be maintained. The 2019 Conservation Strategy also maintains a minimum of 50 percent canopy cover within PACs (USFS 2019b, p. 28). Overall, PACs are designated to preserve key habitat used by California spotted owls, and some researchers have concluded that PACs are a key conservation tool that should continue to be implemented (Berigan et al. 2012, pp. 300, 303). In contrast, other research has shown that PACs can be more susceptible to the effects of high-severity fire due to the relatively larger amounts of surface fuel (North et al. 2012, p. 395).

In April 2019, the USFS completed an updated California spotted owl conservation strategy for the Sierra Nevada national forests (USFS 2019a, entire). The updated strategy includes new scientific understanding since the 2004 Sierra Nevada Forest Plan Amendment and will be incorporated into national forest land management plans as they are updated in the coming years, in accordance with USFS regulations in title 36 of the Code of Federal Regulations (CFR) at part 219. Until the revised national forest land management plans can be completed, the Pacific Southwest Region of the USFS sent a letter of direction to the Sierra Nevada national forests on April 19, 2019, to provide guidance on implementing the new conservation strategy in the interim (USFS 2019b, entire). The new conservation strategy gives direction for increased pace and scale of ecological restoration to provide more resilient habitat for California spotted owls, while simultaneously continuing to protect the most important habitat attributes and areas for California spotted owls.

The three main goals for the 2019 conservation strategy include: (1) Maintain a well-distributed and stable California spotted owl population across the Sierra Nevada by minimizing impacts from non-habitat threats (such as barred owls and contaminants); (2) promote and maintain well-distributed California spotted owl habitat by developing key habitat elements and connectivity; and (3) promote California spotted owl persistence by enhancing habitat resilience to multiple disturbances, considering climate change. This increased habitat resilience will lead to improved conditions on the landscape and greater population resiliency. The new strategy provides adaptive management and metrics for success in order to ensure the conservation measures outlined in the plan are beneficial to California spotted owls.

In addition to the conservation strategy, the USFS is planning to implement a new monitoring plan using acoustic recording units to cover the Sierra Nevada portion of the California spotted owl's range. The goal is to use the information from the new monitoring plan to allow the USFS to conduct a future California spotted owl occupancy modeling effort to provide information over a larger portion of the California spotted owl's range and allow greater potential for inference on broad-scale effects of restoration and disturbance (USFS 2019c, pp. 14–15). Elements of the strategy may entail some short-term, localized reduction in occupancy. These elements allow for more forest management flexibility in application of fuels reduction and other landscape treatment projects as compared to the 2004 Sierra Nevada Forest Plan Amendment both within PACs and on the landscape, as well as more flexibility in the retirement of

PACs when they are no longer occupied. Additional flexibility in these landscape treatments provides access to additional tools to maintain and restore California spotted owl habitat (USFS 2019a, entire). We anticipate that the short-term impacts that may occur for the purpose of fuel reduction and forest health will be outweighed by the long-term benefit as more sustainable and dynamic habitat is developed through active management (USFS 2019a, p. 2).

On August 30, 2017, an MOU (hereafter referred to as the Fire MOU) was signed by SPI, CAL FIRE, National Fish and Wildlife Foundation, and the USFS, which will impact all lands from Lassen National Forest south through Stanislaus National Forest. The purpose of the Fire MOU is to document the agreement between the parties to coordinate on certain actions to reduce the risk of large-scale, high-severity wildfire through forest fuels reduction to benefit California spotted owl conservation. This MOU involves establishing a strategic conservation framework to help restore and protect areas where California spotted owls are threatened by habitat degradation due to uncharacteristically extensive and severe adverse fire effects. The Fire MOU is designed for signatories to engage in collaborative landscape-level fuels and fire risk reduction treatments to: (1) Minimize potential fire-related impacts to California spotted owl activity centers on Federal, State, and private lands; and (2) better coordinate implementation of fuels reduction work on Federal, State, and private lands to maximize the effectiveness of this work. Sites for fuels treatment are selected to minimize risk to known occupied California spotted owl activity centers. Measures associated with the Fire MOU include fire management activities such as increased mechanical thinning that may benefit California spotted owls by decreasing risk of large-scale, high-severity fire. If mechanical thinning is planned with consideration of the California spotted owl's habitat needs, there may be some negative impacts, but these would be outweighed by reducing the risk of large-scale, high-severity fire in California spotted owl activity centers (Jones et al. 2016a, p. 305; Service 2017, pp. 24–25; Chiono et al. 2017, p. 1; Jones et al. 2021b, p. 6).

The USFS, SPI (a private corporation), and CAL FIRE manage forest lands in California that are frequently adjacent to each other and have ongoing programs to protect and enhance habitat for fish and wildlife. On these lands, forest fuels are managed to reduce fire risk and its potential impacts on wildlife species. Under State law, SPI has the authority to participate in fire suppression on its own lands, while CAL FIRE, contract counties, USFS, and other government agencies have primary fire suppression responsibility for all Federal, State, and private wildlands in California. The parties also have responsibilities and interests in the inventory of their respective lands for species recognized as endangered, threatened, proposed as endangered or threatened, candidate, and sensitive species by the Federal or State government. The parties also have responsibility and interest in the development of appropriate protection measures for these species. Due to these natural resource challenges, the Fire MOU parties believe it is important to establish a coordinated, multi-stakeholder agreement to help protect and enhance forest resources.

Though the Fire MOU was initially set to expire on December 2019, an amendment was signed in April 2019 to extend the terms of the MOU through December 2024. In March 2020, a new MOU that supersedes the 2017 MOU and 2019 amendment was signed by the same parties. An amendment to the 2020 Fire MOU was signed in September 2020 to add a number of new commercial forest landowners. The terms of the 2020 MOU are effective through December 2024. The Service is actively engaged with the signatory parties to discuss fuels reduction efforts and associated monitoring.

Barred owls have expanded into western North America over the past several decades, first through the Pacific Northwest and more recently into the Sierra Nevada. The Service and the USFS are funding researchers at the University of Wisconsin-Madison to carry out an ongoing barred owl removal study. The project grant was signed in August of 2018, and funding has been secured from the Service and potentially University of Wisconsin-Madison through 2025 (Peery in litt. 2022). The project addresses several key questions related to the range expansion of barred owls in the Sierra Nevada and will inform the development of a scientifically based barred owl management plan. Specifically, this project: (1) Assesses the current distribution and density of barred owls; (2) conducts experimental barred owl removals; (3) tests for reductions in barred owl site occupancy rates; (4) quantifies spatiotemporal patterns of barred owl recolonization; and (5) characterizes barred owl dispersal into and within the Sierra Nevada. This project takes place primarily in the northern and central Sierra Nevada, including Lassen National Forest, Lassen National Park, Plumas National Forest, Tahoe National Forest, Eldorado National Forest, Yosemite National Park, and Sequoia-Kings Canyon National Park.

Additionally, on July 22, 2022, the Service published in the **Federal Register** (87 FR 43886) a notice of intent to prepare an environmental impact statement, initiating a 30-day public scoping period seeking input on barred owl management in the northern spotted owl's and California spotted owl's ranges. Preventative barred owl management for California spotted owls will likely be considered in the environmental impact statement. Northern spotted owls are the main focus right now, but barred owls have expanded into northern California into the California spotted owl's range and are expected to continue to expand without continued management.

Currently, two HCPs include the California spotted owl. Habitat conservation plans are planning documents required as part of an application for an incidental take permit; they can apply to both listed and non-listed species, including those that are candidates or have been proposed for listing. They describe the anticipated effects of the proposed taking; how those impacts will be minimized or mitigated to the maximum extent practicable; and how the HCP is to be funded.

Sierra Pacific Industries is the largest private forest land owner in California, with approximately 744,621 ha (1,840,000 ac) of timberland in northern California (SPI 2021, p. 1). Sierra Pacific Industries' habitat conservation plan for both the northern spotted owl and California spotted owl covers all areas on SPI-managed property where covered activities will occur within the range of the two spotted owl subspecies, which is more than 607,028 ha (1,500,000 ac) (SPI 2021, p. 2). Covered activities under the HCP include timber operations and other forest management activities. Major activities associated with the HCP include growing, harvesting, and transporting timber; timber stand regeneration and improvements; road and landing construction and maintenance; fuel break construction and maintenance; and monitoring and research (including for spotted owls) (Service 2020, p. 8). Implementation of the HCP is not expected to result in direct injury or mortality of California spotted owls due to the implementation of conservation measures that will be implemented throughout the 50-year permit term. These measures will support California spotted owl species needs and address threats currently affecting the species,

including reducing the risk of catastrophic fire and eradication of illegal marijuana plantations (Service 2020, pp. 10–13).

In 2015, SPI began studying barred owls via removal experiments. In 2018, the study was revised to include the following objectives: (1) assess the genetic differentiation of barred owl populations across northern and central California, (2) analyze allele frequency changes on the front of the range expansion, (3) estimate the amount of spotted owl-barred owl interbreeding (admixture) in each population, and (4) identify what barred owls are preying on in California. These efforts are ongoing, and SPI has committed to continue these efforts during the term of the permit, as feasible. Ongoing research and monitoring efforts for California spotted owls on SPI land have indicated that some California spotted owl populations in mixed-ownership landscapes have higher occupancy, density, and probability of reproduction compared to California spotted owl populations on public land (Roberts et al. 2017, p. 113; Hobart et al. 2019, p. 198; SPI et al. 2022, pp. 9, 17).

The Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) is one of the largest habitat conservation plans in the United States, covering 202,343 ha (500,000 ac). The California spotted owl is currently listed as a ''species not adequately conserved'' under the MSHCP until an MOU is executed with the USFS that addresses management of California spotted owls on USFS lands. The MSHCP plan area includes 21,901 ha (54,119 ac) of modeled habitat for California spotted owls. If the MOU with the USFS is signed, the loss of 5,223 ha (12,905 ac) (24 percent) of this modeled habitat is anticipated over the 75-year permit term. With the low density of California spotted owls in the plan area, loss of these 5,223 ha (12,905 ac) is not anticipated to result in direct mortality of adult birds. However, loss of foraging and nesting habitats to development will cause California spotted owls in impacted areas to disperse in search of other habitats. Thus, loss of breeding and foraging habitat may impact overall population numbers of California spotted owls within the plan area over the long term by reducing the number of areas suitable for use as foraging and nesting sites (Service 2004, p. 449). In order to offset these impacts, the MSHCP will conserve and manage 535 ha (1,321 ac) (2 percent) of modeled habitat for California spotted owls within additional reserve lands. In total, 16,679 ha (41,214 ac) (76 percent) of the modeled habitat for California spotted owls will be included in the MSHCP conservation area. If the MOU with the USFS is signed, additional monitoring and management would occur in habitat for California spotted owls within USFS lands included in the MSHCP conservation area.

Combined Impacts of Threats

The threats discussed above not only act independently, but also interact with each other. It is important to assess the relationship between threats because there may be new or exacerbated impacts that are not considered when a threat is assessed alone. There are a vast number of ways threats may be interacting with each other, but the SSA report and this proposed rule only focus on what is currently most relevant to the viability of the species.

For example, climate change intensifies the threats of large-scale, high-severity fire; drought; and tree mortality, and it increases interannual climate variability (Kadir et al. 2013, pp. 132, 137; Stephens et al. 2018, p. 77). Development in wildland-urban interfaces also increases the likelihood of large-scale, high-severity fire (Mann et al. 2016, pp. 14–18). An increase of large-scale, high-severity fires with changing climate conditions can lead to accelerated, fire-facilitated conversion of forest edge to non-forested habitat (Parks et al. 2019, pp. 1, 7). The impacts to the California spotted owl would likely range from direct physiological impacts to indirect habitat and prey impacts. The loss of trees due to high-severity fire, drought, and tree mortality would likely lead to increased salvage logging on the landscape, further reducing California spotted owl habitat. Additionally, the expansion of barred owls outcompeting California spotted owls in combination with timber harvest outside of PACs further worsens the outlook for habitat availability. Spotted owls living near the wildland-urban interface may be at a higher risk for exposure to anticoagulant rodenticides, as is the case for barred owls and hybrids (Hofstadter et al. 2021, p. 8).

Barred owls are moving south into the California spotted owl's range, so the northern portion of the Sierra Nevada DPS will likely experience a greater magnitude of this threat, and earlier in time. Tree mortality is more concentrated in the Sierra Nevada DPS than other parts of the landscape and may experience more significant impacts from this threat. The threat of wildfire is of higher magnitude in the Coastal-Southern California DPS. Considering the temporal, spatial, and interactive components of all the threats together is important for understanding the viability of California spotted owls throughout their range now and into the future.

Current Condition

For our current condition analysis in the SSA report and this proposed rule, we considered the status of the two populations of California spotted owls: the Sierra Nevada population and the coastal-southern California population. As described above in Background, to analyze these populations in more detail, we further divided them into analysis units; however, we recognize that these units do not function independently, and in areas where the species' distribution is continuous, like the Sierra Nevada population, impacts to one unit may result in impacts to an adjacent unit. We assessed the condition of all California spotted owls' ecological needs where information was available for each analysis unit, including the demographic factors of survival, fecundity, occupancy, and population growth, and habitat components of large trees and canopy cover. In addition, because high-severity fire has significant effects on the condition of habitat within an analysis unit, we also incorporated results from our fire analysis. For each population, we present an overview of the available information on ecological conditions and threats across the entire population, our analysis of the demographic factors and habitat components within each analysis unit to determine current condition, and a summary assessing population resiliency. In this proposed rule, for each DPS, we then assess California spotted owl redundancy and representation under the current condition analysis.

For detailed information on how we determined all demographic and habitat scores, total scores for each population and analysis unit, and uncertainties considered in the analysis, please see the SSA report (Service 2022, pp. 70–77).

Sierra Nevada DPS Current Resiliency

Resiliency is the ability of a species to withstand stochastic events, the normal year-to-year variations in both environmental conditions and demographic conditions (Redford et al. 2011, p. 40). Determined by the size and growth rate of the populations comprising the species, resiliency can be evaluated to gauge the ability of a species to weather the natural range of favorable and unfavorable conditions.

Until recently, California spotted owls and suitable habitat were relatively

well-distributed in the Sierra Nevada with few barriers to dispersal (Gutiérrez et al. 2017, p. 94): as of 2017, an estimated 1.98 million ha (4.9 million ac) of suitable habitat for California spotted owls were available in the Sierra Nevada, primarily on Federal lands (Gutiérrez et al. 2017, pp. xx, 123). Of that land, 75 percent is managed by the USFS, 7 percent is managed by the NPS, and 18 percent is either privately owned or managed by other government agencies (Gutiérrez et al. 2017, p. xx). However, recent large, catastrophic fires have reduced available habitat and have likely created new barriers for California spotted owl dispersal in this DPS. Other barriers to dispersal include urban and suburban development, large reservoirs, physiographic features such as non-forested or unsuitable habitat or vegetation communities, or lack of riparian areas to act as corridors through unsuitable extents (Gutiérrez et al. 2017, pp. 94–95, 253–254).

From our habitat analyses, we found that the Sierra Nevada has higher canopy cover and tree size values than southern California (Service 2022, tables 5, 9, and 13). When comparing the northern to the southern Sierra Nevada, the north contains higher canopy cover, which aligns with historical forest structure data that tend to show more dense forests in the northern Sierra Nevada (Van Wagtendonk et al. 2006, p. 250), with the exception being on the east side of the Sierra Nevada (Humboldt-Toiyabe and Inyo analysis units), which contains more open and disjunct habitat than the west side. Higher canopy cover combined with higher precipitation levels tend to result in lower tree mortality in the northern Sierra Nevada, which may have helped reduce the potential for megafires in the northern Sierra Nevada in past years, but climate change impacts of reduced snowpack and increased temperatures show that increased fire risk is also occurring in the northern Sierra Nevada. We also found that the two units mostly composed of National Parks (Yosemite and Sequoia-Kings Canyon) contain the largest tree size percentages. Overall, the overlap values between canopy cover and large trees were low across all analysis units (Service 2022, table 9).

The threats that are currently impacting the Sierra Nevada population include large-scale, high-severity fire; tree mortality; drought; climate change; various impacts from fuels reductions and forest management; competition with barred owls; and rodenticides. These threats are not equivalent across all analysis units within the Sierra Nevada population (Service 2022, pp. 77–87). For example, competition with barred owls is more pronounced in the northern part of this population than in the southern portion, and the threat from rodenticides is more pronounced at the wildlife-urban interface. However, some threats, like fire, are considered a threat across the population, and there is a general increasing trend in the annual acreage and relative proportion of high-severity fires in the Sierra Nevada (Keane in litt. 2022, p. 3). In 2020–2021, the percent of habitat that burned at high severity within California spotted owl PACs in the Sierra Nevada was almost twice as that from 1993–2019; in 1993–2019, 44 percent of habitat burned, with 35 percent of that at high severity, compared to 65 percent of fire being high severity in 2020–2021 (Keane in litt. 2022, p. 5).

We conducted a separate fire analysis for the entire California spotted owl's range, which includes PACs as well as additional acreage outside PACs (Service 2022, pp. 29–30, appendix I). Our fire analysis shows similar results, with approximately 42 percent of the California spotted owl's range in the Sierra Nevada burned between 1984 and 2021, with 7 percent and 12 percent of that total from acreages burned in 2020 and 2021, respectively. Of the 42 percent of California spotted owl's range burned within the Sierra Nevada, approximately 13 percent was burned at high severity (Service 2022, appendix I). In our supplemental analysis that analyzes habitat and fire metrics along an ecological boundary between the northern and southern Sierra Nevada, we found that both portions of the Sierra Nevada burned at similar amounts between 1984 and 2021 (Service 2022, appendix I). However, the majority of burned acreage in the northern Sierra Nevada occurred in 2021 (18 percent burned with 9 percent at high severity compared to 5 percent or less in all other years and 2 percent or less at high severity from 1984 to 2021). In the southern Sierra Nevada, 11 percent burned in 2020 with 2 percent at high severity in 2020 and 2021, compared to 5 percent or less total burned and 1 percent or less at high severity from 1984 to 2021 (Service 2022, appendix I). These results suggest higher levels of disturbance to the species and increased recovery time for habitat conditions to improve post-fire because such a large acreage burned over a relatively concentrated period of time.

In addition to common threats acting on all analysis units within this population, there are also common management actions taking place within the Sierra Nevada population. For example, the USFS designates PACs around known California spotted owl nest trees, so analysis units containing national forests (*e.g.,* all Sierra Nevada population analysis units except for Yosemite and Sequoia-Kings Canyon) include these protections. Further, barred owl removal experiments in the northern Sierra Nevada have so far been successful in avoiding the catastrophic impacts that could have occurred in the absence of any management.

The current condition of analysis units throughout the Sierra Nevada population varies, with three analysis units currently considered stable, five declining, and three strongly declining (Service 2022, table 12). All three of the units ranked as strongly declining are on the upper boundary of our scoring system for the SSA report. Based on these results, the overall condition of the Sierra Nevada population is declining and, therefore, has low resiliency. However, though resiliency has declined from historical conditions and connectivity has decreased, the Sierra Nevada population is still distributed throughout its historical range, and ongoing conservation measures and regulatory mechanisms are decreasing the magnitude of threats. Therefore, the Sierra Nevada population maintains the ability to withstand stochastic events.

Sierra Nevada DPS Current Redundancy

To assess current redundancy of the Sierra Nevada DPS, we consider the ability of a species to withstand catastrophic events, *i.e.,* natural or anthropogenic stochastic events that would result in the loss of a substantial component of the overall species population. However, redundancy is not simply a measure of the total number of individuals or populations of a species, but instead must also be evaluated in the context of an assessment of reasonably plausible catastrophic events. For example, when we consider the redundancy of an entity comprised of a single population that is very large and widely distributed, it could have a high ability to withstand a catastrophic event that would only affect a small percentage of the overall population. Therefore, our characterization of the Sierra Nevada DPS's redundancy takes into consideration both an assessment of the size and distribution of its population, and an evaluation of the kinds and likelihood of reasonably plausible catastrophic events to which the species could be exposed.

Of the two populations throughout the species' range, the Sierra Nevada population that makes up the Sierra Nevada DPS covers the most area and is

the largest population. Catastrophic events that could impact California spotted owls include very large, high-severity wildfire; extreme drought; extreme weather events; and prolonged and persistent competition and displacement due to barred owl expansion. Overall, current California spotted owl redundancy has declined from historical condition, which risks making the species more vulnerable to extirpations from catastrophic events. However, the Sierra Nevada DPS is large, contiguous, and still distributed throughout its historical range, meaning it is more able to recover from events such large, catastrophic wildfires.

Sierra Nevada DPS Current Representation

In this proposed rule, to assess current representation, which is the California spotted owl's current ability to adapt to change, we considered the ecological setting and genetic diversity in the Sierra Nevada DPS. In the Sierra Nevada population, a majority of California spotted owls occur within mid-elevation ponderosa pine, mixed-conifer, white fir, and mixed-evergreen forest types, with few California spotted owls occurring in the lower elevation oak woodlands of the western foothills (Gutiérrez et al. 2017, p. xix). Further, California spotted owls in the northern portion of the Sierra Nevadas tend to have larger home range sizes than California spotted owls in the southern portion of the mountain range (Gutiérrez et al. 2017, p. xviii). Within the Sierra Nevada, the northern portion of the range experiences more precipitation and lower mean temperatures than the southern portion of the range (Climate Engine 2017, unpaginated). The diversity in habitat and climate between and within the areas for which we have data suggests that the species has some flexibility to adapt to changing environmental conditions.

Of the three spotted owl subspecies (northern, California, and Mexican), California spotted owls have the lowest genetic diversity when measured by unique haplotypes (Barrowclough et al. 1999, pp. 919, 927; Haig et al. 2004, p. 683). This suggests that California spotted owls have lower genetic representation in general than either of the other two subspecies. However, whether the observed level of genetic diversity indicates low representation is unclear. Because the California spotted owl has persisted throughout much of its historical range for an extended period of time, the relatively low genetic diversity may be an historical artifact rather than an indication of concern for representation. Within the California spotted owl subspecies, genetic differences are found between California spotted owls found in the Sierra Nevada and those found in coastal-southern California; this provides some degree of genetic representation at the subspecies level, although not enough for each population to be considered a separate subspecies (Barrowclough et al. 1999, p. 927; Gutiérrez et al. 2017, p. 101; Hanna et al. 2018, pp. 3946–3947, 3949). Whole-genome data indicate that there is greater genetic difference between California spotted owls (in the northern and southern extent of the subspecies' range) than there is between northern spotted owls and California spotted owls in the northern portion of the range; this is consistent with isolation-by-distance (geographic differences increase with geographic scale) (Hanna et al. 2018, pp. 3946–3947). The genetic differences observed between populations, as well as the habitat and climate differences, may represent a moderate degree of adaptation and thus moderate representation at the subspecies level.

Though the Sierra Nevada DPS has lower representation than the subspecies as a whole, the California spotted owl continues to inhabit different ecological settings throughout the Sierra Nevada. The overall condition of the DPS has declined, which has likely resulted in reduced genetic diversity. Therefore, current California spotted owl representation in the Sierra Nevada DPS has declined from historical condition, suggesting that the ability for the taxon to adapt to change is decreased.

Coastal-Southern California DPS Current Resiliency

Habitat within the Coastal-Southern DPS is considered to be naturally fragmented, with little dispersal occurring between subpopulations due to discontinuous mountain ranges (Gutiérrez et al. 2017, pp. 93–95). This natural fragmentation has been further fragmented by development/habitat loss in the greater southern California area. Specific information about habitat and demographic conditions, when available, is incorporated below for each of our southern California analysis units. The available evidence does not document successful dispersal between the San Bernardino, San Gabriel, and San Jacinto Mountains, which are adjacent mountain ranges, indicating that if dispersal does occur within this population, it is very rare (LaHaye et al. 2001, entire; LaHaye et al. 2004, entire; Gutiérrez et al. 2017, pp. 242, 250).

As previously discussed, within this population, occupancy data are only available for the San Bernardino Mountains. The San Bernardino Mountains have historically contained the largest number of California spotted owls, suggesting that information extrapolated from this area would lead to a too optimistic view for the overall population (Gutiérrez et al. 2017, p. 242). Data from one recent study showed higher occupancy in the San Bernardino Mountains than the San Jacinto and San Gabriel Mountains, and the authors suggest that other parts of southern California may also have experienced greater declines than this area (Tempel et al. 2022, pp. 20–21).

As mentioned for the Sierra Nevada population, our habitat analyses found that habitat values for large trees and canopy cover were lower in southern California than in the Sierra Nevada (Service 2022, tables 5, 9, and 13). Overlap between canopy cover and large trees was also low (Service 2022, table 13). In southern California, high canopy cover is positively associated with California spotted owl reproductive output, but large trees appeared to be more important than high canopy cover (Tempel et al. 2022, p. 22) and are also important for occupancy. Our analysis found large tree values for southern California are low, which may indicate lower habitat quality in this analysis unit. For this population, we conducted an additional analysis identifying the percentage of small trees within the overall population that could potentially support platform or stick nests (Service 2022, table 14). We found that 14 percent of the coastal-southern California analysis units contain these small trees compared to an overall value of 1 percent for large trees only trees larger than 61 cm dbh are considered. When looking at the combined total of small trees and large trees, 16 percent of southern California contains potential trees that could support the California spotted owl's ecological needs (Service 2022, table 14).

The threats that are likely currently impacting this population include large-scale, high-severity fire; tree mortality; drought; climate change; various impacts from fuels reductions and forest management; and rodenticides. Competition with barred owls is not yet considered a current threat within this population. Impacts from these threats may not be equally distributed across the population and are not equivalent to the ways that these threats impact the Sierra Nevada population. For example, what might be considered a stochastic event (in this case, an event that removes one or a few individuals from the population) in the Sierra Nevada population could instead be considered

catastrophic if it were to occur in the coastal-southern California population because of the lower number of California spotted owls within this population. Our fire analysis shows that 60 percent of the California spotted owl's range in southern California burned between 1984 and 2021, 17 percent at high severity, with 6 percent of the total area burned in 2020 and 1 percent at high severity that year. There were no fires in 2021 within the range of this population. Typically, 4 percent or less of habitat within this population burned per year, with 1 percent or less burning at high severity, although some years burned at higher percentages (2003 at 6 percent with 3 percent high severity, and 2007 at 8 percent with 4 percent high severity; Service 2022, appendix I). In addition to common threats acting on all analysis units within this population, there are also common management actions taking place throughout the analysis units comprising the coastal-southern California population. For example, analysis units containing national forests include PACs around known California spotted owl nest trees.

The current condition of analysis units within the Coastal-Southern California DPS is that two analysis units are strongly declining and two units are declining (Service 2022, table 17). Based on these results and our scoring of habitat conditions and available demographic information (Service 2022, table 18), the overall condition of the Coastal-Southern California DPS is strongly declining and, therefore, has very low resiliency.

Coastal-Southern California DPS Current Redundancy

As with the Sierra Nevada DPS, our characterization of redundancy for the Coastal-Southern California DPS takes into consideration both an assessment of the size and distribution of its population, and an evaluation of the kinds and likelihood of reasonably plausible catastrophic events to which the species could be exposed.

As with the Sierra Nevada DPS, catastrophic events that could impact the Coastal-Southern California DPS include very large, high-severity wildfire; extreme drought; extreme weather events; and prolonged and persistent competition and displacement due to barred owl expansion. The population that makes up the Coastal-Southern California DPS is highly fragmented with gaps between occupied areas. In areas where demographic data are available (the San Bernardino analysis unit), declines have accelerated over the last 30 years, and as stated above, information extrapolated from a study area that historically contained the largest number of California spotted owls could lead to an overly optimistic view for other areas of the coastal-southern California population (Gutiérrez et al. 2017, p. 242). Overall, current California spotted owl redundancy in this DPS has declined from historical condition, making the species more vulnerable to extirpations and potentially extinction from catastrophic events.

Coastal-Southern California DPS Current Representation

To assess current representation, which is the California spotted owl's current ability to adapt to change, we considered the ecological setting and genetic diversity among the two California spotted owl populations. In coastal and southern California, California spotted owls are found in riparian/hardwood forests and woodlands, live oak/big cone fir forests, and redwood/California laurel forests (Gutiérrez et al. 2017, p. xxvi). California spotted owls use stick nests more frequently in southern California compared to in the Sierra Nevada. Further, California spotted owls in the northern portion of the range tend to have larger home range sizes than California spotted owls in the southern portion of the range (Gutiérrez et al. 2017, p. xviii). The climate of the Coastal-Southern California DPS is more arid than that of the Sierra Nevada (Climate Engine 2017, unpaginated).

In regard to genetic diversity, in the Coastal-Southern California DPS, the population has become highly fragmented, which likely has resulted in reduced genetic diversity. The increased fragmentation has reduced the amount of available habitat in throughout the coastal-southern California population. Therefore, current California spotted owl representation in the coastal-southern California population has declined from historical condition, suggesting that the ability for the DPS to adapt to change is decreased.

Future Condition

For our future condition analysis, we forecast the response of the Sierra Nevada DPS of the California spotted owl to two plausible future scenarios. These two scenarios represent the extremes of a range of future changes in environmental conditions and success of implemented conservation efforts. The future scenarios project the influences to viability discussed above in *Current Condition* into the future and consider the impacts those influences would potentially have on California spotted owl viability. We apply the concepts of resiliency, redundancy, and representation to the future scenarios to describe the future viability of California spotted owls in the Sierra Nevada DPS.

For this analysis, we describe two future scenarios and assess future resiliency for the Sierra Nevada DPS. Scenario 1 assesses future viability with an increase in the trend and magnitude of threats with implemented management efforts having mixed success. Scenario 2 assesses the viability of the species if the trend and magnitude of threats were to continue at the current trajectory into the future with implemented management efforts being fully successful. A full comparison of the assumptions made for each scenario is available in the SSA report (Service 2022, table 19). Using two scenarios representing the extremes of plausible future projections for the species allows us to consider the full range of future possibilities for predicting the future viability of the Sierra Nevada DPS and incorporates any uncertainty regarding the impact of future environmental conditions and the success of implemented conservation efforts. For the SSA report and this proposed rule, we assessed future conditions at approximately 40–50 years. For a detailed description of our methods and assumptions for each future scenario, as well as more details on how the impacts of threats would differ under each scenario, please see the SSA report (Service 2022, pp. 97–100).

In the SSA report, we also applied our two future scenarios to the population of California spotted owls that makes up the Coastal-Southern California DPS. Because we determined that the current condition of the Coastal-Southern California DPS is consistent with an endangered species (see *Status of the Coastal-Southern California DPS of the California Spotted Owl Throughout All of Its Range,* below), we are not presenting the results of the future scenarios in this proposed rule. Please refer to the SSA report (Service 2022, pp. 100–125) for the full analysis of future scenarios.

Scenario 1

Scenario 1 considers viability of the Sierra Nevada DPS if some of the significant threats were to increase in magnitude into the future and future management efforts have mixed success in addressing those threats. Under this scenario, climate change models under RCP 8.5 project temperature increases of 4.5–6 °F, depending on the portion of the range. Increases in temperatures will

likely increase extreme weather events, including heat waves and drought conditions (Kadir et al. 2013, pp. 38, 48). With increased drought conditions, tree mortality and large-scale, high-severity fire are likely to increase in frequency and size, especially if fuel loads in forests are not decreased (Westerling and Bryant 2008, pp. S244–S248; Abatzoglou and Williams 2016, pp. 11770, 11773; Young et al. 2017, p. 78). Extreme weather events or significant changes in interannual climate variability may have negative impacts on the California spotted owl's survival and reproduction. Although there are some protections in place for California spotted owls on public lands, timber harvest values can vary year to year. Therefore, it is possible that increases in timber harvest targets may reduce California spotted owl habitat that is available now or that may be available in the future for California spotted owls to establish new territories and disperse beyond the PACs.

Without continued ongoing experimental removals, barred owls will likely continue to expand their range into California spotted owl habitat, eventually reaching a point of exponential increase and significantly displacing and outcompeting California spotted owls on the landscape (Keane et al. 2018, pp. 8, 47). The timeline for barred owl expansion and replacement of California spotted owls on the landscape is unknown; however, because they were able to expand so quickly within the northern spotted owl's range, under future scenario 1 we assume barred owls would move beyond the Sierra Nevada and continue to expand into southern California. This expansion could be due to current experimental removal efforts becoming less successful over time (*i.e.,* decreased experimental removal efforts) or the barred owl being able to cross what was thought to be unsuitable habitat, like the Central Valley. Under scenario 1, it is also possible that rodenticide use could continue to increase in California due to the legalization of marijuana in 2016. There will likely continue to be an increase in demand for marijuana, which may increase illegal grow sites using anticoagulant rodenticides in California if the costs of buying land and acquiring/maintaining permits to legalize a grow operation are too high (Soboroff and Koss 2017, entire; Yakowicz 2018, entire; Harrison 2018, entire). In regards to disease and parasites, there is evidence that changing climate conditions could increase pathogen development and occurrence (Harvell et al. 2002, p. 2158), creating a slight chance that disease and parasites may become a more significant issue in the future. Finally, development may continue to encroach upon California spotted owl habitat as the California human population continues to grow (California Economic Forecast 2016, pp. xii–xiii, 233–236).

Under scenario 1, almost all analysis units degrade in condition, with four analysis units considered declining, four strongly declining, and three that will likely be extirpated (Service 2022, tables 20 and 22). Two of the units that will likely be extirpated under scenario 1 are currently small, peripheral units. Based on these results, under scenario 1 the future overall condition of the Sierra Nevada population will be strongly declining (average overall future condition score of 0.82). Therefore, the Sierra Nevada population has very low resiliency under future scenario 1.

Scenario 2

Scenario 2 considers a future where the threats continue at the current trajectory and ongoing management efforts are successful at addressing those threats. Under this scenario, climate change models under RCP 4.5 project temperature increases of 3.5–5 °F, depending on the portion of the range. Under future scenario 2, drought conditions, tree mortality events, and high-severity fire will likely continue at the current trajectory. Currently, there are research actions in place to experimentally limit barred owl expansion within study areas, which have so far been successful and which we project will continue to be successful in limiting the barred owl's expansion under this scenario. Protections would continue to stay in place for California spotted owls on public lands, and timber harvest would remain at reduced levels on public lands. Rodenticide use would either remain the same or decrease due to continued law enforcement activity shutting down illegal marijuana grows. Under scenario 2, the current rate of human population growth will continue, leading to steadily increasing development, specifically in areas that are not on public land.

As in future scenario 1, under future scenario 2, large-scale, high-severity fire will likely impact a majority of the California spotted owl's ecological needs, with negative impacts to prey, large trees, habitat heterogeneity, and available nest trees, and there may be some increase in California spotted owl mortality. With a reduction in some of the key habitat components due to large-scale, high-severity fires, fecundity, occupancy, and population growth will likely decline under future scenario 2.

Under scenario 2, most analysis units degrade in condition, but some maintain their current condition. Overall, under scenario 2, we project the Sierra Nevada population will have four analysis units declining, five strongly declining, and two that will likely be extirpated (Service 2022, table 24). Based on these results, under scenario 2, the future condition of the Sierra Nevada population will be strongly declining, but to a lesser degree than under scenario 1. Therefore, the Sierra Nevada DPS has very low resiliency under future scenario 2.

Future Redundancy

Under future scenario 1, we anticipate the population that makes up the Sierra Nevada DPS would be less resilient compared to current condition. The California spotted owl will likely maintain a wide distribution throughout the Sierra Nevada; however, the conditions of all analysis units within the Sierra Nevada population are declining, with over half the analysis units projected to be strongly declining or extirpated. Therefore, under scenario 1, redundancy would decline compared to the current condition, as the species would be less likely to be able to withstand catastrophic events with only one population with very low resiliency.

Under future scenario 2, the Sierra Nevada DPS would be less resilient compared to the current condition. The California spotted owl will likely maintain a majority of its current distribution throughout the Sierra Nevada. Overall, the DPS would be less likely to be able to withstand catastrophic events, with its population losing resiliency and a majority of analysis units declining or strongly declining with the potential to be extirpated under scenario 2. For species redundancy, the outcome of scenario 1 and scenario 2 are very similar after 40–50 years. There are differences in how quickly the population would decrease in condition, the likelihood of the impacts, and how many analysis units within a population may actually become extirpated. It is more likely that redundancy would be reduced, potentially from a catastrophic event, under scenario 1.

Future Representation

Predictions for future scenario 1 are that many of the habitat components identified for California spotted owls will likely have a limited ability to withstand predicted changes and are likely to further decline in condition in

the future. This would indirectly cause a decrease in representation for the Sierra Nevada DPS if the current degree of diversity in habitat and climate declines. Further, with continued declines in occupancy, fecundity, and survival, population growth will decline and will likely further reduce genetic diversity. Under scenario 1, representation would decline compared to current condition as the species would have less flexibility to adapt to changing environmental conditions.

Under Scenario 2, most analysis units degrade in condition, but some maintain their current condition. Overall, under scenario 2 we project the Sierra Nevada population will have seven analysis units declining and four strongly declining (Service 2022, table 24). Based on these results, under scenario 2 the future condition of the Sierra Nevada population will be strongly declining (average overall future condition score of 1.9), but to a lesser degree than under scenario 1. An overall future condition score of 1.9 is at the very upper limit of our scoring boundary for a strongly declining population condition (Service 2022, tables 4 and 7). Therefore, the Sierra Nevada population has very low resiliency under future scenario 2, but it is closer to the boundary of low resiliency.

Table 1. Analysis Unit Current and Future Condition Comparisons (Changes From Current Condition in Bold).

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Analysis Unit	Current Condition	Future Condition Scenario 1	Future Condition Scenario 2
Sierra Nevada Population			
Lassen	Declining	**Strongly declining**	**Strongly declining**
Plumas	Declining	**Strongly declining**	Declining
Tahoe	Stable	**Declining**	**Declining**
Eldorado	Declining	**Strongly declining**	Declining
Humboldt-Toiyabe	Strongly declining	**Extirpated**	Strongly Declining
Stanislaus	Declining	Declining	Declining
Yosemite	Stable	**Declining**	**Declining**
Sierra	Declining	Declining	**Strongly declining**
Sequoia-Kings Canyon	Stable	**Strongly declining**	**Declining**
Sequoia	Strongly declining	**Extirpated**	Strongly declining
Inyo	Strongly declining	**Extirpated**	Strongly declining

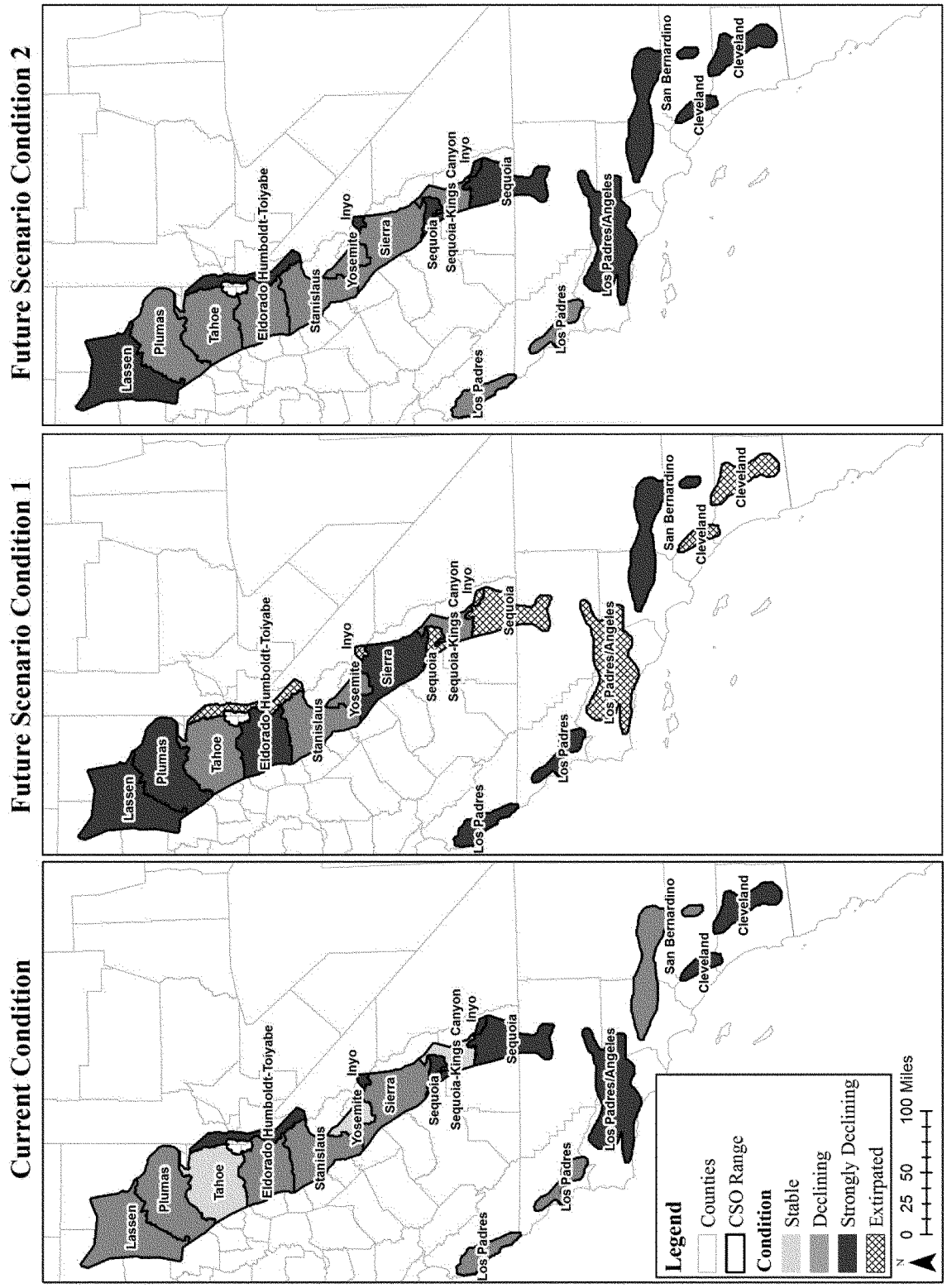

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Figure 2—Condition of California Spotted Owl (CSO) Analysis Units Under Current and Future Scenarios

Determination of California Spotted Owl'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 likely

to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of 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.

Status of the Sierra Nevada DPS of the California Spotted Owl Throughout All of Its Range

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Sierra Nevada DPS of the California spotted owl and its habitat. In this proposed rule, we present summary evaluations of eight threats analyzed in the SSA report for the California spotted owl: wildfire (Factor A), tree mortality (Factor A), drought (Factor A), climate change (Factor A), fuels reduction and forest management (Factor A), competition and hybridization with barred owls (Factor E), rodenticides (Factor E), and development (Factor A), as well as the combined effects of those threats. We also evaluated existing regulatory mechanisms (Factor D) and ongoing conservation measures.

In the SSA, we also considered four additional threats: Overutilization due to recreational, educational, and scientific use (Factor B); disease (Factor C); predation (Factor C); and recreation (Factor E). We concluded that, as indicated by the best available scientific and commercial information, these threats are currently having little to no impact on the California spotted owl, and thus their overall effect now and into the future is expected to be minimal. However, we consider them in this determination, because although these minor threats may have low impacts on their own, combined with impacts of other threats, they could further reduce the number of California spotted owls. For full descriptions of all threats and how they impact the species, please see the SSA report (Service 2022, pp. 25–68).

The California spotted owl needs an adequate amount of nesting, foraging, and roosting habitat to be successful, and requires the components of canopy cover, larger trees, and habitat heterogeneity. Over the last several decades, impacts from wildfire (Factor A), tree mortality (Factor A), and some forest management practices (Factor A), particularly the historical effects of clearcutting, have reduced the amount of forest with these habitat needs. Historical fire suppression has also contributed to the current increase in high-severity fire across the range of the Sierra Nevada DPS of the California spotted owl.

High-severity wildfire is one of the most significant threats currently affecting the California spotted owl and its habitat, including the Sierra Nevada DPS. The Sierra Nevada DPS occurs within a very high wildfire threat category. Approximately 47 percent of the California spotted owl's range burned between 1984 and 2021, with 15 percent burned at high severity. Most of the area burned at high severity occurred in 2020 and 2021. In the Sierra Nevada DPS specifically, over 1,000,000 ha (2,500,000 ac) burned between 1984–2019, with 317,605 ha (784,820 ac) burned at high severity (Keane in litt. 2022, p. 3). Areas burned at high fire severity can take decades to recover. Based on fire activity data from 2000 through 2014, the cumulative amount of fire burned at high severity within the next 75 years could exceed total existing habitat in the Sierra Nevada, such that the loss of suitable habitat may exceed the rate of new habitat growing post-fire (Stephens et al. 2016, pp. 1, 11–13). Although important actions are being taken by the USFS and its partners, particularly through the recent Fire MOUs to reduce the scope and magnitude of wildfires, this magnitude of the threat of wildfire is expected to continue into the foreseeable future.

Under the current condition, 3 of the 11 Sierra Nevada analysis units are in stable condition, 5 analysis units are declining, and 3 analysis units are strongly declining. Based on recent demographic information and our habitat analysis, we found the current resiliency of the Sierra Nevada population is very low. Overall, the subspecies' current redundancy has decreased from historical condition. Although the species is currently distributed throughout its historical range within the Sierra Nevada, the condition of most analysis units is currently declining, reducing the species' ability to withstand catastrophic events. However, the subspecies maintains suitable habitat condition and retains habitat needs, particularly throughout the Sierra Nevada. Additionally, conservation efforts and regulatory mechanisms are decreasing the magnitude of effects from threats, including experimental removals of barred owls.

Effects from the threats described above are anticipated to increase into the foreseeable future, particularly drought and climate change (Factor A). Climate models project increased temperatures and more frequent drought in the Sierra Nevada DPS, with temperature increases projected to increase between 4–6 °F in the next 40 years. Climate projections also forecast snow moving to higher elevations, as well as more extreme precipitation and drought events. Overall increases in drought will increase tree mortality and the risk of high-severity fire. Invasions by barred owls (Factor E) are projected to continue into the foreseeable future and may outpace experimental removal efforts. In both our future scenarios, analysis units within the range of the Sierra Nevada DPS will be either strongly declining or extirpated due to the combined effects of all threats. Overall, redundancy and representation would decline as conditions degrade throughout the range and population resiliency declines, reducing the species' ability to withstand catastrophic events and adapt to changing environmental conditions.

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we find that the Sierra Nevada DPS is facing threats associated with high-severity fire, tree mortality, drought and climate change, rodenticides, and barred owls. Although it is declining in some parts of the DPS, the Sierra Nevada DPS currently retains resiliency, redundancy, and representation. Thus, it is not in danger of extinction now throughout all of its range. However, the threats of wildfire, climate change, and barred owls are anticipated to increase into the foreseeable future, and even in the more optimistic of the plausible future scenarios, habitat is still projected to severely decline, and we project that many parts of the range may become extirpated. Thus, after assessing the best available information, we conclude that the Sierra Nevada DPS 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 of the Sierra Nevada DPS of the California Spotted Owl Throughout a Significant Portion of Its Range

We evaluated the range of the Sierra Nevada DPS of the California spotted owl to determine if the DPS is in danger of extinction now in any portion of its range. The range can theoretically be

divided into portions in an infinite number of ways. We focused our analysis on portions of the range that may meet the definition of an endangered species. For the Sierra Nevada DPS, we considered whether the threats or their effects on the DPS are greater in any biologically meaningful portion of the range than in other portions such that the DPS is in danger of extinction now in that portion.

The statutory difference between an endangered species and a threatened species is the timeframe in which the species becomes in danger of extinction; an endangered species is in danger of extinction now while a threatened species is not in danger of extinction now but is likely to become so in the foreseeable future. Thus, we reviewed the best scientific and commercial data available regarding the time horizon for the threats that are driving the Sierra Nevada DPS of the California spotted owl to warrant listing as a threatened species throughout all of its range. We then considered whether these threats or their effects are occurring (or may imminently occur) in any portion of the range with sufficient magnitude such that the DPS is in danger of extinction now in that portion of its range. We examined the following threats: wildfire (Factor A); tree mortality (Factor A); drought (Factor A); climate change (Factor A); fuels reduction and forest management (Factor A); competition and hybridization with barred owls (Factor E); rodenticides (Factor E); development (Factor A); overutilization due to recreational, educational, and scientific use (Factor B); disease (Factor C); predation (Factor C); and recreation (Factor E), as well as the combined effects of those threats. We also evaluated existing regulatory mechanisms (Factor D) and ongoing conservation measures.

We found a potential difference in biological condition of the DPS in the Humboldt-Toiyabe, Inyo, and Sequoia analysis units (see figure 2, above), where our habitat analysis indicated that they are strongly declining in the current condition.

Our habitat analysis found that the Humboldt-Toiyabe unit has low amounts of suitable habitat for the California spotted owl, and 16 percent of the unit has recently burned. The Inyo unit is a small peripheral area with no recent detections, and habitat is considered degraded. The Sequoia unit has lower values for large trees and canopy cover than many other parts of the Sierra Nevada DPS, and wildfires have burned 60 percent of the unit between 1984 and 2021. We have no evidence that the magnitude of threats is higher in this portion of the range. However, the status of these units is degraded compared to the remainder of the DPS, and they may be in danger of extinction.

We next considered whether or not these three analysis units are significant to the Sierra Nevada DPS. We asked whether this portion of the range (*i.e.,* the Humboldt-Toiyabe, Inyo, and Sequoia analysis unit portions of the Sierra Nevada DPS's range) is significant. The Service's most recent definition of ''significant'' within agency policy guidance has been invalidated by court order (see *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018)). In undertaking this analysis for the Sierra Nevada DPS, we considered whether these three units may be significant. Therefore, in light of the court decision, for the purposes of this analysis when considering whether this portion is significant, we considered whether the portion may (1) occur in a unique habitat or ecoregion for the species; (2) contain high-quality or high-value habitat relative to the remaining portions of the range, for the species' continued viability in light of the existing threats; (3) contain habitat that is essential to a specific life-history function for the species and that is not found in the other portions (for example, the principal breeding ground for the species); or (4) contain a large geographic portion of the suitable habitat relative to the remaining portions of the range for the species.

Overall, the three units make up approximately 14 percent of habitat in the DPS. There are limited owl detections in these areas, particularly in the Inyo and Humboldt-Toiyabe analysis units; thus, these areas are not contributing significantly to the resiliency of the Sierra Nevada population. The habitat in all three units is degraded. They also do not contain any unique or unusual habitat for the taxon, nor do they contain any habitat essential to any life-history functions that is not found in any other portions. Therefore, these portions do not meet the identified prongs for significance, as outlined above.

We also analyzed the five analysis units in the DPS that are currently in declining condition. In our definition of current condition, this means that these analysis units are less likely to persist for the next 40–50 years, but are not in danger of extinction now. Limited population data are available for these analysis units. For the Lassen, Sierra, Eldorado, and portions of the Plumas unit, the most recent demography studies found that California spotted owls are declining under both occupancy and mark-recapture models (Tempel and Gutiérrez 2013, pp. 1091–1093; Tempel et al. 2014b, pp. 86, 90–92, Conner et al. 2016, p. 15). Reproductive output has varied in Lassen, Plumas, and Sierra analysis units, and has been declining in the Eldorado unit (Franklin et al. 2004, p. 24; Blakesley et al. 2010, pp. 17–19), Apparent adult survival remained high in all units with demographic data (Blakesley et al. 2010, pp. 12–19; Conner et al. 2016, p. 11). Within the Lassen, Plumas, and Sierra units, new owls (sub-adults and territorial adults) continued to be marked each year over the course of the demography studies (Conner et al. 2016, pp. 3, 7, table 1), indicating recruitment of owls into those areas through local reproduction or dispersal from other areas. Additionally, these units still maintain suitable habitat and species needs such as forest heterogeneity, tall trees, and canopy cover. These five analysis units overall retain contiguous suitable habitat, allowing for dispersal between areas. Because of this, these analysis units can recover from stochastic and catastrophic events, allowing this portion of the population as a whole to withstand threats and allowing potential dispersal or recolonization from surrounding analysis units. Thus, we conclude that these areas are not currently in danger of extinction.

Therefore, we determine that the Sierra Nevada DPS 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 apply the aspects 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'' (Final Policy; 79 FR 37578, July 1, 2014), including the definition of ''significant,'' that those court decisions held to be invalid.

Status of the Sierra Nevada DPS of the California Spotted Owl

Our review of the best available scientific and commercial information indicates that the Sierra Nevada DPS meets the Act's definition of a threatened species. Therefore, we propose to list the Sierra Nevada DPS of the California spotted owl as a

threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Status of the Coastal-Southern California DPS of the California Spotted Owl Throughout All of Its Range

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Coastal-Southern California DPS of the California spotted owl and its habitat. In this proposed rule, we present summary evaluations of eight threats analyzed in the SSA report for the California spotted owl: wildfire (Factor A), tree mortality (Factor A), drought (Factor A), climate change (Factor A), fuels reduction and forest management (Factor A), competition and hybridization with barred owls (Factor E), rodenticides (Factor E), and development (Factor A), as well as the combined effects of those threats. We also evaluated existing regulatory mechanisms (Factor D) and ongoing conservation measures.

In the SSA, we also considered four additional threats: Overutilization due to recreational, educational, and scientific use (Factor B); disease (Factor C); predation (Factor C); and recreation (Factor E). We concluded that, as indicated by the best available scientific and commercial information, these threats are currently having little to no impact on the California spotted owl, and thus their overall effect now and into the future is expected to be minimal. As with the Sierra Nevada DPS, we now consider them in this determination, because although these minor threats may have low impacts on their own, combined with impacts of other threats, they could further reduce the number of California spotted owls. For full descriptions of all threats and how they impact the species, please see the SSA report (Service 2022, pp. 25–68).

In the Coastal-Southern California DPS, impacts from wildfire are at very high magnitude, with all of the DPS considered to be at extreme fire risk. Our fire analysis shows that 60 percent of the range of the Coastal-Southern California DPS burned between 1984 and 2021, including 17 percent at high severity. These high-severity fires in particular are removing the California spotted owl's needs of canopy cover, large trees, and habitat heterogeneity. Given that habitat in the Coastal-Southern California DPS is already fragmented and that there is limited evidence of movement between habitat patches, any habitat burned at high severity is less likely to be able to recover from high-severity fires.

Development has further degraded naturally fragmented habitat in the Coastal-Southern California DPS, and owls in this DPS are affected by ongoing drought conditions and tree mortality. In southern California, there are high development demands with wind farms and large reservoirs impacting connectivity within the California spotted owl's range, and riparian areas used by California spotted owls are being lost to water diversion. These threats are continuing to reduce the California spotted owl's needs of high canopy cover and large trees, both of which are already at low condition. Barred owls are currently only having a limited impact on this DPS.

Limited population data are available for this part of the range, but in the San Bernardino Mountains, occupancy of territories has declined by half (Tempel et al. 2022, pp. 16, 18). Additionally, we were not able to find information about California spotted owls dispersing between mountain ranges in coastal or southern California. The number of owls in this part of the range is low. Therefore, what might be considered a stochastic event in the Sierra Nevada DPS leading to the removal of one or a few individuals from the population could have a much higher impact if it were to occur in the coastal-southern California DPS. Additionally, due to the highly developed nature of the areas between suitable patches of habitat in coastal and particularly southern California, there is no record of owls dispersing between occupied areas. All four analysis units in this DPS are currently declining.

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we find that threats associated with wildfire, drought, and tree mortality, as well as the current impacts of climate change, have degraded habitat in the Coastal-Southern California DPS of the California spotted owl, such that most of this part of the range could become extirpated. These threats are impacting the DPS now; thus, this DPS does not meet the Act's definition of a threatened species. Due to the extreme risk of wildfire, degraded habitat conditions, no dispersal between subpopulations, and very low population resiliency and redundancy, we find that the Coastal-Southern California DPS meets the Act's definition of an endangered species. Thus, after assessing the best available information, we determine that Coastal-Southern California DPS of the California spotted owl is in danger of extinction throughout all of its range.

Status of the Coastal-Southern California DPS of the California Spotted Owl Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the Coastal-Southern California DPS is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the Coastal-Southern California DPS warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), which vacated the provision of the Final Policy (79 FR 37578, July 1, 2014) providing that if the Services determine that a species is threatened throughout all of its range, the Services will not analyze whether the species is endangered in a significant portion of its range.

Status of the Coastal-Southern California DPS of the California Spotted Owl

Our review of the best available scientific and commercial information indicates that the Coastal-Southern DPS of the California spotted owl meets the Act's definition of an endangered species. Therefore, we propose to list the Coastal-Southern California DPS as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate

goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) may be established to develop and implement recovery plans. The recovery planning process involves the identification of actions that are necessary to halt and reverse the species' decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (*https://www.fws.gov/program/endangered-species*), or from our Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If these DPSs are listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of California and Nevada would be eligible for Federal funds to implement management actions that promote the protection or recovery of the California spotted owl. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance*.

Although the Sierra Nevada DPS and the Coastal-Southern California DPS of the California spotted owl are only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for these DPSs. Additionally, we invite you to submit any new information on the California spotted owl whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with the Service.

Examples of actions that may be subject to the section 7 processes are land management or other landscape-altering activities on Federal lands administered by the USFS, BLM, DOD, NPS, and the Service, as well as actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation. Examples of Federal agency actions that may require consultation for the California spotted owl could include forest and fuels management, land management planning, habitat restoration, recreation management, and road maintenance. Given the difference in triggers for conferencing and consultation, Federal agencies should coordinate with the local Service Field Office (see **FOR FURTHER INFORMATION CONTACT**, above) with any specific questions.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any species listed as an endangered species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. For the Sierra Nevada DPS of the California spotted owl, which we are proposing to list as threatened, the discussion below under II. Proposed Rule Issued Under Section 4(d) of the Act regarding protective regulations under section 4(d) of the Act complies with our policy.

We now discuss specific activities related to the Coastal-Southern California DPS, which we are proposing to list as endangered. Based on the best available information, the following actions are unlikely to result in a violation of section 9 of the Act, if these activities are carried out in accordance with existing regulations and permit requirements; this list is not comprehensive:

(1) Any actions that may affect the Coastal-Southern California DPS of the California spotted owl that are authorized, funded, or carried out by a Federal agency, when the action is conducted in accordance with the consultation requirements for listed species pursuant to section 7 of the Act;

(2) Any action taken for scientific research carried out under a recovery permit issued by us pursuant to section 10(a)(1)(A) of the Act;

(3) Land actions or management carried out under a habitat conservation plan approved by us pursuant to section 10(a)(1)(B) of the Act; and

(4) Recreation activities that comply with local rules and that do not result in take of listed species, including hiking and backpacking.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act if they are not authorized in accordance with applicable law; this list is not comprehensive:

(1) Unauthorized modification of the forest landscape within the range of the Coastal-Southern California DPS; and

(2) Unauthorized use of first- and second-generation anticoagulant rodenticides within the range of the Coastal-Southern California DPS.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act in regards to the Coastal-Southern California DPS of the California spotted owl should be directed to the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Proposed Rule Issued Under Section 4(d) of the Act

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 species. The U.S. Supreme Court has noted that statutory language similar to the language in section 4(d) of the Act authorizing the Secretary to take action that she ''deems necessary and advisable'' affords a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592, 600 (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 the Service when adopting one or more of 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, as a valid exercise of agency authority, rules developed under section 4(d) that included limited prohibitions against takings (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 WL 2344927 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 WL 511479 (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 conservation of the Sierra Nevada DPS of the California spotted owl by encouraging management of its habitat in ways that facilitate conservation for the species. The provisions of this proposed rule are one of many tools that we would use to promote the conservation of the Sierra Nevada DPS of the California spotted owl. This proposed 4(d) rule would apply only if and when we make final the listing of the Sierra Nevada DPS of the California spotted owl as a threatened species.

As mentioned above in Available Conservation Measures, section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of Federal actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

These requirements are the same for a threatened species with a species-

specific 4(d) rule. For example, a Federal agency's determination that an action is ''not likely to adversely affect'' a threatened species will require the Service's written concurrence. Similarly, a Federal agency's determination that an action is ''likely to adversely affect'' a threatened species will require formal consultation and the formulation of a biological opinion.

Provisions of the Proposed 4(d) Rule

Exercising the Secretary's authority under section 4(d) of the Act, we have developed a proposed rule that is designed to address the conservation needs of the Sierra Nevada DPS of the California spotted owl. As discussed previously in Summary of Biological Status and Threats, we have concluded that the Sierra Nevada DPS of the California spotted owl is likely to become in danger of extinction within the foreseeable future primarily due to wildfire, tree mortality, drought, climate change, rodenticides, and barred owls. 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)(1) 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 the Sierra Nevada DPS of the California spotted owl.

The protective regulations we are proposing for the Sierra Nevada DPS of the California spotted owl incorporate prohibitions from the Act's section 9(a)(1) to address the threats to the DPS. Section 9(a)(1) prohibits the following activities for endangered wildlife: importing or exporting; take; possession and other acts with unlawfully taken specimens; 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. This protective regulation includes all of these prohibitions because the Sierra Nevada DPS of the California spotted owl is at risk of extinction in the foreseeable future and putting these prohibitions in place will help to prevent further declines, preserve the DPS's remaining populations, slow its rate of decline, and decrease synergistic, negative effects from other ongoing or future threats.

In particular, this proposed 4(d) rule would provide for the conservation of the Sierra Nevada DPS of the California spotted owl by prohibiting the following activities, unless they fall within specific exceptions or are otherwise authorized or permitted: importing or exporting; take; possession and other acts with unlawfully taken specimens; 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.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulations at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating take would help preserve the DPS's remaining populations, slow their rate of decline, and decrease synergistic, negative effects from other ongoing or future threats. Therefore, we propose to prohibit take of the Sierra Nevada DPS of the California spotted owl, except for take resulting from those actions and activities specifically excepted by the 4(d) rule.

Exceptions to the prohibition on take would include all of the general exceptions to the prohibition against take of endangered wildlife, as set forth in 50 CFR 17.21 and certain other specific activities that we propose for exception, as described below.

The proposed 4(d) rule would also provide for the conservation of the species by allowing exceptions that incentivize conservation actions or that, while they may have some minimal level of take of the Sierra Nevada DPS of the California spotted owl, are not expected to rise to the level that would have a negative impact (that is, would have only de minimis impacts) on the conservation of the DPS. The proposed exceptions to these prohibitions include the following provisions (described below) that are expected to have negligible impacts to the Sierra Nevada DPS of the California spotted owl and its habitat:

(1) Forest or fuels management to reduce the risk or severity of wildfire (such as prescribed fire) where fuels management activities are essential to reduce the risk of catastrophic wildfire, and when such activities will be carried out in accordance with an established and recognized fuels or forest management plan that includes measures to minimize impacts to the California spotted owl and its habitat and results in conservation benefits to California spotted owls.

(2) Habitat management and restoration efforts that are specifically designed to provide for the conservation of the California spotted owl's habitat needs and include measures that minimize impacts to the California spotted owl and its habitat. These activities must be carried out in accordance with finalized State or Federal agency conservation plans or strategies for the California spotted owl.

(3) Management or cleanup activities that remove toxicants and other chemicals from trespass cannabis cultivation sites in California spotted owl habitat. Cleanup of these sites may involve activities that may cause localized, short-term disturbance to California spotted owls, as well as require limited removal of some habitat structures valuable to California spotted owls (*e.g.,* hazard trees that may be a suitable nest site).

We may, under certain circumstances, issue permits to carry out one or more otherwise-prohibited activities, including those described above. The regulations at 50 CFR 17.32 that govern permits for threatened wildlife state that the Director may issue a permit authorizing any activity otherwise prohibited with regard to threatened species. These include permits issued for the following purposes: for scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act (50 CFR 17.32). The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State 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 we must cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State 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 the Sierra Nevada DPS of the California spotted owl that may result in otherwise prohibited take 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 the Sierra Nevada DPS of the California spotted owl. However, interagency cooperation may be further streamlined through planned programmatic consultations for the DPS between us and other Federal agencies, where appropriate. We ask the public, particularly State 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 we could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested, above).

III. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would likely result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered

or threatened species; and (3) the prohibitions found in section 9 of the Act and the 4(d) rule. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

As discussed earlier in this document, there is currently no imminent threat of collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our SSA report and proposed listing determination for the California spotted owl, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to both the Sierra Nevada DPS and the Coastal-Southern California DPS of the California spotted owl, and that those threats in some way can be addressed by section 7(a)(2) consultation measures. The two DPSs occur wholly in the jurisdiction of the United States, and we are able to identify areas that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met and because the Secretary has not identified other circumstances for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat is prudent for both the Sierra Nevada DPS and the Coastal-Southern California DPS of the California spotted owl.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the California spotted owl is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located and data that would be needed to perform other required analyses. A careful assessment of the economic impacts that may occur due to a critical habitat designation is not yet complete, and we are in the process of working with the States and other partners in acquiring the complex information needed to perform that assessment. Because the information sufficient to perform a required analysis of the impacts of the designation is lacking, we conclude that the designation of critical habitat for both the Sierra Nevada DPS and the Coastal-Southern California DPS of the California spotted owl is not determinable at this time. The Act allows the Service an additional year to publish a critical habitat designation that is not determinable at the time of listing (16 U.S.C. 1533(b)(6)(C)(ii)).

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations and species-specific protective regulations promulgated concurrently with a decision to list or reclassify a species as threatened. The courts have upheld this position (*e.g., Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995) (critical habitat); *Center for Biological Diversity* v. *U.S. Fish and Wildlife Service,* 2005 WL 2000928 (N.D. Cal. Aug. 19, 2005) (concurrent 4(d) rule)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 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 federally 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 sent letters to all affected Tribes when we began developing our 12-month finding for the California spotted owl. We will continue to work with Tribal entities during the development of a final determination on this proposal to list the Sierra Nevada DPS and the Coastal-Southern California DPS of the California spotted owl, as well as the proposed 4(d) rule for the Sierra Nevada DPS.

References Cited

A complete list of references cited in this proposed rule is available on the internet at *https://www.regulations.gov* and upon request from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Sacramento Fish and Wildlife 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 § 17.11, amend paragraph (h) by adding entries for ''Owl, California spotted [Coastal-Southern California DPS]'' and ''Owl, California spotted [Sierra Nevada DPS]'' to the List of Endangered and Threatened Wildlife in alphabetical order under BIRDS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
BIRDS				
*	*	*	*	*
Owl, California spotted [Coastal-Southern California DPS].	*Strix occidentalis occidentalis*.	California (All California spotted owls in the vicinity of the Coast, Transverse, and Peninsular mountain ranges from Monterey County in the north to San Diego County in the south, and south of the Tehachapi Pass within Kern County).	E	[**Federal Register** citation when published as a final rule].
Owl, California spotted [Sierra Nevada DPS].	*Strix occidentalis occidentalis*.	California and Nevada (All California spotted owls in the vicinity of the Sierra Nevada mountain range and the Sierra Nevada foothills from Shasta and Lassen Counties in the north, but north of the Tehachapi Pass, Kern County to the south, and east to Carson City, Douglas, and Washoe Counties in Nevada).	T	[**Federal Register** citation when published as a final rule]; 50 CFR 17.41(n).[4d]
*	*	*	*	*

■ 3. Amend § 17.41 by adding a paragraph (n) to read as follows:

§ 17.41 Special rules—birds.

* * * * *

(n) California spotted owl (*Strix occidentalis occidentalis*), Sierra Nevada DPS.

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to the Sierra Nevada distinct population segment (DPS) of the California spotted owl. Except as provided under paragraph (n)(2) of this section and §§ 17.4, 17.5, and 17.7, 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 DPS:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of a commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.* In regard to this DPS, you may:

(i) Conduct activities as authorized by a permit under § 17.32.

(ii) Take, as set forth at § 17.21(c)(2) through (4) for endangered wildlife, and (c)(6) and (7) for endangered migratory birds.

(iii) Take, as set forth at § 17.31(b).

(iv) Possess and engage in other acts with unlawfully taken wildlife, in accordance with the provisions set forth at § 17.21(d)(2) for Federal and state law enforcement officers regarding endangered wildlife, and in (d)(3) and (4) for certain persons as described therein with respect to sick, injured and/or orphaned endangered migratory birds.

(v) Take incidental to an otherwise lawful activity caused by:

(A) Forest or fuels management to reduce the risk or severity of wildfire

(such as prescribed fire) where fuels management activities are essential to reduce the risk of catastrophic wildfire, and when such activities will be carried out in accordance with an established and recognized fuels or forest management plan that includes measures to minimize impacts to the California spotted owl and its habitat and results in conservation benefits to California spotted owls.

(B) Habitat management and restoration efforts that are specifically designed to provide for the conservation of the California spotted owl's habitat needs and include measures that minimize impacts to the California spotted owl and its habitat. These activities must be carried out in accordance with finalized State or Federal agency conservation plans or strategies for the California spotted owl.

(C) Management or cleanup activities that remove toxicants and other chemicals from trespass cannabis cultivation sites in California spotted owl habitat. Cleanup of these sites may involve activities that may cause localized, short-term disturbance to California spotted owls, as well as require limited removal of some habitat structures valuable to California spotted owls (*e.g.,* hazard trees that may be a suitable nest site).

Wendi Weber,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–03526 Filed 2–22–23; 8:45 am]

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Part V

Department of Transportation

Federal Aviation Administration

14 CFR Part 139
Airport Safety Management System; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 139

[Docket No.: FAA–2010–0997; Amdt. No. 139–28]

RIN 2120–AJ38

Airport Safety Management System

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule requires certain airport certificate holders to develop, implement, maintain, and adhere to an airport safety management system (SMS). Certificated airports that qualify under one or more of the following triggering criteria (triggers) are required to develop a SMS under this final rule: are classified as large, medium, or small hubs based on passenger data extracted from the FAA Air Carrier Activity Information System; have a 3-year rolling average of 100,000 or more total annual operations, meaning the sum of all arrivals and departures; or serve any international operation other than general aviation. This rule would expand the safety benefits of SMS to certain certificated airports and further the FAA's aviation-wide approach to SMS implementation in order to address safety at an organizational level.

DATES: This rule is effective April 24, 2023.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see ''How to Obtain Additional Information'' in SECTION VI of this document.

FOR FURTHER INFORMATION CONTACT: For technical questions about this action, contact James Schroeder, Airport Safety and Operations Division, AAS–300, Office of Airport Safety and Standards, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–4974; email *james.schroeder@faa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

List of Abbreviations and Acronyms Frequently Used in This Document

AC Advisory Circular
ACAIS Air Carrier Activity Information System
ACM Airport Certification Manual
AOC Airport operating certificate
ARP FAA Office of Airports
ATO FAA Air Traffic Organization
AVS FAA Aviation Safety Organization
CFR Code of Federal Regulations
CBP Customs and Border Protection
DSR Plan Data Sharing and Reporting Plan
E.O. Executive Order
FAA Federal Aviation Administration
FOIA Freedom of Information Act
ICAO International Civil Aviation Organization
NPIAS National Plan of Integrated Airport Systems
NPRM Notice of Proposed Rulemaking
NTSB National Transportation Safety Board
OMB Office of Management and Budget
OpsNet FAA Operations Network
SBREFA Small Business Regulatory Enforcement Fairness Act of 1996
SMS Safety Management System
SNPRM Supplemental Notice of Proposed Rulemaking
SRM Safety Risk Management
SSI Sensitive Security Information

I. Executive Summary

A. Purpose of the Regulatory Action

SMS has generated wide support in the aviation community as an effective approach that can deliver real safety and financial benefits.[1] SMS integrates modern safety concepts into repeatable, proactive processes in a single system, emphasizing safety management as a fundamental business process to be considered in the same manner as other aspects of business management. The development and implementation of SMS improves safety at the organizational level and is the next step in the continuing evolution of aviation safety. Therefore, the FAA is pursuing an aviation-wide approach that would require the implementation of SMS by those organizations in the best position to prevent future accidents. As part of that process, the FAA is expanding SMS's benefits to certain certificated airports by requiring them to proactively identify and mitigate safety hazards, thereby reducing the possibility or recurrence of incidents or accidents in air transportation. The purpose of this final rule is to require certain Title 14 Code of Federal Regulations (CFR) part 139[2] certificate holders to develop,

[1] *See, e.g.,* National Transportation Safety Board, *NTSB Calls for Enhanced Safety Standards in Some Revenue Passenger-Carrying General Aviation Operations* (Mar. 23, 2021), *https://www.ntsb.gov/news/press-releases/Pages/NR20210323.aspx;* Transportation Research Board, *Airport Cooperative Research Program (ACRP) Synthesis 37: Lessons Learned from Airport Safety Management Systems Pilot Studies* at 46 (2012) (explaining that airports that participated in the SMS program reported increased safety awareness and improved collaboration).

[2] Part 139 requires airports serving scheduled air carrier aircraft with more than 9 seats or unscheduled air carrier aircraft with more than 30 seats to hold an Airport Operating Certificate (AOC). Under part 139, a certificate holder must develop and maintain an Airport Certification Manual (ACM). The ACM contains the processes and procedures the airport uses to comply with part 139 requirements, and the FAA approves the ACM and updates to it.

implement, maintain, and adhere to an airport safety management system (SMS).

A SMS is a formal means for organizations to identify and manage safety risks in their operations. It includes systematic procedures, practices, and policies for the management of safety risk. SMS enforces the concept that safety should be managed with as much emphasis, commitment, and focus as any other critical area of an organization. It prompts organizations to develop decision-making processes and procedures and use effective safety risk controls to proactively identify and mitigate or address any detected noncompliant or unsafe conditions in their operations. As discussed in the FAA Airport SMS Pilot Study report,[3] airports that voluntarily implemented SMS have reported better efficiency in identifying and mitigating hazards in daily activities such as pedestrian safety on ramps and operations with ground support equipment.[4] These airports also used SMS processes for significant events, such as construction safety and phasing planning, to proactively identify and mitigate hazards before the start of the project. This proactive approach, along with the communication of safety issues, provides a robust mechanism for airports to improve safety. The FAA has not formally tracked the number of airports that have implemented SMS since it is not yet a required element under part 139.

The purpose of a SMS is to reduce incidents, accidents, and fatalities in the airfield operations environment. A specific example cited in the RIA was the FOD damage to 14 aircraft in 2007 (NTSB Accident No: DEN07IA069). The advanced communication procedures in a SMS could have expedited the reporting, assessment and mitigation of the FOD hazard, thus limiting the likelihood and severity of this hazard. Expanding SMS to certain certificated airports is the best strategy to continue to reduce incidents and accidents, and improve safety in aviation. ICAO, other Civil Aviation Authorities, industry advisory groups, and the NTSB all support the use of SMS to improve safety. In the U.S., safety management systems have been implemented by part 121 operators and the FAA has voluntary programs designed to expand the use of SMS throughout the aviation system. The FAA has even implemented SMS within many of its organizations. Further, expansion of SMS would also align the U.S. with current ICAO Standards and Recommended Practices.

This final rule requires airport certificate holders that qualify under one or more of the following triggering criteria (triggers) to develop a SMS: airports: (a) classified as large, medium, or small hubs, based on passenger data extracted from the FAA Air Carrier Activity Information System; (b) that have a 3-year rolling average of 100,000 or more total annual operations, meaning the sum of all arrivals and departures; [5] or (c) that serve any international operation other than general aviation. The FAA applied a primarily risk-based approach to the final rule's applicability. The criteria are designed to maximize SMS's safety benefits to stakeholders in the least burdensome manner. Instead of requiring SMS at all certificated airports, only certificated airports with the highest passenger enplanements, the largest total operations, and those hosting international air traffic must have a SMS under this rule. This final rule applies to approximately 265 certificated airports. These airports cover over 90 percent of all U.S. passenger enplanements and include the facilities with the largest number of commercial air transportation operations. This allows safety benefits to flow to airports with the majority of aircraft operations in the United States in addition to airports with international passenger operations to ensure conformity with international standards and recommended practices with the least regulatory burden. This rule does not require SMS implementation at small airports with fewer resources where creating a SMS may be a larger proportional burden and may not be cost beneficial.

This final rule includes an exception to the applicability of the SMS requirement. If a certificate holder qualifies exclusively under the international services trigger, then it may file a waiver request to seek relief from the regulatory requirement to implement SMS. To do so, it must certify that it does not host any operation by any tenant [6] that is required to implement SMS under the applicable laws or regulations of its country of origin (*i.e.,* the jurisdiction that issued the tenant's air carrier certificate, air operator certificate, or equivalent) or any other governing jurisdiction. For example, if international services at an airport are solely provided for operators engaged in general aviation operations, then—absent another trigger—the FAA will not require the airport to implement SMS. By linking the international trigger for part 139 airports to the presence of international tenants with SMS requirements, the FAA supports a holistic approach that encourages the sharing of data and proactive risk management inherent to SMS. Without this linkage, neither SMS reaches its full potential safety benefit. However, if an air carrier tenant commences international service to or from such airport, and the country of origin of such air carrier tenant requires that it adhere to a SMS, then the exception does not apply and the airport must implement SMS.

In the interest of safety, this final rule requires the implementation of SMS in both the movement and non-movement areas [7] of qualifying airports. This rule allows airports to enter into data sharing and reporting arrangements with certain air carrier tenants. Such arrangements allow tenants to share with part 139 certificate holders any hazard report submitted though the tenants' confidential employee reporting systems. This reduces the burden of having to report hazards under two different reporting systems and fosters cooperation and increased communication of safety issues among interested parties, while avoiding gaps in SMS coverage. Separately, this final rule adds an authority citation inadvertently omitted from a previous final rule and amends § 139.101 by removing paragraph (c), which no longer applies.

Airport SMS will help FAA develop its oversight processes so that FAA

[3] Federal Aviation Administration, Airport Safety Management Systems (SMS) Pilot Studies, *https://www.faa.gov/sites/faa.gov/files/airports/airport_safety/safety_management_systems/external/smsPilotTechReportMay2011.pdf* (May 2011).

[4] FAA has not evaluated an airport's safety record prior to participating in SMS under the pilot program. In general, however, the FAA recognizes that airports participating in the pilot studies were proactive about the safety of their operations.

[5] For the purposes of this trigger, the FAA will use the following sources of data to determine number of operations: (a) traffic counts reported by the Air Traffic Control Tower through FAA Operations Network (OpsNet), for airports with FAA or contract towers; (b) FAA Form 5010–1 data for non-towered airports; or (c) other FAA-validated counting systems. Historical OpsNet data is publicly available through *FAA.gov*.

[6] As discussed later in this document, tenant refers to any person or entity occupying space or property under a lease or other agreement (such as an air carrier or maintenance repair and overhaul company) that does business at the airport.

[7] ''Movement area'' is defined as the runways, taxiways, and other areas of an airport that are used for taxiing, takeoff, and landing of aircraft, exclusive of loading ramps and aircraft parking areas, and that are under the control of an air traffic control tower. ''Non-movement Area'' is defined as taxiways, aprons, and other areas not under the control of air traffic or at airports without an operating airport traffic control tower.

targets its involvement on the areas of highest safety risk. For airports with a fully implemented SMS and that have a consistent history of compliance with the requirements of part 139, the FAA will transition to system-based inspections, thereby allowing inspectors to focus on areas of greater risk and the FAA to modify the duration of time between inspections for those airports. In addition to focusing FAA's resources to best address safety needs, the FAA anticipates this approach will create government cost savings from reduced inspector time and travel costs.

B. Summary of the Major Provisions of the Regulatory Action

In its most general form, SMS is a set of decision-making tools that a certificate holder uses to plan, organize, direct, and control its everyday activities in a manner that enhances safety. An airport SMS must include, at a minimum, four components: (a) safety policy, (b) safety risk management, (c) safety assurance, and (d) safety promotion.

Certificate holders must identify their plans for developing and implementing SMS through an FAA-approved Implementation Plan (see § 139.403). Pursuant to § 139.401(f), certificate holders may choose to either document their airport SMS in a separate SMS Manual or in their FAA-approved ACM (see also §§ 139.201–139.203).

The submission of SMS Implementation Plans is staggered based on which trigger prompts certificate holders to comply with this final rule. Airports qualifying under the hub trigger must submit their Implementation Plans first, within 12 months of the effective date of this rule. Certificate holders qualifying under the annual operations trigger must submit Implementation Plans within 18 months, and airports qualifying under the international trigger must submit their Implementation Plans within 24 months.

All certificate holders subject to this final rule must submit their SMS Manual and/or revised ACM to the FAA within the 12 months immediately following the FAA's approval of the Implementation Plan. Certificate holders have 36 months following approval of the Implementation Plan to fully implement their SMS.

Table 1 provides a brief summary of the major provisions of this final rule and changes from the SNPRM.

TABLE 1—SUMMARY OF MAJOR PROVISIONS

Issue	Proposed requirement (from the SNPRM)	Adopted requirement
Applicability of SMS requirements ..	Limited to certificate holders: (a) Classified as large, medium, or small hub; or (b) Having more than 100,000 total annual operations; or (c) Classified as a port of entry, designated international airport, landing rights airport, or user fee airport.	Limited to certificate holders: (a) Classified as large, medium, or small hub; or (b) Having an average of 100,000 or more total annual operations (the sum of all arrivals and departures) over the previous three calendar years; or (c) Classified as a port of entry, designated international airport, landing rights airport, or user fee airport. § 139.401(a).
Waiver for International Trigger	NONE	Allow a certificate holder that qualifies exclusively under the international trigger to obtain a waiver from complying with the SMS requirements if it has no tenants that are required to comply with SMS requirements of any jurisdiction. § 139.401(d).
Scope	SAME AS ADOPTED	Encompass aircraft operations in the movement and non-movement areas (and other airport operations addressed in part 139). § 139.401(b).
Scale	SAME AS ADOPTED	Correspond in size, nature, and complexity to the operations, activities, and risks associated with the airport's operations. § 139.401(c).
Implementation Plan	SAME AS ADOPTED	Detail how the airport will meet the requirements of this final rule; include a schedule for implementing the SMS components; describe any existing programs or policies the airport will use to meet the SMS requirements. § 139.403(b).
Documenting the SMS requirements.	SAME AS ADOPTED	Include methods of compliance contained within the ACM or a separate SMS Manual with incorporation by reference in the ACM. § 139.401(f).
Document Submission and Implementation Deadlines.	Submit Implementation Plan on or before 12 months. Submit SMS Manual and/or ACM update on or before 24 months. Fully implement the SMS on or before 24 months.	Submit Implementation Plan on or before: • 12 months for hub triggers; • 18 months for operations triggers; and • 24 months for international triggers. § 139.403(a). Submit SMS Manual and/or ACM update on or before 12 months after FAA-approval of the Implementation Plan. § 139.403(c). Fully implement the SMS no later than 36 months after FAA-approval of the Implementation Plan. § 139.403(d).
Accountable executive	SAME AS ADOPTED	Identify the accountable executive; report pertinent safety information and data on a regular basis to the accountable executive.[8] § 139.402(a)(1); § 139.402(c)(3).

[8] The FAA anticipates that some airports will provide routine updates to their accountable executive, such as through a continuously updated dashboard.

TABLE 1—SUMMARY OF MAJOR PROVISIONS—Continued

Issue	Proposed requirement (from the SNPRM)	Adopted requirement
Safety Policy Statement	SAME AS ADOPTED	Establish and maintain a safety policy statement signed by the accountable executive. § 139.402(a)(2).
Safety Objectives	SAME AS ADOPTED	Establish and maintain safety objectives; define methods, processes, and organizational structure necessary to meet those safety objectives; monitor safety performance. § 139.402(a)(6) & (7); § 139.402(c)(1).
Safety Risk Management	SAME AS ADOPTED	Establish a system to identify operational safety issues and a process to analyze hazards and their risks. § 139.402(b).
Safety Reporting System	SAME AS ADOPTED	Establish and maintain a reporting system that provides for reporter confidentiality. § 139.402(c)(2).
Data Sharing and Reporting Plan	NONE	Provides option to develop data sharing and reporting plan with tenant(s) required to maintain a SMS subject to requirements of 14 CFR part 5. When such a plan exists, relieves airport from providing safety awareness orientation to applicable tenants or their employees. § 139.401(e).
Training and Orientation	SAME AS ADOPTED	Provide all persons authorized access to movement and non-movement areas safety awareness orientation; provide all employees with responsibilities under the SMS training appropriate to their roles. § 139.402(d)(1) & (3).
Safety Communications	SAME AS ADOPTED	Develop and maintain formal means for communicating important safety information. § 139.402(d)(5).
Record Keeping	SAME AS ADOPTED	Retain: • SMS training records and orientation materials for 24 consecutive calendar months; • SRM documentation for the longer of 36 consecutive calendar months after the risk analysis has been completed or 12 consecutive calendar months after mitigations completed; and • Safety communications for 12 consecutive calendar months. § 139.301(b)(1) & (9) & (10).

C. Summary of Costs and Benefits

The goal of this rule is to improve the safety of the airfield environment (including movement and non-movement areas) by providing an airport with decision-making tools to plan, organize, direct, and control its everyday activities in a manner that enhances safety. The FAA envisions airports being able to use all of the components of a SMS to enhance their ability to identify safety issues and spot trends before they result in a near-miss incident or accident. While the FAA's use of prescriptive regulations and technical operating standards has been effective, such regulations may leave gaps best addressed through performance-based management practices. For example, pilots and controllers may be required to report incidents (such as bird-strikes or runway incursions) under their respective SMS. However, they may not be required to notify the airport of the incident. Because the airport operator best understands its own operating environment, it is in the best position to address many of its own safety issues providing it has sufficient data to address the hazard. A SMS may provide an airport with the capacity to anticipate and address safety issues before they lead to an incident or accident. Table 2 shows quantified present value and annualized benefits and costs over 10 years. The FAA anticipates additional benefits at airports with an implemented Airport SMS in the form of cost savings from reductions in the frequency and breadth of the traditional airport inspection and inspection cycle. Table 2 also includes the FAA's estimated cost savings of changing the traditional inspection cycle at airports with a fully implemented SMS.

TABLE 2—COMPARISON OF COSTS AND BENEFITS OVER 10 YEARS

[Millions of 2020 dollars]

	Present value (3%)	Annualized (3%)	Present value (7%)	Annualized (7%)
Benefits	$199.2	$23.4	$144.1	$20.5
Costs	179.8	21.1	139.0	19.8
Cost Savings	3.1	0.4	2.2	0.3
Net Benefits (includes mitigation benefits, but excludes mitigation costs)	22.5	2.6	7.3	1.0

Table notes: The sum of the individual items may not equal totals due to rounding. Estimates are provided at three and seven percent discount rates per Office of Management and Budget (OMB) guidance.

II. Background

A. Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. This rulemaking is promulgated under the authority described in: (a) 49 U.S.C. 44702, which authorizes the Administrator to issue airport operating certificates; (b) 49 U.S.C. 44706, which authorizes the Administrator to (i) issue an AOC to a person desiring to operate an airport if the person properly and adequately is equipped and able to operate safely; and (ii) include in such AOC all necessary terms to ensure safety in air transportation; and (c) 49 U.S.C. 44701, which requires the Administrator to—among other things—promote safety, prescribe minimum safety standards, and carry out functions that best tend to reduce or eliminate the possibility or recurrence of accidents in air transportation. This regulation is within the scope of the aforementioned authorities because it requires certain certificated airports to develop and maintain a SMS to improve the safety of operations conducted at such airports. The development and implementation of SMS ensures safety in air transportation by helping airports proactively identify and mitigate safety hazards, thereby reducing the possibility or recurrence of accidents in air transportation.

B. Statement of the Problem

The FAA has determined that there are unmitigated risks and safety gaps in the airport environment necessitating a systems approach to improve safety at part 139 certificated airports. The goal of this rule is to improve the safety of the airfield environment (including movement and non-movement areas). The FAA intends to evolve the current part 139 compliance program into a proactive, and ultimately predictive approach using the structured discipline of SMS principles.

The increasing demands on the U.S. air transportation system, including additional air traffic and surface operations, and airport construction, present a potential increased presence of operational hazards in the airfield environment. However, many accidents and incidents that may be mitigated under SMS may not be shared outside the organization, especially in regards to the non-movement area, thus limiting FAA's insight into the breadth or scale of near-miss and other types of potentially hazardous incidents. While the FAA's use of prescriptive regulations and technical operating standards has been effective, such regulations may leave gaps best addressed through improved management practices. As the certificate holder best understands its own operating environment, it is in the best position to address many of its own safety issues. A SMS may provide an airport with the capacity to anticipate and address safety issues before they lead to an incident or accident.

C. Related Actions

In 2015, the FAA issued a final rule requiring 14 CFR part 119 certificate holders authorized to conduct operations under 14 CFR part 121 to develop and implement a SMS (see 14 CFR part 5, Safety Management Systems).[9] The part 5 rule established a general framework and minimum requirements for designing and implementing SMS and allowed air carriers to adapt the SMS to ensure it appropriately dealt with the size, scope, and complexity of their part 121 operations. Additionally, under FAA Order 8000.369, the FAA uses SMS internally in offices such as Airports, Air Traffic Organization, Aviation Safety, Security and Hazardous Materials, Next Generation Air Transportation, and Commercial Space Transportation.

As of the effective date of this final rule, part 5 applies to part 119 certificate holders authorized to conduct operations in accordance with part 121. The FAA acknowledges, however, that the applicability of part 5 may be expanded in the future, which could impact this final rule by allowing greater coordination between part 139 certificate holders and tenants through increased use of data sharing and reporting plans (as discussed later).

This final rule targets part 139 certificated airport operators. It follows a similar framework and harmonizes definitions and requirements with the SMS requirements established under part 5 SMS, when and if appropriate. Nonetheless, this final rule recognizes that there might be differences in SMS requirements depending on the scope and complexity of the operations and types of regulated parties subject to 14 CFR. For example, the FAA recognizes that an airport operation is inherently different from the operation of an air carrier and that the vast majority of part 139 certificate holders are public entities (owned and/or operated by a State or local government or a department, agency, special purpose district, political subdivision, or other instrumentality of a State or local government) rather than private entities like those operating as part 121 air carriers. The revised definition proposed in the SNPRM, and adopted in this final rule of an accountable executive eliminates the substantive differences between the part 121 and part 139 definitions, and clarifies that the accountable executive should not be personally liable to the FAA through certificate action or civil penalty. Thus, in the interest of safety, harmonization is not feasible in all instances and differences in the SMS framework, definitions, and requirements are warranted to best deal with the types and varying degrees of operation of the part 139 certificate holders subject to SMS.

This final rule imposes a SMS requirement on certain airports certificated under part 139. It does not impose any additional SMS requirement on part 119 certificate holders, nor does it expand, revise, or amend the provisions, requirements, or responsibilities established in part 5. A Part 139 airport may choose to update its contractual agreements with applicable tenants. However, in most cases, airport operators have additional means to direct critical safety actions through other controlling documents including airport rules and regulations or minimum standards. Usually, contractual agreements with tenants point to, or incorporate by reference, those other documents to allow for more timely implementation of procedures and actions without the need for changes to the agreement. While the final rule does not impose additional SMS requirements on tenants, it is plausible that to achieve its own SMS requirements under part 139, an airport will use these controlling documents to extend certain SMS requirements onto part 119 certificate holders or other tenants.

For the purposes of this final rule, the terms ''certificate holder'' (when used without part 139 before) and ''operator'' refer to any entity holding an AOC under part 139. The term ''tenant'' refers

[9] Part 119 refers to the Certification of Air Carriers and Commercial Operators. Part 121 refers to Operating Requirements for Domestic, Flag, and Supplemental operations. Operations that occur under part 121 with a part 119 certificate are scheduled commercial air carrier operations. On January 8, 2015, the FAA published the Safety Management Systems for Domestic, Flag, and Supplemental Operations Certificate Holders final rule requiring operators authorized to conduct operations under part 121 to develop and implement a SMS. The rule added a new part 5 to Title 14 of the CFR, creating the set of requirements for SMS that a part 121 certificate holder must meet. The rule also modified part 119 to specify applicability and implementation of the new SMS framework. Part 119 refers to the certification of part 121 air carriers and commercial operators. Part 121 air carriers are regularly scheduled air carriers and are generally large, U.S.-based airlines, regional air carriers, and all cargo operators.

to any person or entity occupying space or property under a lease or other agreement (such as an air carrier or maintenance repair and overhaul company) that does business at the airport.

D. National Transportation Safety Board (NTSB) Recommendations

The NTSB has recommended SMS as a means to prevent future accidents and improve safety in air transportation. The NTSB has cited organizational factors contributing to aviation accidents and has recommended SMS for several sectors of the aviation industry, including aircraft operators and aerodromes (airports). The FAA agrees with the NTSB, concluding the organizational factors and benefits of SMS apply across the aviation industry, including airports.

NTSB submitted comments to the SNPRM concurring with the FAA's ''proposal that implementation of SMS at airports is warranted and that SMS should apply to the entire airfield environment, including non-movement areas.'' [10] NTSB approved of the FAA's proposal to include non-movement areas by stating: ''[they] have investigated accidents that clearly demonstrate that the potential for significant events is not limited to only the movement areas.''

E. International Movement Toward SMS

ICAO's Annex 19—Safety Management document establishes a framework for member States to develop and implement SMS requirements. State Safety Programs, as implemented by member States, require SMS for the management of safety risk. Many member States, including the U.S., started developing and implementing in-country SMS requirements after Annex 19 became applicable in November 2013 (amended Annex 19 applicable November 2019). ICAO requires SMS requirements for international commercial air transportation, international general aviation, design and manufacturing, maintenance, air traffic services, training organizations, and certified aerodromes. It is FAA policy to comply with ICAO standards to the maximum extent practicable. This rule would further align U.S. safety management system requirements for airports with international standards, which are recognized and followed by many international product and service providers also complying with ICAO Standards and Recommended Practices.

F. Summary of the NPRM and SNPRM

On October 7, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) titled ''Safety Management System for Certificated Airports'' (75 FR 62008). The NPRM proposed to require all part 139 certificate holders to establish a SMS for the entire airfield environment, including movement and non-movement areas, to improve safety at airports hosting air carrier operations.

While reviewing the comments received in response to the NPRM, the FAA began to re-evaluate whether requiring a SMS at *all* part 139 certificated airports was the appropriate approach. As part of the re-evaluation, the FAA assessed various combinations of criteria that could trigger the requirement to implement the SMS rule and to maximize safety benefits in the least burdensome manner.

On July 14, 2016, the FAA published a supplemental notice of proposed rulemaking (SNPRM) titled ''Safety Management System for Certificated Airports'' (81 FR 45872). The SNPRM proposed creating triggers for SMS and proposed the FAA's preferred alternative to impose a SMS requirement on airports that (a) are large, medium, or small hubs; (b) serve international air traffic; or (c) have more than 100,000 total annual operations. The FAA also revised the proposed implementation schedule to extend the implementation period from 18 months to 24 months and requires the submission of an Implementation Plan within 12 months (instead of 6 months) from the effective date of the rule. The SNPRM clarified the training requirements and revised certain definitions to ensure consistency—when deemed appropriate—among various FAA SMS initiatives. The SNPRM comment period closed on September 12, 2016.

In 2021, the FAA decided to reopen the comment period in order to solicit comments on any new information or data generated since the close of the 2016 comment period. The FAA was aware of many airports that had voluntarily implemented SMS since 2016 that might provide additional insight to the SNPRM. The FAA also took into account the Covid–19 pandemic and the five years that had elapsed since the close of the 2016 comment period, and determined that these factors taken together warranted reopening the comment period. Accordingly, the FAA reopened the comment period for the SNPRM, published at 81 FR 45872, for 30 days. When the FAA reopened the comment period, the agency stated that the most helpful comments would: provide only data and information that was not previously submitted to the rulemaking docket; reference a specific portion of the proposal; and explain the reason for any recommended change, including supporting data. The reopened SNPRM comment period closed on September 23, 2021.

G. General Overview of Comments

The FAA received submissions from commenters in 2016 and 2021 in response to the SNPRM. The FAA received comments from 38 commenters during the 2016 comment period, and 17 commenters during the comment period that it reopened in 2021. In general, the 2021 comments were similar to the 2016 comments, and were from many of the same commenters that commented during the 2016 comment period. This preamble identifies comments that were received in 2021 and comments that were received in both 2016 and 2021 by indicating the year the comment was received. Any comments for which the preamble does not note a year were received in 2016.

Although most commenters were certificate holders, some were air carriers, consultants, academics, and individuals. The following industry associations submitted comments: Airlines for America (A4A), Airports Council International-North America (ACI–NA), American Association of Airport Executives (AAAE), Helicopter Association International (HAI), and the National Business Aviation Association (NBAA). The comments addressed the following areas of the proposal:

- Applicability;
- Implementation;
- Non-movement area;
- Data protection;
- Safety reporting and interoperability;
- Training and orientation;
- Accountable executive;
- Definitions; and
- Miscellaneous topics.

III. Discussion of Public Comments and Final Rule

A. Applicability

(1) General Applicability

The majority of airport and industry commenters submitted comments about the FAA's preferred alternative for the applicability of the rule. Instead of applying the SMS rule to all certificated airports, the SNPRM amended the proposed applicability to cover only certificate holders identified as (a) large,

[10] National Transportation Safety Board response to SNPRM, September 6th, 2016, Docket Number FAA–2010–0997–0179, Christopher A. Hart, Chairman, page 2.

medium, or small hubs; (b) having more than 100,000 total annual operations; or (c) having international services (triggers (a) through (c) are hereinafter referred to collectively as, the ''preferred alternative'').

Most commenters generally supported the use of the hub classification as a trigger for the applicability of this final rule. However, smaller airports and industry associations questioned the operational and international triggers.

One commenter disagreed with the FAA's revised approach, instead suggesting the FAA require SMS for all certificated airports, as proposed in the NPRM. The commenter believed that applying SMS to a select number of airports could create two levels of safety for airports. The FAA disagrees. The FAA has determined that its approach achieves the most safety benefits in the least burdensome manner, while also strengthening its alignment with international standards. Consistent with other provisions of part 139, this approach relieves relatively small airports from compliance costs when the safety benefits are lower. These small airports have the opportunity to voluntarily implement a SMS, if they believe it is beneficial to their operations.

The FAA continues to encourage airports not certificated under part 139 and part 139 certificate holders that are not subject to this final rule to voluntarily implement SMS and has made Federal funding available for SMS Manuals and Implementation Plan development.

Commenters also proposed alternate frameworks for SMS applicability. For example, some commenters suggested SMS be required on a case-by-case basis. The FAA disagrees with these suggestions because these alternative frameworks would generally cause ambiguity as to when a certificate holder would be required to comply with the SMS requirements. In the case-by-case example referenced above, suggested application of SMS may be regarded as a punitive measure FAA could use to address a certificate holder failing to comply with part 139 requirements. The perception of using SMS as an enforcement tool, contradicts the non-punitive, safety culture critical to a SMS. The FAA's actual intent is for SMS to serve as a risk-based tool targeting highest-risk areas. A case-by-case approach would also be highly subjective because of the unique conditions of each non-compliance issue.

Another commenter suggested that the FAA exclude airports holding a Class IV AOC from the preferred alternative. A Class IV airport is an airport certificated to serve unscheduled passenger operations of large air carrier aircraft. A Class IV airport cannot serve scheduled large or small air carrier aircraft. The FAA disagrees that Class IV airports should be completely excluded, as they serve air carrier aircraft. If a Class IV airport meets one of the triggers because it could serve a large number of air carrier [11] operations or host international operations, it meets the standard identified through the risk-based approach. As discussed later, if a Class IV airport is only identified under the international trigger, the certificate holder may obtain a waiver from the SMS requirements if it meets all of the conditions established in § 139.401(d).

One comment received during the 2021 comment period recommended allowing for a single SMS for use in multi-airports systems. The FAA agrees with this recommendation, and notes that the regulations allow this use, provided that each airport can still meet the requirements of this final rule.

Finally, one commenter observed the preferred alternative could result in certain airports used by air carriers as alternate or emergency airports not being subject to the SMS requirement. This observation is correct: airports designated as an alternate airport are subject to part 139 requirements only if they fulfill one of the triggers.

(2) Triggers

(i) Hub trigger: In the SNPRM, the FAA proposed using data from the National Plan of Integrated Airport Systems (NPIAS) to identify which certificate holders would qualify under the hub trigger. One commenter stated that there is a lag between when NPIAS data is gathered, published, and becomes publicly available. While the commenter requested the FAA use a different data source to determine hub applicability, it also asked the FAA to report SMS applicability within the biennial NPIAS Report to Congress. The FAA partially agrees with these requests. The FAA will use the annually updated Enplanements at All Airports (Primary, Non-primary Commercial Service, and General Aviation) by State and Airport data available on FAA.gov to determine hub applicability. The FAA pulls this data from the Air Carrier Activity Information System (ACAIS), an FAA database containing data reported by the air carriers to the U.S. Department of Transportation, Bureau of Transportation Statistics. The FAA has used ACAIS since the 1980s to categorize airports based on enplanements and determine entitlement funding under the Airport Improvement Program. The FAA shares this data with airports annually and uses it to inform the NPIAS report. The FAA does not plan to add information about SMS applicability to the NPIAS (*e.g.,* adding a column/field to indicate whether the airport is required to implement SMS) as inconsistencies might exist due to a reporting lag. Instead, the FAA will maintain a separate list of airports required to implement SMS on our public website, *FAA.gov.*

(ii) Operations trigger: In the SNPRM, the FAA proposed using operational data submitted through FAA Form 5010–1, Airport Master Record. To determine which airports would be subject to the SMS requirement under this trigger, the FAA used a ''snapshot'' approach, gathering operational data reported in the system on August 1, 2012. Commenters requested changes to either the operations trigger or the source data. Commenters also expressed concerns about the FAA's snapshot approach, explaining that multiple factors could cause airport operations to vary on a yearly basis, causing an airport to exceed 100,000 operations for a particular year but fall below the trigger threshold in the preceding or following years.

The FAA agrees with commenters' concerns about the snapshot approach. Therefore, the FAA will use a 3-year rolling average to determine applicability under the operations trigger.

Accordingly, this final rule retains the operations trigger with minor modifications. This final rule will not use FAA Form 5010–1 as the sole source of data used to determine who qualifies under the operations trigger. Instead, the FAA will use the following: (a) traffic counts reported by the Air Traffic Control Tower through FAA Operations Network (OpsNet) for airports with FAA or contract towers; (b) FAA Form 5010–1 data for non-towered airports; or c) other FAA-validated counting systems. Historical OpsNet data is publicly available through *FAA.gov.*

Lastly, the final rule adds a clause to § 139.401(a)(2) to clarify that operations for the purposes of this trigger mean the sum of all arrivals and departures. This addition does not change the meaning of operations as it is used in the context of the operations trigger and as it was proposed in the SNPRM, but merely provides additional clarity.

(iii) International trigger: In the SNPRM, the FAA proposed requiring SMS at all airports with international

[11] See § 139.5, definition of *large air carrier* aircraft.

services, specifically: (a) those identified as a port of entry (under 19 CFR 101.3), (b) designated international airports (under 19 CFR 122.13), (c) landing rights airports (under 19 CFR 122.14), or (d) user fee airports (under 19 CFR 122.15). Seven commenters expressed general concern that small airports with Customs and Border Protection (CBP) facilities accommodating international general aviation traffic, not scheduled air carrier operations, are unnecessarily included in the international trigger. Several commenters recommended that the FAA should only require airports with scheduled international service to have SMS. In 2021, commenters reiterated concerns about the SMS requirements that would apply to airports under this particular trigger.

The FAA requested comments on alternate methods for identifying international airports, since the FAA no longer maintains Advisory Circular 150/5000–5, Designated U.S. International Airports.

Commenters had mixed responses to the Agency's use of CBP's Guide for Private Flyers list. Many requested the FAA not use the list because it is outdated and is not hosted by the Agency. One commenter recommended the FAA modify FAA Form 5010–1 to include a new field for certificate holders to self-report the availability of international services. Some commenters requested the FAA establish a joint government/industry task force to assess the accuracy of CBP's lists and develop another method to identify international status, which could include self-reporting by airports.

The FAA also agrees with commenters' concerns about the data source for international applicability. It does not appear that any one data source document contains the most up-to-date list of airports with international services. Therefore, this final rule removes reference to CBP regulations. Instead, the FAA will use appropriate available sources of data to determine applicability under this trigger. In addition to CBP regulations, the Agency will use CBP website information and the private flyers list of available airports. The combined use of these lists provides a more comprehensive source of information to determine which airports host international services. The FAA determined that it is unnecessary to establish a joint government/industry task force to develop this information since it is available directly from CBP. The FAA will defer to the expert agency and will not question the accuracy, data gathering systems, analysis, or processes of CBP. As previously stated, the FAA intends to maintain the master list of qualified airports. The FAA determined that it is unnecessary to note this applicability in other lists such as the FAA Form 5010–1 database or the NPIAS because doing so could lead to inconsistent data due to potential reporting lags.

The FAA also agrees with comments submitted in 2016 and 2021 that the intent of the international trigger is not to impose a burdensome regulation on certificate holders with international service capabilities aimed exclusively at general aviation traffic. Thus, the FAA incorporated a provision into this final rule allowing airports hosting international services exclusively for general aviation traffic to obtain a waiver from the SMS requirement. An airport may obtain a waiver as long as there is no tenant at the airport that is required to comply with a SMS requirement imposed by any applicable law or regulation of its country of origin (*i.e.,* the jurisdiction that issued the operator's air carrier certificate, air operator certificate, or equivalent) or any other applicable governing jurisdiction.[12] To obtain a waiver, a certificate holder must submit a formal, written request to the appropriate FAA Regional Airports Division Manager justifying its waiver request, pursuant to § 139.401(d). As discussed later in the preamble, FAA estimates that approximately 74 airports would meet this provision and be eligible to apply for a waiver.

The FAA recognizes that an airport's status could change based on the turnover of tenants conducting business at any given moment. For certificate holders granted a waiver, this final rule (§ 139.401(d)) requires the certificate holder to report to the FAA whether it has had any change in international air carrier service that affects the applicability of part 139 SMS requirements every 2 years.

The FAA also received comments in 2016 and 2021 alleging the framework did not comply with ICAO standards. The FAA concludes that ICAO Annex 14 identifies standards and recommended practices that address certificated airports with international air carrier service. This final rule's international trigger framework is consistent with the overarching intent of the international standards.

[12] If an airport has any tenant required to implement a SMS pursuant to any foreign law or regulation, such foreign jurisdiction could prevent the tenant from operating into, or out of, a U.S. airport that does not have a SMS.

(3) Authority To Implement Triggers

Several commenters asserted that the FAA does not have sufficient authority to implement the proposed triggers. As stated in the SNPRM, the FAA has sufficient statutory authority under Title 49 of the United States Code, Subtitle VII, part A, subpart III, section 44706, ''Airport operating certificates,'' as well as section 44701, ''General requirements,'' and section 44702, ''Issuance of certificates,'' to require SMS at any certificated airport—including those identified as having international services.

(4) Annual Review of Applicability

The FAA was asked to clarify: (a) the timeline and process for reviewing the final rule's applicability to an airport; (b) how the FAA will review each airport's status including when the review will occur; and (c) how much time a newly identified airport would have to comply with this final rule.

The FAA plans to conduct its annual applicability review at the end of each calendar year after this final rule becomes effective. After each annual review, the FAA will post a list of qualifying airports on *FAA.gov* and send airports that qualify due to a status change a letter notifying them of their qualification.

This final rule requires a newly qualified airport to submit its Implementation Plan within 18 months from notification of qualification by the FAA (see § 139.403(a)(4)). After the FAA approves the Implementation Plan, the certificate holder has 12 months to submit its SMS Manual and/or ACM update and 36 months to fully implement SMS.

For an airport that initially qualified under any of the triggers but no longer qualifies due to a status change, the certificate holder will be required under § 139.401(h) to continue to develop, implement, maintain, and adhere to the SMS for the longest of either 24 consecutive calendar months after full implementation; or 24 consecutive calendar months from the date it no longer qualifies under § 139.401(a). Additionally, some airports may cross the threshold of the 100,000 operations criteria from one year to the next. The 24 consecutive calendar months ensure greater continuity and predictability in the airport's SMS. The FAA determined 24 calendar months was the minimum time that would be necessary to accurately validate the withdrawal of the triggering requirements. FAA believes a period beyond 24 consecutive calendar months would be overly burdensome to airport operators.

If at any time during the application process for an AOC, an airport operator becomes subject to this final rule under any of the triggers identified in § 139.401(a), then the FAA expects that such airport operator will develop a SMS simultaneously with the development of its certification program. The FAA does not expect the Implementation Plan requirement for airport operators seeking an AOC under § 139.103 to create an additional burden because the FAA anticipates that the process will occur simultaneously with the certification process.

B. Implementation

Nearly every commenter from both 2016 and 2021, including certificate holders, industry associations, and consultants, commented on the FAA's proposed timeline for submission of the certificate holder's Implementation Plan, SMS Manual, ACM update, and full implementation. While most agreed the amended proposal for submitting the Implementation Plan and SMS Manual was acceptable, none thought a certificate holder could be fully implemented within 2 years. Commenters from the 2021 comment period requested further clarity on how the final rule would affect existing SMS programs. The final rule supplemental guidance incorporates more detail for airports implementing an existing SMS into their part 139 compliance program.

(1) Phased Implementation

In the SNPRM, the FAA addressed comments to the NPRM requesting the FAA mandate a phased approach to implementation. This would entail setting different regulatory timelines for implementation based upon, for example, each SMS component, or requiring the implementation of the SMS in the movement area prior to non-movement areas. As explained in the SNPRM, to facilitate maximum flexibility and scalability, the FAA did not propose a one-size-fits-all implementation approach. A certificate holder is granted flexibility in structuring and fine-tuning its Implementation Plan to best fit its operations and capabilities. Certificate holders are therefore able to phase implementation, either by SMS component or by movement versus non-movement area, as long as they fully implement SMS by the required deadline.

During both the 2016 and 2021 comment periods, commenters reiterated previous comments to the NPRM asking the FAA to require a phased approach and permit more time for implementation.

The FAA maintains that it will not require airports to use a phased approach. This final rule is performance-based and allows flexibility in how the certificate holder implements SMS within the required deadlines. A certificate holder could choose to phase its implementation, as long as that phasing occurs within the full implementation deadline. The FAA addresses potential phasing options and considerations in the related AC, which takes into account experiences from pilot studies and other implementing countries. The AC is a guidance document and the FAA stresses that certificate holders may choose to pursue a phased approach—or not—and to structure their implementation to best fit their operations, needs, and capabilities.

The FAA also acknowledges that safety assurance processes and procedures, including program evaluation and auditing, would require experience under the SMS to be meaningful. By the deadline for full implementation, the FAA expects a certificate holder to *identify* those safety assurance processes and procedures and a timeline for rolling out those activities identified in the SMS Manual or ACM; not actually apply those practices prior to full implementation.

(2) Staggered Implementation

In addition to requesting a phased implementation, numerous commenters requested the FAA impose a staggered approach to implementation. The meaning and scope of ''staggered'' varied per commenter, but commenters focused on staggering by size and complexity of airport operations, by applicability triggers, or based on airport human and financial resources.

The FAA agrees that a staggered approach will benefit industry implementation as well as FAA review and oversight. Therefore, this final rule staggers rollout of document submission and implementation requirements based on the applicability triggers. This approach conforms to commenters' requests to implement a staggered approach based on size and complexity of the airport's operation. By being the last to implement, smaller, less complex operations gain the ability to learn and seek advice from larger, more complex airports that already underwent the process. They will also have more time to identify resources and program appropriate funding, where needed.

(3) FAA Review of Documents

The majority of commenters requested the FAA provide a detailed timeline for FAA review, and approval or acceptance, of the certificate holder's Implementation Plan and SMS Manual/ACM update. Several commenters specifically requested that this final rule include regulatory text imposing deadlines for FAA review. Commenters also requested the FAA conclude that if a certificate holder receives no feedback from the FAA Regional staff within a certain number of days after document submission (*e.g.,* 60 or 90), then the Implementation Plan or SMS Manual should be deemed approved or accepted.

Lastly, the FAA was asked to explain whether it expects a certificate holder who has already voluntarily implemented (or begun implementation of) a SMS to submit an Implementation Plan. The commenter suggested these airports conduct a gap analysis to determine gaps between their established programs and this final rule and submit a letter to the FAA summarizing those gaps.

The FAA acknowledges the importance of approval of the Implementation Plan to full SMS implementation. Therefore, the deadlines for submission of the SMS Manual and/or ACM update and full implementation dates are calculated based on the FAA's approval of the Implementation Plan, rather than the effective date of this final rule. This approach is similar to the one used in part 5, except that it does not provide an absolute deadline by which the FAA must approve each Implementation Plan.

On average, the FAA estimates it will take an inspector 60 days to review an Implementation Plan and 90 days to review a SMS Manual and/or ACM update. The FAA deems these estimates reasonable and achievable under the staggered implementation approach. FAA Regional inspectors will work closely with their team leads, managers, and Headquarters liaisons should any problem or question arise about the submission or review process. Furthermore, the change to how the deadlines are calculated (*i.e.,* based on the Implementation Plan approval date) allows for more communication between the inspector and certificate holder, should changes be required.

The FAA intends to leverage existing long-standing processes, whereby the FAA Regional inspectors work closely with the airport operator to review and approve submitted changes to their ACM. These processes are typically explained in FAA Orders, which are publicly available documents. FAA Order 5280.5, ''Airport Certification Program Handbook,'' will provide inspectors with guidance on how to

review, approve, and accept document submissions, and also inspect SMS implementation. Part 139 does not include a process for certificate holders to resolve disapproval of changes to their ACM, and the FAA has not added such a process in this final rule.[13] The ACM review processes have historically been successful under the part 139 program.

The FAA developed a standardized Implementation Plan template in AC 150/5200–37A and has updated the material along with this final rule. Certificate holders are not required to use the template but are encouraged to do so to simplify and expedite FAA review and approval.

A certificate holder is not required to submit changes to its approved Implementation Plan. As discussed in the SNPRM, the Implementation Plan serves as a tool to help certificate holders develop and implement the various components and elements of SMS within the prescribed and/or approved deadlines. Once approved, the FAA expects the certificate holder to make necessary adjustments to ensure compliance with the prescribed deadlines.

Airports that have already voluntarily implemented SMS also must provide an Implementation Plan detailing how they will comply with this final rule. The FAA has determined that the Implementation Plan requirements are scalable, flexible and not overly burdensome. The certificate holder could use the AC guidance material and template to identify whether it has already completed the elements required under this final rule to assess any gaps between the final rule and its existing programs. Certificate holders may use an existing gap analysis as the basis for their Implementation Plan. However, the FAA would not accept a gap analysis alone, in lieu of the Implementation Plan.

(4) Timeline for Document Submission and Full Implementation

The SNPRM proposed an amended schedule for submission of a certificate holder's-Implementation Plan (12 months after the rule's effective date) and the SMS Manual and/or ACM update (24 months after the rule's effective date). The SNPRM implied that full implementation would be completed as of the date the SMS Manual was submitted. Most commenters agreed the amount of time proposed for submitting the Implementation Plan and SMS Manual was acceptable. However, many commenters from the 2016 and 2021 comment periods believed that full implementation was unachievable within 2 years. Numerous comments supported ICAO's model allowing 3 years for full implementation, while others supported alternate timelines ranging from 3 to 8 years. One commenter during the 2021 comment period argued that the implementation period of 2 years was too long. Commenters during both the 2016 and 2021 comment periods stated that by extending the timeline for full implementation, certificate holders would have more time to (a) amend existing tenant leases in non-movement areas, and change applicable leaseholds, contracts, policies and procedures; (b) work with State legislatures to protect SMS-related data; (c) implement based on FAA review and approval of the Implementation Plan; (d) effectively manage the number of hazards reported; (e) garner support and buy-in, hold partnering sessions with all stakeholders, and ensure that the written program will be positively received and accepted upon implementation; and (f) obtain local, state, or Federal funding to meet SMS requirements (*e.g.,* to obtain consultant services, acquire software systems, etc.). One commenter from the 2021 comment period recommended that the FAA reconsider its submittal timelines for SMS Implementation Plans and Manuals/ACM SMS sections.

The FAA agrees it is appropriate to increase the time allotted for full implementation. Thus, under this final rule, certificate holders qualifying under the hub trigger must be fully implemented approximately 4 years from the effective date of this final rule, plus any additional time that is required for FAA approval of the Implementation Plan. Because the FAA is using a staggered approach to submission of the Implementation Plan, certificate holders qualifying under the operations trigger have over 4.5 years and those qualifying under the international trigger have over 5 years to fully implement from this final rule's effective date.

Table 3 depicts the timeline for submission of the Implementation Plan, SMS Manual and/or ACM update, and full implementation based on a trigger. It also provides an estimated full implementation date based on a 60-day FAA review and approval of the Implementation Plan. The only documents required for submission are the Implementation Plan and SMS Manual and/or ACM update.

During the 2021 comment period, the FAA received several comments urging the FAA to reconsider SMS rulemaking and required implementation at this time due to the economic impact airports are facing as a result of the COVID–19 pandemic. The FAA recognizes the pandemic's impact on many airports; however, this rule's triggering criteria in § 139.401(a) account for factors that influence the triggers, such as the COVID–19 pandemic. The final rule also includes an implementation schedule based on the trigger and continues to be scalable and flexible to accommodate changes in airport operations. As previously addressed, Federal funding is also available for SMS Manuals and Implementation Plan development.

TABLE 3—TIMELINE FOR SUBMISSION OF THE IMPLEMENTATION PLAN, SMS MANUAL AND/OR ACM UPDATE, AND FULL IMPLEMENTATION BASED ON TRIGGER

Triggers	Submit implementation plan	Submit SMS Manual and/or ACM update	Fully implement *
Large, medium, and small hubs.	12 months from effective date.	12 months from date on which the FAA approves the Implementation Plan.	36 months from the date on which the FAA approves the Implementation Plan.
+100,000 average annual operations.	18 months from effective date.	12 months from date on which the FAA approves the Implementation Plan.	36 months from the date on which the FAA approves the Implementation Plan.
International airports	24 months from effective date.	12 months from date on which the FAA approves the Implementation Plan.	36 months from the date on which the FAA approves the Implementation Plan.

*Approximate dates assume 60-day FAA review of Implementation Plan.

[13] The FAA notes that part 5 also does not detail resolution of disapproval or non-acceptance.

(5) Timeline for New Airports Qualifying After the Effective Date of This Final Rule, or Due to Changes in Status

In the SNPRM, the FAA discussed SMS requirements imposed on: (a) airports that were subject to the rule at the time of the effective date of this final rule, and (b) airport operators requesting an AOC (newly certificated airports) after the effective date of this final rule. The FAA failed to address certain circumstances that could arise after the effective date of this final rule; particularly, when a certificate holder could become subject to, or no longer subject to, the requirements of this final rule due to a change in its hub, operations, or international status. In these instances, two commenters requested clarification of the timelines for submission of Implementation Plans, SMS Manuals and/or ACM updates, and full implementation.

As further discussed in section A, ''*Applicability,*'' this final rule addresses these circumstances and requires the certificate holder to: (a) submit an Implementation Plan within 18 months of notification of qualification by the FAA; (b) submit a SMS Manual and/or ACM update within 12 months of Implementation Plan approval; and (c) fully implement a SMS within 36 months of Implementation Plan approval. This final rule also addresses circumstances in which a certificate holder no longer meets any of the qualification triggers. Section 139.401(h) requires the certificate holder to continue to develop, implement, maintain, and adhere to its SMS for the longest of either twenty-four consecutive calendar months after full implementation; or twenty-four consecutive calendar months from the date it no longer qualifies under § 139.401(a). For illustration purposes only, assume a certificated airport qualified only under the international trigger due to the presence of a part 129 international carrier. If the international air carrier ceases operations at the airport, and if there are no other commercial international operations, then the airport no longer will be subject to the SMS requirements, but § 139.401(h) requires the airport to continue to develop, implement, maintain, and adhere to its SMS for the longest of either twenty-four consecutive calendar months after full implementation; or twenty-four consecutive calendar months from the date it no longer qualifies under § 139.401(a). Some airports may cross the threshold of the international flights criteria frequently. The FAA determined twenty-four calendar months was the minimum time that would be necessary to accurately validate the withdrawal of the triggering requirements. FAA believes a period beyond twenty-four consecutive calendar months would be overly burdensome to airport operators.

C. Non-Movement Area

The FAA believes it is essential that SMS regulatory requirements apply to non-movement areas through part 139 because. . . . We received comments during the 2016 and 2021 comment periods from numerous entities, including associations, certificate holders, and air carriers, on the proposed application of SMS to non-movement areas. Except for a few notable exceptions, most disagreed with the FAA's proposal to include non-movement areas in an airport's SMS. Nearly all of these commenters suggested ways—through either regulatory text or preamble discussion—for the FAA to clarify its intentions with respect to applicability of SMS to non-movement areas and to improve the requirements to reflect the practicalities of airport operations.

Several of these commenters from both the 2016 and 2021 comment periods also urged the FAA to resolve potential duplication and conflicts between the SMS of an air carrier tenant (*i.e.,* a part 119 certificate holder subject to part 5 SMS) and the SMS of an airport operator for activities conducted in leased facilities located in non-movement areas. Commenters from both comment periods suggested that airport involvement in air carrier tenant leased areas could introduce new risks for air carriers because the air carriers would have to ensure compliance with different procedural mitigations at each airport they fly into. Commenters from both comment periods also addressed potential duplication and conflict for passenger operations in non-movement areas. However, both airport and cargo operators indicated that operations on cargo ramps are unique since they are managed exclusively by cargo operators. Lastly, commenters from both comment periods asked the FAA to exclude non-movement areas subject to exclusive area agreements with the Transportation Security Administration (TSA), when the certificate holders have implemented SMS.

The FAA received and considered the following suggestions to address the implementation in non-movement areas:

1. Make SMS implementation in non-movement areas voluntary for part 139 certificate holders;

2. Apply SMS in the non-movement areas only for ''traditional'' airport responsibilities (*e.g.,* infrastructure condition, driving, airport-provided or required marking and lighting, and public protection), and let air carriers or other third parties address other functions (*e.g.,* pushback and towing, aircraft servicing, jet bridge operation, and baggage/cargo handling);

3. Encourage (or require) part 139 certificate holders to implement SMS first in the movement area and then in the non-movement areas (phasing in areas in which the airport has complete control, areas in which the airport shares control, and areas in which a third-party has control);

4. Permit part 139 certificate holders to exclude SMS applicability from areas specifically identified in the SMS Manual that are under the control of one or more air carrier tenants with part 5 SMS;

5. Allow part 139 certificate holders to delegate their authority to their tenants to implement SMS in certain non-movement areas where the certificate holder can show the tenant has greater control, or limit the role of the airport operator in such areas to that of a ''coordinator'';

6. Permit part 139 certificate holders to delegate SMS oversight and responsibility to a designated senior official of each affected tenant; and

7. Clarify whether the part 139 certificate holder SMS or the air carrier tenant SMS has precedence for safety issues in non-movement areas, subject to the SMS requirements of parts 5 and 139 (*e.g.,* gate operations near aircraft, ground servicing vehicles, etc.).

(1) Regulatory Authority in the Non-Movement Area

One commenter reasserted its argument—first brought forth in its comments to the NPRM—that the FAA lacks the necessary authority to regulate non-movement areas pursuant to 49 U.S.C. 44706. Another commenter stated the FAA has not offered a compelling reason to substantiate the proposed expansion of its regulatory oversight to non-movement areas.

The FAA has broad authority under 49 U.S.C. 44702 to issue AOCs. Under 49 U.S.C. 44706, the FAA can issue an AOC to a person desiring to operate an airport if it finds that the certificate holder ''properly and adequately is equipped and able to operate safely under this part and regulations and standards prescribed under this part.'' Furthermore, 49 U.S.C. 44701(c) allows the FAA to regulate to ''reduce or eliminate the possibility or recurrence of accidents in air transportation.''

The FAA acknowledges that the majority of the quantified benefits

related to wildlife strikes are primarily occurring in the movement area, which make up about 50 percent of benefits. However, the FAA has identified numerous safety concerns, events, accidents, and incidents in non-movement areas that constitute hazards and may reasonably contribute or lead to accidents in air transportation (examples of which are discussed both later in the preamble as well as in the accompanying RIA). Instituting SMS in movement and non-movement areas is consistent with the FAA's authority and safety mission, because it provides significant benefits and contributes to the reduction or elimination of the possibility of recurrent air transportation related accidents.

In one example, discussed further in the RIA, an airport identified a hazard to passengers walking on a ramp between parked aircraft and the terminal. The airport mitigated the hazard by adding pavement markings to guide passengers along a safe path between aircraft and the terminal. In another example, an airport identified a trend regarding collisions between moving aircraft wingtips or service vehicles and the tails of stationary aircraft parked at gates. The airport mitigated the hazard using pavement markings as a clear indicator for ramp wing-walkers and marshallers to maintain proper clearances.

The regulatory evaluation of this final rule provides additional examples of past events that justify the need for implementation of SMS in non-movement areas. See Section IV, Benefits, in the regulatory evaluation for this rule. Accidents and incidents continue to occur. For example, during the 2-month period encompassing January and February 2017, a large hub airport reported four damaging incidents in the non-movement area. Two of the incidents occurred during pushback, and all four incidents involved vehicle movements or safety personnel required to monitor such movements. In February, May, and July 2017, a second large hub airport (owned and operated by the same entity) reported three more damaging incidents in the non-movement area, similar to those experienced at the first airport.

Furthermore, as discussed in the SNPRM, and in direct support for instituting SMS in non-movement areas, pilot studies found that it was difficult to apply SMS concepts only to the movement area because aircraft and airside personnel routinely flow between movement and non-movement areas. Airport operators and/or airport owners currently have sufficient authority to implement the training, safety reporting, and Safety Risk Management (SRM) processes required in this final rule, as well as to undertake the additional responsibility and burden in the non-movement area that will result from this rule, including potential development of new expertise in this area.

(2) Inclusion of Fuel Farms, Baggage-Makeup, and Military Areas

A commenter argued against the inclusion of fuel farms as part of the SMS requirements. The FAA disagrees that SMS implementation in fuel farms should be voluntary for airports. As stated in the SNPRM, fuel farms are regulated under § 139.321 as part of the certificate holder's AOC. Therefore, it is a natural progression to implement relevant portions of the SMS in the fuel farm environment.

Another commenter requested the FAA include baggage-makeup areas within the definition of non-movement area. The FAA previously responded to issues about applicability to baggage-makeup areas in both the ''Responses to Clarifying Questions (to the NPRM)'' and the SNPRM. The FAA continues to disagree with including baggage-makeup areas explicitly within the definition of non-movement areas. At the majority of airports, these areas are located in the terminal environment. The purpose of addressing non-movement areas in SMS is to address conditions, events, incidents, or accidents that could potentially threaten, or harm, passenger-carrying operations, and to reduce or eliminate the possibility of recurrence of accidents in air transportation (as authorized by 49 U.S.C. 44701, 49 U.S.C. 44702, and 49 U.S.C. 44706). However, if a baggage-makeup area is located outside the landside facilities—in proximity to air carrier operations—the certificate holder would need to ensure the implementation of relevant portions of this final rule, like awareness of the safety reporting system for individuals working in the external baggage-makeup areas. The ''non-movement area'' definition covers these rare instances without explicitly identifying baggage-makeup areas.

The FAA addressed certain issues about joint-use airport facilities in the NPRM and SNPRM. Notwithstanding, several commenters—including various certificate holders—stated the SNPRM was unclear with respect to non-movement areas that are under the exclusive control of the military or other governmental entities. The FAA maintains its position that non-movement areas under the exclusive control of military units or other governmental agencies are excluded from the applicability of SMS requirements. This exclusion will apply to military facilities at joint-use airports or leased areas at joint-use airports. All such areas must be identified in the SMS Manual and/or ACM update, and the certificate holders should include the exclusion in any ''lease and use agreement''—or similar legal instrument—with applicable military units or governmental agencies. Certificate holders can—at their own initiative—promote the voluntary inclusion of the military and governmental bodies in SMS-related activities and programs.

(3) Inconsistency With ICAO Standard

A commenter noted that ICAO Annex 19, Appendix 2, states an ''organization's SMS should identify hazards and mitigate risks associated with its products or services.'' It argued that an airport's SMS should only be applicable to products or services provided by the airport or its contractors, meaning that services provided in non-movement areas by parties other than the airport operator would not be covered (*e.g.,* baggage handlers or provisioning crews). The commenter believed the FAA's proposal is inconsistent with this international standard and may lead to negative consequences.

The FAA does not agree with the commenter's interpretation. ''Note 2'' of Amendment 1 to ICAO's Annex 19 states: ''the service provider's interface with other organizations can have a significant contribution to the safety of its products or services.'' Section 2.1.1 of Appendix 2 states: ''the service provider shall develop and maintain a process to identify hazards associated with its aviation products or services.'' Furthermore, pursuant to section 2.1.2: ''hazard identification shall be based on a combination of reactive and proactive methods.''

The sections referenced above evidence and recognize the complexity of certain operations (*i.e.,* airport operations). The interface between a service provider and other organizations can significantly contribute to the safety of the service provider's products or services. Airport operations are complex, and certain actions occurring in movement and non-movement areas could pose a threat to the safety of aircraft and air transportation. Airports should consider all conditions that could pose a threat or hazard to the airport's operations, whether partly or completely located in the movement or non-movement areas. This is not an issue of where the hazard occurs, but if

it could occur. Conditions in the non-movement areas could constitute hazards because they can foreseeably lead—or be part of a chain of events that leads—to aircraft accidents (*e.g.,* An aircraft taxis over wheel chocks left on the ramp, causing damage to the aircraft's nose wheel spray deflector. The damaged deflector prevents extension or retraction of nose gear after takeoff, causing an emergency diversion and nose gear-up landing.[14]

Based on the above, and on the FAA's authority to regulate the non-movement area pursuant to 49 U.S.C. 44701, 44702, and 44706, the FAA determined the regulation of the non-movement area for SMS purposes is consistent with ICAO standards.

(4) Air Carrier Operations in Non-Movement Areas

Commenters that commented during both the 2016 and 2021 comment periods were confused about the applicability of SMS regulatory requirements in non-movement areas. Some air carriers and airport operators believed the SMS requirements proposed in the SNPRM would duplicate requirements already imposed on air carriers through part 5. These entities believed the part 139 final rule should exclude non-movement areas under the exclusive control of air carriers since they are already covered through the air carrier's SMS.

The part 5 final rule limited the FAA's oversight of the air carrier's SMS to aviation activities conducted under part 121. The FAA acknowledged in the preamble of the part 5 final rule that some air carriers may opt to extend their SMS to other aviation and non-aviation-related activities. The FAA clarified that it would only conduct oversight of SMS activities related to aviation operations that the air carriers conduct under part 121. Many air carriers have voluntarily extended their SMS to include ramp operations, but these programs are not required to comply with part 5, nor are they inspected by the FAA.

The part 5 final rule also narrowed the definition of the term ''hazard'' to ensure consistency with the NTSB's definition of ''aircraft accident.'' Accordingly, the part 5 definition of ''hazard'' involves a condition that could foreseeably cause or contribute to an aircraft accident as defined in 49 CFR 830.2. An ''aircraft accident'' is defined as: ''an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage.'' By limiting the scope of the definition of ''hazard'' in part 5, the FAA's oversight is narrowed to the air carrier's operation.

The FAA notes that certain aspects of an air carrier's operations conducted in non-movement areas are not subject to the provisions of part 121. Similarly, unfavorable occurrences, which could lead to an accident, injury, or damage, may not involve an aircraft with the intention of flight but could still be of concern to an airport operator. As previously discussed, the need for proactive safety management in the non-movement area is evidenced by the large number of safety accidents and incidents in non-movement areas. Therefore, the FAA believes it is essential that SMS regulatory requirements apply to non-movement areas through part 139.

The FAA Office of Airports' (ARP) oversight and inspection related to application of the SMS to non-movement areas will focus on the airport operator's processes and practices to ensure proactive safety management, since ARP inspectors are not authorized to inspect air carrier operations for compliance with part 5, 119, or 121.

As for implementation of SMS in non-movement areas, the FAA does not agree that it should be voluntary or dictated by regulation (see section B, ''Implementation''). However, the FAA agrees that additional flexibility—to facilitate compliance with the requirements for SMS implementation in non-movement areas—will be beneficial to account for unique contractual, business, or operational arrangements involving air carrier tenants required to implement SMS. For example, the airport operator could establish a means for air carriers' tenants to share with the airport any reports, safety information, and analysis relevant to the air carrier's operations in the movement and non-movement areas of the airport. The air carrier tenant employees could file the information through the airport's safety reporting system. However, the flexibility of this final rule allows for—but does not require—the certificate holders to enter into an arrangement in which air carrier tenant employees continue using their employer's confidential employee reporting system (See 14 CFR 5.71(a)(7)) to communicate relevant safety data and reports, as long as the air carrier tenant shares relevant information derived from such reports or findings with the airport. Section 139.401(e) affords certificate holders such flexibility by alleviating duplicative reporting and encourages sharing of information by addressing interoperability issues between the regulated entities. If the part 139 certificate holder chooses to develop a Data Sharing and Reporting (DSR) Plan, this option is available.

A certificate may develop a DSR Plan as a means of compliance with § 139.401(e). If the certificate holder chooses this means of compliance, the DSR Plan must include, as a minimum: (a) the types of information (*e.g.,* hazard reports, investigation findings, etc.) the airport operator expects the air carrier tenants to share if they are reported through their part 5 confidential employee reporting system or other hazard collection means; (b) the timeliness of sharing relevant safety data and reports; (c) the process for analyzing joint safety issues or hazards; (d) other processes, procedures, and policies to aid the part 139 certificate holder's compliance with its obligations under the airport SMS; and (e) the identification of means by which the requirements of the plan will be executed (*e.g.,* private agreement, internal bylaws, internal regulations, internal policies, memorandums of understanding, etc.). The part 139 certificate holder may choose to incorporate the DSR Plan into the ACM or SMS Manual.

Establishing a DSR does not necessarily require any additional capital investment by the airport or the tenant to facilitate data sharing as § 139.401(e) does not prescribe how data sharing should occur (for example, data sharing could be achieved through routine meetings between the airport and the part 121 air carrier). A DSR might also reduce the total amount of incidents that would otherwise be reported to the airport, as the DSR Plan may allow for a tenant, through its own internal reporting system and SMS, to analyze and mitigate reported hazards that it determines do not require further analysis or mitigation by the airport.

Airport operators must work with air carrier tenants that chose to participate in the DSR Plan to ensure they agree to the terms it established. The FAA stresses that the development and participation in the DSR Plan is voluntary both for the airport operator and air carrier tenants. Airports that develop a DSR Plan may encourage participation by, among other things, reminding air carrier tenants of the benefits afforded through the DSR Plan, such as relief from duplicative reporting.

[14] Ref. *https://www.asias.faa.gov/apex/f?p=100:17:::NO::AP_BRIEF_RPT_VAR:CHI01FA270.*

The DSR Plan affords the airport operator flexibility in how it engages applicable air carrier tenants. This final rule does not dictate the means by which the airport operator must carry out the provisions; rather, it requires airport operators choosing this option to describe how they will implement the provisions. For example, an airport operator may have sufficient rights and powers to institute requirements such as data sharing through airport issued rules, regulations, or policies. In other cases, an airport operator may need to enter into a private agreement or amendment to an agreement or an internal directive or guideline to implement such provisions. The part 139 certificate holder will simply identify the means by which it will implement the minimum requirements of the DSR Plan to allow for the sharing of information (*e.g.,* private agreement, rules and regulations, memorandum of understanding, etc.). It will not have to incorporate the agreements, rules, or other provisions into the DSR Plan.

Regardless of the existence or form of delegation, the FAA emphasizes that the burden of compliance with the regulatory requirements established by this final rule rests solely on the part 139 certificate holder. Any failure of an air carrier tenant to uphold any term or condition established in an arrangement or agreement between the air carrier tenant and the part 139 certificate holder that is used to carry out the provisions of the DSR Plan is not a valid or reasonable justification for lack of compliance with the regulation.[15]

Further, an FAA inspector could request to inspect the optional documentation (*e.g.,* private agreement, internal bylaws, internal regulations, internal policies, memorandums of understanding, etc.) referenced in the DSR Plan, whenever the FAA determines—or has reasonable belief—that the airport is not complying with related provisions of the regulation. The inspection of the documentation facilitates the FAA's assessment of compliance with the regulation and the FAA's understanding of the delegation of responsibilities among the parties.

[15] The FAA notes that the scope of oversight burden under this final rule is not different than current requirements in part 139. Airports are currently responsible for compliance in all areas covered under part 139 and the airport ACM. Moreover, almost every part 139 airport is federally obligated through the federal grant program and is required to meet certain federal grant assurances including the requirement to operate in a safe and serviceable manner. The oversight expectations present under existing part 139 rules are sustained in this final rule; the SMS process simply establishes a systematic approach to the airport's already-existing responsibilities and helps mitigate incidents or accidents that may occur.

Therefore, the FAA recommends that certificate holders include a clause or provision in such agreements or documents that all parties involved facilitate access to the FAA for the review of the agreements or documents—at the FAA's request—so the FAA can assess compliance with all applicable regulatory requirements when in question. As discussed in Section D, Data Protection, the FAA may request additional SMS-related data or information under existing regulatory oversight processes to ensure that systemic or national compliance issues are reported when appropriate. In most cases, the FAA will review requested documents while on the airport. The only time the FAA will take physical possession of SMS-related data off airport will be as part of an investigation. Otherwise, the part 139 certificate holder will retain all other SMS-related information.

Airport operators executing a DSR Plan with a tenant would not be required to make their safety reporting systems available to the tenants or tenant's employees for safety reporting purposes. The airport operators would also not be required to extend their SMS training or make available SMS materials to the tenant's employees if the tenant's SMS covers such training or materials.

D. Data Protection

Most commenters to the SNPRM that commented during both the 2016 and the 2021 comment periods, including certificate holders, associations, and air carriers, claim the FAA has not adequately considered the effects that a lack of data protection will have on SMS implementation. Commenters asked the FAA to take action to protect from public disclosure SMS-related information such as hazard reports, safety risk management documentation, investigations, and Safety Assurance reports. Without Federal action, these commenters believed a lack of data protection could significantly impact the effectiveness of the certificate holder's safety reporting system and overall SMS.

A commenter noted that airport operators generally have greater difficulty than air carriers in protecting against the disclosure of safety information because most airports are owned and operated by governmental entities that may be subject to a state's freedom of information laws. In the absence of effective protection mechanisms, most certificate holders could be required to disclose safety data gathered as part of their SMS.

The FAA was asked to provide guidance on the appropriate way to handle open records act and Freedom of Information Act (FOIA) obligations if an airport operator comes into possession of, or has access to, air carrier SMS information. A commenter stated that if the FAA intends for safety reporting to be independent of other governmental functions, it must explicitly include language in this final rule that prohibits the airport operator from sharing information with other government entities, notwithstanding any contrary local or State requirements or law. Another commenter mentioned that airport operators may not have authority to ignore non-safety implications of data they receive in connection with shared SMS data. A commenter from the 2021 comment period requested that the FAA codify a FOIA exemption for SMS reporting.

The FAA assessed various suggestions for dealing with potential data protection issues:

(1) State-Level Fix

Two commenters believed that if the FAA finds a way to provide Federal protection, existing state legislation (in some states) would grant similar protection. One of the commenters stated that the FAA would have to opine that grant-obligated airports are required to keep confidential those records collected in compliance with a SMS rule, thus allowing protection under its state's open records laws. However, another commenter explained that its state's existing public records laws are broad and would not protect any data submitted to the airport's safety reporting system. While these commenters are not averse to working with their state legislatures to ensure protections, they request additional time for implementation to address these issues. In 2021, one commenter requested an exclusion of SMS-related data from state level public records requests in the final regulation, provided the FAA determines it has the authority to create such an exclusion.

In contrast, two commenters disagreed with the State-level fix, explaining that the FAA has underestimated the monetary and schedule challenges posed by putting the onus on the certificate holder to work with state authorities. The commenter also believes a patchwork of different protection standards is not conducive to the success of the SMS effort.

The FAA recognizes that most certificate holders are owned by public entities, whether it is a State, a subdivision of a State, a local

governmental body or other similar entity. Certificate holders are in the best position to seek legal guidance to determine the most appropriate way to handle and protect data and information gathered. They should assess applicable State legal frameworks to determine how to comply with data privacy laws and reporting requirements. (For example, SMS data that is required to be redacted as part of a disclosure requirement might also be subject to applicable State law.) Furthermore, certificate holders have the ability to evaluate whether States afford data and information protection mechanisms through local statutes and regulations or through other legal or contractual arrangements such as confidential disclosure agreements. Notably, the FAA does not have the authority to preempt State freedom on information laws without a congressional mandate. The FAA is also not in a position to assess any State's legal framework, to impose any requirement to create or implement State laws and regulations to protect data and information, or to counsel about handling and protection of data shared amongst third parties. Thus, the FAA cannot determine whether FOIA exceptions preclude disclosure requirements under applicable State laws, or if other laws, regulations, or contractual arrangements would preclude disclosures made amongst third parties.

(2) Federal-Level Protection

Commenters from the 2016 and 2021 comment period re-stressed their assertions that existing Federal protections could be used to protect SMS data. Commenters disagreed with the FAA's finding that data protection under SSI provisions is inapplicable and may be impermissible because those procedures are for information obtained or developed in the conduct of security activities as described in 49 CFR part 1520. The commenters argued that hazard reports and SRM processes could identify airport vulnerabilities. Another commenter believed the FAA should commit to using the provisions of 49 U.S.C. 44735(b)(4) to assist certificate holders in securing exemptions from state law. One commenter argued that the FAA already has the legal authority to exempt SMS-data from disclosure under Federal, state, and local freedom of information and sunshine laws. The commenter stated that Congress imposed on the FAA the responsibility of overseeing and regulating aviation safety in the U.S., and that pursuant to that authority, the FAA adopted a comprehensive regulatory scheme for certain activities. As such, the commenter maintained that Federal protection could be afforded since, whenever the FAA preempts the field, U.S. courts tend to invalidate state laws and regulations that conflict with the FAA safety regulations.

Commenters that commented during both the 2016 and 2021 comment periods agreed that a single Federal standard or statutory exemption should apply to all airports regarding data and information protection. Some commenters wanted the FAA to seek legislative protection to address data protection. Numerous commenters believed that the FAA should explicitly address data protection in this final rule's regulatory text and pressed for Federal legislation to protect such information.

Pursuant to 49 U.S.C. 44735, as amended, the FAA must protect certain voluntarily submitted reports, data, or other information produced or collected for purposes of developing and implementing a safety management system acceptable to the Administrator; however, this protection is not afforded to any SMS information *required* to be submitted to the FAA. Consequently, the FAA is limiting the SMS information that certificate holders are required provide the Agency (*i.e.,* certificate holder's implementation plan and SMS Manual, and/or ACM update).

Specifically, the FAA is not incorporating regulatory language requiring certificate holders to report to the FAA any safety-related data developed under a SMS. This approach should have no repercussions under FOIA and is consistent with the authority under 49 U.S.C. 44735. It should also not affect the FAA's ability to review a certificate holder's documentation to assess compliance with part 139; meaning, the FAA might take possession of such documentation when investigating a potential issue of non-compliance.

Certificate holders are not prohibited from voluntarily sharing information with other governmental entities. The protection under 44735 only safeguards against release by the FAA, and *does not* extend to other governmental entities nor to private entities. This means that whenever a certificate holder releases or submits information to any other governmental entity, the information rendered is not protected from release by such governmental entity, absent other applicable law.

The information might also not be protected from discovery in civil litigation, although the certificate holder could request that a court extend additional or ancillary protections available under the laws of the relevant jurisdiction. Furthermore, the FAA cannot protect data that is shared by and among third parties; such protection would have to be granted statutorily or under a legally-binding agreement to protect the information that is recognized as protected under state or local law.

As previously stated in the SNPRM, data protection under SSI provisions is inapplicable and may be impermissible because those procedures are for information obtained or developed in the conduct of security activities, as described in 49 CFR part 1520.

(3) Creation of a National Data Repository

Numerous commenters from both the 2016 and 2021 comment periods believed data could be protected under existing Federal protections if the FAA established a national repository for certificate holders to voluntarily submit hazard data. Two commenters during the 2021 comment period suggested that such a repository would be advantageous and reduce the financial burden to airports. One commenter explained that while the FAA may have little to no need for such information, the approach would allow certificate holders to take advantage of the narrow legislative provision.

Regarding the request for the creation of a national data repository, the FAA acknowledges that such a database would allow it to protect all SMS data submitted voluntarily to the FAA. Notwithstanding, the FAA has concluded that a national data repository will not provide an immediate solution to data protection. As one of the commenters accurately stated, certificate holders could inundate the FAA with hazard reports and documentation to gain Federal protection. Further, a national database would not prevent disclosure under State or local laws. Certificate holders would still be in possession of the data before submitting it to the national database.

The FAA remains interested in the long-term idea of a national database, as a means to identify systemic safety issues and hazards. The FAA will re-explore this option after certificate holders' SMS mature, and the FAA has more time to analyze and consider the types of information that could be submitted as well as all resource requirements regarding collection. When deemed appropriate, the FAA may consider implementing a national data repository, pursuant to the provisions of 49 U.S.C. 44735, which allows the FAA to protect from disclosure all ''reports, data, or other

information produced or collected for purposes of developing and implementing a safety management system'' as long as the data is furnished voluntarily and is not required to be submitted to the FAA pursuant to other provisions of law. In addition, the implementing regulations to 49 U.S.C. 40123, codified at 14 CFR part 193, afford the FAA the option of designating voluntarily submitted safety information as ''protected'' information, thereby preventing its disclosure to unauthorized third parties.

(4) De-Identified Data

During the part 139 SMS pilot studies, certain participants explored the use of third parties to de-identify hazard reports before these were filed with the certificate holder. One commenter noted that such a system would add cost and complexity to SMS implementation and operation, although it did not address whether the option would result in the protection of SMS data.

As a clarification, the FAA realizes that some confusion exists regarding the information that a certificate holder must submit to the FAA. One commenter from the 2021 comment period stated that the requirement for airports to share de-identified data with the FAA was unreasonable.

As stated in the SNPRM, the FAA decided not to propose data reporting requirements for safety-related data created under a SMS. The only documents or information that must be submitted to the FAA under the SMS provisions are the certificate holder's Implementation Plan and SMS Manual and/or ACM update. While at the entity's facility, the FAA may request to review additional SMS-related data or information under existing regulatory oversight processes to ensure that systemic or national compliance issues are reported when appropriate. The only time the FAA will take physical possession of SMS-related data off airport will be as part of an investigation. Otherwise, the certificate holder will retain all other SMS-related information.

E. Safety Reporting and Interoperability

The SNPRM proposed to require certificate holders to establish and maintain a confidential hazard reporting system and to encourage all persons accessing the movement and non-movement areas to report hazards to the certificate holders. The SNPRM also acknowledged the numerous ongoing SMS efforts (*e.g.,* part 5 and internal efforts to implement SMS within the FAA) and the overlapping responsibilities related to hazard reporting. Commenters to the SNPRM—including certificate holders, air carriers, an association, and a consultant—commented on the proposed requirement to establish and maintain a confidential hazard reporting system.

In addition to concerns about data protection (see section D. ''*Data Protection*''), commenters sought clarification on how SMS reporting systems are meant to work and how they should be implemented. These commenters requested the FAA address how it expects information and data to flow between the airport tenants (including those required to implement reporting systems under their own certificate programs) and certificate holders. Multiple commenters, including certificate holders and air carriers, believed that requiring employees to report to multiple SMS systems is duplicative and could cause confusion. A commenter also expressed concerns about how hazard reporting would be implemented for crewmembers or air carriers operating into multiple part 139 airports, stating that it is not reasonable to expect the crewmembers to be trained to comply with each individual airport's SMS and reporting systems. Another commenter requested the FAA clarify whether it considers a confidential hazard reporting system to be the same as an operational safety issues system.

One commenter from the 2021 comment period asked whether this rule would apply to air carriers, and whether airports would be expected to investigate airline incidents or only act as a repository of lessons learned and corrective actions to be shared with all employees and employers.

(1) Change in Terminology

As stated in the SNPRM, the FAA agrees the term ''hazard reporting system'' is confusing and does not adequately address the genesis of the requirement. The intent of the reporting system is to ensure a transparent means of reporting safety issues within the movement and non-movement areas. As such, this final rule changes the terminology in § 139.402(c)(2) from ''hazard reporting system'' to ''safety reporting system.''

(2) Data Sharing and Reporting Plan

The FAA agrees that, for air carriers or other tenants that are required to maintain a SMS, the reporting system as proposed in the SNPRM could be duplicative. The FAA believes that the DSR Plan (See section C. ''*Non-Movement Area*''), could alleviate the duplicative reporting burden.

Under § 139.402(c)(2), the airport operator is required to maintain a confidential safety reporting system. The system must be accessible by all individuals with access to the movement and non-movement areas (except those excluded through an optional DSR Plan). The certificate holder needs access to this type of data to proactively address safety issues in the movement and non-movement areas. While the FAA acknowledges that the majority of incidents related to wildlife strikes account for about 50 percent of the estimated benefits primarily occurring in the movement area, the FAA finds that the conditions for events, accidents, and incidents that occur are originating in the non-movement area. The majority of conditions, events, accidents, and incidents that occur in an airport transpire in the non-movement area. These conditions that—if unreported, unanalyzed, or unmitigated—could directly result or indirectly contribute to a chain of events that lead to accidents in air transportation.

The FAA reiterates that part 5 works in parallel to this final rule, as it encourages air carriers and airports to communicate with one another when hazards and safety issues are identified through their respective SMS procedures and processes. Consistent with the intent of this rule and the FAA's SMS policy, the part 5 final rule also recommended that air carriers notify airports of hazards identified in airport facilities, so all certificate holders are aware of issues, analyze the risks, and take appropriate remedial action.

One commenter from the 2021 comment period recommended that the FAA speed up the development of SMS software to enable data sharing with an FAA-supported vendor in a manner similar to how the FAA implemented the SMS requirements under part 5. The FAA does not intend to develop data sharing software at this time, but reiterates that Federal funding may be available for SMS software development.

(3) Crewmembers Accessing Non-Movement Areas

The FAA agrees that it is unreasonable to expect that all air carrier crewmembers would have knowledge of the reporting systems of all airports they fly into. For air carriers or other tenants not addressed through an optional DSR Plan, the FAA recommends, but does not require, that all crewmembers *based* at a particular airport and those crewmembers most often accessing an airport's non-

movement area receive safety awareness orientation and report safety issues to the airport's safety reporting system. The FAA anticipates that crewmembers who are not based at an airport, or with limited access to the non-movement area of other airports, will continue to report safety issues through their air carrier's employee reporting system.[16]

The FAA deems it crucial for all individuals with access to the movement and non-movement areas to have a means of reporting safety issues and hazards, since there are limited numbers of certificate holder employees with access to these areas at any given time. The availability of alternate reporting venues increases the possibility that an air carrier employee or an employee of another tenant located at the airport will, upon witnessing safety issues not readily visible to certificate holder employees, report those observations. This, in turn, allows the certificate holder to analyze the situation and take prompt action to fix any problems found or implement ancillary measures to enhance safety at the airport.

F. Training and Orientation

The SNPRM identified a 2-prong approach to training requirements. First, a small number of certificate holder employees (those involved in the implementation and compliance with the SMS) would be required to receive SMS-specific training. Second, all other individuals with access to the movement and non-movement areas of the airport would not have to undergo SMS-specific training, but would instead receive hazard (safety) awareness orientation (*e.g.,* they could be provided with brochures or be required to complete training modules that discuss what a hazard is and how to report it to the airport's safety reporting system).[17]

Most commenters agreed with the FAA, but some from both the 2016 and 2021 comment periods requested that the FAA provide clarification.

(1) Identification of Roles, Responsibilities, and Minimum Training Elements

Most commenters requested that this final rule include job roles, responsibilities, and minimum training elements for compliance. Comments received during the 2021 comment period reiterated these requests.

The FAA finds it would be overly prescriptive to (a) identify specific roles or job titles, or (b) set the minimum elements of SMS-specific training in regulatory text. This rule is performance-based and grants latitude to certificate holders in establishing and tailoring their SMS to their particular operations.

Although the FAA requires the certificate holder to identify an accountable executive, it grants airport operators discretion as to how to allocate resources to comply with the remaining requirements of the rule. Smaller airports may use their accountable executive to implement other provisions of the rule. For example, the certificate holder can require the accountable executive to be responsible for both SRM and continuous oversight under safety assurance, instead of acting exclusively as the overarching decision maker or figurehead. Accordingly, the FAA has determined it would be overly restrictive or burdensome to identify certain roles or job titles warranting training and orientation.

The FAA does not identify minimum elements of SMS-specific training for the same reason it does not identify specific roles or job titles. As explained above, the FAA wants certificate holders to have maximum flexibility in implementing the SMS, in such a way that it can be tailored to their unique operating environment, and to facilitate their compliance with the broad requirements and intent of the rule. Notwithstanding, in the interest of addressing commenters' concerns, the FAA decided to incorporate a non-binding, non-exhaustive list of examples of training programs implemented by pilot study participants in the AC.

The FAA received several comments in 2021 concerning the training, qualifications, and deployment of qualified FAA SMS inspectors. Some commenters from the 2021 comment period were also concerned that FAA's oversight would encroach into certificate holders' decision-making and the judgments certificate holders make during the safety risk assessment process, including the proposed and implemented mitigations. The FAA intends to train current part 139 inspectors on overseeing compliance with this rule in the current inspection process, and on how to provide additional guidance to assist certificate holders with complying with the rule.

Commenters also questioned whether the FAA would accept the completion of SMS-related coursework to demonstrate compliance with the FAA SMS requirements.

Training received in support of the FAA Air Traffic Organization (ATO) or ARP SMS does not meet the intent of the SMS-specific training requirements identified in this final rule. Any existing training provided by ATO or ARP would be specific to compliance with the FAA's internal SMS efforts and not specific to the individual airport's SMS.

(2) Training Estimates Used in Regulatory Evaluation Calculations

A few commenters from both the 2016 and 2021 comment periods requested that the FAA provide clarification on how it developed the training estimates. Many of these commenters offered an approximation of the number of employees that would require training at their airport.

The FAA agrees that the number of employees requiring SMS-specific training will vary per certificate holder. The FAA requested training information from the airports that participated in the pilot study programs.[18] That data was used to develop an average for large-sized (large, medium, and small hub airports) and small-sized (all other airports) operations. The FAA analyzed those responses and included the number of employees needing training based on the specific requirements of this final rule. The FAA notes that many of the pilot study airports appeared to provide training on topics outside the scope of this rulemaking and those courses were not included as part of the analysis.

In the 2016 comment period, four airport operators (one of which holds two AOCs) provided estimated numbers of employees needing training. One airport operator, who operates a large hub airport, agreed with the FAA's average estimates of 3 and 10 employees. The other three airport operators provided their own estimates. One operator, who holds AOCs for a large hub and a reliever airport, estimated a total of 40 employees in these airports will require training. Another large hub airport estimated 30 to 40 employees will require training. A

[16] FAA anticipates that most air carriers with part 5 SMS programs will develop DSRs between tenants and airports; however, this rule does not establish a regulatory requirement for an airport to develop a DSR. Non-DSR agreement airports will continue to operate as they do currently to meet current requirements of other established regulations. In situations where a DSR does not exist, a pilot, for example, would continue to report hazards through their company's reporting mechanism, or through the airport's Safety Management System.

[17] Airport SMS safety awareness/orientation can be accomplished through such methods as written communication, presentation, or brochures.

[18] External SMS Efforts—Part 139 Rulemaking, Airport SMS Pilot Studies (Sept. 22, 2020), available at *https://www.faa.gov/airports/airport_safety/safety_management_systems/external/pilot_studies/./*

third large hub airport estimated approximately 2 to 3 people per division will require training. In the 2021 comment period, one commenter stated that it believed the FAA estimate of 10 employees requiring comprehensive SMS training at large airports was low. Another commenter noted that some airports are expanding SRM training to include Planning, Engineering, and Capital Development teams, which increases the total anticipated trainees to more than 50 at some airports (as many as 80 total).

The FAA affirms its preliminary estimates as averages for the regulated community's unique operations. The FAA recognizes that some airport operators may have to train more employees than others to ensure compliance with the rule. The FAA also understands that some certificate holders may train employees in topics that are well beyond the scope of this regulation—such as occupational health and safety issues—but those programs are separate from this final rule (as violations of other regulations would not necessarily result in part 139 violations). If a certificate holder elects to include training on topics beyond the scope of this regulation, the FAA would only conduct oversight of the SMS activities related to the applicable provisions of part 139. For example, an airport could be cited for a violation of an OSHA requirement if compliance with OSHA requirements was incorporated into its ACM, or if the OSHA violation also resulted in a failure to comply with its SMS process. However, the basis for the noncompliance would be failure to comply with the SMS process, not non-compliance with the OSHA requirement.

(3) Safety Awareness Orientation

Commenters expressed concerns about the potential duplicate requirements already imposed on air carriers through part 5. As addressed in section C of the preamble, ''*Non-Movement Area,*'' certificate holders executing a DSR Plan with a tenant are not required to duplicate safety awareness orientation materials provided in the tenant's SMS to that tenant's employees. Those employees would be reporting to the tenant's part 5 confidential employee reporting system and would not need to be advised of how to report to the airport's safety reporting system.

One commenter requested that the FAA revise the proposed requirement to ''update'' awareness materials every twenty-four months (§ 139.402(d)(1)). The FAA agrees and this final rule requires the airport operator to review and update the safety awareness orientation materials every twenty-four months or sooner when necessary. An earlier review and update of the orientation material is necessary when there has been a change in the material.

(4) Development of Training Materials

Numerous commenters requested the FAA develop and make available SMS-related training materials that would be compliant with SMS training requirements.

The FAA notes that the certificate holder is in the best position to determine the competencies necessary for the individuals with roles and responsibilities under its SMS. The FAA plans to provide briefings and guidance materials, including conducting webinars, to help communicate this information.

While the FAA believes that most certificate holders will rely upon industry-developed training materials, certificate holders may develop their own training materials based on industry publications and guidance. For example, the Airports Cooperative Research Program of the Transportation Research Board has published numerous reports on SMS-related topics. Some of these reports provide detailed information, processes, and examples associated with each of the four components of SMS. Airport operators could use these publications, as well as other publicly available SMS material, to develop their own training materials.

(5) Clarification of ''Comprehensive SMS Training''

The FAA received comments requesting clarification of ''comprehensive SMS training'' as it relates to the training and orientation requirements. While not in the regulatory text, the term was used in the SNPRM preamble to identify all training that is necessary to ensure personnel overseeing the SMS are competent to perform their roles and responsibilities. Individuals responsible for analyzing hazard (safety) reports to determine appropriate mitigation actions must be properly trained in SRM and hazard assessment procedures. Similarly, individuals with responsibility for daily oversight of the SMS must be trained in all requirements of the SMS. The certificate holder may use train-the-trainer formats where necessary.

(6) Clarification of ''Access''

Commenters requested the FAA clarify or define the term ''access,'' as it is used in § 139.402(d)(1). The term ''access'' applies to both vehicular and pedestrian access to the movement and non-movement areas. The intent of this requirement is to ensure that all individuals who may have an opportunity to witness a safety issue understand what they should be reporting, when, and how.

G. Accountable Executive

In the SNPRM, the FAA proposed a new definition for ''accountable executive.'' The new definition addressed the diversity of business structures and varying degrees of complexity of certificate holders. The FAA explained that it anticipated most certificate holders would designate an airport manager or airport director as the accountable executive, and that accountability could not be delegated. Numerous entities, including associations, certificate holders, and air carriers, commented on the revised definition of ''accountable executive.''

(1) Amendment or Elimination of the Accountable Executive Requirement

While most commenters agreed with the concept of an accountable executive, the FAA received requests for revisions or explanations. One 2021 commenter incorrectly interpreted the FAA's proposal to allow certificate holders to designate an accountable organization structure instead of one executive. This commenter further stated that while there is a need for an Accountable Executive, in many cases, airport structure could call for one or more ''responsible executive(s)'' to oversee the implementation and operation of the SMS.

The FAA is not persuaded by arguments recommending changes to, or elimination of, the ''accountable executive.'' The concept of an accountable executive is key to the successful development and implementation of a SMS and consistent with international standards. Additionally, this rule requires the identification of an individual as an accountable executive, rather than the designation of an accountable organization structure in place of an accountable executive or one or more responsible executives. A certificate holder may choose to identify support staff to assist the accountable executive, as discussed further in the supplemental guidance AC.

(2) Delegation

Commenters asserted that certificate holders should have the option to delegate the accountable executive's roles and responsibilities to a lower-level or operational manager with direct

oversight of the SMS. As stated in the SNPRM, accountability *cannot* be delegated. The accountable executive's role is meant to instill safety as a core organizational value and to ensure that SMS is properly implemented and maintained through the allocation of resources and tasks. By designating an accountable executive, responsibility for the certificate holder's overall safety performance is placed at a high level within the organization. Some airports may choose to designate additional positions to implement the daily operation of the SMS. However, such designations are left to the discretion of the certificate holders, based on their unique operating environments and management structures. For guidance purpose, the FAA has included in the AC examples of accountable executive designations and addressed the issue of ''responsible executive or manager'' for the day-to-day oversight of SMS activities.

(3) Personal Liability and Oversight

Commenters from both the 2016 and 2021 comment periods believed the FAA should make stronger statements limiting the personal liability of accountable executives. They requested the FAA include preamble language: (a) stating that the accountable executive is not personally liable to the FAA through certificate action or civil penalty, and (b) establishing a clear regulatory intent that this final rule is not intended to increase or create personal liability for the accountable executive. Additionally, one 2021 commenter requested that the rule be revised to allow the accountable executive to seek indemnification from tenants in respect to SMS compliance issues within their leaseholds, and to appoint a tenant accountable executive for that purpose.

The definition of ''accountable executive'' also limits both control and responsibility to ''operations conducted under the certificate holder's Airport Operating Certificate.'' As ''an individual designated by the certificate holder,'' the FAA does not expect the definition to usurp the oversight role of the legislative body or authority that is the certificate holder.

Concerns regarding the accountable executive's personal liability for the actions of tenant organizations, air carriers, or leaseholds, are misplaced. As stated in the SNPRM, the new definition clarifies that accountable executives are not personally liable to the FAA, through either certificate action or civil penalty. The FAA limited the ''control'' and ''responsibility'' of an accountable executive to operations conducted under the certificate holder's AOC. Since the scope of action and responsibility of an accountable executive is limited, the FAA decided not to include nor require indemnification by the accountable executive to any third party under this final rule. While the FAA does not intend for accountable executives acting within the scope of their powers and duties to have personal liability to any third party, the FAA must stress that liability issues are typically controlled by state law, and the parties remain subject to applicable state law with regard to liability issues and remedial action.

Generally speaking, the airport manager or director's role of ensuring compliance with the AOC does not change under this final rule. Prior to this final rule, violations of part 139 requirements would be found against the certificate holder. The same logic holds true under the SMS final rule.

Along the same lines, while the FAA allows an airport operator to establish a DSR Plan (See section C. ''*Non-Movement Area*'') to address reporting and data sharing with applicable tenants required to comply with part 5, if the certificate holder discovers that the tenant is not complying with the terms of the agreement, or policy and relevant safety issues or findings are not being properly or timely conveyed to the airport operator, the onus for compliance remains with the airport operator. The airport operator is responsible for ensuring the airport's safety reporting system is accessible for reports by tenant employees and that those employees receive safety awareness orientation materials.

H. Definitions

In the SNPRM, the FAA revised the definitions of numerous terms, either in response to comments or to conform to agency policy at the time of the proposal. The FAA received many comments regarding the new definitions of hazard and non-movement area. The FAA also received suggestions during both the 2016 and the 2021 comment periods to revise other terms related to this final rule.

(1) ''Hazard'' Definition

Commenters from the 2016 and 2021 comment periods disagreed with the FAA's use of the part 5 definition of the term ''hazard.'' They believed that the term is not applicable to the airport environment since it is centered on the operation of an aircraft and aircraft accidents, as defined by the NTSB. These commenters recommended the FAA use the ''hazard'' definitions included in FAA Order 5200.11, FAA Airports (ARP) Safety Management System (SMS), FAA Order 8040.4, Safety Risk Management Policy, and the ICAO Safety Management Manual (3rd edition).

The FAA understands the confusion arising from the SNPRM definition of ''hazard'' and the limited reporting that may occur through a strict reading of the regulatory text. To ensure consistent application and reporting across the airport-airline industry, as well as to ensure applicability to the non-movement area, the FAA amends the definition in this final rule. For this rule, we define the term ''hazard'' as ''a condition that could foreseeably cause or contribute to: (a) injury, illness, death, damage to or loss of system, equipment, or property, or (b) an aircraft accident as defined in 49 CFR 830.2.'' The FAA determined this revised definition establishes a suitable parameter that encompasses the wide range of conditions that airports may encounter and deem as hazards, and it enables airports to include conditions that are not necessarily related to an aircraft accident. For example, part (a) of the definition allows for ramp incidents; accidents and fatalities involving aircraft ground service equipment and other vehicles; construction-related fatalities; and damage to airfield facilities including lighting, signage, pavement, safety areas, and navigational aids to qualify as a hazard. These incidents would not constitute ''hazards'' if the definition was limited to part (b) (conditions that could foreseeably cause or contribute to an aircraft accident). As a result, the FAA revised the definition to more broadly encompass the myriad of conditions in the airport environment, including in movement and non-movement areas and conditions involving and not involving aircraft. The FAA notes that this definition will also provide flexibility to airport organizations for defining what a reportable hazard is for their organization, and as a part of developing their SMS they may define thresholds for what might entail a reportable incident. This will allow, for example, a small airport to treat an incident that results in $1,000 in damage as a potentially reportable incident, whereas a large airport may consider property damage at that level to be *de minimis.*

(2) ''Non-Movement Area'' Definition

Commenters requested the FAA retain a more generic definition of the term ''non-movement area'' as opposed to a definition that specifies the types of areas included. The FAA was asked: (a) to exclude ''fuel farms'' from the

definition of ''non-movement area'' or to at a minimum allow their inclusion at the option of the certificate holder, and (b) to re-evaluate its decision not to include baggage-makeup areas in the definition of ''non-movement area.''

As discussed in section C. ''*Non-Movement Area,*'' the FAA is adopting the definition for ''non-movement area'' as proposed.

(3) Harmonization of ''Safety Policy,'' ''Safety Risk Management,'' ''Safety Assurance,'' and ''Safety Promotion'' Definitions

The FAA agrees with commenters' request from the 2016 comment period to update the definitions of ''safety policy'' and ''safety assurance.'' One commenter from the 2021 comment period emphasized the need for consistent terminology related to the SRM process. Any revision must be carefully assessed since both definitions sync with part 5 instead of internal FAA Orders. Where commenters requested the FAA use ICAO definitions, the FAA's intent is to first synchronize these definitions with part 5 or other Agency definitions—if possible—to ensure the industry uses similar taxonomy. Therefore, this final rule revises the definitions of the terms ''safety policy,'' ''safety assurance,'' and ''safety promotion,'' to sync with the current definitions in part 5. This final rule also updates the definition of the term ''safety risk management'' to more closely align it to the definition in part 5. The notable difference is that airports typically use the term ''risk mitigation,'' whereas air carriers use the term ''risk control.'' To address this difference, this final rule uses both terms for the definition of ''safety risk management.''

I. Miscellaneous Topics

(1) FAA's Rulemaking Authority

A commenter stated that the FAA Aviation Act of 1958 does not give the Administrator the power to require regulated parties to self-analyze, self-disclose, self-report, and self-implement procedures beyond those stipulated through legislative and administrative processes.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S.C. The FAA proposed this rulemaking under the authority described in 49 U.S.C. 106(f), 44701, 44702, and 44706 (See section II. A. of this preamble). In the Federal Aviation Act of 1958, as amended and recodified, 49 U.S.C. 40101, *et seq.,* Congress provided the FAA with (a) exclusive authority to regulate safety, (b) the efficient use of the airspace, (c) protection of people and property on the ground, (d) air traffic control, (e) navigational facilities, and (f) the regulation of aircraft noise at its source.

Title 49 of the U.S.C., section 44706, provides for the FAA to regulate airport safety through the issuance of airport operating certificates. Under this statute, Congress requires the certificate to contain the terms necessary to ensure safety in air transportation.

Under the implementing regulations for section 44706, codified at 14 CFR part 139, the FAA regulates airport certificate holders in many areas, including: (a) records, (b) personnel, (c) paved areas, (d) unpaved areas, (e) safety areas, (f) airport marking/signs/lighting, (g) aircraft rescue and firefighting, (h) snow and ice control, (i) handling and storing hazardous substances and materials, (j) traffic and wind indicators, (k) airport emergency plans, (l) self-inspection programs, (m) pedestrian and ground vehicles, (n) obstructions, (o) protection of navigation aids, (p) public protection, (q) wildlife hazard management, (r) airport condition reporting, (s) identifying, marking, and lighting construction and other unserviceable areas, and (t) noncomplying conditions.

Requiring certain certificated airports to implement a SMS for the entire airfield environment is consistent with the FAA's statutory and regulatory framework described above. The primary purpose of section 44706 and its implementing regulations is to ensure safety in air transportation and such safety is advanced by the additional safety measures applicable to airports subject to this final rule. The FAA has the authority to implement regulations to improve safety at airports hosting air carrier operations including requiring certificate holders to develop and implement measures to ensure safety in air transportation by proactively identifying and mitigating safety hazards, thereby reducing the possibility or recurrence of accidents in air transportation. This final rule is a performance-based regulation that requires certificated airports that meet pre-established qualification criteria (triggers) to develop and maintain a SMS to improve the safety of operations conducted at such airports; therefore, it is within the scope of authority of the Agency.

(2) Applicability to Non-Certificated Airports

The FAA stated in the SNPRM that the proposed rule would only apply to holders of a part 139 AOC. Commenters asked The FAA to (a) confirm that it did, and (b) clarify whether the SMS requirement was voluntary for general aviation airports that are not certificated under part 139.

The FAA confirms that this final rule does not apply to non-certificated airports, but continues to encourage such airports to voluntarily adopt SMS. The rule is not affected by, nor does it depend on, whether an airport has accepted Federal financial assistance or property conveyances. Further, this final rule does not require airport tenants to have a separate SMS because it only applies to holders of part 139 AOCs. As previously discussed, this fact does not prevent certificate holders from engaging with tenants to implement alternatives that facilitate compliance with the requirements of the SMS.

(3) FAA Oversight

The SNPRM included a discussion of the FAA's role and oversight of certificate holders under the proposed SMS rule. This discussion noted SMS is not a substitute for compliance with existing regulations and provided general expectations about inspections in a SMS environment, emphasizing the importance of implementing a systems-based approach to oversight.

Commenters from both the 2016 and 2021 comment periods asked the FAA to clarify certain aspects of its oversight activities, particularly: (a) how SMS fits in relation to other federal regulations such as the Occupational Safety and Health Administration (OSHA) rules, National Environmental Policy Act (NEPA) rules, State regulations, and other local ordinances; (b) how SMS brings value beyond standards imposed elsewhere, and (c) whether hazards identified through their SMS will qualify as items of concern. Commenters also requested the FAA state that the SMS rule will not alter existing State laws regarding standards of care or duty of care.

Commenters from both the 2016 and 2021 comment periods requested that the FAA clarify its oversight approach in either the final rule preamble or the regulatory text.

The FAA does not intend for the implementation of SMS at an airport to implicate regulations issued by other agencies. In some instances, airport SMS may complement compliance with other regulations (such as OSHA, NEPA). An airport SMS is the next critical step in the FAA's ongoing transition to a more streamlined and performance-based regulatory framework for airports. Airport SMS will evolve the FAA's oversight processes so FAA involvement targets the areas of highest safety risk. For airports with a fully implemented SMS

and that have a consistent history of compliance with the requirements of part 139, the FAA will transition to a system-based inspection allowing an inspector to focus on areas of greater risk. As a consistent history of compliance under SMS develops, the FAA will have data to support modifying the duration of time between an airport's periodic inspections. The FAA will continue to use a traditional approach and cycle for inspections at airports without a SMS, with higher risks, or a history of non-compliance. The FAA retains the ability to use a traditional inspection cycle for airports with a fully implemented SMS when deemed necessary (*e.g.,* increase in number of discrepancies with part 139 requirements).

A comment received in 2021 emphasized that the FAA should be flexible and less prescriptive in its approach. Another comment received in 2021 emphasized that the FAA should provide training and resources for SMS education. The FAA acknowledges that shifting from a prescriptive to performance-based regulation and systems-based oversight will take time and require educating and guiding both FAA inspectors and airport operators. The FAA will update FAA inspector guidance, provide training to the FAA inspectors on the requirements of this final rule, and provide outreach to the industry regarding the final rule requirements.

The FAA received comments during both the 2016 and 2021 comment periods asking the FAA to: (a) collaborate with airports with existing voluntary SMS and other stakeholders to develop SMS oversight guidelines based on lessons learned that explicitly define the systems-based approach and how it changes inspector responsibilities and activities; (b) commit to a timetable and process for training its inspectors on the new approach and clarify that no SMS inspections will take place until inspectors have been trained; (c) cross train all part 121 and part 139 inspectors in the respective SMS requirements; and (d) invite airport industry representatives to participate in the training of FAA inspectors.

The FAA does not normally invite industry representatives to participate in the training of FAA inspectors and does not believe SMS requirements would cause it to change this position. While the FAA does not agree that part 139 and part 121 inspectors require cross-training in the respective SMS requirements, ARP and AVS will identify the various SMS requirements and areas of connectivity in Agency materials.

The SMS final rule will not alter the responsibilities of the FAA's regional inspector staff. Like other part 139 related activities, the regional inspector staff is responsible for reviewing, approving, accepting, and inspecting the airport's SMS documents and program. As discussed in the SNPRM, FAA Headquarters staff will supplement these activities—by providing support and guidance to our regional inspection staff—to ensure national consistency and timely program implementation. Questions regarding federal financial assistance for SMS related activities should be directed to the appropriate FAA Regional Office or Airport District Office personnel.

(4) Safety Risk Management

The SNPRM proposed minimum requirements for SRM, including establishing a systematic process for analyzing hazards and related risks, using a standard five-step process. As part of the SRM component, the SNPRM also included standard documentation and record retention requirements.

The FAA was asked to re-evaluate the requirement to handle all hazards through the five-step process, in light of a comment that certificate holders should have the flexibility to determine which hazards require analysis using the five-step process and which hazards only need review and mitigation.

Commenters questioned (a) the FAA inspector's role in the risk determination process, and (b) whether the FAA will be able to overrule a certificate holder's determination, even when safety standards are met.

The SNPRM did not propose to require the use of a predictive risk matrix for hazard assessment, but suggested its use as an effective method to analyze and prioritize risk. The FAA was asked whether a specific matrix must be used, or if airport operators will be allowed to modify the risk matrix included in the NPRM to better fit the airport's needs and goals. While encouraged, this final rule does not require the use of a predictive risk matrix.

Commenters from both the 2016 and 2021 comment periods: (a) noted that many large hub and international airports have existing, comprehensive safety and risk management programs; (b) requested the FAA explain how these existing programs will be integrated into SMS processes; and (c) recommended that the FAA accept or provide credit to airports with existing processes similar to those outlined in the proposal.

This final rule provides airport operators flexibility in how they resolve safety issues and hazards. It does not require certificate holders to use the five-step process to address all safety concerns. Instead, the regulatory text requires certificate holders to use the five-step process to analyze ''hazards.'' The FAA acknowledges that not all reports through the airports' safety reporting system or other sources constitute hazards. Therefore, certificate holders would only need to use the systematic analysis for identified hazards.

Nothing in this final rule requires consensus decision making. While the FAA encourages certificate holders to work with affected stakeholders, it is not a requirement of this final rule. If the airport operator develops a DSR Plan, the FAA expects it to identify when and how the airport and tenant will work together to analyze and resolve joint safety issues. In most cases, the certificate holder is also the airport owner and, as owner, has ultimate control over their airport's decisions. Similarly, the FAA expects that whenever the certificate holder is an entity other than the airport owner, the agreement allowing the certificate holder to operate the airport should have adequate controls and provisions (*i.e.* sufficient authority and resources) to allow them to make all pertinent decisions to enable compliance with part 139 and the FAA-approved ACM (the FAA notes that this scope of oversight is similar to existing expectations under part 139 and the FAA-approved ACM). In extreme cases, if the airport identifies hazard mitigations under the SRM process that a tenant is unwilling to implement, an airport might be expected to restrict or break its contract and cease operations with the tenant to ensure that the hazardous condition does not continue. Regardless of the existence of any agreement, policy, or arrangement, and regardless of the decision-making process or determinations made under them, the certificate holder remains solely responsible before the FAA for full compliance with the SMS requirements of this final rule. Notwithstanding, the FAA committed in the NPRM and SNPRM to not second guess certificate holder decisions under SRM processes, and the FAA's position has not changed in this final rule. The only time the FAA will weigh in is if the certificate holder uses SRM processes to circumvent regulation or standards.

The certificate holder may identify in its FAA-approved Implementation Plan any existing programs, policies, or activities it plans to use as a means of

compliance with the rule. Where an existing program is used as a foundation, the certificate holder will explain what additional actions will be put in place to ensure the programs fully meet the intent of the requirement. As long as existing safety and risk management programs meet the requirements of this final rule, they can be used ''as is'' to comply. However, if there are gaps between the existing program and this final rule requirements, the certificate holder would still be required to comply with this final rule and must identify in its Implementation Plan how it will address those gaps prior to the full implementation deadline.

In the SNPRM, the FAA acknowledged that the definition of ''risk mitigation'' did not harmonize with part 5's ''risk control'' terminology. The FAA's conclusion was that the term ''mitigate'' was straightforward and aligned with other guidance certificate holders have received related to FAA SMS initiatives. While this final rule retains the definition of ''risk mitigation,'' it expands the definition of ''safety risk management'' and ''safety assurance'' to incorporate the term ''control'' or ''controlling'' to provide better harmonization with part 5.

A commenter from the 2021 comment period recommended that the FAA create an FAA ''Airport Safety'' web page, similar in format to the FAA web page ''Airline Safety.'' Once the rule is published, the Office of Airports intends to update the public facing web page to contain current and relevant part 139 SMS material.

(5) Record Retention

Under the SRM component, the FAA proposed to require a certificate holder to develop processes to identify hazards that may impact the airport's operations. The certificate holder will use these processes to analyze those hazards and risks and retain any documentation developed through these processes to assist in trend and root cause analysis. The FAA proposed to require a certificate holder to retain records associated with SRM processes for the longer of (a) 36 months after the risk analysis of identified hazards has been completed or (b) 12 months after required mitigations have been implemented. Under the Safety Promotion component (see § 139.402(d)), the FAA proposed to require certificate holders to also retain training records and hazard awareness orientation briefing materials. Commenters asked the FAA to clarify how long a certificate holder should retain data.

The record retention requirements proposed in the NPRM and SNPRM sync with existing record retention requirements under part 139. In this case, the FAA found it more useful to apply existing part 139 retention standards for ease of document retention instead of syncing requirements with part 5. A certificate holder may always choose to retain records for longer, especially where State laws require longer retention. This final rule provides the minimum requirement for compliance.

(6) SMS Manual Updates

While drafting this final rule, the FAA recognized some confusion regarding the requirement in § 139.401(g) to provide the FAA with copies of any changes to the Airport SMS Manual, on an annual basis. This final rule retains this provision but adds the caveat ''or upon FAA request.'' One commenter from the 2021 comment period incorrectly interpreted the SNPRM as requiring FAA approval of SMS manuals, and noted that such approval will impede SMS development.

Unlike the ACM, the SMS Manual is not approved; rather, it is accepted by the FAA. The certificate holder could implement new provisions in the SMS Manual without previously sharing those changes with the FAA, unlike the requirement for changes to the FAA-approved ACM. Therefore, regulatory text was necessary to ensure that the FAA has the most up-to-date version of the SMS Manual prior to conducting the annual certification inspection, or during any other surveillance activities.

If no changes have been made to the SMS Manual over the past year (or upon FAA request), the certificate holder can simply send an electronic or written message to the FAA stating no changes have been made.

(7) Guidance and Work Groups

The FAA received numerous comments during both the 2016 and 2021 comment periods from certificate holders and associations, requesting clarification on how the FAA would (a) update existing draft guidance with publication of this final rule, and (b) provide timely updates to guidance, during implementation.

The FAA received comments during the 2021 comment period inquiring about industry participation in development of the final rule. The FAA provided industry an opportunity to participate in the development of the final rule through the 2016 and 2021 comment periods, in accordance with the Administrative Procedure Act.

AC 150/5200–37A has been updated to address requirements contained in this final rule and is being published simultaneously with this final rule. All comments related to AC material were catalogued and adjudicated during the update to AC 150/5200–37A. Industry was given additional time to submit comments on the AC and the FAA received detailed comments within the comment period. Regarding comments received during the 2016 and 2021 comment periods on guidance updates, the FAA has several existing methods for disseminating timely updates including Policy Guidance Letters and Cert Alerts that could be used to disseminate implementation and oversight guidance as the programs evolve.

One commenter from the 2021 comment period recommended the addition of an awards and recognition section in the FAA's guidance to provide existing examples of SMS, in an effort to encourage the growth of SMS. The FAA encourages certificate holders to explore means of developing their SMS safety culture at their airport and currently considers the available guidance publications sufficient.

IV. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39 as amended) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. The FAA has provided a more detailed Regulatory Impact Analysis of this final rule in the docket of this rulemaking. This portion

of the preamble summarizes the FAA's analysis of the economic impacts of this rule.

In conducting these analyses, the FAA has determined that this final rule: (1) has benefits that justify its costs; (2) is not an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866; (3) is ''significant'' as defined in DOT's Regulatory Policies and Procedures; (4) will have a significant economic impact on a substantial number of small entities; (5) will not create unnecessary obstacles to the foreign commerce of the United States; and (6) will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

A. Regulatory Evaluation

Total Benefits and Costs of This Rule

The rule requires a SMS at certain U.S. airports in an effort to improve airport safety, complement existing airport safety regulations in part 139, and meet the intent of the ICAO standard.

The goal of this rule is to improve the safety of the airfield environment (including movement and non-movement areas) by providing an airport with decision-making tools to plan, organize, direct, and control its everyday activities in a manner that enhances safety. Table 4 shows benefits and costs over ten years. Table 4 also includes the FAA's estimated cost savings of changing the traditional inspection cycle at airports with a fully implemented SMS. The benefits discussed below are only achievable through airports implementing mitigation measures identified through their SMS processes; however, the regulatory evaluation does not quantify the potential costs to implement these mitigations. There are no available empirical retrospective analyses of existing SMS programs that the FAA could leverage to quantitatively estimate the benefits related to the potential effectiveness of airport SMSs at mitigating accidents and incidents. Transport Canada's initial 2019 report on airport SMS implementation notes, in part, ''we were not able to quantify the extent of SMS's contribution to aviation safety,'' although it does discuss perceived qualitative benefits, particularly at larger airports.[19] Similarly, not enough time has elapsed since the implementation of Part 121 SMS to measure the potential effectiveness of SMS for air carriers, particularly in light of disruptions to air travel due to the COVID–19 pandemic. As a result, to estimate some potential benefits related to accident and incident mitigation, FAA used a panel of subject matter experts to assign quantitative probabilities to the mitigation effectiveness in each selected event. As described in further detail in the Regulatory Impact Analysis, of the 1,840 accidents and incidents used for this analysis, the FAA assumed a 20–39 percent chance of preventing similar accidents or incidents for 81 percent of these events through a SMS, and for the other 19 percent of events the FAA assumed between a 40–59 percent chance of effective mitigation.

TABLE 4—COMPARISON OF COSTS AND BENEFITS OVER 10 YEARS

[Millions of 2020 dollars]

	Present value (3%)	Annualized (3%)	Present value (7%)	Annualized (7%)
Benefits	$199.2	$23.4	$144.1	$20.5
Costs	179.8	21.1	139.0	19.8
Cost Savings	3.1	0.4	2.2	0.3
Net Benefits (includes mitigation benefits, but excludes mitigation costs)	22.5	2.6	7.3	1.0

Note: The sum of the individual items may not equal totals due to rounding.

Over the ten-year period of analysis, the estimated present value benefit of the final rule is $144.1 million at a seven percent discount rate with an annualized benefit of $20.5 million. At a three percent discount rate, the present value benefit is $199.2 million with an annualized benefit of $23.4 million. Excluding mitigation costs, the estimated present value cost of the final rule is $139 million at a seven percent discount rate with an annualized cost of $19.8 million. At a three percent discount rate, the cost in present value is $179.8 million with an annualized cost of $21.1 million. The cost savings, at a seven percent discount rate, is $2.2 million with an annualized cost savings of $0.3 million and $3.1 million, at a three percent discount rate, with annualized cost savings of $0.4 million.

Who is potentially affected by this rule?

After updating the list to account for the new data sources, there are 191 applicable airports (as of February 2017). Part 139 certificated airports that meet one or more of the following triggering criteria: (a) classified as a small, medium, or large hub airport based on passenger data extracted from the Air Carrier Activity Information System, (b) has a three-year rolling average of 100,000 or more total annual operations [20] or (c) serves any international operation other than general aviation. Table 5 below provides an estimated number of impacted airports by the three different triggering criteria.

TABLE 5—ESTIMATED NUMBER OF AFFECTED AIRPORTS BY CATEGORY

Airport categories	Number of airports
Large, Medium, and Small Hub	132
>100,000 Operations	27
International Traffic	32

General Assumptions:

- Cost and benefit estimates are in 2020 dollars.
- Costs and benefits are estimated over a ten-year period.
- Costs to airports begin to accrue in year 1.
- Benefits of SMS begin to accrue in year 5 or year 6 after full implementation.
- The present value discount rates of seven percent and three percent are

[19] (Evaluation summary—Evaluation of Safety Management Systems in Civil Aviation—July 2019 (canada.ca)).

[20] In the context of the operations trigger, the term operations means the sum of all arrivals and departures.

applied per Office of Management and Budget guidance.[21]

Benefits of This Rule

The objective of SMS is to proactively manage safety, identify potential hazards or risks, and implement measures that mitigate those risks. The FAA envisions airports being able to use all of the components of SMS to enhance the airport's ability to identify safety issues and spot trends before they result in a near-miss, incident, or accident. Anecdotally, based on the FAA Airport SMS Pilot Study, airports indicate benefits from increased communication and reporting that are all fundamental components of SMS. These efforts are expected to prevent accidents and incidents. Over the ten-year period of analysis, the benefits of the rule are estimated to be $144.1 million at seven percent present value or $20.5 million annualized. At a 3 percent discount rate, the benefit in present value is $199.2 million or $23.4 million annualized.

Costs of This Rule

The rule requires certain part 139 certificated airports to establish a SMS based on the four components: (i) safety policy; (ii) safety risk management (SRM); (iii) safety assurance; and (iv) safety promotion. These components include costs to document an airport's Implementation Plan and SMS manual, staffing, equipment/material, training, update training records, and recording potential hazards over ten years. The costs vary based on the size of the airport. The total cost, over 10 years, in present value at a seven percent discount rate is $139 million or $19.8 million annualized. At a three percent discount rate, the cost in present value is $179.8 million or $21.1 million annualized.

Alternatives Considered

The FAA analyzed the following applicability alternatives in the SNPRM:

1. All part 139 airports;
2. Airport operators holding a Class I AOC;
3. Certificated international airports;
4. Large, medium, and small hub airports and certificated airports with more than 100,000 total annual operations; and
5. Large, Medium, and Small hub airports, certificated airports with more than 100,000 total annual operations, and certificated international airports.

The SNPRM identified the last alternative as the preferred alternative. Upon receiving comments on how affected airports were selected, the FAA reviewed the selection process and refined some of the triggering criteria. This final rule will continue to apply to large, medium, and small hub airports, certificated airports with more than 100,000 total annual operations, and certificated airports that serve any international operation other than general aviation. The change in this final rule further reduces the number of applicable airports from approximately 265 impacted airports to 191.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Section 604 of the Act requires agencies to prepare a final regulatory flexibility analysis (FRFA) describing the impact of final rules on small entities. After preparing the FRFA, the FAA estimates that a substantial number of small-entity airports will be affected by the final rule and does not certify that there will not be a significant effect on a substantial number of small entities.

(i) A Statement of the Need for, and Objectives of, the Rule

The FAA remains committed to continuously improving safety in air transportation. The FAA believes that a SMS can address potential safety gaps that are not completely eliminated through effective FAA regulations and technical operating standards. The certificate holder best understands its own operating environment and, therefore, is in the best position to address safety issues through improved management practices.

Both the NTSB and ICAO support SMS as a means to prevent future accidents and improve safety. The NTSB has cited organizational factors contributing to aviation accidents and has recommended SMS for several sectors of the aviation industry, including aircraft operators. The FAA has concluded those same organizational factors and benefits of SMS apply across the aviation industry, including airports. In 2001, ICAO adopted a standard in Annex 14 that all member states establish SMS requirements for airport operators hosting international operations. The FAA supports conformity of U.S. aviation safety regulations with ICAO standards and recommended practices.

(ii) A Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

Many commenters reported an additional burden on small airports that they believe was not included on the Initial Regulatory Evaluation.

FAA Response: The FAA reevaluated the impact by class to assess the burden on smaller airports. While the FAA originally believed that Class II, III, IV certificate holders would gain benefits similar to Class I certificate holders from formalized hazard identification, risk analysis, training and communications processes; the cost impact is substantial on these certificate holders. Based on this analysis the FAA changed the scope of this final rule to affect a smaller population of small airports. The change in this requirement still advances the FAA's safety goals by targeting airports with over 90 percent of all passenger enplanements.

Additionally, SMS is scalable. Airport characteristics, such as size, organization and governance structures, type of air carrier operations, and number of operations, are all factors that affect a certificate holder's version of SMS. This final rule further clarifies the scalability of SMS, which the FAA believes mitigates the burden on smaller airports and this final rule also increases the time for implementation.

A commenter disputes the definition of a small airport by operation and class.

FAA Response: The FAA maintains that the number of operations and class help determine the size of an airport. Effectively all non-Class I airports are treated as small. The FAA agrees that a substantial number of small-entity airports will be affected. Many of the smaller airport employees have broad responsibilities—an airport employee could cut the grass, remove foreign-object debris, and drive the fire truck. The classification of small in the regulatory evaluation was done based on operation and size. The regulatory

[21] *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

flexibility analysis uses the SBA definition.

(iii) The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in This Final Rule as a Result of the Comments

The FAA did not receive comments to the SNPRM from the Small Business Administration.

(iv) A Description of an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

There are an estimated 191 part 139 certificated airports impacted by the rule. From the 191 airports, the FAA identified at least 32 airports that meet the Small Business Administration (SBA) definition of small governmental jurisdictions such as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.[22] The FAA considers this a substantial number of small entities. The 2015 revenue, for these airports, ranges from about $123 thousand to $41.0 million. Using the preceding information, the FAA estimates that their ratio of annualized costs to annual revenues is higher than 2 percent for several of the airports, as shown in Table 6 below.

TABLE 6—BREAKOUT OF AIRPORTS MEETING SBA DEFINITION

Number	Airport ident.	New part 139 classification	2015 Population estimate[23]	2015 NPIAS classification	2015 Revenue[24]	Total annualized costs[25]	Ratio (%)
1	ACK	Class I	10,858	Non Hub	$7,744,371	$85,175	1.10.
2	ACY	Class I	39,091	Small Hub	12,012,655	85,175	0.71.
3	BGM	Class I	46,058	Non Hub	3,185,093	85,175	2.67.
4	BGR	Class I	32,309	Non Hub	12,036,215	85,175	0.71.
5	BTV	Class I	42,477	Small Hub	16,639,848	85,175	0.51.
6	BZN	Class I	43,399	Small Hub	8,918,137	85,175	0.96.
7	CIU	Class I	13,787	Non Hub	1,031,955	85,175	8.25.
8	COE	Class IV	49,131	GA	not available	85,175	not available.
9	DRT	Class I	36,000	Non Hub	not available	85,175	not available.
10	ECP	Class I	37,495	None	10,320,416	85,175	0.83.
11	EGE	Class I	6,840	Non Hub	4,860,347	85,175	1.75.
12	ELM	Class I	28,291	Non Hub	3,002,954	85,175	2.84.
13	FAI	Class I	32,453	Small Hub	9,971,203	85,175	0.85.
14	FRG	Class IV	8,685	Reliever	not available	85,175	not available.
15	GCN	Class I	585	Non Hub	1,359,481	85,175	6.27.
16	GSP	Class I	28,340	Small Hub	8,309,709	85,175	1.03.
17	IAG	Class I	48,888	Reliever	2,559,262	85,175	3.33.
18	INL	Class I	6,172	Non Hub	123,838	85,175	68.78.
19	JNU	Class I	32,603	Small Hub	6,224,563	85,175	1.37.
20	KTN	Class I	8,176	Non Hub	not available	85,175	not available.
21	MDT	Class I	49,070	Small Hub	26,150,106	85,175	0.33.
22	MLI	Class I	42,636	Small Hub	11,064,089	85,175	0.77.
23	MRY	Class I	28,394	Non Hub	8,468,100	85,175	1.01.
24	MYR	Class I	31,027	Small Hub	18,799,347	85,175	0.45.
25	PGD	Class I	18,155	Non Hub	7,048,500	85,175	1.21.
26	PRC	Class I	41,603	Comm Serv	1,448,110	85,175	5.88.
27	PSP	Class I	47,201	Small Hub	19,063,440	85,175	0.45.
28	SGJ	Class I	14,061	Non Hub	3,657,899	85,175	2.33.
29	TEB	Class IV	69	Reliever	41,039,253	85,175	0.21.
30	TIX	Class IV	45,278	GA	not available	85,175	not available.
31	TRI	Class I	26,651	Non Hub	6,583,279	85,175	1.29.
32	VRB	Class IV	16,343	GA	not available	85,175	not available.

(v) A description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

[22] *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

[23] Data retrieved 10/4/2017 from *https://data.census.gov/cedsci/table?tid=GOVSTIMESERIES.CG00ORG01.*

[24] Revenue data from Compliance Activity Tracking System (CATS) accessed on 10/5/2017 from *https://cats.airports.faa.gov/.*

[25] Annualized using a capital recovery factor of 0.14238, over 10 years, using a 7 percent rate of interest.

TABLE 7—SMALL AIRPORT

[Costs over 10 years]

Small airport costs	Total hours	Total cost per airport	Description
Manual & Implementation Plan (One-time).	N/A	$138,150	One-time cost of $138,150 per small airport.
Manual Revisions (Annually)	72	1,990	Clerical Employee Wage × 12 hours × 6 years.
Staffing	N/A	774,918	129,159 staffing cost per airport × 6 years.
Initial Software (One-time)	N/A	26,074	Initial Software Cost of $26,074 per airport.
Recurrent Software (Annually)	N/A	32,595	Recurring Software Cost of $6519 per airport × 5 years.
Initial Training fee (One-time)	N/A	810	1 Manager, 1 Maintenance Person, 1 Clerical × $270 training fee per person.
Initial Training Time (One-time)	9	462	1 Manager, 1 Maintenance Person, 1 Clerical × 3 hours for each.
Recurrent Training Fee (Biennial) ...	NA	540	1 Manager, 1 Maintenance Person, 1 Clerical × $90 training fee per person × 2 years.
Recurrent Training Time (Biennial)	9	462	1 Manager, 1 Maintenance Person, 1 Clerical × 1.5 hours for each × 2 years.
Hazard Awareness Orientation (One-time).	8	692	SMS Manager × 8 hours.
Hazard Awareness Orientation (Biennial).	4	346	SMS Manager × 2 hours to update awareness orientation × 2 Years.
Promotional Material (Biennial)	N/A	7,020	2340 spent every other year on promotional material × 3 years.
Record Potential Hazards (Annually).	65	1,797	Clerical Wage × 15 min × 52 hazards per year × 5 years.
Reporting Potential Hazards (Annually).	65	4,668	Blended Wage × 15 min × 52 hazards per year × 5 years for small airports.
Update Distribution Log (Biennial) ...	2.5	69	Clerical Wage × 5 min × 10 tenants per small airport × 3 years.
Update Training Records (Biennial)	0.8	22	Clerical Wage × 5 min × 3 employee training records per airport × 3 years.
Documenting Safety Risk Management (Annually).	130	5,188	Operations Specialist Wage × 30 min × 52 documents per year × 5 years.
Reporting Safety Information under Safety Assurance (Annually).	10	631	Operations Research Wage × 1 hour × 2 reports per year × 5 years.
Total	375	996,434	

Table notes:
Clerical Employee[26] $27.64.
Operation Research Analyst[27] $63.12.
General and Operations Manager[28] $86.50.
Airfield Operations Specialist[29] $39.31.
Blended Wage (Mechanic, Pilot, Flight Attendant, Airfield Ops Specialist)[30] $71.82.

Small airport costs	Total hours	Total cost per airport	Description
Manual & Implementation Plan (One-time).	N/A	$138,150	One-time cost of $138,150 per small airport.
Manual Revisions (Annually)	72	1,990	Clerical Employee Wage × 12 hours × 6 years.
Staffing	N/A	774,918	$129,159 staffing cost per airport × 6 years.
Initial Software (One-time)	N/A	26,074	Initial Software Cost of $26,074 per airport.
Recurrent Software (Annually)	N/A	32,595	Recurring Software Cost of $6,519 per airport × 5 years.
Initial Training fee (One-time)	N/A	810	1 Manager, 1 Maintenance Person, 1 Clerical × $270 training fee per person.
Initial Training Time (One-time)	9	462	1 Manager, 1 Maintenance Person, 1 Clerical × 3 hours for each.
Recurrent Training Fee (Biennial) ...	NA	540	1 Manager, 1 Maintenance Person, 1 Clerical × $90 training fee per person × 2 years.
Recurrent Training Time (Biennial)	9	462	1 Manager, 1 Maintenance Person, 1 Clerical × 1.5 hours for each × 2 years.
Hazard Awareness Orientation (One-time).	8	692	SMS Manager × 8 hours.
Hazard Awareness Orientation (Biennial).	4	346	SMS Manager × 2 hours to update awareness orientation × 2 Years.
Promotional Material (Biennial)	N/A	7,020	$2,340 spent every other year on promotional material × 3 years.

[26] Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Code 43–6014; May 2020. This wage includes compensation information from BLS.

[27] Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Code 15–2031; May 2020. This wage includes compensation information from BLS.

[28] Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Code 11–1021; May 2020. This wage includes compensation information from BLS.

[29] Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Code 53–2022; May 2020. This wage includes compensation information from BLS.

[30] Blended wage: Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Code 53–2022; May 2020. This wage includes compensation information from BLS.

Small airport costs	Total hours	Total cost per airport	Description
Record Potential Hazards (Annually).	65	$1,797	Clerical Wage × 15 min × 52 hazards per year × 5 years.
Reporting Potential Hazards (Annually).	65	4,150	Blended Wage × 15 min × 52 hazards per year × 5 years for small airports.
Update Distribution Log (Biennial) ...	2.5	69	Clerical Wage × 5 min × 10 tenants per small airport × 3 years.
Update Training Records (Biennial)	0.8	22	Clerical Wage × 5 min × 3 employee training records per airport × 3 years.
Documenting Safety Risk Management (Annually).	130	5,188	Operations Specialist Wage × 30 min × 52 documents per year × 5 years.
Reporting Safety Information under Safety Assurance (Annually).	10	631	Operations Research Wage × 1 hour × 2 reports per year × 5 years.
Total	375	995,916	

Table notes:
Clerical Employee[31] $27.64.
Operation Research Analyst[32] $63.12.
General and Operations Manager[33] $86.50.
Airfield Operations Specialist[34] $39.31.
Blended Wage (Mechanic, Pilot, Flight Attendant, Airfield Ops Specialist)[35] $63.85.

(vi) A Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in This Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

The FAA analyzed the following four alternatives in the SNPRM: (a) all part 139 airports; (b) airport operators holding a Class I AOC; (c) certificated international airports; (d) large, medium, and small hub airports and certificated airports with more than 100,000 total annual operations; and (e) large, medium, and small hub airports, certificated airports with more than 100,000 total annual operations (the sum of all arrivals and departures), and certificated international airports. The fourth alternative was identified as the preferred alternative in the SNPRM. This alternative reduced the qualified population of airports from all 531 part 139 airports to approximately 265 by eliminating a number of small airports. This alternative focused on airports with high passenger traffic and included facilities with the largest number of arrivals and departures so that safety benefits would flow to the overwhelming majority of aircraft operations.

This final rule will continue to apply to large, medium, and small hub airports, certificated airports with 100,000 or more total annual operations using a three-year rolling average, and certificated airports that serve any international operation other than general aviation. However, after reviewing public comments to the SNPRM, the FAA modified the preferred alternative to allow airports identified under the international trigger with no international commercial traffic to obtain a waiver from this regulation. This change in this final rule reduces the number of airports from approximately 265 to 191 qualified airports. The additional estimated 74 airports that the FAA projects will obtain waivers are also small airports.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined that it will have only a domestic impact and, therefore, will not create unnecessary obstacles to the foreign commerce of the United States.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA uses an inflation-adjusted value of $158.0 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a valid Office of Management and Budget (OMB) control number.

This final rule will impose the following amended information

[31] Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Code 43–6014; May 2020. This wage includes compensation information from BLS.

[32] Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Code 15–2031; May 2020. This wage includes compensation information from BLS.

[33] Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Code 11–1021; May 2020. This wage includes compensation information from BLS.

[34] Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Code 53–2022; May 2020. This wage includes compensation information from BLS.

[35] Blended wage computed by taking the average of four occupation wages: Bureau of Labor Statistic (BLS); Annual Mean Wage, Occupation Codes 53–2022, 53–2011, 49–3011, 53–2031; May 2020. This wage includes compensation information from BLS.

collection requirements to the existing information collection requirements previously approved under OMB Control Number 2120–0675. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA submitted these information collection amendments for its review and OMB approved the amended information collection requirements under existing OMB Control Number 2120–0675.

Summary: This final rule requires certain certificate holders to establish a SMS for the entire airfield environment (including movement and non-movement areas) to improve safety at airports hosting air carrier operations. A SMS is a formalized approach to managing safety by developing an organization-wide safety policy, developing formal methods for identifying hazards, analyzing and mitigating risk, developing methods for ensuring continuous safety improvement, and creating organization-wide safety promotion strategies.

Under this final rule, applicable certificate holders are required to submit an Implementation Plan, SMS Manual and/or ACM update under a staggered implementation schedule. The intent of the Implementation Plan is for a certificate holder to identify its plan for implementing SMS within applicable areas, and map its schedule for implementing requirements. The certificate holder will describe its means for complying with this final rule by either developing a SMS Manual and updating its ACM with cross-references, or documenting the SMS requirements directly in the ACM.

This final rule also requires applicable certificate holders to maintain records related to formalized hazard identification and analysis under Safety Risk Management, training records under Safety Promotion, and other Safety Promotion materials (also referred to as safety communications).

Public comments: The FAA received a few comments in the 2016 and 2021 comment periods that expressed concern that the initial SMS planning, data collection, software, documentation, and implementation process were underestimated. Another commenter stated that the regulatory evaluation did not account for the cost of attrition on training records.

The FAA used information from pilot study participants before and after the initial regulatory evaluation to estimate costs and cannot validate the cost estimates provided above. Additionally, the FAA had no basis to account for attrition on the small number of employees that are estimated to require training under the rule. Attrition is a normal course of business cost. The FAA expects little to no attrition solely due to SMS.

Use: While the Implementation Plan's main purpose is to guide a certificate holder's implementation, the plan also provides a basis for the FAA's oversight during the development and implementing phases. The FAA's review and approval of the Implementation Plan ensures that a certificate holder is given feedback early and before it may make significant capital improvements as part of its SMS development and implementation.

The ACM update and/or the SMS Manual establishes the foundation for a SMS. Like the Implementation Plan, the FAA will approve the ACM update (a current practice under the existing rule). However, the FAA will accept the certificate holder's SMS Manual.

Collection and analysis of safety data is an essential part of a SMS. Types of data to be collected, retention procedures, analysis processes, and organizational structures for review and evaluation will be documented in either the ACM or SMS Manual, with cross-references in the ACM. These records will be used by a certificate holder in the operation of its SMS and to facilitate continuous improvement through evaluation and monitoring. While this final rule does not require a certificate holder to submit these records to the FAA, it is required to make these records available upon request.

Respondents (including number of): The FAA estimates that 191 part 139 certificated airports will be impacted by the paperwork requirements in this rule.

TABLE 8—AFFECTED POPULATION

Airport* categories	Number of airports	Data source
Large, Medium, and Small Hub	132	2015 annual passenger boarding (enplanements) and all-cargo data from Air Carrier Activity Information System (ACAIS) available on *FAA.gov.*
>100,000 Operations	27	Rolling average of 2013 to 2015 FAA Form 5010–1, Airport Master Record for non-towered airports and Operations Network (OPSNET) data for towered airports.
International Traffic	32	All available CBP data sources including CBP regulations, public website information, and the private flyers list of available airports to determine international applicability (excludes airports with no commercial international traffic).

Frequency and Annual Burden Estimate: The FAA used the information below to estimate the paperwork burden for the approximately 132 large and 59 small part 139 certificated airports impacted by the rule.

TABLE 9—WAGES

Clerical Employee	$27.64
Operation Research Analyst	63.12
Management Occupations	86.50
Airfield Operations Specialist	39.91
Blended Wage (Mechanic, Pilot, Flight Attendant, Airfield Operations Specialist	63.85

TABLE 10—IMPACT ON SMALL AIRPORTS

[Over 10 years]

Paperwork requirements	Hours per airport	Small airport	Description
Manual & Implementation Plan (One-time).	NA	$138,150	One-time cost of $138,150 per small airport.
Manual Revisions (Annually)	72	1,990	Clerical Employee Wage × 12 hours × 6 years for small airports.
Initial Software (One-time)	NA	26,074	Initial Software Cost of $26,074 per airport.
Recurrent Software (Annually)	NA	32,595	Recurring Software Cost of $6,519 per airport × 5 years for small airports.
Promotional Material (Biennially)	NA	7,020	$2,340 spent every other year on promotional material × 3 years.
Record Potential Hazards (Annually)	65	1,797	Clerical Wage × 15 min × 52 hazards per year × 5 years for small airports.
Reporting Potential Hazards (Annually)	65	4,150	Blended Wage × 15 min × 52 hazards per year × 5 years for small airports.
Update Distribution Log (Biennially)	2.5	69	Clerical Wage × 5 min × 10 tenants per small airport × 3 years.
Update Training Records (Biennially)	0.8	22	Clerical Wage × 5 min × 3 employee training records per airport × 3 years.
Documenting Safety Risk Management (Annually).	130	5,188	Operations Specialist Wage × 30 min × 52 documents per year × 5 years for small airports.
Reporting Safety Information under Safety Assurance (Annually).	10	631	Operations Research Wage × 1 hour × 2 reports per year × 5 years for small airports.
Total	345.3	217,686	

TABLE 11—IMPACT ON LARGE AIRPORTS

[Over 10 years]

Paperwork requirements	Hours per airport	Large airport	Description
Manual & Implementation Plan (One-time).	NA	$250,460	One-time cost of $250,460 per large airport.
Manual Revisions (Annually)	84	2,322	Clerical Employee Wage × 12 hours × 7 years for large airports.
Initial Software (One-time)	NA	26,074	Initial Software Cost of $26,074 per airport.
Recurrent Software (Annually)	NA	39,114	Recurring Software Cost of $6,519 per airport × 6 years for large airports.
Promotional Material (Biennially)	NA	7,020	$2,340 spent every other year on promotional material × 3 years.
Record Potential Hazards (Annually)	78	2,156	Clerical Wage × 15 min × 52 hazards per year × 6 years for large airports.
Reporting Potential Hazards (Annually)	78	4,980	Blended Wage × 15 min × 52 hazards per year × 6 years for large airports.
Update Distribution Log (Biennially)	37.5	1,037	Clerical Wage × 15 min × 50 tenants per large airport × 3 years.
Update Training Records (Biennially)	3.3	91	Clerical Wage × 5 min × 10 employee training records per airport × 4 years.
Documenting Safety Risk Management (Annually).	156	6,226	Operations Specialist Wage × 30 min × 52 documents per year × 6 years for large airports.
Reporting Safety Information under Safety Assurance (Annually).	12	757	Operations Research Wage × 1 hour × 2 reports per year × 6 years for large airports.
Total	448.8	340,237	

The hourly burden, over 10 years, for small airports is 345.3 hours multiplied by 59 airports for a total of 20,373 hours. Annually, this is equivalent to 2,037 hours per year. For the 132 large airports, the hourly burden is 59,242 over 10 years or 5,924 hours per year.

While Tables 8 and 9 identify the cost per airport, there are a few airports that will not purchase software. For small airports, there are 44 airports with a per airport cost of $217,686 and 15 airports with a per airport cost of $191,612 (excluding the $26,074 initial software cost). For large airports, there are 99 airports with an estimated per airport cost of $340,237. The remaining 33 airports have a per airport cost of $314,163 (excluding the $26,074 initial software cost). The total cost burden combined over a 10-year period, for small and large airports, sums to $556.4 million ($51 million at 7 percent present value).

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these proposed regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in

paragraph 5–6.6 and involves no extraordinary circumstances.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. Most airports subject to this final rule are owned, operated, or regulated by a local government body (such as a city or council government), which, in turn, is incorporated by or as part of a State. The FAA determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The FAA has determined that it is not a ''significant energy action'' under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policy and agency responsibilities of Executive Order 13609, Promoting International Regulatory Cooperation. The FAA has determined that this action would eliminate differences between U.S. aviation standards and those of other civil aviation authorities by requiring certain certificated airports to have a SMS.

VI. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document may be obtained by using the internet—

1. Search the Federal eRulemaking Portal (*www.regulations.gov*);

2. Visit the FAA's Regulations and Policies web page at *www.faa.gov/regulations_policies/;* or

3. Access the Government Printing Office's web page at *www.GovInfo.gov.*

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9680.

B. Comments Submitted to the Docket

Comments received may be viewed by going to *www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entities' requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit *https://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 139

Air carriers, Airports, Aviation safety, Reporting and recordkeeping requirements, Safety Management Systems (SMS).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 139—CERTIFICATION OF AIRPORTS

■ 1. The authority citation for part 139 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701–44706, 44709, 44719, 47175.

■ 2. Amend § 139.5 by adding in alphabetical order definitions for ''Accountable executive'', ''Airport Safety Management System (SMS)'', ''Hazard'', ''Non-movement area'', ''Risk'', ''Risk analysis'', ''Risk mitigation'', ''Safety assurance'', ''Safety policy'', ''Safety promotion'', and ''Safety risk management'' to read as follows:

§ 139.5 Definitions.

* * * * *

Accountable executive means an individual designated by the certificate holder to act on its behalf for the implementation and maintenance of the Airport Safety Management System. The accountable executive has control of the certificate holder's human and financial resources for operations conducted under an Airport Operating Certificate. The accountable executive has ultimate responsibility to the FAA, on behalf of the certificate holder, for the safety performance of operations conducted under the certificate holder's Airport Operating Certificate.

* * * * *

Airport Safety Management System (SMS) means an integrated collection of processes and procedures that ensures a formalized and proactive approach to system safety through risk management.

* * * * *

Hazard means a condition that could foreseeably cause or contribute to: (1) injury, illness, death, damage to or loss of system, equipment, or property, or (2) an aircraft accident as defined in 49 CFR 830.2.

* * * * *

Non-movement area means the area, other than that described as the movement area, used for the loading, unloading, parking, and movement of aircraft on the airside of the airport (including ramps, apron areas, and on-airport fuel farms).

* * * * *

Risk means the composite of predicted severity and likelihood of the potential effect of a hazard.

Risk analysis means the process whereby a hazard is characterized for its likelihood and the severity of its effect or harm. Risk analysis can be either a quantitative or qualitative analysis; however, the inability to quantify or the lack of historical data on a particular hazard does not preclude the need for analysis.

Risk mitigation means any action taken to reduce the risk of a hazard's effect.

* * * * *

Safety assurance means processes within the SMS that function systematically to ensure the performance and effectiveness of risk controls or mitigations and that the organization meets or exceeds its safety

objectives through the collection, analysis, and assessment of information.

Safety policy means the certificate holder's documented commitment to safety, which defines its safety objectives and the accountabilities and responsibilities of its employees in regard to safety.

Safety promotion means a combination of training and communication of safety information to support the implementation and operation of a SMS in an organization.

Safety risk management means a process within the SMS composed of describing the system, identifying the hazards, and analyzing, assessing, and controlling or mitigating the risk.

* * * * *

§ 139.101 [Amended]

■ 3. Amend § 139.101 by removing paragraph (c).

■ 4. Amend § 139.103 by revising paragraph (b) to read as follows:

§ 139.103 Application for certificate.

* * * * *

(b) Submit with the application, two copies of an Airport Certification Manual, and a Safety Management System Manual (where applicable), prepared in accordance with subparts C and E of this part.

■ 5. Amend § 139.203, in the table in paragraph (b) titled ''Required Airport Certification Manual Elements,'' by redesignating entry 29 as entry 30 and adding a new entry 29.

The addition reads as follows:

§ 139.203 Contents of Airport Certification Manual.

* * * * *

(b) * * *

REQUIRED AIRPORT CERTIFICATION MANUAL ELEMENTS

Manual elements	Airport certificate class			
	Class I	Class II	Class III	Class IV
* * * *	*		*	*
29. Policies and procedures for the development of, implementation of, maintenance of, and adherence to, the Airport's Safety Management System, as required under subpart E of this part. Section 139.401(1) prescribes which certificate holders are subject to this requirement.	X	X	X	X
* * * *	*		*	*

■ 6. Amend § 139.301 by revising paragraph (b)(1) and adding paragraphs (b)(9) and (10) to read as follows:

§ 139.301 Records.

* * * * *

(b) * * *

(1) *Personnel training.* Twenty-four consecutive calendar months for personnel training records and orientation materials, as required under §§ 139.303, 139.327, and 139.402(d).

* * * * *

(9) *Safety risk management documentation.* The longer of thirty-six consecutive calendar months after the risk analysis of identified hazards under § 139.402(b)(2) has been completed, or twelve consecutive calendar months after mitigations required under § 139.402(b)(2)(v) have been completed.

(10) *Safety communications.* Twelve consecutive calendar months for safety communications, as required under § 139.402(d).

* * * * *

■ 7. Amend § 139.303 by revising paragraphs (e)(5) and (6) and adding paragraph (e)(7) to read as follows:

§ 139.303 Personnel.

* * * * *

(e) * * *

(5) § 139.337, Wildlife hazard management;

(6) § 139.339, Airport condition reporting; and

(7) § 139.402, Components of airport safety management system.

* * * * *

■ 8. Add subpart E to read as follows:

Subpart E—Airport Safety Management System

Sec.

Subpart E—Airport Safety Management System

§ 139.401 General requirements.

(a) Each certificate holder or applicant for an Airport Operating Certificate meeting at least one of the following criteria must develop, implement, maintain, and adhere to an Airport Safety Management System pursuant to the requirements established in this subpart. If the certificate holder:

(1) Is classified as a large, medium, or small hub based on passenger data extracted from the Air Carrier Activity Information System;

(2) Has an average of 100,000 or more total annual operations, meaning the sum of all arrivals and departures, over the previous three calendar years; or

(3) Is classified as a port of entry, designated international airport, landing rights airport, or user fee airport.

(b) The scope of an Airport Safety Management System must encompass aircraft operation in the movement area, aircraft operation in the non-movement area, and other airport operations addressed in this part.

(c) The Airport Safety Management System should correspond in size, nature, and complexity to the operations, activities, hazards, and risks associated with the certificate holder's operations.

(d) If a certificate holder qualifies exclusively under paragraph (a)(3) of this section and has no tenants that are required to comply with SMS requirements of any jurisdiction, the certificate holder is eligible for a waiver from the requirements of paragraph (a) of this section.

(1) To obtain the waiver, the certificate holder must submit a written request to the Regional Airports Division Manager justifying its request.

(2) If FAA grants a certificate holder's request for a waiver, the certificate holder must validate its waiver eligibility to the Regional Airports Division Manager every two years.

(e) If an airport has a tenant required to maintain a SMS subject to the requirements of part 5 of this title, then the certificate holder may develop a data sharing and reporting plan to address the reporting and sharing of hazard and safety data with the tenant.

(1) Any data sharing and reporting plan must include, at a minimum:

(i) The types of information the certificate holder expects the tenant to share;

(ii) The timeliness of sharing relevant safety data and reports;

(iii) Processes for analyzing joint safety issues or hazards;

(iv) Other processes, procedures, and policies to aid the certificate holder's compliance with its obligations under the Airport Safety Management System; and

(v) Identification of the mechanisms through which the certificate holder will ensure compliance with the plan to achieve the full implementation of the requirements.

(2) With a data sharing and reporting plan, the requirement for the certificate holder to provide safety awareness orientation to the tenants or their employees under § 139.402(d)(1) is waived.

(3) The certificate holder remains the ultimate responsible party for compliance with its Airport Safety Management System.

(f) Each certificate holder required to develop, implement, maintain, and adhere to an Airport Safety Management System under this subpart must describe its compliance with the requirements identified in § 139.402, either:

(1) Within a separate section of the certificate holder's Airport Certification Manual titled Airport Safety Management System; or

(2) Within a separate Airport Safety Management System Manual. If the certificate holder chooses to use a separate Airport Safety Management System Manual, the Airport Certification Manual must incorporate by reference the Airport Safety Management System Manual.

(g) On an annual basis or upon FAA request, the certificate holder shall provide the FAA copies of any changes to the Airport Safety Management System Manual.

(h) A certificate holder that starts implementation of an Airport Safety Management System but no longer qualifies under paragraph (a) of this section must continue to develop, implement, maintain, and adhere to its Airport Safety Management System for the longest of the following periods:

(1) Twenty-four consecutive calendar months after full implementation; or

(2) Twenty-four consecutive calendar months from the date it no longer qualifies under paragraph (a) of this section.

§ 139.402 Components of Airport Safety Management System.

An Airport Safety Management System must include:

(a) *Safety Policy.* A Safety Policy that, at a minimum:

(1) Identifies the accountable executive;

(2) Establishes and maintains a safety policy statement signed by the accountable executive;

(3) Ensures the safety policy statement is available to all employees and tenants;

(4) Identifies and communicates the safety organizational structure;

(5) Describes management responsibility and accountability for safety issues;

(6) Establishes and maintains safety objectives; and

(7) Defines methods, processes, and organizational structure necessary to meet safety objectives.

(b) *Safety Risk Management.* Safety Risk Management processes and procedures for identifying hazards and their associated risks within airport operations and for changes to those operations covered by this part that, at a minimum:

(1) Establish a system for identifying operational safety issues.

(2) Establish a systematic process to analyze hazards and their associated risks, which include:

(i) Describing the system;

(ii) Identifying hazards;

(iii) Analyzing the risk of identified hazards and/or analyzing proposed mitigations;

(iv) Assessing the level of risk associated with identified hazards; and

(v) Mitigating the risks of identified hazards, when appropriate.

(3) Establish and maintain records that document the certificate holder's Safety Risk Management processes.

(i) The records shall provide a means for airport management's acceptance of responsibility for assessed risks and mitigations.

(ii) Records associated with the certificate holder's Safety Risk Management processes must be retained for the longer of:

(A) Thirty-six consecutive calendar months after the risk analysis of identified hazards under paragraph (b)(2) of this section has been completed; or

(B) Twelve consecutive calendar months after mitigations required under paragraph (b)(2)(v) of this section have been completed.

(c) *Safety assurance.* Safety assurance processes and procedures to ensure mitigations developed through the certificate holder's Safety Risk Management processes and procedures are adequate, and the Airport's Safety Management System is functioning effectively. Those processes and procedures must, at a minimum:

(1) Provide a means for monitoring safety performance including a means for ensuring that safety objectives identified under paragraph (a)(6) of this section are being met.

(2) Establish and maintain a safety reporting system that provides a means for reporter confidentiality.

(3) Report pertinent safety information and data on a regular basis to the accountable executive. Reportable data includes:

(i) Compliance with the requirements under this subpart and subpart D of this part;

(ii) Performance of safety objectives established under paragraph (a)(6) of this section;

(iii) Safety critical information distributed in accordance with paragraph (d)(5)(ii) of this section;

(iv) Status of ongoing mitigations required under the Airport's Safety Risk Management processes as described under paragraph (b)(2)(v) of this section; and

(v) Status of a certificate holder's schedule for implementing the Airport Safety Management System as described under § 139.403.

(d) *Safety Promotion.* Safety Promotion processes and procedures to foster an airport operating environment that encourages safety. Those processes and procedures must, at a minimum:

(1) Provide all persons authorized to access the airport areas regulated under this part with a safety awareness orientation, which includes hazard identification and reporting. The safety awareness orientation materials must be readily available and must be reviewed and updated every twenty-four calendar months or sooner if necessary.

(2) Maintain a record of all safety awareness orientation materials made available under paragraph (d)(1) of this section including any revisions and means of distribution. Such records must be retained for twenty-four consecutive calendar months after the materials are made available.

(3) Provide safety training on those requirements of SMS and its implementation to each employee with responsibilities under the certificate holder's SMS that is appropriate to the individual's role. This training must be completed at least every twenty-four months.

(4) Maintain a record of all training by each individual under paragraph (d)(3) of this section that includes, at a minimum, a description and date of training received. Such records must be retained for twenty-four consecutive calendar months after completion of training.

(5) Develop and maintain formal means for communicating important safety information that, at a minimum:

(i) Ensures all persons authorized to access the airport areas regulated under this part are aware of the SMS and their safety roles and responsibilities;

(ii) Conveys critical safety information;

(iii) Provides feedback to individuals using the airport's safety reporting system required under paragraph (c)(2) of this section; and

(iv) Disseminates safety lessons learned to relevant airport employees or other stakeholders.

(6) Maintain records of communications required under this section for 12 consecutive calendar months.

§ 139.403 Airport Safety Management System implementation.

(a) Each certificate holder required to develop, implement, maintain, and adhere to an Airport Safety Management System under this subpart must submit an Implementation Plan to the FAA for approval according to the following schedule:

(1) For certificate holders identified under § 139.401(a)(1), on or before April 24, 2024;

(2) For certificate holders identified under § 139.401(a)(2), on or before October 24, 2024;

(3) For certificate holders identified under § 139.401(a)(3), on or before April 24, 2025.

(4) For a certificate holder that qualifies under § 139.401(a) after April 24, 2023, on or before 18 months after the certificate holder receives notification from the Regional Airports Division Manager of the change in its status.

(b) An Implementation Plan must provide:

(1) A detailed proposal on how the certificate holder will meet the requirements prescribed in this subpart.

(2) A schedule for implementing SMS components and elements prescribed in § 139.402. The schedule must include timelines for the following requirements:

(i) Developing the safety policy statement as prescribed in § 139.402(a)(2) and when it will be made available to all employees and tenants as prescribed in § 139.402(a)(3);

(ii) Identifying and communicating the safety organizational structure as prescribed in § 139.402(a)(4);

(iii) Establishing a system for identifying operational safety issues as prescribed in § 139.402(b)(1);

(iv) Establishing a safety reporting system as prescribed in § 139.402(c)(2);

(v) Developing, providing, and maintaining safety awareness orientation materials as prescribed in § 139.402(d)(1);

(vi) Providing SMS-specific training to employees with responsibilities under the certificate holder's SMS as prescribed in § 139.402(d)(3); and

(vii) Developing, implementing, and maintaining formal means for communicating important safety information as prescribed in § 139.402(d)(5).

(3) A description of any existing programs, policies, or procedures that the certificate holder intends to use to meet the requirements of this subpart.

(c) Each certificate holder required to develop, implement, maintain, and adhere to an Airport Safety Management System under this subpart must submit its amended Airport Certification Manual and Airport Safety Management System Manual, if applicable, to the FAA in accordance with its Implementation Plan but not later than 12 months after receiving FAA approval of the certificate holder's Implementation Plan.

(d) A certificate holder that qualifies under § 139.401(a) must fully implement its Airport Safety Management System no later than 36 months after the approval of its Implementation Plan.

Issued in Washington, DC, under authority provided by 49 U.S.C. 106(f), 44701, 44702, and 44706 on or about February 15, 2023.

Billy Nolen,

Acting Administrator.

[FR Doc. 2023–03597 Filed 2–22–23; 8:45 am]

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Part VI

Department of Labor

Employee Benefits Security Administration

Exemptions From Certain Prohibited Transaction Restrictions; Notice

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grants of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: 2023–03, Blue Cross and Blue Shield Association, D–12077; 2023–04, Blue Cross and Blue Shield of Arizona, Inc., D–12035; 2023–05, Blue Cross and Blue Shield of Vermont, D–12055; 2023–06, Hawaii Medical Service Association, D–12038; 2023–07, BCS Financial Corporation, D–12036; 2023–08, Blue Cross and Blue Shield of Mississippi, D–12040; 2023–09, Blue Cross and Blue Shield of Nebraska, Inc., D–12041; 2023–10, BlueCross BlueShield of Tennessee, Inc., D–12045; 2023–11, Midlands Management Corporation 401(k) Plan, D–12031; 2023–12, DISH Network Corporation 401(k) Plan and the EchoStar 401(k) Plan, D–12012.

SUPPLEMENTARY INFORMATION: Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. Each notice set forth a summary of the facts and representations made by the applicant for the exemption and referred interested persons to the application for a complete statement of the facts and representations. Each application is available for public inspection at the Department in Washington, DC. Each notice also invited interested persons to submit comments on the requested exemption to the Department. In addition, each notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). Each applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

Each notice of proposed exemption was issued, and each exemption is being granted, solely by the Department, because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011) and based upon the entire record, the Department makes the following findings:

(a) Each exemption is administratively feasible;

(b) Each exemption is in the interests of the plan and its participants and beneficiaries; and

(c) Each exemption is protective of the rights of the participants and beneficiaries of the plan.

Blue Cross and Blue Shield Association Located in Chicago, Illinois

[Prohibited Transaction Exemption 2023–03; Exemption Application No. D–12077]

Exemption

On August 24, 2022, the Department published a notice of proposed exemption in the **Federal Register** [1] permitting Blue Cross and Blue Shield Association (BCBSA) to make a series of payments to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield Association (the Plan), including: (1) the past payment of $69,000,000, made on March 12, 2021; and (2) the past payment of $13,500,000, made on March 28, 2022 (the Restorative Payments). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the ligation proceeds received or the Restorative Payments amount, plus reasonable attorneys' fees to BCBSA.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

[1] 87 FR 52118 (August 24, 2022).

Background

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost $183,368,144, or 77.82 percent of its assets. These losses caused the Plan to be underfunded.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).[2] At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBSA took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on November 24, 2020, BCBSA and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement). On June 22, 2022, BCBSA and the Plan amended the Contribution and Assignment Agreement to provide that BCBSA's Restorative Payments under the Agreement will consist of a $69,000,000 payment made on March 12, 2021, and a $13,500,000 payment made on March 28, 2022.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBSA.[3] Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will

[2] Case number 20–CIV–07606.

[3] Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

transfer a repayment (the Repayment) to BCBSA that does not exceed the total Restorative Payments made by BCBSA, plus reasonable attorneys' fees paid by BCBSA on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBSA to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBSA do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBSA for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBSA under this exemption, the amount of reasonable attorneys' fees paid by BCBSA on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBSA in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

Written Comments

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. In response, the Department received three written comments from Plan participants and no requests for a public hearing.

Comments From Plan Participants

The first commenter stated that they do not agree that this exemption should be granted to BCBSA. They also stated that BCBSA has not been truthful in the past with how they have made changes to the Plan and the notice for this exemption was sent on the last possible day that BCBSA was required to provide notice.

The second commenter stated that they are against the Department granting this exemption to BCBSA because the Plan was frozen as of 12/31/2021, and, as a result, they are losing seven years of retirement income.

The third commenter stated that they supported the exemption with one caveat: BCBSA should be required to bear the cost of the Attorneys' Fees incurred in connection with the plan's legal claims without getting reimbursed for those fees by the plan. The third commenter stated:

''While Allianz clearly bears primary responsibility for this situation, I believe BCBSA also bears significant responsibility for having made the ill-advised decision to invest such a large proportion of plan assets in the Structured Alpha Funds . . . Notwithstanding the generally favorable outcome of this situation in the fullness of time, I believe it is appropriate as a matter of public policy for BCBSA to bear some financial consequences in this matter.''

Department's Response

With respect to the first commenter, the Department encourages them to contact the Department at any time if they believe that they have not received the benefits to which they are entitled under the Plan. Regarding the issues raised in the comment, the Department notes that changes to the Plan made by BCBSA in the past are not material to the terms of this exemption. Regarding BCBSA's requirement to provide notice within 15 calendar days of the proposed exemption's publication date, the Department has no reason to believe that BCBSA did not meet this requirement.

With respect to the second commenter, the Department again encourages any participant to contact the Department if they believe they have not received all the benefits they are entitled to under the Plan. Regarding the substance of the comment, the Department notes that BCBS's decision to freeze the Plan in 2021 does not affect or relate to this exemption.

With respect to the third commenter, the Department notes that in granting this exemption, the Department is explicitly not rendering judgment as to whether the Plan's fiduciaries have met their general fiduciary responsibilities of prudence and loyalty as set forth under ERISA Section 404. Further, condition (b) of this exemption expressly states, ''[i]n connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against . . .: (1) any fiduciary of the Plan.''

Regarding Attorneys' Fees, this exemption also has strict standards that limit BCBSA's receipt of such fees to reasonable legal expenses paid by BCBSA on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by the Independent Fiduciary who confirms that the fees were reasonably incurred and paid by BCBSA to unrelated third parties.

Department's Additional Comment

The Department is amending the last sentence of Section (III)(c) of the exemption by replacing the word ''minimize'' with ''avoid.'' The Department is making this revision to emphasize that the Repayment to BCBSA under this exemption should be carried out in a manner that avoids unnecessary costs and disruption to the Plan and Plan investments.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D–12077) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022 at 87 FR 52118.

Exemption

Section I. Definitions

(a) The term ''Attorneys' Fees'' means reasonable legal expenses paid by BCBSA on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBSA to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBSA do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCBSA for representation of BCBSA or the interests of any party other than the Plan.

(b) The term ''BCBSA'' means Blue Cross and Blue Shield Association.

(c) The term ''Claims'' means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term ''Contribution and Assignment Agreement'' means the written agreement dated November 24, 2020, and its amendment that became effective on June 22, 2022, containing all material terms regarding BCBSA's agreement to make Required Restorative Payments to the Plan in return for the Plan's potential Repayment to BCBSA of an amount that is not more than the lesser of the Required Restorative Payment Amount (as described in Section I(h)) or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBSA in connection with the Claims.

(e) The term ''Independent Fiduciary'' means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBSA and does not hold an ownership interest in BCBSA or affiliates of BCBSA;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries; [4]

(5) Has not received gross income from BCBSA or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBSA or from affiliates of BCBSA while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The ''Plan'' means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield Association.

(g) The term ''Plan Losses'' means the $183,368,144 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term ''Restorative Payments'' means the payments made by BCBSA to the Plan in connection with the Plan Losses, defined above, consisting of: (1) the past payment of $69,000,000 on March 12, 2021; and (2) the past payment of $13,500,000 on March 28, 2022. The sum of (1)–(2) is the Required Restorative Payment Amount.

(i) The ''Repayment'' means the payment, if any, that the Plan will transfer to BCBSA following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

Section II. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective November 24, 2020, to the following transactions: BCBSA's transfer of Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCBSA, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

Section III. Conditions

(a) The Plan received the entire Restorative Payment Amount no later than March 28, 2022;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBSA; and/or (4) any person or entity related to a person or entity identified in (1)–(3) of this paragraph;

(c) The Plan's Repayment to BCBSA is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBSA may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBSA must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBSA for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBSA to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75–4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative

[4] 29 CFR 2509.75–4.

Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBSA for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBSA under this exemption, the amount of reasonable attorney fees paid by BCBSA on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBSA in connection with the Claims from any non-Plan party (*i.e.,* pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBSA must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(l) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

Effective Date: This exemption is effective as of November 24, 2020.

For Further Information: Contact Mr. Joseph Brennan of the Department, telephone (202) 693–8456. (This is not a toll-free number.)

Blue Cross and Blue Shield of Arizona, Inc., Located in Phoenix, Arizona

[Prohibited Transaction Exemption 2023–04; Exemption Application No. D–12035]

Exemption

On August 24, 2022, the Department published a notice of proposed exemption in the **Federal Register** [5] permitting Blue Cross and Blue Shield of Arizona, Inc. (BCBS AZ) to make a series of payments to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Arizona, Inc. (the Plan), including: (1) past payments totaling $130,000,000; and (2) future amounts necessary for (a) the Plan's assets to be equal to or greater than 100% of the Plan's current liabilities, and (b) the Plan to have an adjusted funding target attainment percentage (AFTAP) of 110% (the Restorative Payments). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the ligation proceeds received or the Restorative Payments amount, plus reasonable attorneys' fees to BCBS AZ.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

Background

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost $302,470,379.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).[6] At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBS AZ took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on November 5, 2020, BCBS AZ and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement). Pursuant to the Contribution and Assignment Agreement, BCBS AZ agreed to make $274 million in Restorative Payments to the Plan pursuant to an installment payment structure (the Restorative Payments). BCBS AZ made its first installment payment of $60 million to the Plan on September 15, 2020. Thereafter, BCBS AZ made Restorative Payments to the Plan of $35,000,000, on December 28, 2020, $10,000,000, on July 31, 2021, and $25,000,000 on December 21, 2021.

On October 13, 2021, BCBS AZ and the Plan amended the Restorative Payments provision of the Contribution and Assignment Agreement to state that, before December 31, 2023, BCBS AZ would contribute amounts necessary for the Plan to have: (a) an adjusted funding target attainment percentage of 110% (after taking into account any waivers of the funding standard carryover balance by the Plan Sponsor); and (b) an amount of assets that is at least 100% of current Plan liabilities. In addition, any minimum required contributions made by BCBS AZ to the Plan on or after October 13, 2021, will not be included as part of the Restorative Payments required under the Contribution and Assignment Agreement.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBS AZ.[7] Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will

[5] 87 FR 52130 (August 24, 2022).

[6] Case number 20–CIV–07606.

[7] Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

transfer a repayment (the Repayment) to BCBS AZ that does not exceed the total Restorative Payments made by BCBS AZ, plus reasonable attorneys' fees paid by BCBS AZ on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS AZ to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS AZ do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS AZ for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS AZ under this exemption, the amount of reasonable attorneys' fees paid by BCBS AZ on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS AZ in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

Written Comments

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D–12035) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022 at 87 FR 52130.

Exemption

Section I. Definitions

(a) The term ''Attorneys' Fees'' means reasonable legal expenses paid by BCBS AZ on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS AZ to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBS AZ do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCBS AZ for representation of BCBS AZ or the interests of any party other than the Plan.

(b) The term ''BCBS AZ'' means Blue Cross and Blue Shield of Arizona, Inc.

(c) The term ''Claims'' means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term ''Contribution and Assignment Agreement'' means the written agreement between BCBS AZ and the Plan, dated November 5, 2020, and its amendment that became effective on October 13, 2021, containing all material terms regarding BCBS AZ's agreement to make Required Restorative Payments to the Plan in return for the Plan's potential Repayment to BCBS AZ of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS AZ in connection with the Claims.

(e) The term ''Independent Fiduciary'' means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS AZ and does not hold an ownership interest in BCBS AZ or affiliates of BCBS AZ;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries; [8]

(5) Has not received gross income from BCBS AZ or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS AZ or from affiliates of BCBS AZ while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The ''Plan'' means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Arizona, Inc.

(g) The term ''Plan Losses'' means the $302,470,379 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term ''Restorative Payments'' means the payments made by BCBS AZ to the Plan in connection with the Plan Losses, defined above, consisting of: (1) a first installment amount of $60,000,000 that BCBS AZ contributed to the Plan on September 15, 2020; (2) a second installment amount of $35,000,000 that BCBS AZ contributed to the Plan on December 28, 2020; (3) a third installment amount of $10,000,000 that BCBS AZ contributed to the Plan on July 30, 2021; (4) a fourth installment amount of $25,000,000 that BCBS AZ contributed to the Plan on December 21, 2021; and (5) other amounts contributed to the Plan by BCBS AZ before December 31, 2023 that are necessary for (i) the Plan to have an adjusted funding target attainment percentage of 110% after taking into account any waivers of the funding standard carryover balance by the Plan

[8] 29 CFR 2509.75–4.

Sponsor, and (ii) the Plan's assets to be equal to or greater than 100% of the current liabilities of the Plan. The sum of (1)–(5) is the Required Restorative Payment Amount. The term ''Required Restorative Payment'' will not include any required minimum contributions that BCBS AZ makes to the Plan on and after October 13, 2021.

(i) The ''Repayment'' means the payment, if any, that the Plan will transfer to BCBS AZ following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

Section II. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 15, 2020, to the following transactions: BCBS AZ's transfer of Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCBS AZ, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

Section III. Conditions

(a) The Plan received the entire Restorative Payment Amount no later than December 31, 2023;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS AZ; and/or (4) any person or entity related to a person or entity identified in (1)–(3) of this paragraph;

(c) The Plan's Repayment to BCBS AZ is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS AZ may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBS AZ must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS AZ for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBS AZ to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75–4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS AZ for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS AZ under this exemption, the amount of reasonable attorney fees paid by BCBS AZ on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBS AZ in connection with the Claims from any non-Plan party (*i.e.,* pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBS AZ must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(l) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

Effective Date: This exemption is effective as of September 15, 2020.

For Further Information: Contact Mr. Frank Gonzalez of the Department, telephone (202) 693–8553. (This is not a toll-free number.)

Blue Cross and Blue Shield of Vermont Located in Berlin, Vermont

[Prohibited Transaction Exemption 2023–05; Exemption Application No. D–12055]

Exemption

On August 24, 2022, the Department published a notice of proposed

exemption in the **Federal Register** [9] permitting Blue Cross and Blue Shield of Vermont (BCBS VT) to make a series of payments to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Vermont (the Plan) over a four-year period (the Restorative Payments). The Restorative Payments will return the Plan to at least the Plan's funding level (126.61%) as of January 1, 2019. If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the ligation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCBS VT.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

Background

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost $41,588,205.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).[10] At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBS VT took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on December 21, 2020, BCBS VT and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement).

In the Contribution and Assignment Agreement, BCBS VT agreed to make an initial $13,000,000 lump sum payment to the Plan which was expected to restore the Plan to an AFTAP funding level of approximately 80% as of the January 1, 2021 valuation of the Plan. BCBS VT also agreed to make such additional payments to the Plan as necessary to maintain the Plan's funding level at 80% as of such date, to the extent the preliminary $13,000,000 installment payment fails to do so. Finally, BCBS VT stated that it intended to make subsequent installment payments to the Plan on at least an annual basis and over a four-year period to restore Plan funding to approximately the level that was reported prior to the losses sustained within the Allianz Structured Alpha strategy.

Since the effective date of the Contribution and Assignment Agreement, BCBS VT has made two Restorative Payments to the Plan: a $13,000,000 payment remitted on December 23, 2020, and a $3,100,000 payment remitted on September 14, 2021.

This exemption requires BCBS VT to make the Restorative Payments necessary to bring the Plan's funding percentage to at least its January 1, 2019, pre-loss funded percentage of 126.61%, by December 31, 2024. The prior restorative payments noted together with the funding obligations noted here constitute the Required Restorative Payments under this exemption.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBS VT.[11] Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBS VT that does not exceed the total Restorative Payments made by BCBS VT, plus reasonable attorneys' fees paid by BCBS VT on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS VT to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS VT do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS VT for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS VT under this exemption, the amount of reasonable attorneys' fees paid by BCBS VT on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS VT in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

Written Comments

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D–12055) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022 at 87 FR 52135.

Exemption

Section I. Definitions

(a) The term ''Attorneys' Fees'' means reasonable legal expenses paid by BCBS VT on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS VT to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBS VT do not include: (1) legal expenses paid by the

[9] 87 FR 52135 (August 24, 2022).

[10] Case number 20–CIV–07606.

[11] Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

Plan; and (2) legal expenses paid by BCBS VT for representation of BCBS VT or the interests of any party other than the Plan.

(b) The term ''BCBS VT'' means Blue Cross and Blue Shield of Vermont.

(c) The term ''Claims'' means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term ''Contribution and Assignment Agreement'' means the written agreement between BCBS VT and the Plan, dated December 21, 2020, containing all material terms regarding BCBS VT's agreement to make Restorative Payments (as described in Section I(h)) to the Plan in return for the Plan's potential Repayment to BCBS VT of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS VT in connection with the Claims.

(e) The term ''Independent Fiduciary'' means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS VT and does not hold an ownership interest in BCBS VT or affiliates of BCBS VT;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries; [12]

(5) Has not received gross income from BCBS VT or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS VT or from affiliates of BCBS VT while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The ''Plan'' means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Vermont, Inc.

(g) The term ''Plan Losses'' means the $41,588,205 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term ''Restorative Payments'' means the payments made by BCBS VT to the Plan in connection with the Plan Losses, defined above, including: (1) the past payment of $13,000,000 made on December 23, 2020, (2) the past payment of $3,100,000 made on September 14, 2021, and (3) amounts necessary to restore the Plan to its funding level of 126.91% before December 31, 2024. The sum of (1)–(3) is the Required Restorative Payment Amount.

(i) The ''Repayment'' means the payment, if any, that the Plan will transfer to BCBS VT following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

Section II. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 17, 2020, to the following transactions: BCBS VT's transfer of the Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCBS VT, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

Section III. Conditions

(a) The Plan receives the entire Restorative Payment Amount no later than December 31, 2024;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS VT; and/or (4) any person or entity related to a person or entity identified in (1)–(3) of this paragraph;

(c) The Plan's Repayment to BCBS VT is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS VT may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBS VT must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

[12] 29 CFR 2509.75–4.

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS VT for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBS VT to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75–4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS VT for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS VT under this exemption, the amount of reasonable attorney fees paid by BCBS VT on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBS VT in connection with the Claims from any non-Plan party (*i.e.,* pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBS VT must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(l) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

Effective Date: This exemption is effective as of December 21, 2020.

For Further Information: Contact Mr. Nicholas Schroth of the Department, telephone (202) 693–8571. (This is not a toll-free number.)

Hawaii Medical Service Association Located in Honolulu, Hawaii

[Prohibited Transaction Exemption 2023–06; Exemption Application No. D–12038]

Exemption

On August 24, 2022, the Department published a notice of proposed exemption in the **Federal Register** [13] permitting the past restorative payment of $50,000,000 (the Restorative Payment) by Hawaii Medical Service Association (HMSA) to the Non-Contributory Retirement Program for Certain Employees of Hawaii Medical Service Association (the Plan). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the ligation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to HMSA.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

Background

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost $187,271,581.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).[14] At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, HMSA took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on November 3, 2020, HMSA and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement) whereby HMSA agreed to make a $50,000,000 Restorative Payment to the Plan. Subsequently, on December 18, 2020, HMSA made a $50,000,000 Restorative Payment to the Plan. This $50,000,000 payment is the Required Restorative Payment Amount under this exemption.

In exchange for the Restorative Payment, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to HMSA.[15] Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will

[13] 87 FR 52141 (August 24, 2022).

[14] Case number 20–CIV–07606.

[15] Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

transfer a repayment (the Repayment) to HMSA that does not exceed the total Restorative Payment made by HMSA, plus reasonable attorneys' fees paid by HMSA on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by HMSA to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to HMSA do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by HMSA for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to HMSA under this exemption, the amount of reasonable attorneys' fees paid by HMSA on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by HMSA in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

Written Comments

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D–12038) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022 at 87 FR 52141.

Exemption

Section I. Definitions

(a) The term ''Attorneys' Fees'' means reasonable legal expenses paid by HMSA on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by HMSA to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to HMSA do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by HMSA for representation of HMSA or the interests of any party other than the Plan.

(b) The term ''HMSA'' means Hawaii Medical Service Association.

(c) The term ''Claims'' means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term ''Contribution and Assignment Agreement'' means the written agreement between HMSA and the Plan, dated November 3, 2020, containing all material terms regarding HMSA's agreement to make a $50,000,000 payment to the Plan in return for the Plan's potential Repayment to HMSA of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by HMSA in connection with the Claims.

(e) The term ''Independent Fiduciary'' means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of HMSA and does not hold an ownership interest in HMSA or affiliates of HMSA;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries; [16]

(5) Has not received gross income from HMSA or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from HMSA or from affiliates of HMSA while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The ''Plan'' means the Non-Contributory Retirement Program for Certain Employees of Hawaii Medical Service Association.

(g) The term ''Plan Losses'' means the $187,271,581 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term ''Restorative Payment'' means the payments made by HMSA to the Plan in connection with the Plan Losses, defined above, consisting of a $50,000,000 payment that HMSA contributed to the Plan on December 18, 2020. This $50,000,000 payment is the Required Restorative Payment Amount.

(i) The ''Repayment'' means the payment, if any, that the Plan will transfer to HMSA following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

Section II. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective November 3, 2020, to the following transactions: HMSA's transfer of the Restorative Payment to

[16] 29 CFR 2509.75–4.

the Plan; and, in return, the Plan's Repayment of an amount to HMSA, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

Section III. Conditions

(a) The Plan received the entire Restorative Payment Amount on December 18, 2020;

(b) In connection with its receipt of the Required Restorative Payment, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) HMSA; and/or (4) any person or entity related to a person or entity identified in (1)–(3) of this paragraph;

(c) The Plan's Repayment to HMSA is not more than the lesser of the total Restorative Payment received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to HMSA may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to HMSA must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payment and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payment, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to HMSA for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by HMSA to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75–4.

(f) The Plan pays no interest in connection with the Restorative Payment;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payment;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payment. However, if first approved by the Independent Fiduciary, the Plan may reimburse HMSA for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to HMSA under this exemption, the amount of reasonable attorney fees paid by HMSA on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by HMSA in connection with the Claims from any non-Plan party (*i.e.,* pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, HMSA must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(l) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

Effective Date: This exemption is effective as of November 3, 2020.

For Further Information: Contact Mrs. Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567. (This is not a toll-free number.)

BCS Financial Corporation Located in Oakbrook Terrace, Illinois

[Prohibited Transaction Exemption 2023–07; Application No. D–12036]

Exemption

On August 24, 2022, the Department published a notice of proposed exemption in the **Federal Register** [17] permitting BCS Financial Corporation (BCS) to make a series of payments to the Non-Contributory Retirement Program for Certain Employees of BCS Financial Corporation (the Plan), including: (a) past payments totaling $19,600,000; and (b) a payment of $1,800,000 on or before September 13, 2023 (the Restorative Payments). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the ligation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCS.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

[17] 87 FR 52146 (August 24, 2022).

Background

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost $29,496,983.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).[18] At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCS took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on October 9, 2020, BCS and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement). Pursuant to the Contribution and Assignment Agreement, BCS agreed to make a $16,000,000 Restorative Payment to the Plan within seven business days after the Agreement's effective date. Subsequently, on October 13, 2020, BCS made a $16,000,000 Restorative Payment to the Plan.

On September 27, 2021, BCS and the Plan amended the Restorative Payments provision of the Contribution and Assignment Agreement. Pursuant to the amendment, BCS agreed to make the following three additional Restorative Payments to the Plan: (a) a payment of $1,800,000 on or before September 13, 2021; (b) a payment of $1,800,000 on or before September 13, 2022; and (c) a payment of $1,800,000 on or before September 13, 2023. Since the effective date of the Restorative Payment Amendment, BCS Financial has made two additional Restorative Payments to the Plan: a $1,800,000 payment on September 14, 2021, and a $1,800,000 payment on January 14, 2022.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCS.[19] Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCS that does not exceed the total Restorative Payments made by BCS, plus reasonable attorneys' fees paid by BCS on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCS to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCS do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCS for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCS under this exemption, the amount of reasonable attorneys' fees paid by BCS on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCS in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

Written Comments

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D–12036) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022 at 87 FR 52146.

Exemption

Section I. Definitions

(a) The term ''Attorneys' Fees'' means reasonable legal expenses paid by BCS on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCS to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCS do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCS for representation of BCS or the interests of any party other than the Plan.

(b) The term ''BCS'' means BCS Financial Corporation.

(c) The term ''Claims'' means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term ''Contribution and Assignment Agreement'' means the written agreement between BCS and the Plan, dated October 9, 2020, and its amendment that became effective on September 27, 2021, containing all material terms regarding BCS's agreement to make Restorative Payments (as described in Section I(h)) to the Plan in return for the Plan's potential Repayment to BCS of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCS in connection with the Claims.

(e) The term ''Independent Fiduciary'' means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCS and does not hold an ownership interest in BCS or affiliates of BCS;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction

[18] Case number 20–CIV–07606.

[19] Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries; [20]

(5) Has not received gross income from BCS or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCS or from affiliates of BCS while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The ''Plan'' means the Non-Contributory Retirement Program for Certain Employees of BCS Financial Corporation.

(g) The term ''Plan Losses'' means the $29,496,983 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term ''Restorative Payments'' means the payments made by BCS to the Plan in connection with the Plan Losses, defined above, including: (1) the past payment of $16,000,000, made on October 13, 2020; (2) the past payment of $1,800,000, made on September 14, 2021; (3) the past payment of $1,800,000 made on January 14, 2022; and (4) a payment of $1,800,000 to be made on or before September 13, 2023. The sum of (1)–(4) is the Required Restorative Payment Amount.

(i) The ''Repayment'' means the payment, if any, that the Plan will transfer to BCS following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

Section II. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 17, 2020, to the following transactions: BCS's transfer of the Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCS, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

Section III. Conditions

(a) The Plan receives the entire Restorative Payment Amount no later than September 13, 2023;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCS; and/or (4) any person or entity related to a person or entity identified in (1)–(3) of this paragraph;

(c) The Plan's Repayment to BCS is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCS may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCS must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCS for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCS to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75–4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCS for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCS under this exemption, the amount of reasonable attorney fees paid by BCS on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCS in connection with the Claims from any non-Plan party (*i.e.,* pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

[20] 29 CFR 2509.75–4.

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCS must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(l) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

Effective Date: This exemption is effective as of October 9, 2020.

For Further Information: Contact Mr. Frank Gonzalez of the Department, telephone (202) 693–8553. (This is not a toll-free number.)

Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company Located in Flowood, Mississippi

[Prohibited Transaction Exemption 2023–08; Application No. D–12040]

Exemption

On August 24, 2022, the Department published a notice of proposed exemption in the **Federal Register** [21] permitting the past payments of $70,000,000 and $12,000,000 (the Restorative Payments) by the Plan sponsor, Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company (BCBS MS), to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Mississippi (the Plan). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the ligation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCBS MS.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

Background

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost $102,446,155.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).[22] At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBS MS took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on September 17, 2020, BCBS MS and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement).

Pursuant to the Contribution and Assignment Agreement, BCBS MS agreed to make the following Restorative Payments to the Plan: (a) a $70,000,000 payment within seven business days of the effective date of the Contribution and Assignment Agreement; and (b) a $12,000,000 payment on or about November 24, 2020. BCBS MS subsequently made the following Restorative Payments to the Plan: (a) a payment of $70,000,000 on September 21, 2020; and (b) a payment of $12,000,000 on November 25, 2020.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBS MS.[23] Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBS MS that does not exceed the total Restorative Payments made by BCBS MS, plus reasonable attorneys' fees paid by BCBS MS on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS MS to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS MS do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS MS for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS MS under this exemption, the amount of reasonable attorneys' fees paid by BCBS MS on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS MS in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

Written Comments

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The

[21] 87 FR 52152 (August 24, 2022).

[22] Case number 20–CIV–07606.

[23] Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D–12040) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022 at 87 FR 52152.

Exemption

Section I. Definitions

(a) The term ''Attorneys' Fees'' means reasonable legal expenses paid by BCBS MS on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS MS to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBS MS do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCBS MS for representation of BCBS MS or the interests of any party other than the Plan.

(b) The term ''BCBS MS'' means Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company.

(c) The term ''Claims'' means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term ''Contribution and Assignment Agreement'' means the written agreement between BCBS MS and the Plan, dated September 17, 2020, containing all material terms regarding BCBS MS's agreement to make (a) a $70,000,000 payment within seven business days of the effective date of the Contribution and Assignment Agreement and (b) a $12,000,000 payment on or about November 24, 2020, in return for the Plan's potential Repayment to BCBS MS of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS MS in connection with the Claims.

(e) The term ''Independent Fiduciary'' means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS MS and does not hold an ownership interest in BCBS MS or affiliates of BCBS MS;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries; [24]

(5) Has not received gross income from BCBS MS or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS MS or from affiliates of BCBS MS while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The ''Plan'' means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Mississippi.

(g) The term ''Plan Losses'' means the $102,446,155 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term ''Restorative Payments'' means the payments made by BCBS MS to the Plan in connection with the Plan Losses, defined above, consisting of (1) a payment of $70,000,000 on September 21, 2020; and (2) a payment of $12,000,000 on November 25, 2020. The sum of (1) and (2) is the Required Restorative Payment Amount.

(i) The ''Repayment'' means the payment, if any, that the Plan will transfer to BCBS MS following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

Section II. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 17, 2020, to the following transactions: BCBS MS's transfer of the Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCBS MS, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

Section III. Conditions

(a) The Plan received the entire Restorative Payment Amount by November 25, 2020;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS MS; and/or (4) any person or entity related to a person or entity identified in (1)–(3) of this paragraph;

(c) The Plan's Repayment to BCBS MS is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation

[24] 29 CFR 2509.75–4.

proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS MS may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBS MS must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS MS for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBS MS to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75–4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS MS for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS MS under this exemption, the amount of reasonable attorney fees paid by BCBS MS on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBS MS in connection with the Claims from any non-Plan party (*i.e.,* pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBS MS must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(l) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

Effective Date: This exemption is effective as of September 17, 2020.

For Further Information: Contact Mrs. Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567. (This is not a toll-free number.)

Blue Cross and Blue Shield of Nebraska, Inc. Located in Omaha, Nebraska

[Prohibited Transaction Exemption 2023–09; Application No. D–12041]

Exemption

On August 24, 2022, the Department published a notice of proposed exemption in the **Federal Register** [25] permitting the past payments of $7,000,000 and $6,600,000 (the Restorative Payments) by the Plan sponsor, Blue Cross and Blue Shield of Nebraska, Inc. (BCBS Nebraska), to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Nebraska, Inc. (the Plan). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the ligation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCBS Nebraska.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

Background

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost $33,649,481.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach

[25] 87 FR 52157 (August 24, 2022).

of contract (the Claims).[26] At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBS Nebraska took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on November 5, 2020, BCBS Nebraska and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement). Pursuant to the Contribution and Assignment Agreement, BCBS Nebraska agreed to make Restorative Payments to the Plan not in excess of $33,649,481 by September 15, 2022. Subsequently, on August 25, 2021, BCBS Nebraska made a $7,000,000 Restorative Payment to the Plan.

On March 17, 2022, BCBS Nebraska and the Plan amended the Restorative Payments provision of the Contribution and Assignment Agreement to require BCBS Nebraska to make one additional Restorative Payment of $6,600,000 to the Plan by September 15, 2022. Subsequently, on March 29, 2022, BCBS Nebraska made a $6,600,000 Restorative Payment to the Plan.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBS Nebraska.[27] Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBS Nebraska that does not exceed the total Restorative Payments made by BCBS Nebraska, plus reasonable attorneys' fees paid by BCBS Nebraska on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS Nebraska to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS Nebraska do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS Nebraska for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS Nebraska under this exemption, the amount of reasonable attorneys' fees paid by BCBS Nebraska on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS Nebraska in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

Written Comments

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D–12041) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022. at 87 FR 52157.

Exemption

Section I. Definitions

(a) The term ''Attorneys' Fees'' means reasonable legal expenses paid by BCBS Nebraska on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS Nebraska to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBS Nebraska do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCBS Nebraska for representation of BCBS Nebraska or the interests of any party other than the Plan.

(b) The term ''BCBS Nebraska'' means Blue Cross and Blue Shield of Nebraska, Inc.

(c) The term ''Claims'' means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term ''Contribution and Assignment Agreement'' means the written agreement between BCBS Nebraska and the Plan, dated November 5, 2020, and its amendment that became effective on March 17, 2022, containing all material terms regarding BCBS Nebraska's agreement to make (a) a payment not in excess of $33,649,481 by September 15, 2022, and (b) a payment of $6,600,000 by September 15, 2022, in return for the Plan's potential Repayment to BCBS Nebraska of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS Nebraska in connection with the Claims.

(e) The term ''Independent Fiduciary'' means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS Nebraska and does not hold an ownership interest in BCBS Nebraska or affiliates of BCBS Nebraska;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries; [28]

(5) Has not received gross income from BCBS Nebraska or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any

[26] Case number 20–CIV–07606.

[27] Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

[28] 29 CFR 2509.75–4.

prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS Nebraska or from affiliates of BCBS Nebraska while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The ''Plan'' means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Nebraska, Inc.

(g) The term ''Plan Losses'' means the $33,649,481 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term ''Restorative Payments'' means the payments made by BCBS Nebraska to the Plan in connection with the Plan Losses, defined above, consisting of (1) a payment of $7,000,000 on August 25, 2021; and (2) a payment of $6,600,000 on March 29, 2022. The sum of (1) and (2) is the Required Restorative Payment Amount.

(i) The ''Repayment'' means the payment, if any, that the Plan will transfer to BCBS Nebraska following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

Section II. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 17, 2020, to the following transactions: BCBS Nebraska's transfer of the Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCBS Nebraska, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

Section III. Conditions

(a) The Plan received the entire Restorative Payment Amount by March 29, 2022;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS Nebraska; and/or (4) any person or entity related to a person or entity identified in (1)–(3) of this paragraph;

(c) The Plan's Repayment to BCBS Nebraska is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS Nebraska may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBS Nebraska must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS Nebraska for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBS Nebraska to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75–4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS Nebraska for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS Nebraska under this exemption, the amount of reasonable attorney fees paid by BCBS Nebraska on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBS Nebraska in connection with the Claims from any non-Plan party (*i.e.,* pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the

outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBS Nebraska must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(l) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

Effective Date: This exemption is effective as of November 5, 2020.

For Further Information: Contact Ms. Anna Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

BlueCross BlueShield of Tennessee, Inc. Located in Chattanooga, Tennessee

[Prohibited Transaction Exemption 2023–10; Application No. D–12045]

Exemption

On August 24, 2022, the Department published a notice of proposed exemption in the **Federal Register** [29] permitting the past restorative payment of $100,000,000 to the BlueCross BlueShield of Tennessee, Inc. Pension Plan (the Plan) Plan by the Plan sponsor, BlueCross BlueShield of Tennessee, Inc. (BCBS Tennessee). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the ligation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCBS Tennessee.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

Background

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost $93,576,015.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).[30] At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBS Tennessee took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on October 8, 2020, BCBS Tennessee and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement), whereby BCBS Tennessee agreed to make a $100,000,000 payment to the Plan within seven business days of the effective date of the Contribution and Assignment Agreement. This $100,0000 payment is the Required Restorative Payment Amount under this exemption. BCBS Tennessee remitted $100,000,000 to the Plan on October 8, 2020.

In exchange for the Restorative Payment, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBS Tennessee.[31] Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBS Tennessee that does not exceed the total Restorative Payment made by BCBS Tennessee, plus reasonable attorneys' fees paid by BCBS Tennessee on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS Tennessee to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS Tennessee do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS Tennessee for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS Tennessee under this exemption, the amount of reasonable attorneys' fees paid by BCBS Tennessee on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS Tennessee in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

Written Comments

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D–12045) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022 at 87 FR 52163.

Exemption

Section I. Definitions

(a) The term ''Attorneys' Fees'' means reasonable legal expenses paid by BCBS Tennessee on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS Tennessee to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBS Tennessee do not include: (1) legal

[29] 87 FR 52163 (August 24, 2022).

[30] Case number 20–CIV–07606.

[31] Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

expenses paid by the Plan; and (2) legal expenses paid by BCBS Tennessee for representation of BCBS Tennessee or the interests of any party other than the Plan.

(b) The term ''BCBS Tennessee'' means BlueCross BlueShield of Tennessee, Inc.

(c) The term ''Claims'' means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term ''Contribution and Assignment Agreement'' means the written agreement between BCBS Tennessee and the Plan, dated October 8, 2020, containing all material terms regarding BCBS Tennessee's agreement to make a $100,000,000 payment to the Plan in return for the Plan's potential Repayment to BCBS Tennessee of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS Tennessee in connection with the Claims.

(e) The term ''Independent Fiduciary'' means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS Tennessee and does not hold an ownership interest in BCBS Tennessee or affiliates of BCBS Tennessee;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries; [32]

(5) Has not received gross income from BCBS Tennessee or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS Tennessee or from affiliates of BCBS Tennessee while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The ''Plan'' means the BlueCross BlueShield of Tennessee, Inc. Pension Plan.

(g) The term ''Plan Losses'' means the $93,576,015 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term ''Restorative Payment'' means the payments made by BCBS Tennessee to the Plan in connection with the Plan Losses, defined above, consisting of a $100,000,000 payment that BCBS Tennessee contributed to the Plan on October 8, 2020. This $100,000,000 payment is the Required Restorative Payment Amount.

(i) The ''Repayment'' means the payment, if any, that the Plan will transfer to BCBS Tennessee following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

Section II. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective October 8, 2020, to the following transactions: BCBS Tennessee's transfer of the Restorative Payment to the Plan; and, in return, the Plan's Repayment of an amount to BCBS Tennessee, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

Section III. Conditions

(a) The Plan received the entire Restorative Payment Amount by October 8, 2020;

(b) In connection with its receipt of the Required Restorative Payment, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS Tennessee; and/or (4) any person or entity related to a person or entity identified in (1)–(3) of this paragraph;

(c) The Plan's Repayment to BCBS Tennessee is not more than the lesser of the total Restorative Payment received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS Tennessee may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBS Tennessee must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payment and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payment, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

[32] 29 CFR 2509.75–4.

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS Tennessee for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBS Tennessee to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75–4.

(f) The Plan pays no interest in connection with the Restorative Payment;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payment;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payment. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS Tennessee for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS Tennessee under this exemption, the amount of reasonable attorney fees paid by BCBS Tennessee on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBS Tennessee in connection with the Claims from any non-Plan party (*i.e.,* pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBS Tennessee must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(l) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

Effective Date: This exemption is effective as of October 8, 2020.

For Further Information: Contact Ms. Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567. (This is not a toll-free number.)

Midlands Management Corporation 401(k) Plan Oklahoma City, OK

[Prohibited Transaction Exemption 2023–11; Application No. D–12031]

Exemption

On March 9, 2022, the Department published a notice of proposed exemption in the **Federal Register** [33] that would permit: (1) the December 18, 2018 Restorative payment of $8,292,189 to the Plan by Safety National in exchange for the Plan's assignment to Midlands of the Assigned Interests; and (2) the potential additional cash payment(s) by Midlands to the Plan if the amount(s) Midlands receives from the Assigned Interests exceeds $8,292,189, provided the conditions described in the proposal were met.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

[33] 87 FR 13315 (March 9, 2022).

Background

As discussed in further detail in the proposed exemption, beginning as early as 2013, and continuing through 2017, the Plan's former third party administrator, Vantage Benefit Administrators (Vantage), caused the unauthorized transfers of Plan assets directly to an account that Vantage used to operate its own business. Vantage caused 180 such unauthorized transfers that totaled in excess of $5.5 million. Midlands Management Corporation (Midlands), the Plan sponsor, became aware of the unauthorized withdrawals on October 25, 2017 and engaged an unrelated party, Beasley & Company (Beasley), to investigate and assess associated Plan losses. Beasley ultimately found that the Plan's losses were $9,292,189.[34]

The Plan and Midlands filed suit against Vantage and its principals, Jeffrey and Wendy Richie, and on March 18, 2018, obtained a $10,170,452.00 final judgment. On April 19, 2018, an involuntary Chapter 7 bankruptcy petition was filed against Vantage. The Plan and Midlands have filed a creditor claim against the Vantage bankruptcy estate. The Plan has also received a $1,000,000 insurance settlement payment in connection with the unauthorized transfers.[35]

In addition to the Claims against Vantage and the Richies, the Plan and Midlands filed Claims against Matrix Trust Company, the Plan's custodian, and RSM and Cole & Reed, P.C., the Plan's former auditors. Collectively, the claims against these parties, as well as against Vantage and the Richies are hereinafter referred to as the ''Lawsuits.'' The Applicant estimates that it anticipates recovering up to $4 million total, or approximately 49 percent of the Restorative Payment amount.

On December 18, 2018, Midlands was acquired by Safety National Casualty Corporation. In connection with the acquisition, Safety National made an $8,292,189 restorative payment to the Plan to restore losses caused by the unauthorized withdrawals (the Restorative Payment). The Applicant represents that the Restorative Payment addresses the $9,292,189 in aggregate losses incurred by the Plan, minus the $1,000,000 settlement payment that the

[34] Amount includes both principal amount and associated lost interest.

[35] This settlement payment came via the Plan's crime policy with Federal Insurance Company and was subsequently allocated to participant accounts and reported as ''other contributions'' in the Plan's statement of changes in net assets available for benefits for the year ended December 31, 2018.

Plan received from Federal Insurance Company.

In exchange for the Restorative Payment, the Plan transferred the Assigned Interests to Midlands pursuant to a Recovery Rights Agreement. As discussed throughout the proposed exemption, the Assigned Interests represent the Plan's rights to receive proceeds from the Lawsuits.

On March 9, 2022, the Department proposed an exemption that would permit the Restorative Payment of $8,292,189 to the Plan in exchange for the Plan's assignment to Midlands of the Plan's right to proceeds from the Lawsuits and the potential additional cash payment(s) by Midlands to the Plan if the amount(s) Midlands recovers from the Assigned Interests exceeds $8,292,189 (the Transactions). Absent an exemption, the Transactions would violate ERISA Sections 406(a)(1)(A) and (D).[36]

This exemption requires a prudently appointed and qualified independent fiduciary, Prudent Fiduciary Services, LLC (PFS), to protect and promote the interests of Plan participants and beneficiaries for all purposes with respect to the Transactions. This exemption also requires that, in entering into the Recovery Rights Agreement, the Plan did not release any claims, demands, and/or causes of action against any fiduciary of the Plan or Midlands, and that the Plan has not and will not incur any expenses or bear any costs in connection with the assignment of its rights under the Recovery Rights Agreement, the Lawsuits, or this exemption.

As required under this exemption, if Midlands recovers more than the $8,292,189 Restorative Payment amount from the Assigned Interests, Midlands would be required to immediately transfer any such excess directly to the Plan. Conversely, if Midlands recovers less than $8,292,189 from the Assigned Interests, the Plan would not be required to repay any amount of the Restorative Payment back to Midlands, and Midlands would be solely responsible for all costs and expenses associated with pursuing the Assigned Interests.

[36] ERISA Section 406(a)(1)(A) prohibits a plan fiduciary from causing the plan to engage in a transaction if the fiduciary knows or should know that such transaction constitutes a direct or indirect sale or exchange of any property between the plan and a party-in-interest. ERISA Section 406(a)(1)(D) prohibits a plan fiduciary from causing a plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or an indirect transfer to, or use by or for the benefit of, a party-in-interest, of the income or assets of the plan.

With regard to this exemption, the Department finds that the favorable terms of the Transactions together with the protective conditions included therein are appropriately protective of, and in the interest of the Plan and its participants and beneficiaries. In this regard, the Department notes that the Restorative Payment immediately provided the Plan with $8,292,189 in cash. If the Plan did not receive the immediate Restorative Payment, the individual account balances of Plan participants would have remained underfunded in the aggregate by $8,292,189 until the Lawsuits were resolved.

Written Comments

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption. All comments and requests for a hearing were due to the Department by April 22, 2022. The Department received no written comments and did not receive any requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption described below.

The complete application file (D–12031) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on March 9, 2022, at 87 FR 13315.

Exemption

Section I. Definitions

(a) The term ''Assigned Interests'' means the Plan's right to proceeds from the Lawsuits, which were transferred to Midlands in return for the Restorative Payment.

(b) The term ''Independent Fiduciary'' means Prudent Fiduciary Services, LLC (PFS), or a successor Independent Fiduciary, to the extent PFS or the successor Independent Fiduciary continues to serve in such capacity, and who:

(1) Is not an affiliate of Midlands and does not hold an ownership interest in Midlands or affiliates of Midlands;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) Is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries at 29 CFR 2509.75–4;

(5) Has not received gross income from Midlands or affiliates of Midlands for that fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from Midlands or from affiliates of Midlands while serving as an Independent Fiduciary. This prohibition will continue for a period of six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as Independent Fiduciary.

(c) The term ''Lawsuits'' means the lawsuit filed by the Plan and Midlands against Vantage and its principals, Jeffrey and Wendy Richie in Case No.: 3:17-cv-03459, the bankruptcy claims filed against the Chapter 7 Estate of Vantage, and the claims filed against Matrix Trust, RSM, and Cole & Reed, for misrepresentation, breach of contract, breach of fiduciary duties, violations of state law, aiding and abetting, failure to supervise, and common law fraud.

(d) The term ''Midlands'' includes the following entities: (i) Midlands

Management Corporation, (ii) the CAP Shareholders, and (iii) Cap Managers, LLC.

(e) The term ''Recovery Rights Agreement'' means the written agreement under which the Plan agreed to transfer its rights to the Assigned Interests in exchange for the Restorative Payment.

(f) The term ''Restorative Payment'' means the $8,292,189 payment that was remitted to the Plan by Safety National as part of Safety National's acquisition of Midlands.

Section II. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A) and (D) shall not apply to: (1) the December 18, 2018 Restorative payment of $8,292,189 to the Plan by Safety National in exchange for the Plan's assignment to Midlands of the Assigned Interests; and (2) the potential additional cash payment(s) by Midlands to the Plan if the amount(s) Midlands receives from the Assigned Interests exceeds $8,292,189. In order to receive such relief, the conditions in Section III must be met in conformance with the definitions set forth in Section I.

Section III. Conditions

(a) The Restorative Payment and any Excess Recovery Amount payment, described below, are properly allocated to the Plan participants' accounts;

(b) If Midlands receives more than $8,292,189 from the Assigned Interests, Midlands must immediately transfer to the Plan the Excess Recovery Amount, which is the difference between the amount of Assigned Interest proceeds and $8,292,189. Midlands may reduce the Excess Recovery Amount (but not the Restorative Payment amount) paid to the Plan only by the amount of reasonable attorney's fees that Midlands incurred in pursuing the Assigned Interests if the fees were paid to unrelated third parties;

(c) If Midlands receives less than $8,292,189 from the Assigned Interests, then Midlands must automatically forgive any unrecovered shortfall amount, with no Plan assets transferred to Midlands;

(d) In connection with its receipt of the Restorative Payment, the Plan has not and will not release any claims, demands and/or causes of action it may have against: (1) any fiduciary of the Plan; (2) Midlands; and/or (3) any person or entity related to a person or entity identified in (1)–(2) of this paragraph;

(e) A qualified independent fiduciary (the Independent Fiduciary) that is unrelated to Midlands and/or its affiliates and is acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B):

(1) Reviewed the terms and conditions of the Restorative Payment and the Recovery Rights Agreement and the proposed and final exemptions;

(2) Determined that the Covered Transactions were prudent, in the interest of, and protective of the Plan and its participants and beneficiaries;

(3) Confirmed that the Restorative Payment amount was properly made to the Plan and appropriately allocated;

(4) Monitors the Plan's Assigned Interests on an ongoing basis to ensure that all recovery amounts due the Plan are immediately and properly remitted to the Plan, and appropriately allocated to participant accounts;

(5) Monitors and ensures that legal fees paid in connection with the Assigned Interests and the Lawsuits are limited to reasonable attorney's fees paid to unrelated third parties that Midlands incurred in pursuing recoveries from the Assigned Interests and the Lawsuits;

(6) Has not entered into any agreement or instrument that violates ERISA Section 410 or Department's Regulations codified at 29 CFR 2509.75–4;

(f) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party associated with this exemption, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the Proposed Transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation;

(g) Not later than 90 days after the resolution of Midlands' collection efforts with respect to the Assigned Interests, the Independent Fiduciary must submit a written statement to the Department confirming and demonstrating that all of the requirements of the exemption have been met;

(h) If an Independent Fiduciary resigns, is removed, or is unable to serve as an Independent Fiduciary for any reason, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section I(b); and (2) otherwise meets all of the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible before the appointment of a successor Independent Fiduciary, the Applicant must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information including the qualifications of the successor Independent Fiduciary;

(i) Neither the Independent Fiduciary, nor any parties related to the Independent Fiduciary, have performed any prior work on behalf of Midlands or any party related to Midlands;

(j) Neither the Independent Fiduciary, nor any parties related to the Independent Fiduciary, have any financial interest with respect to the Independent Fiduciary's work as Independent Fiduciary, apart from the express fees and reimbursement for reasonable expenses paid to the Independent Fiduciary to represent the Plan with respect to the Covered Transactions that are the subject of this exemption;

(k) Neither the Independent Fiduciary, nor any parties related to the Independent Fiduciary, have received any compensation or entered into any financial or compensation arrangements with Midlands or any parties related to Midlands;

(l) The Plan pays no interest in connection with the Restorative Payment;

(m) No Plan assets are pledged to secure the Restorative Payment;

(n) The Covered Transactions do not involve any risk of loss to either the Plan or its participants and beneficiaries;

(o) The Plan has no liability for the Restorative Payment, even in the event that the amount recovered by Midlands with respect to the Assigned Interests is less than $8,292,189;

(p) The Plan does not incur any expenses, commissions or transaction costs in connection with the Covered Transactions and this exemption;

(q) Midlands may not receive or retain any proceeds from the Lawsuits other than from the Assigned Interests;

(r) All terms of the Covered Transactions are and will remain at least as favorable to the Plan as the terms and conditions the Plan could obtain in a similar transaction negotiated at arm's-length with unrelated third parties; and

(s) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate, at all times.

Effective Date: This exemption is effective as of December 18, 2018.

For Further Information: Contact Mr. Joseph Brennan of the Department, telephone (202) 693–8456. (This is not a toll-free number.)

DISH Network Corporation 401(k) Plan and the EchoStar 401(k) Plan (Collectively, the Plans) Located in Englewood, CO

[Prohibited Transaction Exemption 2023–12; Exemption Application No. D–12012]

Exemption

On March 9, 2022, the Department published a notice of proposed exemption in the **Federal Register** at 87 FR 13320, regarding the acquisition and holding by the DISH Network Corporation 401(k) Plan (the DISH Plan) and the EchoStar 401(k) Plan (the EchoStar Plan) of subscription rights (the Rights) that were issued during the period November 26–29, 2019, by the DISH Network Corporation (DISH or the Applicant), a party in interest with respect to the Plans.[37]

Based on the record, the Department has determined to grant the proposed exemption. This exemption provides only the relief specified herein. It provides no relief from violations of any law other than the prohibited transaction provisions of ERISA, as expressly stated herein.

The Department makes the requisite findings under ERISA Section 408(a) based on the Applicant's adherence to all of the conditions of the exemption. Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

Background

As discussed in greater detail in the proposed exemption, on November 7, 2019, DISH announced its intent to conduct a rights offering (the Offering) for general corporate purposes, including investments in DISH's wireless business. The DISH Chairman and controlling shareholder is Charles W. Ergen.

Mr. Ergen also beneficially owns more than 50% of the total combined voting power of EchoStar Corporation (EchoStar), a global provider of satellite communications solutions.

Under the Offering, all holders of record of DISH's Class A (the Class A Stock) and DISH's Class B common stock (the Class B Stock), or collectively, the ''DISH Stock''), and outstanding convertible notes automatically received certain rights (the Rights), at no charge. Among the holders of the DISH Stock were the DISH Plan and the EchoStar Plan, which are sponsored by DISH and EchoStar, respectively.

Under the terms of the Offering, each holder received one Right for every 18.475 shares of DISH Class A or B Common Stock, or a Class A Common Stock equivalent (as applicable). Fractional Rights were not issued. A total of 29,834,992 Rights to purchase 29,834,992 DISH Class A Common Stock were issued in the Offering. Each Right entitled the holder to purchase one share of DISH Class A Common Stock for $33.52 per whole share of Class A Common Stock.

The DISH Plan received 180,084 Rights and the EchoStar Plan received 9,073 rights in connection with the Offering. The Applicant represents that Newport Trust Company (Newport), a qualified independent fiduciary acting solely in the interest of the Plans' participants, made all decisions regarding the holding and disposition of the Rights by each Plan in accordance with the Plans' provisions.

The Applicant requested an exemption to permit the acquisition and holding by the Plans of the Rights that were issued by DISH, a party in interest with respect to the Plans, from November 26 through November 29, 2019. An exemption is necessary because the acquisition and holding of the Rights by the Plans is prohibited under ERISA and the Code.

On March 9, 2022, the Department published a notice of proposed exemption in the **Federal Register** at 87 FR 13320 that would permit the Plans' acquisition and holding of the Rights. The exemption requires Newport to protect and promote the interests of the Plans' participants in the transactions. The exemption's protective conditions include a requirement that Newport represent the Plans' interests for all purposes with respect to the acquisition and holding of the Rights, and that no brokerage fees, commissions, subscription fees, or other charges were paid by the Plans with respect to the acquisition and holding of the Rights. In addition, Newport's responsibilities included determining whether and when to exercise or sell each Right held by the Plans.

As discussed below, with regard to this exemption, the Department finds that the favorable terms of the acquisition and holding of the Rights by the Plans, combined with the protective conditions included therein, are appropriately protective and in the interest of the Plans and their participants to support the granting of this exemption.

Comments Received Regarding Proposed Exemption

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the proposed exemption by April 25, 2022. During the comment period, the Department received one written comment from the Applicant, which requested several clarifications to the proposed exemption in the areas discussed below. The Department also received 12 comments from Plan participants (eight in writing and four by phone) regarding whether the exemption would affect their benefits, and in response, the Department explained the proposed exemption to each commenter.

Applicant's Comments

1. No ERISA Section 406(b) Exemptive Relief

The Applicant notes that the proposed exemption does not include the same scope of exemptive relief as prior rights offering exemptions. While some prior exemptions involving rights offerings provide relief from ERISA Sections 406(b)(1) and 406(b)(2),[38] this exemption does not. The Applicant requests clarification that exemptive relief from Section 406(b)(1) and (2) is not necessary. Alternatively, the Applicant requests that this exemption provide relief from ERISA Sections 406(b)(1) and (2).

Department's Response: The Department understands the following based on the Applicant's representations:

- DISH conducted the Rights Offering for its own general corporate purposes;
- All holders of record of DISH's Class A and B Common Stock received the Rights automatically at no charge;
- As required by this exemption, all decisions regarding the holding and disposition of the Rights by each Plan were made in accordance with the Plan provisions by a qualified independent

[37] For purposes of this exemption, references to the provisions of Title I of ERISA, unless otherwise specified, should be read to refer as well to the corresponding provisions of Code Section 4975.

[38] ERISA Section 406(b)(1) prohibits a plan fiduciary from dealing with the assets of a plan in his own interest or own account. ERISA Section 406(b)(2) prohibits a plan fiduciary in his individual or in any other capacity from acting in any transaction involving the plan on behalf of a party, or representing a party whose interests are adverse to the interests of the plan or the interests its participants or beneficiaries of the plan.

fiduciary acting solely in the interest of Plan participants.

Based on these representations, the Department has determined that ERISA Section 406(b)(1) or (2) is not implicated with respect to the transactions covered herein. Accordingly, any act of self-dealing or conflict of interest by a Plan fiduciary is not covered by this exemption.

2. Rights Described as Issued to Individually-Directed Participant Accounts

Section I of the proposed exemption describes the covered transactions as including the issuance of the Rights ''to the individually-directed accounts of participants'' in the Plans. The Applicant states it would be more accurate to state that the Rights were issued to the Plans. The Applicant also notes that for both of the DISH Network Corporation 401(k) Plan and the EchoStar Corporation 401(k) Plan, the proceeds from the sale of rights were allocated pro rata to the plan accounts of participants invested in DISH Stock, based on their plan account holdings on the November 17, 2019 record date of the rights offering.

Department's Response: The Department has revised Section I of the exemption to reflect the Applicant's requested change that the Rights were issued to the Plans rather than to the participants' accounts in the Plans.

3. Proposed Exemption Preamble States That DISH and EchoStar Participants Were Treated the Same

The Applicant notes that preamble to the proposed exemption states that ''[t]he acquisition and holding of the Rights occurred as a result of the Rights Offering, which was approved by the DISH Board of Directors, in which all shareholders of DISH *and EchoStar,* including their Plans, were treated exactly the same . . .'' [emphasis added]. The Applicant also notes that ownership of shares of EchoStar Corporation stock did not provide any entitlement to the Rights.

Department's Response: The Department accepts this clarification to the proposed exemption preamble.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption described below. The Department has also added clarifying language to certain conditions of the exemption.

The complete application file (D–12012) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the proposed exemption.[39]

Exemption

Section I. Covered Transactions

The restrictions of ERISA Sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A), and Code Sections 4975(c)(l)(A) and (E), by reason of Code Section 4975(c)(1), will not apply to the past acquisition and holding by the DISH Network Corporation 401(k) Plan (the DISH Plan) and the EchoStar 401(k) Plan (the EchoStar Plan; collectively, the Plans) of certain subscription rights (the Rights) that were issued by the DISH Network Corporation (DISH or the Applicant) to Plans during a rights offering (the Rights Offering) that occurred from November 26 through November 29, 2019, if the conditions described in Section II below have been met.

Section II. Conditions

(a) The Plans acquired the Rights as a result of an independent act of DISH as a corporate entity without any action by the Plans;

(b) The acquisition and holding of the Rights occurred as a result of a rights offering approved by the DISH board of directors that treated all DISH shareholders the same, including the Plans;

(c) The acquisition of the Rights by the Plans occurred on the same terms made available to other eligible holders of DISH Stock and convertible notes, and the Plans received the same proportionate number of Rights as such other eligible holders;

(d) The Plans did not pay any fees or commission in connection with the acquisition or holding of the Rights. The Plans paid commissions and SEC fees to third parties solely in connection with the sale of the Rights;

(e) All decisions regarding the holding and disposition of the Rights by the Plans were made by Newport Trust Company (Newport), acting prudently and solely in the interest of the participants of the Plans, in accordance with the provisions of the Plans as the qualified independent fiduciary (the Independent Fiduciary);

(f) As the Independent Fiduciary, Newport:

(1) Has not been indemnified, in whole or in part, for negligence of any kind or for any violation of state or federal law in performing its duties and responsibilities to the Plans under the terms of this exemption, and there is no cap or limitation on its liability for negligence of any kind arising from the performance of its duties as the Plans' Independent Fiduciary;

(2) Has not entered into any agreement or instrument that violates ERISA Section 410 or the Department's regulations at 29 CFR 2509.75–4 by purporting to relieve Newport from responsibility or liability for any responsibility, obligation or duty imposed on it under Part 1 of Title I of ERISA; and

(3) Has acknowledged that there is no instrument or contractual arrangement that purports to waive or release it from liability for any violation of state or federal law.

Effective Date: This exemption is effective from November 26, 2019, the date the Plans received the Rights, until November 29, 2019, the last date the Rights were sold by the Plans on the NASDAQ Global Select Market.

For Further Information: Contact Mrs. Blessed Chuksorji-Keefe of the Department at (202) 693–8567. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

[39] 87 FR 13320 (3/9/2022).

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

George Christopher Cosby,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2023–03632 Filed 2–22–23; 8:45 am]

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Part VII

Department of Homeland Security

8 CFR Part 208

Department of Justice

Executive Office for Immigration Review

8 CFR Part 1208

Circumvention of Lawful Pathways; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[CIS No. 2736–22; Docket No: USCIS 2022–0016]

RIN 1615–AC83

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1208

[A.G. Order No. 5605–2023]

RIN 1125–AB26

Circumvention of Lawful Pathways

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security (''DHS'') and the Department of Justice (''DOJ'') are issuing a notice of proposed rulemaking (''NPRM'' or ''proposed rule'') in anticipation of a potential surge of migration at the southwest border (''SWB'') of the United States following the eventual termination of the Centers for Disease Control and Prevention's (''CDC'') public health Order. The proposed rule would encourage migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in countries through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain. It would do so by introducing a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel. In the absence of such a measure, which would be implemented on a temporary basis, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments' continued ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system, in the face of exceptionally challenging circumstances. Coupled with an expansion of lawful, safe, and orderly pathways into the United States, the Departments expect the proposed rule to lead to a reduction in the numbers of migrants who seek to cross the SWB without authorization to enter, thereby reducing the reliance by migrants on dangerous human smuggling networks, protecting against extreme overcrowding in border facilities, and helping to ensure that the processing of migrants seeking protection in the United States is done in an effective, humane, and efficient manner.

DATES: Comments must be submitted on or before March 27, 2023. The electronic Federal Docket Management System will accept comments before midnight eastern time at the end of that day.

ADDRESSES: You may submit comments on this proposed rule through the Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the website instructions for submitting comments. Comments submitted in a manner other than the one listed above, including emails or letters sent to the Departments' officials, will not be considered comments on the proposed rule and may not receive a response from the Departments. Please note that the Departments cannot accept any comments that are hand-delivered or couriered. In addition, the Departments cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs or USB drives. The Departments are not accepting mailed comments at this time. If you cannot submit your comment by using *http://www.regulations.gov,* please contact the Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 (not a toll-free call) for alternate instructions.

FOR FURTHER INFORMATION CONTACT:

For DHS: Daniel Delgado, Acting Director, Border and Immigration Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security; telephone (202) 447–3459 (not a toll-free call).

For Executive Office for Immigration Review (''EOIR''): Lauren Alder Reid, Assistant Director, Office of Policy, EOIR, Department of Justice, 5107 Leesburg Pike, Falls Church, VA 22041; telephone (703) 305–0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to submit comments on this action by submitting relevant written data, views, or arguments. To provide the most assistance to the Departments, comments should reference a specific portion of the proposed rule; explain the reason for any recommendation; and include data, information, or authority that supports the recommended course of action. Comments must be submitted in English, or an English translation must be provided. Comments submitted in a manner other than those listed above, including emails or letters sent to the Departments' officials, will not be considered comments on the proposed rule and may not receive a response from the Departments.

Instructions: If you submit a comment, you must submit it to DHS Docket Number USCIS 2022–0016. All submissions may be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to the Departments. The Departments may withhold information provided in comments from public viewing that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at *https://www.regulations.gov.*

Docket: For access to the docket and to read background documents or comments received, go to *https://www.regulations.gov,* referencing the docket number listed above. You may also sign up for email alerts on the online docket to be notified when comments are posted or another **Federal Register** document is published.

II. Executive Summary

Economic and political instability around the world is fueling the highest levels of migration since World War II, including in the Western Hemisphere. Even while CDC's Title 42 public health Order has been in place, encounters at our SWB [1]—referring to the number of

[1] United States Government sources refer to the U.S. border with Mexico by various terms, including ''SWB,'' ''the southern border,'' ''U.S.-Mexico border,'' or ''the land border with Mexico.'' In some instances, these differences can be substantive, referring only to portions of the border, while in others they simply reflect different word choices. The ''southern border'' is both a land and maritime border extending from beyond California to the west to beyond Florida to the east. This proposed rule would apply along the entirety of the U.S. land border with Mexico, referred to in the regulatory text as the ''southwest land border,'' but the Departments use different terms in the preamble to describe the border. This is in large part to reflect the source material supporting the proposed rule, but the Departments believe that the factual

times U.S. officials encounter noncitizens [2] attempting to cross the SWB of the United States without authorization to do so—have reached an all-time high, driven in large part by an unprecedented exodus of migrants from countries such as Colombia, Cuba, Ecuador, Nicaragua, Peru, and Venezuela. For the 30 days ending December 24, 2022, total daily encounters along the SWB consistently fluctuated between approximately 7,100 and 9,700 per day, averaging approximately 8,500 per day, with encounters exceeding 9,000 per day on 12 different occasions during this 30-day stretch.[3] Smuggling networks enable and exploit this unprecedented movement of people, putting migrants' lives at risk for their own financial gain.[4] Meanwhile, the current asylum system—in which most migrants who are initially deemed eligible to pursue their claims ultimately are not granted asylum in the subsequent EOIR removal proceedings [5]—has contributed to a growing backlog of cases awaiting review by asylum officers and immigration judges. The practical result of this growing backlog is that those deserving of protection may have to wait years for their claims to be granted, while individuals who are ultimately found not to merit protection may spend years in the United States before being issued a final order of removal. As the demographics of border encounters have shifted in recent years to include larger numbers of non-Mexicans—who are far more likely to make asylum claims—and as the time required to process and remove noncitizens ineligible for protection has grown (during which time individuals become eligible to apply for employment authorization), the apprehension of border crossers has had limited deterrent effect.[6]

While the CDC's Title 42 public health Order [7] has been in effect, migrants who do not have proper travel documents have generally not been processed into the United States; they have instead been expelled to Mexico or to their home countries under the Order's authority without being processed under the authorities set forth in Title 8 of the United States Code, which includes the Immigration and Nationality Act (''INA'' or ''the Act''). When the Order is eventually lifted, however, the United States Government will process all such migrants who cross the border under Title 8 authorities, as statutorily required. At that time, the number of migrants seeking to cross the SWB without lawful authorization to do so is expected to increase significantly, unless other policy changes are made. Such challenges were evident in the days following the November 15, 2022, court decision that, had it not been stayed on December 19, 2022, would have resulted in vacatur of the Title 42 public health Order effective December 21, 2022.[8] Leading up to the expected termination date, migrants gathered in various parts of Mexico, including along the SWB, waiting to cross the border once the Title 42 public health Order was lifted.[9] According to internal Government sources, smugglers were also expanding their messaging and recruitment efforts, using the expected lifting of the Title 42 public health Order to claim that the border was open, thereby seeking to persuade would-be migrants to participate in expensive and dangerous human smuggling schemes. In the weeks between the November announcement that the Title 42 public health Order would be lifted and the December 19 stay order that kept the Title 42 public health Order in place, encounter rates jumped from an average of 7,700 per week (early November) to 8,600 per week (mid-December).[10]

While a number of factors make it particularly difficult to precisely project the numbers of migrants who would seek to cross the border, without authorization, after the lifting of the Title 42 public health Order, DHS encounter projections and planning models suggest that encounters could rise to 11,000–13,000 encounters per day, absent policy changes and absent a viable mechanism for removing Cuban, Haitian, Nicaraguan, and Venezuelan (''CHNV'') nationals who do not have a valid protection claim.[11] Early data indicate that the recently announced enforcement processes, as applied to Cuban, Haitian, and Nicaraguan nationals,[12] which couple new parole

circumstances described in the preamble call for applying the proposed rule across the entirety of the U.S. land border with Mexico.

[2] For purposes of this discussion, the Departments use the term ''noncitizen'' to be synonymous with the term ''alien'' as it is used in the Immigration and Nationality Act (''INA'' or ''Act''). *See* INA 101(a)(3), 8 U.S.C. 1101(a)(3); *Barton* v. *Barr,* 140 S. Ct. 1442, 1446 n.2 (2020).

[3] DHS Office of Immigration Statistics (''OIS'') analysis of data downloaded from the U.S. Customs and Border Protection (''CBP'') Unified Immigration Portal (''UIP'') on January 4, 2023.

[4] Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business,* New York Times, July 26, 2022, *https://www.nytimes.com/2022/07/25/us/migrant-smugging-evolution.html* (last visited Dec. 13, 2022).

[5] *See* EOIR, Executive Office for Immigration Review Adjudication Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim (Oct. 13, 2022), *https://www.justice.gov/eoir/page/file/1062976/download* (last visited Jan. 27, 2023). The EOIR adjudication outcome statistics report on the total number of cases originating with credible fear claims resolved on any ground in a fiscal year, without regard to whether an asylum claim was adjudicated. The asylum grant rate is a percentage of that total number of cases.

[6] For noncitizens encountered at the SWB in FY 2014–FY 2019 who were placed in expedited removal, 6 percent of Mexican nationals made fear claims that were referred to USCIS for adjudication, compared to 57 percent of people from Northern Central America, and 90 percent of all other nationalities. OIS analysis of Enforcement Lifecycle data as of September 30, 2022. Of note, according to OIS analysis of historic EOIR and CBP data, there is a clear correlation since FY 2000 between the increasing time it takes to complete immigration proceedings and the lower share of noncitizens being removed, and the growth in non-Mexican encounters at the SWB. Both trends accelerated in the 2010s, as non-Mexicans became the majority of border encounters, and they have accelerated further since FY 2021, as people from countries other than Mexico and Northern Central America now account for the largest numbers of border encounters.

[7] *See* CDC, Public Health Determination and Order Regarding Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 87 FR 19941, 19941–42 (Apr. 6, 2022) (describing the CDC's recent Title 42 orders, which ''suspend[ ] the right to introduce certain persons into the United States from countries or places where the quarantinable communicable disease exists in order to protect the public health from an increased risk of the introduction of COVID–19'').

[8] *See Huisha-Huisha* v. *Mayorkas,* No. 21–100, 2022 WL 16948610 (D.D.C. Nov. 15, 2022), *cert. and stay granted, Arizona* v. *Mayorkas,* No. 22A544, 2022 WL 17957850 (S. Ct. Dec. 27, 2022).

[9] *See, e.g.,* Leila Miller, *Asylum Seekers Are Gathering at the U.S.-Mexico Border. This Is Why,* L.A. Times (Dec. 23, 2022), *https://www.latimes.com/world-nation/story/2022-12-23/la-fg-mexico-title-42-confusion* (last visited Jan. 27, 2023).

[10] OIS analysis of CBP UIP data downloaded January 13, 2023.

[11] DHS SWB Encounter Planning Model generated January 6, 2023. The complexity of international migration limits the Department's ability to precisely project border encounters under the best of circumstances. The current period is characterized by greater than usual uncertainty due to ongoing changes in the major migration source countries (*i.e.,* the shift from Mexico and Northern Central America to new countries of origin, discussed further below), the growing impact of climate change on migration, political instability in several source countries, the evolving recovery from the COVID pandemic, and uncertainty generated by border-related litigation, among other factors.

The DHS Office of Immigration Statistics (OIS) leads an interagency SWB Encounter Projections Working Group that generates encounter projections every 2–4 weeks, using the best data and modeling available. The enterprise encounter projection utilizes a mixed method blended model that combines a longstanding subject matter expert model produced by the CBP STAT Division with a Bayesian structural time series statistical model produced by OIS. The blended model is run through a standard statistical process (Monte Carlo simulations) to generate 68 percent and 95 percent confidence intervals for each of 33 separate demographic groupings. In light of the greater-than-usual uncertainty at the current time, the Department's planning models are designed to prepare the Department for all reasonably likely eventualities, and thereby focus on the upper bounds of the blended model's 68 and 95 percent confidence intervals.

[12] See Part III.E of this preamble.

processes with prompt returns of those who cross the SWB without utilizing these processes, are deterring irregular migration from those countries,[13] thus yielding a decrease in encounter numbers. However, there are a number of factors that could contribute to these gains being erased after the lifting of the Title 42 public health Order, including the presence of several large diaspora populations in Mexico and elsewhere in the hemisphere, the unprecedented recent growth in migration from countries of origin not previously typical, the already large number of migrants in proximity to the SWB, and the general uncertainty surrounding the expected impact of the termination of the Title 42 public health Order on the movement of migrants. Thus, the high end of the estimated encounter rate remains a possibility for which the Departments need to prepare. In the absence of the policy changes included in the proposed rule, most people processed for expedited removal under Title 8 will likely establish credible fear and remain in the United States for the foreseeable future despite the fact that many of them will not ultimately be granted asylum,[14] a scenario that would likely incentivize an increasing number of migrants to the United States and further increase the likelihood of sustained, high encounter rates.

Such a high rate of migration risks overwhelming the Departments' ability to effectively process, detain, and remove, as appropriate, the migrants encountered. This would put an enormous strain on already strained resources; risk overcrowding in already crowded U.S. Border Patrol (''USBP'') stations and border ports of entry in ways that pose significant health and safety concerns; and create a situation in which large numbers of migrants—only a small proportion of whom are likely to be granted asylum—are subject to extreme exploitation by the networks that support their movements north.

In response to this urgent and extreme situation, the Departments are proposing a rule that would—

- account for the lawful, safe, and orderly means for noncitizens to enter the United States to seek asylum and other forms of protection,
- provide core protections for noncitizens who would be threatened with persecution or torture in other countries, and
- build upon ongoing efforts to share the responsibility of providing asylum and other forms of protection to deserving migrants with the United States' regional partners.

At the same time, the NPRM would address the reality of unprecedented migratory flows, the systemic costs those flows impose on the immigration system, and the ways in which a network of increasingly sophisticated smuggling networks cruelly exploit the system for financial gain. Specifically, this rule would establish a presumptive condition on asylum eligibility for certain noncitizens who fail to take advantage of the existing and expanded lawful pathways [15] to enter the United States, including the opportunity to schedule a time and place to present at a port of entry and thus seek asylum or other forms of protection in a lawful, safe, and orderly manner, or to seek asylum or other protection in one of the countries through which they travel on their way to the United States.

This effort draws, in part, on lessons learned from the successful Uniting for Ukraine (''U4U'') [16] and Venezuela parole processes,[17] as well as the recently implemented processes for Cubans, Haitians, and Nicaraguans,[18] under which DHS coupled a mechanism for noncitizens from these countries to seek entry into the United States in a lawful, safe, and orderly manner, with the imposition of new consequences for those who cross the border without authorization to do so—namely returns to Mexico.[19] Prior to the implementation of these processes, the Government of Mexico had not been willing to accept the return of such nationals; the Government of Mexico's decision to do so was predicated, in primary part, on the implementation of these processes.

Prior to the announcement of U4U, for example, thousands of Ukrainian migrants, fleeing their country in the wake of Russia's unprovoked war of aggression, arrived at ports of entry along the SWB seeking entry into the United States. A large informal encampment formed in Tijuana, Mexico, and Ukrainian encounters averaged just under 940 per day in the two weeks prior to the announcement of U4U.[20] After U4U launched and Ukrainian citizens with approved applications were provided the option to fly directly into the United States—coupled with the return to Mexico pursuant to the Title 42 public health Order of Ukrainians who sought to cross irregularly at the land border—daily SWB encounters of Ukrainians dropped to an average of just over 12 per day in the two weeks ending May 10, 2022.[21]

Similarly, within a week of the announcement of the Venezuela parole process on October 12, 2022, the number of Venezuelans encountered at the SWB fell drastically, from an average of over 1,100 a day from October 5–11 to under 200 per day from October 18–24, and further declined to 67 per day as of the week ending November 29, 2022, and 28 per day the week ending January 22.[22] Similarly, the number of Cuban, Haitian, and Nicaraguan nationals encountered dropped significantly in the wake of the new processes being introduced, which coupled a lawful, safe, and orderly way for such nationals to seek parole in the United States with consequences (in the form of prompt returns to Mexico) for those who nonetheless crossed the SWB without authorization. Between the announcement of these processes on January 5, 2023, and January 21, the number of daily encounters between ports of entry of Cuban, Haitian, and Nicaraguan nationals dropped from 928 to 92, a 92 percent decline.[23]

This NPRM, which draws on these successful processes, would position the Departments to implement a temporary measure that would discourage irregular migration [24] by encouraging migrants to

[13] Encounters of Cubans, Haitians, and Nicaraguans between ports of entry at the southwest border declined from 928 on January 5 (the day of the announcement) to just 92 on January 22—a decline of 92 percent. Encounters of other noncitizens began to rebound from their typical seasonal drop, increasing by 40 percent during the same period. OIS analysis of CBP UIP data downloaded January 23, 2023.

[14] *See infra* Section III.C.

[15] The term ''lawful pathways,'' as used in this preamble, refers to the range of pathways and processes by which migrants are able to enter the United States or other countries in a lawful, safe, and orderly manner and seek asylum and other forms of protection.

[16] *See* DHS, *Uniting for Ukraine* (Sept. 16, 2022), *https://www.dhs.gov/ukraine* (last visited Dec. 13, 2022); DHS, Implementation of the Uniting for Ukraine Parole Process, 87 FR 25040 (Apr. 27, 2022).

[17] *See* DHS, *DHS Announces New Migration Enforcement Process for Venezuelans* (Oct. 12, 2022), *https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans* (last visited Dec. 13, 2022); *see also* DHS, Implementation of a Parole Process for Venezuelans, 87 FR 63507 (Oct. 19, 2022).

[18] These processes are further discussed in Part III.E of this preamble.

[19] While the Title 42 public health Order has been in place, those returns have been made under Title 42. When the Title 42 public health Order is lifted, the affected noncitizens will instead be subject to removal to Mexico under Title 8.

[20] OIS analysis of data pulled from CBP UIP on December 9, 2022.

[21] *Id.*

[22] USBP encountered an average of 225 Venezuelans per day in November 2022 and 199 per day in December 2022. OIS analysis of data pulled from CBP UIP on January 23, 2023. Data are limited to USBP encounters to exclude those being paroled in through ports of entry.

[23] OIS analysis of data pulled from CBP UIP on January 23, 2023.

[24] In this NPRM, ''irregular migration'' refers to the movement of people into another country without authorization.

use lawful, safe, and orderly pathways and allowing for swift returns of migrants who bypass lawful pathways, even after the termination of the Title 42 public health Order. It would respond to the expected increase of migrants seeking to cross the SWB following the termination of the Title 42 public health Order that would occur in the absence of a policy shift, by encouraging reliance on lawful, safe, and orderly pathways, thereby shifting the relevant incentives that otherwise encourage migrants to make a dangerous journey to the border. It would also be responsive to the requests of foreign partners that have lauded the sharp reductions in irregular migration associated with the aforementioned process for Venezuelans and have urged that the United States continue and build on this kind of approach, which couples processes for individuals to travel directly to the United States with consequences at the land border for those who do not avail themselves of these processes. The United States has, as noted above, already extended this model to Cuba, Haiti, and Nicaragua. The Departments assess that continuing to build on this approach is critical to our ongoing engagements with regional partners, in particular the Government of Mexico, regarding migration management in the region.

Consonant with these efforts, the United States already has taken significant steps to expand safe and orderly options for migrants to lawfully enter the United States. The United States has, for example, increased and will continue to increase—

- refugee processing in the Western Hemisphere;
- country-specific and other available processes for individuals seeking parole for urgent humanitarian reasons or other reasons of significant public benefit; and
- opportunities to lawfully enter the United States for the purpose of seasonal employment.

In addition, once the Title 42 public health Order is terminated, the United States will expand implementation of the CBP One application (''CBP One app''), an innovative mechanism for noncitizens to schedule a time to arrive at ports of entry at the SWB, to allow an increasing number of migrants who may wish to claim asylum to request an available time and location to present and be inspected and processed at certain ports of entry, in accordance with operational limitations at each port of entry.[25] Use of this app protects migrants from having to wait in long lines of unknown duration at the ports of entry, and enables the ports of entry to manage the flows in a safe and efficient manner, consistent with their footprint and operational capacity, which vary substantially across the SWB. Once present in the United States, those who enter through this mechanism would be able to make claims for asylum and other forms of protection and would be exempted from this proposed rule's rebuttable presumption on asylum eligibility. They would be vetted and screened, and assuming no public safety or national security concerns, would be eligible to apply for employment authorization after crossing the border as they await resolution of their cases.[26]

These and other available pathways increase the accessibility of humanitarian protection and other immigration benefits in ways that provide a lawful, safe, and orderly mechanism for migrants to make their protection claims. Consistent with U4U and the CHNV processes, this proposed rule would also position the Departments to impose consequences on certain noncitizens who fail to avail themselves of the range of lawful, safe, and orderly means for seeking protection in the United States or elsewhere. Specifically, this proposed rule would establish a rebuttable presumption that certain noncitizens who enter the United States without documents sufficient for lawful admission are ineligible for asylum, if they traveled through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, unless they were provided appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process; presented at a port of entry at a pre-scheduled time or demonstrate that the mechanism for scheduling was not possible to access or use; or sought asylum or other protection in a country through which they traveled and received a final decision denying that application. This presumption could be rebutted, and would necessarily be rebutted if, at the time of entry, the noncitizen or a member of the noncitizen's family had an acute medical emergency; faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder;[27] or satisfied the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11. The presumption also would be rebutted in other exceptionally compelling circumstances, as the adjudicators may determine in the sound exercise of the judgment permitted to them under the proposed rule. Unaccompanied children would be excepted from this presumption.

The rebuttable presumption would be a ''condition[]'' on asylum eligibility, INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), that would apply in affirmative and defensive asylum application merits adjudications, as well as during credible fear screenings. Individuals subject to the rebuttable presumption would remain eligible for statutory withholding of removal and protection under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT'').[28]

With the availability to schedule a time and place to arrive at U.S. ports of entry and other lawful pathways, this proposed system is designed to protect against an unmanageable flow of migrants arriving at the SWB; ensure that those with valid asylum claims have an opportunity to have their claims heard, whether in the United States or elsewhere; enable the Departments to continue administering the immigration laws fairly and effectively; and reduce the role of exploitative transnational criminal organizations and smugglers.

The Departments propose that the rule would apply to noncitizens who enter the United States without authorization at the southwest land border on or after the date of termination of the Title 42 public health Order and before a specified sunset date, 24 months from the rule's effective

[25] As of January 12, 2023, this mechanism is currently available for noncitizens seeking to cross SWB land ports of entry to request a humanitarian exception from the Title 42 public health Order. *See* CBP, Fact Sheet: Using CBP One™ to Schedule an Appointment (last modified Jan. 12, 2023), *https://www.cbp.gov/document/fact-sheets/cbp-one-fact-sheet-english* (last visited Jan. 13, 2023). Once the Title 42 public health Order is terminated, and the ports of entry open to all migrants who wish to seek entry into the United States, this mechanism will be broadly available to migrants in central and northern Mexico, allowing them to request an available time and location to present and be inspected and processed at certain ports of entry.

[26] Under current employment authorization regulations, there is no waiting period before a noncitizen parolee in this circumstance may apply for employment authorization. *See* 8 CFR 274a.12(c)(11).

[27] The term ''imminent'' refers to the immediacy of the threat; it makes clear that the threat cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer poses an immediate threat. The term ''extreme'' refers to the seriousness of the threat; the threat needs to be sufficiently grave, such as a threat of rape, kidnapping, torture, or murder, to trigger this ground for rebuttal.

[28] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114.

date. After the sunset date, the rule would continue to apply to such noncitizens during their Title 8 proceedings. The Departments intend that the rule would be subject to a review prior to its scheduled termination date, to determine whether the rebuttable presumption should be extended, modified, or sunset as provided in the rule.

Issuance of this rule is justified in light of the migration patterns witnessed in late November and December of 2022, and the concern about the possibility of a surge in irregular migration upon, or in anticipation of, the eventual lifting of the Title 42 public health Order. The Departments seek to obtain public comment on the proposal and to avoid any misimpression that migrants will be able to cross the border without authorization, and without consequence, upon the eventual lifting of the Order. Under this proposed rule the Departments would use their Title 8 authorities to process, detain, and remove, as appropriate, those who cross the SWB without authorization and do not have a valid protection claim.

The Departments are issuing this proposed role with a 30-day comment period because they seek to be in a position to finalize the proposed rule, as appropriate, before the Title 42 public health Order is lifted. The lifting of the Order could occur as a result of several different litigation and policy developments, including the vacatur of the preliminary injunction entered in *Louisiana* v. *CDC,* No. 22–cv–885, 2022 WL 1604901 (W.D. La. May 20, 2022), *appeal pending,* No. 22–30303 (5th Cir.); the lifting of the stay entered by the Supreme Court in *Arizona* v. *Mayorkas,* No. 22A544, 2022 WL 17957850 (U.S. Dec. 27, 2022); or ''the expiration of the Secretary of HHS' declaration that COVID–19 constitutes a public health emergency,'' 86 FR at 42829. The termination of the Secretary of HHS' declaration that COVID–19 constitutes a public health emergency is expected to occur on May 11, 2023 in light of the recent announcement that ''[a]t present, the Administration's plan is to extend'' the public health emergency to May 11 and then end it on that date, Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy (Jan. 30, 2023), *available at https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.* The Departments are thus seeking to move as expeditiously as possible, while also allowing sufficient time for public comment. For similar reasons, the Departments may conclude that it is necessary to shorten or forgo the standard 30-day delay in the final rule's effective date. In addition, if, prior to the issuance of the final rule, the Title 42 public health Order is lifted or encounter rates rise significantly (even without the lifting of the Title 42 public health Order), the Departments intend to take appropriate action, consistent with the Administrative Procedure Act (''APA''), which may include issuance of a temporary or interim final rule similar to this NPRM while the Departments complete the notice-and-comment rulemaking process.

The Departments are requesting comments on all aspects of the NPRM and particularly welcome comments addressing the following issues:

- Whether the proposed duration of the rule should be modified, including whether it should be shorter, longer, or of indefinite duration;
- Whether the Departments should modify, eliminate, or add to the proposed grounds for necessarily rebutting the rebuttable presumption;
- Whether the Departments should modify, eliminate, or add to the proposed exceptions to the rebuttable presumption;
- Whether the proposed mechanisms for evaluating asylum, statutory withholding, and CAT claims should be retained or modified;
- Whether any further regulatory provisions should be added or amended to address the application of the rebuttable presumption in adjudications that take place after the rule's sunset date; and
- Whether the proposed rule appropriately provides migrants a meaningful and realistic opportunity to seek protection.

In addition, although the Departments have not identified any persons or entities with justifiable reliance interests in the status quo concerning eligibility for asylum—which is an entirely discretionary benefit—the Departments welcome comments on the existence of reliance interests and the best ways to address them.

III. Background

A. Migratory Trends

Political and economic instability, coupled with the lingering adverse effects of the COVID–19 global pandemic, have fueled a substantial increase in migration throughout the world. This global increase is reflected in the trends on our border, where we have experienced a sharp increase in encounters of non-Mexican nationals over the past two years, and particularly in the final months of 2022. Throughout the 1980s and into the first decade of the 2000s, encounters along the SWB routinely numbered in excess of one million per year, with USBP averaging 1.2 million encounters per year from Fiscal Year (''FY'') 1983 through FY 2006.[29] By the early 2010s, three decades of investments in border security and strategy contributed to reduced border flows, with USBP averaging fewer than 400,000 encounters per year from 2011–2018.[30] These gains were subsequently reversed, however, as USBP SWB encounters more than doubled between 2017 and 2019 to reach a 12-year high.[31] Following a steep drop in the first months of the COVID–19 pandemic, encounters almost doubled again in 2021 as compared to 2019, increased by an additional one-third between 2021 and 2022, and reached an all-time high of 2.2 million USBP SWB encounters in FY 2022.[32] Encounters in the first quarter of FY 2023 (October–December 2022) exceeded the same period in FY 2022 by more than a third, and non-Mexican encounters in this same period were up 61 percent over the previous year.[33] (See Figure 1, below.)

1. Changing Demographics

Shifts in migrants' demographics have accelerated the increase in flows. Border encounters in the 1980s and 1990s consisted overwhelmingly of single adults from Mexico, most of whom were migrating for economic reasons.[34] Beginning in the 2010s, a growing share of migrants have been from Northern Central America (''NCA'') [35] and, since the late 2010s, from countries throughout the Americas.[36] As the

[29] OIS analysis of historic USBP data. Encounter data prior to 2005 are only available for U.S. Border Patrol. All numbers in this paragraph are likewise therefore limited to USBP encounters.

[30] *Id.*

[31] *Id.*

[32] *Id.* As discussed in the following section, encounter data from March 2020 through the current data somewhat overstate flows to the border since repeat encounters have been markedly higher during the period that Title 42 expulsions have been completed.

[33] OIS Persist data through December 31, 2022.

[34] According to historic OIS Yearbooks of Immigration Statistics, Mexican nationals accounted for 96 to over 99 percent of apprehensions of persons entering without inspection between 1980 and 2000. On Mexican migrants from this era's demographics and economic motivations, see Jorge Durand et al., ''The New Era of Mexican Migration to the United States,'' 86 *The Journal of American History,* no. 2, 518 (1999) (addressing the demographics and economic motivations of Mexican migrants from this era).

[35] Northern Central America refers to El Salvador, Guatemala, and Honduras.

[36] According to OIS Production data, Mexican nationals continued to account for 89 percent of total SWB encounters in FY 2010, with Northern Central Americans accounting for 8 percent and all

make-up of border crossers has expanded from Mexican single adults to single adults and families from throughout the hemisphere (and beyond), the number of encounters has increased; those encountered also have been more likely to seek asylum and other forms of relief.[37]

The application of Title 42 authorities at the land border also has altered migratory patterns, in part by incentivizing individuals who are expelled—without being issued a removal order, which, unlike a Title 42 expulsion order, carries immigration consequences [38]—to try to re-enter, often multiple times.[39] For this reason, the growth in encounters since 2021 is best assessed by comparing unique encounters—defined as the number of individuals who are encountered in a given year, instead of the total number of encounters, which can include a single migrant who sought to enter multiple times and is counted as an encounter each time—in recent months to those in the pre-pandemic period of FY 2014–FY 2019.[40]

The number of unique encounters increased sharply in FY 2021 to 1,126,888 (and 1,734,683 total encounters) from an average of 471,216 unique encounters (and 581,045 total encounters) per year in FY 2014–FY 2019.[41] Notably, both the number and percentage of unique encounters from countries other than Mexico and NCA contributed to a big share of this increase, rising sharply in FY 2021 to 322,123 (representing 29 percent of unique encounters), from an average of 40,549 per year (8 percent of unique encounters) in FY 2014–FY 2019.[42] This trend continued in FY 2022, with unique encounters reaching 1,741,506 (2,378,945 total encounters). This increase was largely driven by nationals of countries other than Mexico and NCA, accounting for 972,191 unique encounters (1,028,987 total encounters) in FY 2022 (56 percent of unique encounters; 43 percent of total encounters) and 424,530 unique encounters (442,932 total encounters) in the first three months of FY 2023 (71 percent of unique encounters; 62 percent of total encounters).[43] Migrant populations from these newer source countries have included large numbers of families and children.[44]

Much of this shift is driven by a significant increase in unique encounters of CHNV nationals, which jumped more than ten-fold from an average of 15,557 in FY 2014–FY 2019 to 169,436 in FY 2021, with total CHNV encounters increasing from an average of 33,095 to 184,716.[45] CHNV unique encounters increased sharply again in FY 2022 to 605,690 (626,410 total encounters), constituting 35 percent of all unique encounters in FY 2022 and 26 percent of total encounters that year.[46] Overall, unique encounters of CHNV nationals rose 257 percent between FY 2021 and FY 2022 (with total CHNV encounters rising 239 percent), unique encounters of Brazilians, Colombians, Ecuadorans, and Peruvians increased 100 percent (with total encounters increasing 56 percent), and unique encounters of Mexican and NCA nationals fell 4 percent (with total encounters falling 0.5 percent).[47] These trends continued in the first 3 months of FY 2023, with CHNV countries accounting for 40 percent of unique encounters October–December 2022 and Brazilians, Colombians, Ecuadorans, and Peruvians climbing to 19 percent.[48] (See Figure 2, below.)

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Figure 1: SWB U.S. Border Patrol Encounters, FY 1960–FY 2022

other nationalities for 3 percent. Northern Central Americans' share of total encounters increased to 21 percent by FY 2012 and averaged 46 percent in FY 2014–FY 2019, the last full year before the start of the COVID–19 pandemic. All other countries accounted for an average of 5 percent of total SWB encounters in FY 2010–FY 2013, and for 10 percent of total encounters in FY 2014–FY 2019.

[37] For noncitizens encountered at the SWB in FY 2014–FY 2019 who were placed in expedited removal, 6 percent of Mexican nationals made fear claims that were referred to USCIS for adjudication compared to 57 percent of people from Northern Central America and 90 percent of all other nationalities. OIS analysis of Enforcement Lifecycle data as of September 30, 2022.

[38] For example, subject to certain exceptions, noncitizens ordered removed pursuant to expedited removal (INA section 235(b)(1), 8 U.S.C. 1225(b)(1)) or section 240 (8 U.S.C. 1229a) removal proceedings initiated at the time of arrival in the United States are inadmissible for five years after the date of removal. INA 212(a)(9)(A)(i), 8 U.S.C. 1182(a)(9)(A)(i). Noncitizens previously removed pursuant to expedited removal orders or section 240 removal orders who enter or attempt to re-enter the United States without being admitted are also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the INA, 8 U.S.C. 1182(a)(9)(C)(i)(II). Such noncitizens may be subject to reinstatement of such a prior order of removal upon subsequent illegal re-entry. INA 241(a)(5), 8 U.S.C. 1231(a)(5).

[39] According to OIS analysis of OIS Persist Data through June 30, 2022, a total of 39 percent of noncitizens expelled under the Title 42 authority between March 2020 and May 2022 were re-encountered within one month, compared to 5 percent of those repatriated after issuance of a removal order issued pursuant to Title 8 authorities; and 12-month re-encounter rates were 47 percent for Title 42 expulsions compared to 14 percent for Title 8 repatriations. Persons expelled under the Title 42 authority were more likely to be re-encountered than those repatriated after issuance of a removal order issued pursuant to Title 8 authorities, regardless of citizenship or family status.

[40] The period FY 2014–FY 2019 is chosen as the comparison period because these were the first years in which non-Mexicans consistently accounted for a large and growing share of SWB encounters. The period since FY 2021 focuses on *unique* encounters, defined as persons not previously encountered in the 12 months prior to the referenced encounter date, because Title 42 has contributed to much higher repeat encounter rates, as 28 percent of SWB encounters since April 2020 have been repeat encounters, where repeat encounters are defined as encounters of individuals previously encountered in the preceding 12 months, compared to 15 percent of SWB encounters in FY 2013 through February 2020. OIS Persist Dataset based on data through December 31, 2022. (Detailed data on repeat versus unique encounters are not available before FY 2013.)

[41] OIS Persist Dataset based on data through December 31, 2022.

[42] *Id.*

[43] *Id.*

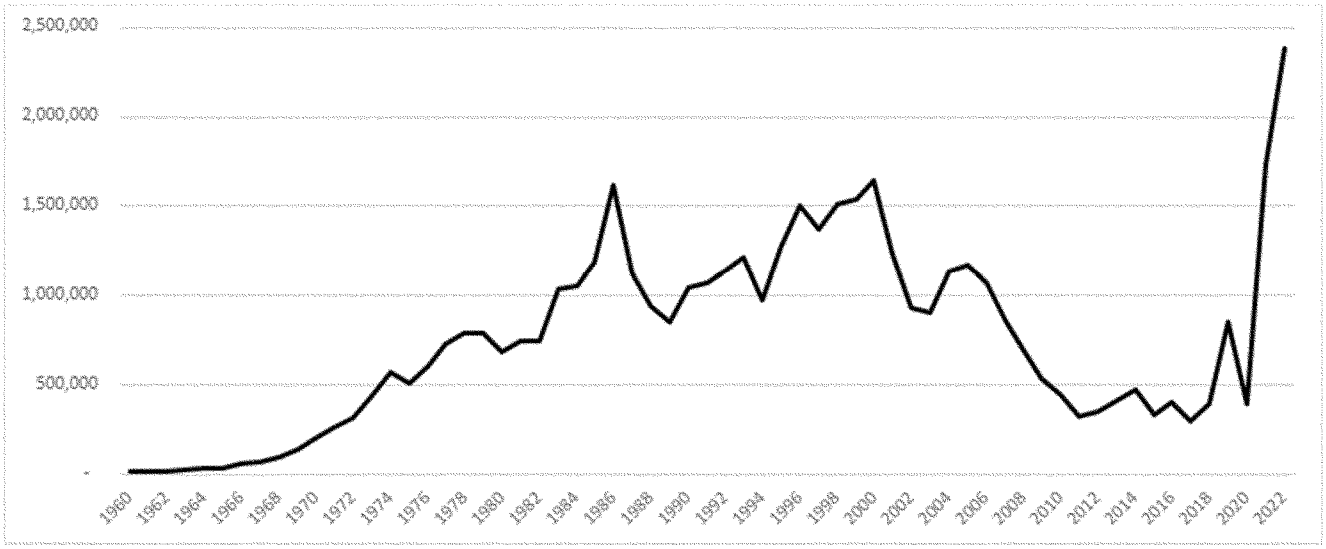
[44] A total of 65 percent of unique NCA encounters and 40 percent of all other unique non-Mexican encounters were unaccompanied children or family unit individuals in FY 2021–FY 2023Q1, compared to 13 percent of unique Mexican encounters. OIS Persist Dataset based on data through December 31, 2022.

[45] OIS Persist Dataset based on data through December 31, 2022.

[46] *Id.*

[47] *Id.* Of note, OIS utilizes a rigorous record matching methodology to generate unique encounter data, and the program is only run monthly upon receipt of CBP's official monthly encounter data. (The official encounter data are also only produced monthly after the real-time data go through extensive quality control.) OIS has only extended its person-level record matching back to 2013. For these reasons, unique encounter records are only available for encounters occurring between 2013 and December 2022. Most references in this preamble report on total encounter data, instead of unique encounter data, since it allows analysis of more recent numbers as well as longer historic comparisons. To the extent we are relying on unique encounters, the text will explicitly say so.

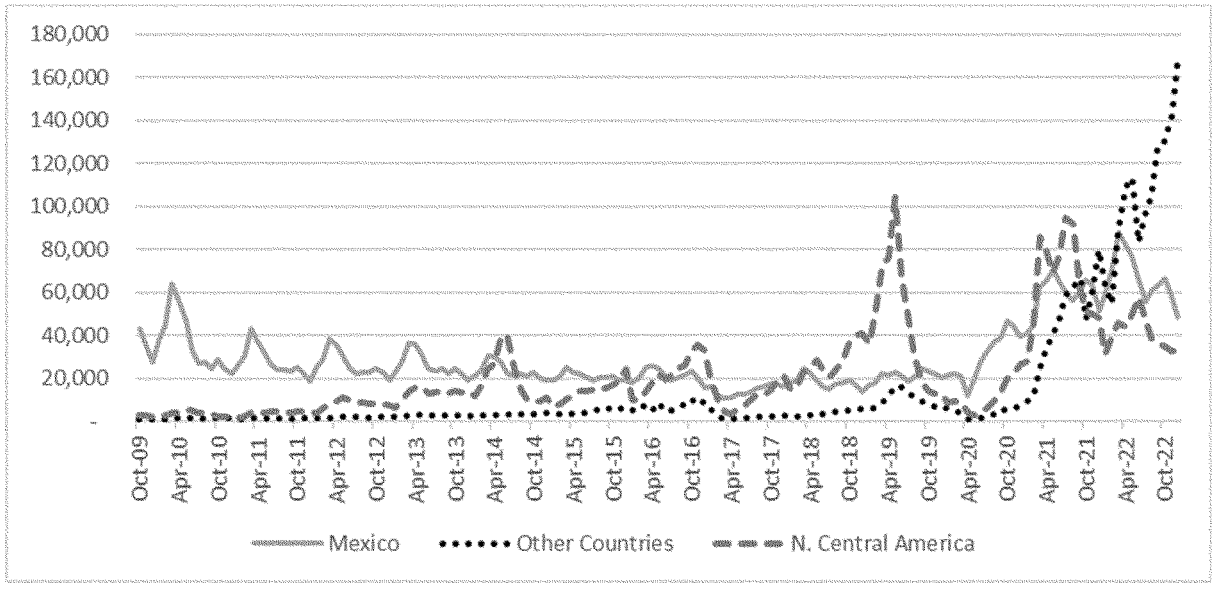
[48] *Id.*



Note: Figure is limited to U.S. Border Patrol encounters because Office of Field Operations data are unavailable prior to 2005. Border Patrol encounters account for 87 percent of SWB encounters since FY 2009.

Source: OIS analysis of CBP data and OIS Production data through December 31, 2022.

Figure 2: Total SWB Encounters by Selected Citizenships, FY 2010–December 2022



Source: OIS Production data through December 31, 2022.

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2. Impact on Regional Partners

These migratory flows have affected every country throughout the Western Hemisphere. In the first nine months of 2022 alone, the Government of Colombia encountered over 170,000 Venezuelan migrants; as of September 2022, there were nearly 2.5 million Venezuelans living in Colombia, compared to 1.7 million in September 2021, representing an increase of approximately 800,000 in just one year.[49] From January through October 2022, the Government of Panama encountered approximately 210,000 irregular migrants having crossed through the Darién Gap—a dangerous 100-kilometer stretch of dense jungle between Colombia and Panama, which is particularly notorious for the violence of the human smugglers operating in lawless stretches of jungle[50]—with nearly 60,000 migrants crossing into Panama irregularly via the Darién Gap in October 2022 alone, a sharp increase compared to the almost 5,000 migrants encountered in January 2022.[51] The

[49] R4V, Regional Refugee and Migrant Response Plan 2023–2024 (Nov. 30, 2022), *https://www.r4v.info/en/rmrp2023-2024* (last visited Dec. 15, 2022); R4V, Refugees and Migrants from Venezuela (Dec. 12, 2022), *https://www.r4v.info/en/refugeeandmigrants* (last visited Dec. 15, 2022).

[50] Refugees International, *Life on the Edge of the Darien Gap* (June 16, 2022) *https://www.refugeesinternational.org/reports/2022/6/16/life-on-the-edge-of-the-darien-gap* (last visited Dec. 15, 2022); United Nations Office on Drugs and Crime, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response, https://www.unodc.org/documents/human-trafficking/2021/Aggravated_SOM_and_Gender.pdf* (last visited Dec. 11, 2022).

[51] Government of Panama, *Irregulares en Tránsito Frontera Panamá-Colombia 2022, https://*

Costa Rican migration agency similarly reports that 3,700 migrants were arriving every single day at Costa Rica's border with Panama in October 2022.[52] Meanwhile, the number of displaced Nicaraguans in Costa Rica doubled in an eight-month period, reaching more than 150,000 in February 2022, before the same figure increased to approximately 200,000 by June 2022.[53] Nicaraguans also claimed asylum in Mexico at three times the rate in 2022 as compared to 2021[54] and, as discussed above, are being encountered on our border at an unprecedented rate.

Mexico has similarly experienced a sharp increase in irregular migration in recent months. In October 2022, the Government of Mexico encountered more than 50,000 irregular migrants, almost doubling the numbers encountered only a few months earlier.[55] This increase was driven largely by a dramatic rise in Venezuelan encounters, which rose from about 1,200 in February 2022 to more than 20,000 in October 2022.[56] In addition to Venezuela and the NCA countries, Mexico also saw consistently high volumes from a wide range of countries in the Western Hemisphere, including Brazil, Colombia, Cuba, Ecuador, Nicaragua, and Peru.[57] From January to October 2022, some 350,000 irregular migrants have been encountered in Mexico, which is already more than it encountered in all of calendar year 2021.[58]

The increased flow of Venezuelans and Nicaraguans has posed a particular concern for the region, as neither government accepts the repatriation of their nationals at anywhere near the scale at which they are currently migrating. Colombia is hosting more than 2 million Venezuelans and has granted temporary protection to 1.5 million; Peru is hosting 1.5 million Venezuelans, including over 500,000 asylum seekers; Brazil and Chile are hosting 380,000 Haitians; and Costa Rica is hosting more than 200,000 Nicaraguans and recently announced its intention to grant Nicaraguans and Venezuelans temporary protection.[59]

3. Venezuela Process

As described above, on October 12, 2022, in an effort to address the significant increase in Venezuelan migrants, the United States and Mexico jointly announced a new process that was modeled on the successful U4U process, seeking to incentivize Venezuelans to use a new lawful process to come to the United States and disincentivize them from traveling to the U.S.-Mexico land border. Specifically, the Venezuela process allows eligible Venezuelan nationals, and their family members, to request an advance authorization to travel to the United States, which, if issued, allows them to travel to the United States to be considered for a case-by-case determination of parole by U.S. Customs and Border Protection (''CBP'') officers. The initiation of this process was paired with a decision by the Mexican Government to accept the return (under the Title 42 public health Order currently in place) of Venezuelans who sought to cross the U.S.-Mexico border irregularly. The United States Government is currently in close consultation with the Government of Mexico, as well as other foreign partners, to accept the return of third-country nationals under Title 8 authorities, including Venezuelan nationals, subsequent to the lifting of the Title 42 public health Order.

The Venezuela process has had a profound impact on the movement of Venezuelan migrants throughout the region. In the week leading up to the October 12, 2022, announcement, the United States was encountering approximately 1,100 Venezuelans between ports of entry at its SWB every day; numbers fell sharply within weeks and averaged 67 Venezuelans per day the week ending November 29, 2022, and 28 per day the week ending January 22, 2023.[60] Panama's daily encounters of Venezuelans also declined significantly in the wake of the parole process, falling some 88 percent, from 4,339 on October 16, 2022, to 532 by the end of that month. In October 2022, there were a total of 59,773 migrants who irregularly entered Panama; as a result of the sharp decline in Venezuelan migration, Panama encountered 16,632 migrants in November.[61]

The success of the Venezuela process provided a model for the subsequently announced Cuban, Haitian, and Nicaragua processes and supports this proposed rule. These processes demonstrate that the availability of processes to enter the United States in an orderly manner, coupled with consequences imposed on those who bypass lawful pathways, can significantly change migratory patterns in ways that protect migrants from a dangerous journey, reduce the role of pernicious smuggling networks, and respond to the urgency of the moment, given the current and anticipated flows and capacity limitations at the SWB.

4. Processes for Cubans, Haitians, and Nicaraguans

On January 5, 2023, as part of the United States' continued efforts to decrease migration flows at the SWB and building upon the successes of the Venezuela process, DHS announced similar border enforcement measures to address the significant increase in encounters of Cuban, Haitian, and Nicaraguan nationals attempting to enter the United States without

www.migracion.gob.pa/images/img2022/PDF/IRREGULARES_%20POR_%20DARI%C3%89N_NOVIEMBRE_2022.pdf (last visited Dec. 11, 2022).

[52] Michael D. McDonald, *The American Dream Is Over for Venezuelans Stranded in Costa Rica,* Bloomberg, Oct. 27, 2022, *https://www.bloomberg.com/news/articles/2022-10-27/american-dream-is-over-for-venezuelans-stranded-in-costa-rica* (last visited Dec. 13, 2022).

[53] Boris Cheshirkov, *Number of Displaced Nicaraguans in Costa Rica Doubles in Less than a Year,* UNHCR, Mar. 25, 2022, *https://www.unhcr.org/news/briefing/2022/3/623d894c4/number-displaced-nicaraguans-costa-rica-doubles-year.html* (last visited Dec. 13, 2022); UNHCR, *Costa Rica Fact Sheet September 2022* (Oct. 30, 2022), *https://reliefweb.int/report/costa-rica/costa-rica-fact-sheet-september-2022* (last visited Dec. 13, 2022) (''As of June 30, 2022, Costa Rica was hosting 215,933 people of concern: of these, 11,205 are refugees and 204,728 asylum seekers, the majority Nicaraguans (89%).'').

[54] *See* Government of Mexico, *La COMAR en Números* (Dec. 2022), *https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022__31-Dic.__1.pdf* (last visited Feb. 1, 2023).

[55] Government of Mexico, *Events of People in an Irregular Migratory Situation in Mexico by Continent and Country of Nationality, 2022* (Cuadro 3.1.1), *http://www.politicamigratoria.gob.mx/es/PoliticaMigratoria/CuadrosBOLETIN?Anual=2022&Secc=3* (last visited Dec. 11, 2022).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] UNHCR, *Colombia Operational Update: January-February 2022* (Mar. 19, 2022), *https://reliefweb.int/report/colombia/colombia-operational-update-january-february-2022* (last visited Dec. 4, 2022); The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables* (June 10, 2022) (''L.A. Declaration Fact Sheet''), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/* (last visited Dec. 13, 2022); UNHCR, *Peru, https://reporting.unhcr.org/peru* (last visited Dec. 11, 2022); Migration Policy Institute, *Haitian Migration through the Americas: A Decade in the Making* (Sept. 30, 2021), *https://www.migrationpolicy.org/article/haitian-migration-through-americas* (last visited Dec. 13, 2022); Alvaro Murillo et al., *Costa Rica Prepares Plan to Regularize Status of 200,000 Mostly Nicaraguan Migrants,* Reuters, Aug. 10, 2022, *https://www.reuters.com/world/americas/costa-rica-prepares-plan-regularize-status-200000-mostly-nicaraguan-migrants-2022-08-10/* (last visited Dec. 13, 2022).

[60] OIS analysis of data pulled from CBP UIP on January 23, 2023.

[61] Government of Panama, *Irregulares en Tránsito Frontera Panamá-Colombia 2022, https://www.migracion.gob.pa/images/img2022/PDF/IRREGULARES_%20POR_%20DARI%C3%89N_NOVIEMBRE_2022.pdf* (last visited Dec. 11, 2022).

authorization.[62] Further, DHS lifted the initial cap of 24,000 on the number of parolees eligible for the previously implemented Venezuela process and replaced it with a monthly cap of 30,000 travel authorizations spread across the four separate parole processes.[63] Although it has only recently been implemented, initial results indicate that the parole processes for Cuban, Haitian, and Nicaraguan nationals—which coupled the implementation of new pathways for nationals from these countries to enter the United States with the prompt return to Mexico of those who arrived at the SWB without advance authorization—have had a similar effect as the Venezuela process in disincentivizing migrants from these countries from making the dangerous irregular journey to United States. In the first weeks after the announcement, encounters of Cubans, Haitians, and Nicaraguans (''CHNs'') between ports of entry on the SWB declined from 928 on the day of the announcement (January 5, 2023) to just 92 on January 22—a decline of 92 percent. The decline in encounters of nationals of these countries occurred even as encounters of other noncitizens began to rebound from their typical seasonal drop.[64]

5. Border Encounters Remain High, and Are Likely To Increase Further Absent Additional Policy Changes

Despite the sharp decrease in Venezuelan migration encountered at the U.S. border in the wake of implementation of the Venezuela process, the baseline number of total SWB encounters remained high throughout the end of 2022—and significantly higher than the historical average of less than 1,600 encounters per day from 2014–2019.[65] For the 30 days ending December 24, 2022, total daily encounters along the SWB consistently fluctuated between approximately 7,100 and 9,700, averaging approximately 8,500 per day, with encounters exceeding 9,000 per day on twelve different occasions during this 30-day period.[66]

The number of migrants crossing the Darién Gap and heading north also remained high by historical standards, even after the number of Venezuelan migrants began to decline.[67] Almost 110,000 migrants traveled through the Darién Gap between 2010 and 2019.[68] The majority of these encounters occurred in 2015, 2016, and 2019, which saw 29,289, 30,055, and 22,102 encounters per year, respectively; [69] encounters were fewer than 10,000 all other years.[70] This is compared to over 16,000 in the month of November alone in 2022.[71] As of the end of November 2022, approximately 4,000 migrants crossed the Darién Gap per week on average from a wide range of countries, including most prominently Ecuador and Haiti,[72] and NGOs operating in Mexico reported that there were at least 125,000 migrants moving northward through Mexico that month as well, many of whom may seek to make their way to the SWB.[73]

Meanwhile, the refusal of certain countries to accept the removal of their own nationals poses particular challenges. There was a significant increase in the number of encounters of Cuban and Nicaraguan nationals at the SWB in the fall of 2022—in part driven by the fact that, generally, neither country accepts removals of their nationals at the rate the United States seeks to remove them. Nationals from these two countries accounted for over 83,000 SWB encounters in the 30 days ending December 24, 2022—an average of approximately 2,770 a day, as compared to an average of approximately 1,570 a day in the 30 days preceding the April 1, 2022, CDC termination order.[74] Cubans and Nicaraguans together accounted for just over 32 percent of total encounters during the more recent time period.[75] These challenges prompted the January 5, 2023, adoption of new parole processes for Cuban, Haitian, and Nicaraguan nationals that combine the implementation of lawful, safe, and orderly pathways for nationals from those countries to seek to come to the United States, coupled with the prompt return of those who fail to use these lawful processes. This was made possible by the Government of Mexico's independent decision to start accepting returns of nationals of these countries—a decision that was in part contingent on the implementation of these new lawful processes for migrants from these countries to enter the United States without making the dangerous journey to the SWB. Within the first weeks of implementation, the numbers of Cuban, Haitian, and Nicaraguan nationals encountered at the SWB without authorization decreased significantly, and while these processes are in place, DHS anticipates that encounters of Cuban, Haitian, and Nicaraguan nationals will remain low, as compared to the numbers encountered at the end of 2022, akin to the results that were observed following the implementation of the Venezuela process. However, DHS anticipates that flows from all four countries would increase—perhaps significantly—in the absence of (1) a policy change to allow for swift removal of inadmissible noncitizens; and (2) the Government of Mexico's continued willingness to accept the returns of CHNV nationals, once the Title 42 public health Order is lifted.

Specifically, the DHS Office of Immigration Statistics planning model assumes that, without a meaningful policy change, border encounters could rise, and potentially rise dramatically—up to as high as 13,000 a day—subsequent to the lifting of the Title 42 public health Order.[76] As described below, DHS does not currently have the

[62] *See,* DHS, DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes (Jan. 5, 2023), *https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and* (last visited Jan. 30, 2023).

[63] *See* 88 FR 1279, 1280 (Jan. 9, 2023).

[64] OIS analysis of CBP UIP data downloaded January 23, 2023. SWB encounters typically fall in the weeks between Christmas and mid-January, a pattern also observed in the 2022–2023 cycle. Total SWB encounters between ports of entry averaged 7,728 per day for December 1–24, 2022, and then dropped to an average of almost 4,900 per day between December 25, 2022 and January 1, 2023, including a low of 2,750 on the first. Similarly, encounters of Cubans, Haitians, and Nicaraguans between ports of entry averaged 2,828 per day December 1–24 and dropped to an average of just over 1,300 per day December 25–January 1, including a low of 467 on January 1. Yet while encounters of all groups rebounded after New Year's, CHN and non-CHN nationals have diverged since the announcement of the new processes, with encounters of non-CHN nationals increasing 67 percent January 1–22 and encounters of CHN nationals falling back below their New Year's day level. *Id.*

[65] OIS Persist Dataset based on data through December 2022.

[66] OIS analysis of data pulled from CBP UIP on January 4, 2023.

[67] Government of Panama, *Baja Ingreso de Migrantes Irregulares a Panamá* (Oct. 28, 2022), *https://www.migracion.gob.pa/inicio/noticias/878-baja-ingreso-de-migrantes-irregulares-a-panama* (last visited Dec. 13, 2022).

[68] Government of Panama, *Irregulares en Tránsito Frontera Panamá—Colombia 2010–2019, https://www.migracion.gob.pa/images/img2021/pdf/IRREGULARES%202010-2019%20actualizado.pdf* (last visited Dec. 8, 2022).

[69] *Id.*

[70] *Id.*

[71] Government of Panama, *Irregulares en Tránsito Frontera Panamá-Colombia 2022, https://www.migracion.gob.pa/images/img2022/PDF/IRREGULARES_%20POR_%20DARI%C3%89N_NOVIEMBRE_2022.pdf* (last visited Dec. 11, 2022).

[72] *Id.*

[73] La Prensa Latina Bilingual Media, *NGOs Estimate 125K Migrants Moving North Through Southern Mexico* (Nov. 7, 2022), *https://www.laprensalatina.com/ngos-estimate-125k-migrants-moving-north-through-southern-mexico/* (last visited Dec. 13, 2022).

[74] OIS Persist Dataset based on data through October 2022, and OIS analysis of data pulled from CBP UIP on January 4, 2023.

[75] OIS analysis of data pulled from CBP UIP on January 4, 2023.

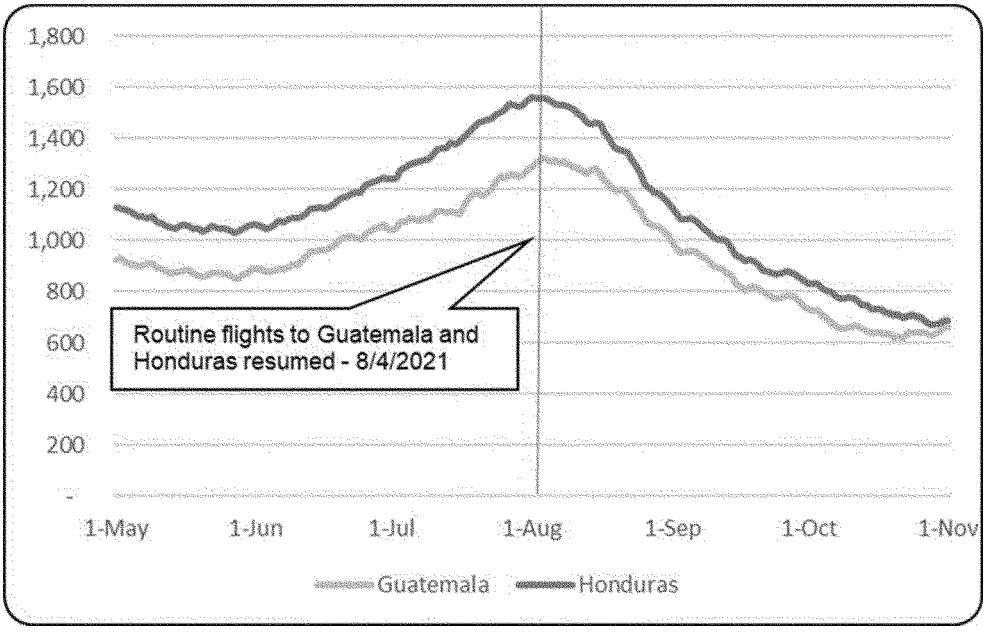
[76] DHS SWB Encounter Planning Model generated January 6, 2023.

infrastructure, personnel, or funding to sustain the processing of migratory flows of this magnitude in a safe and orderly manner over time.

6. The Importance of Quickly Returning Migrants Without a Legal Basis To Stay

DHS data shows that the ability to quickly remove individuals who do not have a legal basis to remain in the United States can reduce migratory flows—whereas, conversely, the inability or failure to do so risks yielding increased flows. CBP, for example, saw rapidly increasing numbers of encounters of Guatemalan and Honduran nationals from January 2021 until August 2021, when these countries began accepting the direct return of their nationals via Title 42. In January 2021, CBP encountered an average of 424 Guatemalan nationals and 362 Honduran nationals a day. By August 4, 2021, the 30-day average daily encounter rates had climbed to 1,249 Guatemalan nationals and 1,502 Honduran nationals—an increase of 195 percent and 315 percent, respectively. In the 60 days immediately following the resumption of return flights, average daily encounters fell by 38 percent for Guatemala and 42 percent for Honduras, as shown in Figure 3 below.[77] Since then, encounters for both countries have fluctuated but remain well below the pre-August 4, 2021, numbers; in November 2022, encounters averaged 481 per day for Guatemala and 433 per day for Honduras.[78]

Figure 3: Daily Encounters of Guatemalan and Honduran Nationals, May 1–November 1, 2021



Note: Figure depicts 30-day average of daily encounters.

Source: OIS Persist Data as of September 30, 2022.

Returns have proven to be effective, but the Departments do not believe that they are sufficient. For instance, while the numbers of encounters of Guatemalan and Honduran nationals have fallen, in the 30 days ending December 24, 2022, CBP encountered an average of around 970 nationals from these two countries each day.[79] The provision of lawful processes for individuals who intend to migrate is also a critical component to reducing migratory flows, particularly when paired with a consequence for bypassing such lawful pathways—a model that has been proven to work by U4U and the Venezuela process in recent months, as detailed above.

7. The Pernicious Role of Smuggling Networks

As described above, migratory movements to the SWB are in many cases facilitated by, and actively encouraged by, human smuggling organizations that exploit migrants for profit. These smuggling networks have become more and more sophisticated over time, increasingly using social media to deceive migrants and lure them into initiating a dangerous journey during which they may be robbed and otherwise harmed, often with false promises about what will happen to them when they reach the United States.[80] Migrants often pay large sums to be brought through jungles, mountains, and rivers, frequently with small children in tow.

The Darién Gap is particularly notorious for the violence of the human smugglers operating in lawless stretches of the jungle.[81] As of October 2022, over 210,000 migrants have travelled to the SWB from South America through the Darién Gap in 2022 alone.[82] The International Organization for Migration (''IOM'') reports that as of October 2022, 30 individuals had died crossing the Darién Gap in 2022, including nine

[77] OIS analysis of OIS Persist Dataset based on data through August 31, 2022.

[78] OIS Persist Dataset based on data through November 2022.

[79] OIS analysis of data pulled from CBP UIP on January 3, 2023.

[80] Tech Transparency Project, *Inside the World of Misinformation Targeting Migrants on Social Media* (July 26, 2022), *https://www.techtransparency project.org/articles/inside-world-misinformation-targeting-migrants-social-media* (last visited Dec. 6, 2022).

[81] United Nations Office on Drugs and Crime, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response, https://www.unodc.org/documents/human-trafficking/2021/Aggravated_SOM_and_Gender.pdf* (last visited Dec. 11, 2022).

[82] Government of Panama, *Irregular Migrants Transiting through Darién by Country, https://www.datosabiertos.gob.pa/dataset/ebb56d40-112f-455e-9418-ccd73560021d/resource/3fae4878-5068-4b80-b250-ee9e52b16510/download/irregulares-en-transito-por-darién-por-pais-octubre-2022.pdf* (last visited Dec. 11, 2022).

children.[83] Women and children are particularly vulnerable to attack and injury; children are also at risk for diarrhea, respiratory diseases, dehydration, and other ailments that require immediate attention. The Panamanian Red Cross reports that 10 to 15 percent of migrants are sexually assaulted crossing the Darién Gap.[84] Upon reaching the border area, noncitizens seeking to cross into the United States usually pay transnational criminal organizations—including, increasingly, the Mexican drug cartels—to coordinate and guide them along the final miles of their journey.[85] This cartel-controlled movement of people across the border is a billion-dollar criminal enterprise, in which the migrants pay thousands of dollars to be smuggled in inhumane conditions.[86]

Tragically, a significant number of individuals lose their lives along the way. In FY 2022, more than 890 migrants died attempting to enter the United States between ports of entry across the SWB, an estimated 58 percent increase from FY 2021 (565 deaths) and a 252 percent increase from FY 2020 (254 deaths). First responders in Eagle Pass, Texas, estimate that about 30 bodies have been taken out of the Rio Grande River each month since March 2022. The number of migrants rescued by CBP has almost quadrupled over the past two years—from approximately 5,330 in FY 2020, to approximately 12,900 in FY 2021, to over 22,000 in FY 2022. CBP attributes these rising trends to the historic increases in overall USBP encounters between ports of entry over this time period, and the fact that these encounters are increasingly taking place in remote and rugged locations where the perils of trying to enter the United States are particularly acute. Meanwhile, these numbers do not account for the countless incidents of death, illness, assault, and exploitation that migrants experience well before they arrive at our border during the perilous journey north.

This proposed rule seeks to mitigate the role of would-be smugglers by incentivizing intending asylum seekers to utilize lawful, safe, and orderly pathways for seeking protection in the United States or elsewhere. For example, incentivizing migrants to schedule their arrival at land ports of entry minimizes the role of smugglers who seek to bring migrants through often dangerously hot and inhospitable locations between ports of entry. Collectively, the incentives and disincentives seek to minimize the irregular migratory flow to the border, and thus minimize the role—and profit—of the pernicious smuggling networks as a result.

B. Effects on Resources and Operations

The large numbers of migrants crossing the border has placed a significant toll on the United States Government, as well as the States and local communities where migrants are provisionally released. While the United States Government has taken extraordinary steps to meet the need, the current level of migratory movements and the anticipated increase in the numbers of migrants following the lifting of the Title 42 public health Order threaten to exceed the capacity to maintain the safe and humane processing of migrants who have crossed the border without authorization to do so. By channeling noncitizens to lawful pathways available away from the SWB, this proposed rule aims to discourage migrants from making the journey to the border in the first instance.

1. Capacity Constraints

The United States' border processing and immigration systems were not built to manage the nature and scale of the current irregular migration flows at the border and are operating under increasing strain. To respond to the accelerated increase in encounters along the SWB since January 2021, DHS has taken a series of extraordinary steps. CBP obligated more than $669 million to build and operate 10 soft-sided processing facilities along the SWB in FY 2022. Since 2021, DHS has deployed more than 10,000 additional Federal personnel from across the Department on temporary rotations to the SWB, to include CBP agents and officers, law enforcement personnel from other DHS components, and the DHS Volunteer Force. In addition, CBP has hired or contracted over 1,000 civilian USBP Processing Coordinators, who, among other roles, supplement processing operations. Yet, even with this increase in facilities and personnel, there are risks of overcrowding—challenges that will be exacerbated as encounters increase.

In addition, the Federal Emergency Management Agency (''FEMA'') has spent $260 million in FYs 2021 and 2022 on grants to non-governmental and state and local entities through the Emergency Food and Shelter Program—Humanitarian (''EFSP–H'') to assist with the reception and onward travel of migrants arriving at the SWB.[87] This spending is on top of $1.4 billion in FY 2022 appropriations that were earmarked for SWB contingency operations in response to the ongoing surge in migration.[88] Further, through FY 2023 appropriations, Congress made available up to $785 million ''for the purposes of providing shelter and other services to families and individuals encountered by the Department of Homeland Security.'' [89]

Despite these efforts, DHS operations are subject to significant resource and capacity constraints. Of the nine SWB USBP sectors, four were over capacity, at 100 to 128 percent, with three more at capacity levels between 68 and 99 percent as of December 24, 2022, prior to the implementation of the parole processes for Cubans, Haitians, and Nicaraguans.[90] The impact has been particularly acute in certain border sectors. Increased flows are disproportionately occurring within the remote Del Rio, El Paso, and Yuma sectors. In FY 2022, the Del Rio, El Paso, and Yuma sectors encountered almost double (94 percent increase) the number of migrants as compared to FY 2021 and an eleven-fold increase over the average for FY 2014–FY 2019, primarily as a result of increases from CHNV countries.[91] As of December 24, 2022, these three sectors were each operating at the limits of, or over, their safe operating capacity, given space limitations, at 100 to 128 percent.[92]

The focused increase in encounters in those three sectors has been particularly

[83] Catalina Oquendo, *El Darién, la Trampa Mortal para los Migrantes Venezolanos,* El País, Oct. 11, 2022, *https://elpais.com/america-colombia/2022-10-11/el-darien-la-trampa-mortal-para-los-migrantes-venezolanos.html* (last visited Dec. 13, 2022).

[84] Voz de América, *Los 10 Peligros de Cruzar el Darién, el ''Infierno Verde'' de las Américas* (Aug. 19, 2022), *https://www.vozdeamerica.com/a/los-10-peligros-de-cruzar-el-darien-el-infierno-verde-de-las-americas/6705004.html* (last visited Dec. 13, 2022).

[85] Interpol, *People Smuggling, https://www.interpol.int/en/Crimes/People-smuggling* (last visited Dec. 11, 2022).

[86] José de Córdoba et al., *Smuggling Migrants to the U.S. is Big Business,* The Wall Street Journal, July 1, 2022, *https://www.wsj.com/articles/smuggling-migrants-to-the-u-s-is-big-business-11656680400* (last visited Dec. 13, 2022).

[87] EFSP Humanitarian Relief Table, created by DHS (Aug. 5, 2022).

[88] Memorandum for Interested Parties, from Alejandro N. Mayorkas, Secretary of Homeland Security, *Re: DHS Plan for Southwest Border Security and Preparedness* at 19 (Apr. 26, 2022), *https://www.dhs.gov/sites/default/files/2022-04/22_0426_dhs-plan-southwest-border-security-preparedness.pdf* (last visited Jan. 30, 2023).

[89] *See* Public Law 117–328, div. F, tit. II, sec 211, 136 Stat. 4459, 4736 (2022).

[90] OIS analysis of data pulled from CBP UIP on December 24, 2022.

[91] OIS Persist Dataset based on data through October 2022.

[92] OIS analysis of data pulled from CBP UIP on December 24, 2022.

challenging. The Yuma and Del Rio sectors are geographically remote, and because of that—until the past two years—have never been a focal point for large numbers of individuals entering without authorization between ports of entry. As a result, these sectors have limited infrastructure to process the elevated encounters that they are experiencing in a safe and orderly manner. The El Paso sector has relatively modern infrastructure for processing noncitizens encountered at the border, but is far away from other CBP sectors, which makes it challenging to move individuals elsewhere for processing during surges—a key component of CBP's ability to effectively manage migratory surges.

Meanwhile, many of the land ports of entry have limited space and capacity to process an influx of migrants, including those who may seek protection from removal, and are expected to quickly reach their safe operating capacity limits given the increase in migrants they are expected to encounter following the lifting of the Title 42 public health Order. Absent a lawful, safe, and orderly means for managing the flows, the ports of entry risk massive congestion: migrants would be forced to wait in long lines for unknown periods of time while exposed to the elements in order to be processed, in conditions that could also put the migrants at risk. This is of great concern to the Government of Mexico, because these lines would extend into Mexico and could adversely impact legitimate travel and trade, or lead to individuals camping out overnight or forming makeshift encampments on Mexican territory.

The capacity constraints are felt by DOJ as well. As the number of migrants arriving at the SWB has increased, so too have the number of Notices to Appear filed in EOIR's immigration courts and the number of pending cases.[93] In FY 2022, EOIR hired 104 immigration judges for a total of 634 and completed a record 312,486 cases. Yet the number of cases pending before the immigration courts has risen to nearly 1.8 million, as the courts were unable to keep pace with the incoming volume.

2. Decompression Efforts

In an effort to reduce overcrowding in sectors that are experiencing surges, DHS deploys lateral transportation, using buses and flights to move noncitizens to other sectors with capacity to process. In October 2022, USBP sectors along the SWB operated a combined 120 decompression buses containing almost 25,000 noncitizens along 480 routes to neighboring sectors. The majority of these buses are staffed by CBP personnel, which often requires pulling them off other key missions. In October 2022, USBP sectors also operated 113 lateral decompression flights, redistributing approximately 14,500 noncitizens to other sectors with additional capacity.

These assets are finite. Already in FY 2022, U.S. Immigration and Customs Enforcement (''ICE'') modified its ICE Air Operations' air charter contract to increase the number of daily-use aircraft from 10 to 12 to meet the increasing air transportation demands, and CBP has executed a new contract that will provide for flight hours equivalent to approximately four to eight additional decompression flights per day. And while DHS is actively working to obtain additional contracted transportation support, such contract support takes time to put in place, and is also costly and resource intensive.

As a result, use of DHS air resources to operate lateral flights limits DHS's capacity to operate international repatriation flights to receiving countries, leaving noncitizens who have been ordered removed in custody for longer, which presents challenges in light of DHS's limited detention space. This in turn reduces the numbers of noncitizens who can be referred for detention each day and, as appropriate, removed efficiently after receiving final orders of removal, including pursuant to expedited removal (''ER''), at any given point in time. Further increases would exacerbate the need for decompression flights and further reduce the amount of resources available to conduct removal flights, which in turn would further decrease the number of noncitizens who can be referred to ICE detention centers. This would occur at precisely the point in time at which an increase in removal flights and faster movement of migrants into expedited removal, out of detention, and onto removal flights, as appropriate, is needed in order to disincentivize a further increase in encounters, and to effectively, humanely, and efficiently remove those who do not claim a fear of persecution or torture or are otherwise found not to have a credible fear.

3. State, Local Government, and Non-Governmental Limits

Increased encounters of noncitizens at the SWB not only strain DHS resources, but also place additional pressure on States, local communities, and NGO partners both along the border and in the interior of the United States. These are key partners, providing shelter and other key social services to migrants and facilitating the onward movement of those conditionally released from DHS custody. In FY 2021 and FY 2022, Congress made approximately $260 million available through FEMA's EFSP–H in an order to help sustain these efforts.[94] As noted above, through FY 2023 appropriations, Congress made available up to $785 million ''for the purposes of providing shelter and other services to families and individuals encountered by the Department of Homeland Security.'' [95] However, State, local government, and NGO capacity to provide these critical supports is limited, and may reach its outer limit once the Title 42 public health Order is lifted in the absence of additional policy changes.

C. Systemic Issues

The U.S. asylum system was designed decades ago—when migratory flows were dramatically different than they are today—to serve the key goals of efficiently and fairly providing protection to noncitizens who are in the United States and are deserving of protection, while also efficiently denying and ultimately removing those who do are not deemed eligible for discretionary forms of protection and do not qualify for the mandatory relief of statutory withholding of removal or protection under the CAT. However, a systemic lack of resources and the changing nature, scope, and demographics of the migratory flows that the United States is encountering has made it difficult to achieve these key, twin goals.

By statute, certain inadmissible noncitizens may be placed in ER pursuant to section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1). Those who are in ER and who indicate an intent to apply for asylum or a fear of persecution or torture in their country of removal are subject to what are referred to as ''credible fear'' interviews, pursuant to which an asylum officer assesses whether there is a ''significant possibility . . . that the [noncitizen] could establish eligibility for asylum.'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v); *see also* 8 CFR 235.3(b)(4)(i), 1235.3(b)(4)(i). Those found not to have a credible fear, including following immigration judge (''IJ'') review of a negative determination when requested, are subject to removal

[93] *See* EOIR, Executive Office of Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions (Oct. 13, 2022), *https://www.justice.gov/eoir/page/file/1242166/download* (last visited Feb. 1, 2023).

[94] EFSP Humanitarian Relief Table, created by DHS (Aug. 5, 2022).

[95] *See* Public Law 117–328, div. F, tit. II, sec 211, 136 Stat. at 4736.

without the full removal proceedings provided for by section 240 of the INA, 8 U.S.C. 1229a. Those who are found to have a credible fear are generally placed in removal proceedings under section 240 during which they can apply for asylum and other forms of relief and protection from removal.[96]

There is, however, a significant disparity between the number of noncitizens who are found to have a credible fear and the number of noncitizens whom an IJ ultimately determines should not be removed at the end of the section 240 process because, for example, the noncitizen is found eligible for asylum or some other form of protection (such as withholding of removal or CAT). A full 83 percent of the people who were subject to ER and claimed fear from 2014 to 2019 were referred to an IJ for section 240 proceedings, but only 15 percent of those cases that were completed were granted asylum or some other form of protection.[97] Similarly, among cases referred and completed since 2013, significantly fewer than 20 percent of people found to have a credible fear were ultimately granted asylum from EOIR.[98] Ultimately, the number of individuals who are referred to an IJ at the beginning of the ER process greatly exceeds the number who are actually granted asylum or some other form of relief or protection.

Meanwhile, the process for those who establish a credible fear is quite lengthy, with half of all cases taking more than four years to complete, and in many cases much longer. Indeed, 39 percent of all SWB credible fear referrals to EOIR from FY 2014 to FY 2019 remain in EOIR proceedings today.[99] As of FY 2022 year-end, more than a quarter (26 percent) of EOIR cases resulting from SWB encounters making credible fear claims from as long ago as FY 2014 remained in proceedings, one-third (33 percent) of EOIR cases resulting from FY 2016 encounters remained in proceedings, and almost half (48 percent) of EOIR cases resulting from FY 2019 encounters remained in proceedings.[100] Excluding *in absentia* orders, the mean completion time for EOIR cases completed in FY 2022 was 4.2 years.[101]

As a result, a large number of cases linger in a variety of incompletely resolved statuses for extended periods. For all SWB encounters from FY 2014 to FY 2019 that claimed fear and were referred to EOIR, only 9 percent had been granted relief by the end of FY 2022, and only 11 percent had an executed removal order—leaving 80 percent in some degree of limbo.[102]

As a result, those who have a valid claim to asylum in the United States often have to wait years for a final protection decision. Conversely, noncitizens ultimately found ineligible for asylum or another form of protection are likely to spend many years in the United States prior to being ordered removed.

In addition, the proportion and the absolute numbers of people claiming fear of persecution or torture in their home countries has increased dramatically in recent years. Prior to 2011, the overall share of total SWB encounters who were processed for expedited removal and claimed fear never exceeded 2 percent.[103] By 2013, with increasing numbers of non-Mexican encounters, the rate had climbed to 15 percent of people placed in ER making fear claims that were referred to USCIS asylum officers (36,025 referrals).[104] By comparison, in 2019—prior to the implementation of the Title 42 public health Order—further growth in non-Mexican encounters meant that 44 percent of people placed in ER claimed fear, resulting in 98,266 credible fear adjudications.[105] Despite this dramatic increase in the number of people claiming fear since 2013, the percent who are ultimately granted asylum or other forms of protection has remained static or even fallen over this period, with IJ asylum grant rates in FY 2013–FY 2017 consistently falling between 12 and 17 percent, down from 24–38 percent in FY 2008–FY 2012.[106]

The fact that large numbers of migrants pass the credible fear screening, only to be denied relief or protection on the merits after a lengthy adjudicatory process, has high costs to the system in terms of resources and time.

Meanwhile, the fact that migrants can wait in the United States for years before being issued a final order denying relief, and that many such individuals are never actually removed, likely incentivizes migrants to make the journey north.

D. U.S. Efforts in Response

The United States has taken a number of measures in an attempt to offer alternative pathways to address the root causes of migration, improve the asylum system, and address the pernicious role of smugglers. These are important improvements, yet alone are insufficient in the near term to change the incentives of migrants, reduce the risks associated with current levels of irregular migration and the anticipated surge of migrants to the border, and protect migrants from human smugglers that profit from their vulnerability, necessitating this NPRM.

1. Asylum Processing IFR and Other Process Improvements

In March 2022, the Departments adopted an interim final rule (''IFR'') to shorten the time frame for adjudicating

[96] Under an interim final rule issued in March 2022, and discussed below, some noncitizens found to have a credible fear are referred to an asylum officer for further review of the noncitizen's claims for asylum and other forms of protection, followed by IJ review if the noncitizen's asylum claim is denied. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078 (Mar. 29, 2022) (''Asylum Processing IFR'').

[97] OIS Enforcement Lifecycle data through September 30, 2022. Referrals to an IJ include positive credible fear findings by U.S. Citizenship and Immigration Services (''USCIS'') asylum officers, negative fear findings that are vacated by an IJ, and USCIS case closures that are placed in section 240 proceedings. Grants of relief or protection include grants of asylum, statutory withholding of removal, withholding or deferral of removal under the CAT regulations, cancellation of removal, and adjustment of status under various statutory provisions. While only 15 percent of all case completions result in relief or protection, OIS estimates that 28 percent of cases decided on their merits are grants of relief. Cases of relief decided on their merits include grants of asylum and other grants of status under statutory provisions (*i.e.,* excluding withholding of removal, deferral of removal, cancellation of removal, and claimed status reviews); and the percentage of cases decided on their merits is calculated by dividing relief on merits by the sum of relief on merits and removal orders on merits (*i.e.,* excluding removal orders issued *in absentia*). All data on EOIR outcomes for credible fear cases in this discussion are based on case outcomes for all noncitizens encountered on the SWB in FY 2014–FY 2019, with data reflecting final or most current outcomes as of September 30, 2022. In general, relatively few Mexican nationals claim credible fear when placed in expedited removal, so EOIR outcomes cited here would be similar if the records were limited to non-Mexican encounters.

[98] *See* EOIR, EOIR Adjudication Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim (Oct. 13, 2022), *https://www.justice.gov/eoir/page/file/1062976/download* (last visited Jan. 27, 2023). The EOIR adjudication outcome statistics report on the total number of cases originating with credible fear claims resolved on any ground in a fiscal year, without regard to whether an asylum claim was adjudicated. The asylum grant rate is a percentage of that total number of cases.

[99] OIS Enforcement Lifecycle data through September 30, 2022.

[100] *Id.*

[101] OIS analysis of DOJ EOIR data.

[102] OIS Enforcement Lifecycle data through September 30, 2022. Here and throughout this discussion, references to removal orders and removal orders with or without confirmed removals include IJ grants of voluntary departures with or without confirmed departures.

[103] OIS analysis of historic CBP and USCIS data.

[104] OIS analysis of Enforcement Lifecycle data through September 30, 2022.

[105] *Id.*

[106] OIS analysis of DOJ EOIR Review of Asylum Adjudication Statistics as of October 2022.

asylum claims.[107] For noncitizens subject to that IFR, following a positive credible fear determination, asylum officers conduct an initial asylum merits interview instead of referring the case directly for removal proceedings before an IJ under section 240 of the INA, 8 U.S.C. 1229a. This creates multiple efficiencies, including using the information presented to the asylum officer in the credible fear interview as the asylum application, which eliminates the need for duplicative paperwork and processing time. If USCIS does not grant asylum, the individual is referred to EOIR for streamlined section 240 removal proceedings. The entire process—from credible fear claim to a final immigration court decision—is designed to take substantially less time than the average four years it takes to adjudicate asylum claims otherwise.

That rule, however, is being phased in gradually, and the Departments do not yet have the capacity, and do not expect to have the capacity in the near term, to process the large number of migrants expected to cross the border through the system that rule establishes.

2. Process Improvements

The Departments are making a number of other process improvements as well. DHS is digitalizing many of the processes that make up the U.S. immigration system, thus enabling agencies to process migrants more rapidly, securely store documentation, and share information to inform real-time decision-making with significant time savings. Meanwhile, USCIS also has made significant strides in protecting against what would be even greater backlog growth by hiring new officers and establishing an agency-wide focus on operational efficiency. The Asylum Division has grown from 273 authorized asylum officer positions in 2013 to 1,024 authorized asylum officer positions in 2022. USCIS has also put in place a number of initiatives to increase the efficiency of its processes, including the November 2022 launch of online filing for the Form I–589 for affirmative asylum applicants, working with other DHS components to digitize the A-File (the file containing immigration-related records relating to a noncitizen), and conducting more than 34,211 video-assisted interviews. EOIR has made similar strides in addressing its pending caseload, through judicial and staff hiring, modernization of courtroom technology, and the ongoing digitalization of court files.[108]

In addition, EOIR has created efficiencies by reducing barriers to immigration court. In that regard, EOIR has expanded the Immigration Court Helpdesk program to several additional courts, issued guidance on using the Friend of the Court model to assist pro se respondents, and reconstituted its pro bono liaison program at each immigration court.[109] The above measures promote efficiency as, where a noncitizen is represented, the IJ does not have to engage in time-consuming discussions at hearings to ascertain whether the noncitizen is subject to removal and potentially eligible for any relief. In addition, a noncitizen's counsel can assist the noncitizen in gathering evidence, can prepare the noncitizen to testify, and can work with DHS counsel to narrow the issues the IJ must decide.

While critically important, these process improvements are not, on their own, sufficient to respond to the significant resource needs associated with the increase in migrants anticipated following the lifting of the Title 42 public health Order.

3. Taking on the Smugglers

In June of 2021, DOJ established a law enforcement task force, Joint Task Force Alpha (''JTFA''), to marshal investigative and prosecutorial resources in partnership with DHS to enhance U.S. enforcement efforts against human smuggling and trafficking groups operating in Mexico and the NCA countries of Guatemala, El Salvador, and Honduras. Since then, the task force has made significant strides in its efforts to disrupt and dismantle dangerous human smuggling organizations.[110] JTFA's impact and results include contributing to 165 domestic and international arrests, 69 convictions, 45 defendants sentenced including significant jail time imposed for human smuggling-related crimes; substantial asset forfeiture including hundreds of thousands of dollars in cash, real property, vehicles, firearms, and ammunition; dozens of defendants indicted under seal pending arrest; and numerous pending extradition requests against foreign leadership targets located in NCA and Mexico.[111]

[107] *See* Asylum Processing IFR, 87 FR 18078.

[108] *See, e.g.,* Executive Office for Immigration Review Electronic Case Access and Filing, 86 FR 70708 (Dec. 13, 2021) (EOIR final rule implementing electronic filing and records applications for all cases before the immigration courts and the Board of Immigration Appeals); EOIR Director's Memorandum 22–07, Internet-Based Hearings (Aug. 12, 2022), *https://www.justice.gov/eoir/page/file/1525691/download.*

[109] *See, e.g.,* EOIR Director's Memorandum 22–06, Friend of the Court (May 5, 2022), *https://www.justice.gov/eoir/page/file/1503696/download;* EOIR Director's Memorandum 22–01, Encouraging and Facilitating Pro Bono Legal Services (Nov. 5, 2021), *https://www.justice.gov/eoir/book/file/1446651/download.*

[110] DOJ Office of Public Affairs, *Attorney General Announces Initiatives to Combat Human Smuggling and Trafficking and to Fight Corruption in Central America* (June 7, 2021), *https://www.justice.gov/opa/pr/attorney-general-announces-initiatives-combat-human-smuggling-and-trafficking-and-fight* (last visited Dec. 8, 2022).

[111] DOJ, Office of Public Affairs (''OPA''), *Eight Indicted in Joint Task Force Alpha Investigation and Arrested as Part of Takedown of Prolific Human Smuggling Network,* Department of Justice (Sept. 13, 2022), *https://www.justice.gov/opa/pr/eight-indicted-joint-task-force-alpha-investigation-and-arrested-part-takedown-prolific-human* (last visited Dec. 15, 2022); DOJ, OPA, *Two Guatemalan Nationals Plead Guilty to Human Smuggling Conspiracy Resulting in 2021 Death of Migrant in Odessa, Texas,* Department of Justice (Sept. 30, 2022), *https://www.justice.gov/opa/pr/two-guatemalan-nationals-plead-guilty-human-smuggling-conspiracy-resulting-2021-death-migrant* (last visited Dec. 15, 2022); U.S. Attorney for the District of Arizona, *Human Smuggling Coordinators Sentenced to 45 Months in Prison* (Aug. 31, 2022), *https://www.justice.gov/usao-az/pr/human-smuggling-coordinators-sentenced-45-months-prison* (last visited Dec. 15, 2022); U.S. Attorney for the Western District of Texas, *Defendants Indicted in Tractor Trailer Smuggling Incident That Resulted in 53 Deaths* (July 20, 2022), *https://www.justice.gov/usao-wdtx/pr/defendants-indicted-tractor-trailer-smuggling-incident-resulted-53-deaths* (last visited Dec. 15, 2022); DOJ, OPA, *Readout of Latest Justice Department Leadership Meeting on Joint Task Force Alpha's Anti-Human Smuggling and Trafficking Efforts* (June 13. 2022), *https://www.justice.gov/opa/pr/readout-latest-justice-department-leadership-meeting-joint-task-force-alpha-s-anti-human* (last visited Dec. 15, 2022); U.S. Attorney for the District of Arizona, *Three Individuals Arrested for Conspiracy to Transport and Harbor 86 Illegal Aliens from Mexico, Guatemala, and Honduras* (July 6, 2022), *https://www.justice.gov/usao-az/pr/three-individuals-arrested-conspiracy-transport-and-harbor-86-illegal-aliens-mexico* (last visited Dec. 15, 2022); DOJ, OPA, *Eight Defendants Indicted for Human Smuggling and Drug Conspiracy Offenses* (May 10, 2022), *https://www.justice.gov/opa/pr/eight-defendants-indicted-human-smuggling-and-drug-conspiracy-offenses* (last visited Dec. 15, 2022); DOJ, OPA, *DOJ–DHS–INL in Mexico Host Foreign Law Enforcement Partners at Regional Human Smuggling Roundtable Event* (April 6, 2022), *https://www.justice.gov/opa/pr/doj-dhs-inl-mexico-host-foreign-law-enforcement-partners-regional-human-smuggling-roundtable* (last visited Dec. 15, 2022); DOJ, OPA, *Man Sentenced for Role in International Human Smuggling Conspiracy* (Sept. 28, 2021), *https://www.justice.gov/opa/pr/man-sentenced-role-international-human-smuggling-conspiracy* (last visited Dec. 15, 2022); DOJ, OPA, *Law Enforcement Cooperation Between United States and Mexico Leads to Mexican Takedown of Significant Human Smugglers* (Mar. 10, 2022), *https://www.justice.gov/opa/pr/law-enforcement-cooperation-between-united-states-and-mexico-leads-mexican-takedown* (last visited Dec. 15, 2022); U.S. Attorney for the Western District of Texas, *Cuban National Sentenced to Over 38 Years in Prison for Drug Trafficking and Other Crimes after Using His Border Ranch as a Criminal Corridor* (Mar. 9, 2022), *https://www.justice.gov/usao-wdtx/pr/cuban-national-sentenced-over-38-years-prison-drug-trafficking-and-other-crimes-after* (last visited Dec. 15, 2022); U.S. Attorney for the District of Arizona, *Human*

Continued

In April 2022, DHS launched an unprecedented ''Counter Human Smuggler'' campaign designed to disrupt and dismantle human smuggling networks, which included an increase in resources for JTFA and other interagency law enforcement efforts. The Counter Human Smuggler campaign focuses on disrupting key aspects of these criminal operations, including financial assets, and ability to travel and conduct commerce. DHS has committed over $60 million to the effort and surged more than 1,300 personnel in Latin America and along the SWB.[112] Working closely with our foreign partners, DHS has achieved unprecedented results. The results so far have included a 500 percent increase in disruption activities in the first six months, including over 5,000 arrests and 5,500 disruptions of smuggling infrastructure (*e.g.,* raiding smuggler stash houses, impounding tractor trailers that are used to smuggle migrants, and confiscating smugglers' information technology).[113] Despite this monumental effort to counter human smuggling, it alone will not decrease the daily number of encounters at the SWB to a manageable level—these efforts must be combined with other efforts, including an increase in available lawful pathways throughout the region and consequences for migrants who bypass them.

E. Lawful Processes for Individuals To Access the United States

The United States Government has committed to enhancing legal pathways and processes for migrants in the region to access protection and opportunity in the United States. The United States has taken meaningful steps to realize this commitment, including by announcing significant increases to H–2 temporary worker visas and refugee processing in the Western Hemisphere, and by introducing innovative parole processes for nationals of certain countries in the region. By expanding these pathways and processes, the United States has provided migrants an alternative to paying smuggling organizations that profit from taking migrants on a dangerous journey to the SWB, and has provided incentives for migrants to seek an alternative and safer pathway to the United States.

1. Process for Venezuelan Nationals

As described above, on October 12, 2022, the United States Government announced a new process for Venezuelans that created a strong incentive for Venezuelans to wait in safe places to access an orderly process to come to the United States. The process is initiated by a U.S.-based supporter, who agrees to provide financial support to a Venezuelan beneficiary located outside the United States—including those still in Venezuela—thus providing a mechanism for such individuals to enter the United States without having to resort to a dangerous trek north. In order to be eligible, Venezuelan beneficiaries could not have entered the United States, Mexico, or Panama unlawfully following the date of announcement of the process. If they pass the requisite screening and vetting, they are provided advance authorization to travel by air to the United States and, if authorized to travel, are subject to a case-by-case parole determination once they arrive. Beneficiaries of this process can apply for asylum and other applicable immigration benefits and are eligible to immediately apply for employment authorization through an electronic process created by USCIS.[114] The Venezuela process has dramatically impacted migratory flows throughout the region, and as of January 22, 2023, more than 14,300 Venezuelans have come to the United States lawfully pursuant to this process.[115]

By coupling the provision of a safe and orderly lawful process that allows Venezuelan nationals and their immediate family members to come to the United States for a period of up to two years and receive work authorization with a consequence for those who enter unlawfully between the ports of entry, the process has provided critical protections while also yielding a reduction in migratory flows.[116] DHS recently announced changes to the process.[117] Specifically, DHS:

- Lifted the limit of 24,000 total travel authorizations and replaced it with a monthly limit of 30,000 travel authorizations spread across this process and the separate and independent parole processes for Cubans, Haitians, and Nicaraguans; and
- Added an exception that will enable Venezuelans who cross without authorization into the United States at the SWB and are subsequently permitted a one-time option to voluntarily depart or voluntarily withdraw their application for admission to maintain eligibility to participate in the parole process.[118]

2. Processes for Nationals of Cuba, Haiti, and Nicaragua

As noted above, the United States Government recently initiated similar processes for nationals of Cuba, Haiti, and Nicaragua.[119] Like the process for Venezuelans, the processes for Cubans, Haitians, and Nicaraguans allows U.S.-based supporters to apply on behalf of an individual or family to be considered, on a case-by-case basis, for advanced authorization to travel and a temporary period of parole for up to two years for urgent humanitarian reasons or significant public benefit.[120] The parole is for an initial period of two years and parolees may apply for work authorization immediately after entering the country. Like the Venezuela process, implementation of the processes for Cubans, Haitians, and Nicaraguans was and remains contingent on the Government of Mexico's decision to accept the return (under Title 42) or removal (under Title 8) of such migrants who enter irregularly at the SWB.

3. Additional Processes for Haitian Nationals

The United States is working to increase number of Haitians granted immigrant visas and parole in support of family reunification. The Department of State has resumed adjudicating immigrant visas (''IVs'') on December 12 and has committed to surge consular officers to eliminate the IV case backlog in early 2023.

4. Additional Processes for Cuban Nationals

In September 2022, the United States Government announced the resumption

Smuggling Coordinator Pleads Guilty (Feb. 3, 2022), *https://www.justice.gov/usao-az/pr/human-smuggling-coordinator-pleads-guilty* (last visited Dec. 15, 2022); U.S. Attorney for the District of Arizona, *Human Smugglers Plead Guilty to Transporting and Harboring Over 100 Illegal Aliens* (Nov. 18, 2021), *https://www.justice.gov/usao-az/pr/human-smugglers-plead-guilty-transporting-and-harboring-over-100-illegal-aliens* (last visited Dec. 15, 2022); DOJ, OPA, *Attorney General Merrick B. Garland Delivers Remarks at the Meeting of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons* (Jan. 25, 2022), *https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-meeting-president-s-interagency-task* (last visited Dec. 15, 2022); DOJ, OPA, *Readout of Justice Department Leadership Meeting on Human Smuggling and Trafficking Networks* (Nov. 5, 2021), *https://www.justice.gov/opa/pr/readout-justice-department-leadership-meeting-human-smuggling-and-trafficking-networks* (last visited Dec. 15, 2022).

[112] DHS, *FACT SHEET: Counter Human Smuggler Campaign Update* (Oct. 6, 2022), *https://www.dhs.gov/news/2022/10/06/fact-sheet-counter-human-smuggler-campaign-update-dhs-led-effort-makes-5000th* (last visited Dec. 13, 2022).

[113] *Id.*

[114] *DHS Announces New Migration Enforcement Process for Venezuelans, supra.*

[115] OIS analysis of CBP data provided January 23, 2023.

[116] *See supra* Part III.A.3 of this preamble.

[117] *See* 88 FR 1279 (Jan. 9, 2023).

[118] *Id.* at 1280.

[119] *See* 88 FR 1255 (Jan. 9, 2023).

[120] *Id.* at 1256.

of the Cuban Family Reunification Parole (''CFRP'') program, which allows approved Cubans to enter the United States as parolees,[121] thereby allowing USCIS to work through the backlog of over 12,500 CFRP applications. This program has been paused since 2017, but over 125,000 Cubans were authorized to travel for the purpose of parole from 2004 to 2017. Beneficiaries must be currently living in Cuba and be petitioned by a U.S. citizen or LPR family member who was invited to participate. Potential beneficiaries cannot apply for themselves.[122]

By statute, Cuban parolees may apply for LPR status after a year of residence in the United States. Cuban Adjustment Act, Public Law 89–732, 80 Stat. 1161 (1966) (8 U.S.C. 1255 note). In addition, beginning in early 2023, the U.S. Embassy in Havana will resume full immigrant visa processing for the first time since 2017, which will increase the pool of noncitizens eligible for CFRP.[123]

5. Labor Pathways

The United States Government recognizes that many migrants encountered at the SWB are seeking employment opportunities and often hoping to provide for their families via remittances sent home. The United States welcomes, through lawful pathways, noncitizen workers who play a vital role in the economy, particularly in the light of concentrated labor shortages. DHS and its interagency partners have been working diligently over the past few years to expand recruitment of workers for H–2 visas from the Western hemisphere and facilitate their entry into the United States. In FY 2022, for example, the Unites States Government issued more than 19,000 H–2 visas to Guatemalans, Hondurans, and Salvadorans—a 94 percent increase over the 9,796 H–2 visas in FY 2021.[124] In addition, on December 15, 2022, DHS and the Department of Labor (''DOL'') issued a temporary final rule that made an additional 64,716 H–2B temporary nonagricultural worker visas available to employers in FY 2023, in addition to the 66,000 H–2B visas that are normally available each fiscal year. The H–2B supplemental includes an allocation of 20,000 visas to workers from Haiti and the Central American countries of Honduras, Guatemala, and El Salvador.[125]

In addition, the United States Agency for International Development (''USAID'') has worked directly with labor ministries in Central America to dramatically decrease the time it takes to match H–2 workers to employers' requests—from 55 days to 16 days in Guatemala, from 24 days to nine days in Honduras, and from 42 days to 30 days in El Salvador.[126] Certain U.S. embassies and consulates prioritize H–2 visa applications, to the point at which these consular sections can process them in two business days.[127] While not a substitute for asylum, these available processes respond to the needs of many of those encountered at the border who are in fact seeking economic opportunity, not asylum.

6. Expanded Refugee Processing in the Region

In the past two years, the United States Government has taken steps to significantly expand refugee admissions from Latin America and the Caribbean through the U.S. Refugee Admissions Program (''USRAP''). In FY 2022, the United States Government resettled 2,485 refugees from the Western Hemisphere, a 521 percent increase over FY 2021.[128] In June 2022, the United States made a commitment under the Los Angeles Declaration on Migration and Protection to resettle 20,000 refugees from the Americas during Fiscal Years 2023 and 2024.[129] In fulfillment of this commitment, significant resources are being put in place to expand regional refugee processing, which, coupled with the process improvements, are expected to result in thousands more individuals applying for, and being granted, refugee status.

Globally, the United States Government has dedicated significant efforts to rebuilding, strengthening, and modernizing USRAP, including by implementing actions stemming from a major review of USRAP processing across the United States Government. In FY 2022, the United States significantly improved the efficiency and responsiveness of refugee applicant screening and vetting through coordination with the National Vetting Center (''NVC''). Increased efficiency and vetting through the NVC, combined with new technologies and innovation, will allow the United States Government to further improve efficiencies in screening and vetting.[130]

7. Scheduling Arrivals at Ports of Entry

The United States is also expanding the implementation of an innovative new process that uses technology—the CBP One app, a free, public-facing application that can be downloaded on a mobile phone—to significantly increase the number of individuals, including those who may be seeking asylum, that CBP can process at land border ports of entry.

Upon the lifting of the Title 42 public health Order, individuals will be able to use the CBP One app to schedule a time to arrive at a port of entry in order to be processed into the United States in a safe and orderly manner, and once in the United States, able to make claims for protection. CBP has conducted extensive testing of the application to ensure it can receive a high volume of requests at one time, works on both iOS and Android, is user-friendly, and employs clear and accessible language.

The use of CBP One is expected to create efficiencies that will enable CBP to safely and humanely expand its ability to process noncitizens at land border ports of entry, including those who may be seeking asylum. First, the provision of advance biographical and biometric information by the noncitizen, as required by the application (in the form of basic applicant information and provision of a live photograph)—all information that would otherwise be collected upon arrival at the port of entry—is expected to save processing time, thereby allowing CBP officers to process more individuals than would otherwise be possible. CBP anticipates that use of the CBP One app will enable CBP to schedule appointments for—and

[121] USCIS, *USCIS Resumes Cuban Family Reunification Parole Program Operations* (Sept. 9, 2022), *https://www.uscis.gov/newsroom/alerts/uscis-resumes-cuban-family-reunification-parole-program-operations* (last visited Nov. 30, 2022).

[122] USCIS, *The Cuban Family Reunification Parole Program* (last updated Sept. 1, 2022) *https://www.uscis.gov/humanitarian/humanitarian-parole/the-cuban-family-reunification-parole-program* (last visited Dec. 13, 2022).

[123] Department of State, Los Angeles Declaration on Migration and Protection Lima Ministerial Meeting: Fact Sheet (''Lima Ministerial Fact Sheet'') (last updated Oct. 6, 2022), *https://www.state.gov/los-angeles-declaration-on-migration-and-protection-lima-ministerial-meeting/* (last visited Dec. 14, 2022); USCIS, *USCIS Resumes Cuban Family Reunification Parole Program Operations* (Sept. 1, 2022), *https://www.uscis.gov/newsroom/alerts/uscis-resumes-cuban-family-reunification-parole-program-operations* (last visited Dec. 13, 2022).

[124] Lima Ministerial Fact Sheet.

[125] *See* 87 FR 76816, 76817, 76819 (Dec. 15, 2022).

[126] USAID, *Remarks of Administrator Power at the Discussion On Opportunities and Incentives For Expanded H–2A Visa Recruitment with USDA Secretary Vilsack* (Sept. 30, 2022), *https://www.usaid.gov/news-information/speeches/sep-30-2022-remarks-administrator-power-discussion-opportunities-and-incentives* (last visited Jan. 31, 2023).

[127] *Id.*

[128] Lima Ministerial Fact Sheet.

[129] L.A. Declaration Fact Sheet.

[130] Department of State, *Report to Congress on Proposed Refugee Admissions for Fiscal Year 2023* (Sept. 8, 2022), *https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fiscal-year-2023/* (last visited Dec. 13, 2022).

process—multiple times more noncitizens at the border than the pre-pandemic (2014–2019) daily number of inadmissible noncitizens seeking to enter the United States at land border ports of entry. Second, these time savings are expected to reduce the time undocumented individuals spend in CBP custody, which further facilitates a safe and orderly process, reduces the risks associated with overcrowding, and promotes the health and safety of the DHS workforce and noncitizens alike.

Individuals who schedule a time to arrive at a port of entry using CBP One, present themselves at that time, and are processed into the United States, would not be subject to the rebuttable presumption on asylum eligibility created by this proposed rule, whether in an application for asylum or during a credible fear screening.

While the Departments are aware of concerns regarding the accessibility of the CBP One app, both the app and the proposed rule are designed to take account of such accessibility concerns. CBP has observed that the overwhelming majority of noncitizens processed at ports of entry have smartphones. A CBP survey of migrants at the Hidalgo and Brownsville Ports of Entry on December 11, 2022, substantiates that observation—finding that 93 of 95 migrants of all ages had smartphones. In addition, third parties may assist noncitizens to navigate the app and input the required information to schedule a time and place to arrive at a port of entry. The Departments also have proposed to address those who nonetheless continue to have access concerns, by excepting from the rebuttable presumption individuals who arrive at ports of entry without a pre-scheduled time and place if the noncitizen demonstrates by a preponderance of the evidence that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.

In sum, by enabling migrants to schedule a time to arrive at a port of entry, DHS anticipates being able to minimize wait times, ultimately process more migrants, and channel arrivals to ports according to their capacity and ability to safely operate. This will help protect CBP officers' ability to effectively carry out their other critical missions of facilitating trade and travel at the ports of entry.

F. Increased Access to Protection and Other Pathways in the Region

Recognizing that managing migration is a collective responsibility, the United States has been working closely with countries throughout the region to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration, including access to international protection for those in need, throughout the Western Hemisphere. This focus is exemplified in three policy-setting documents: the U.S. Strategy for Addressing the Root Causes of Migration in Central America; [131] the Collaborative Migration Management Strategy (''CMMS''); [132] and the Los Angeles Declaration on Migration and Protection (''L.A. Declaration''), which was endorsed in June 2022 by 21 countries.[133] The CMMS and the L.A. Declaration support a collaborative and regional approach to migration and forced displacement, pursuant to which countries in the hemisphere commit to implementing programs to stabilize communities hosting migrants and asylum seekers, providing increased regular pathways and protections for migrants and asylum seekers residing in or traveled through their countries, and humanely enforcing existing immigration laws. The L.A. Declaration specifically lays out the goal of collectively ''expand[ing] access to regular pathways for migrants and refugees.'' [134]

To further L.A. Declaration commitments, the Department of State's Bureau of Population, Refugees, and Migration (''PRM'') and USAID announced $314 million in new funding for humanitarian and development assistance for refugees and vulnerable migrants across the hemisphere, including support for socio-economic integration and humanitarian aid for Venezuelans in 17 countries of the region.[135] And on September 22, 2022, PRM and USAID announced nearly $376 million in additional humanitarian assistance, which will provide essential support for vulnerable Venezuelans within Venezuela, as well as urgently needed assistance for migrants, refugees, and host communities across the region, further contributing to stabilization to address humanitarian crises in the region.[136]

Already there have been dividends from these efforts, as countries throughout the region have made substantial improvements to their protection systems, offering migrants meaningful new avenues to access temporary protection, domestic job markets, and public benefits such as health care and education. For example, as of 2021, Mexico is the third highest recipient of asylum claims in the world and the Government of Mexico has announced substantial increases to its labor visa programs over the past two years to help those seeking protection enter the labor market.[137] Costa Rica announced its intention to provide protected status to more than 200,000 displaced Nicaraguans.[138] And Colombia is working to provide temporary protected status to more than 2 million displaced Venezuelans.[139]

The following descriptions are illustrative of the efforts being taken by countries in the region, all of which are parties to the 1951 United Nations Convention relating to the Status of Refugees (''Refugee Convention'') or the 1967 Protocol relating to the Status of Refugees (''Refugee Protocol'' or ''Protocol'') [140] and the Convention Against Torture.[141] The Departments recognize that not all the options below

[131] The White House, *FACT SHEET: Strategy to Address the Root Causes of Migration in Central America* (July 29, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-strategy-to-address-the-root-causes-of-migration-in-central-america/* (last visited Dec. 13, 2022).

[132] The White House, *FACT SHEET: The Collaborative Migration Management Strategy* (July 29, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-the-collaborative-migration-management-strategy/* (last visited Dec. 13, 2022).

[133] Department of Homeland Security, Los Angeles Declaration on Migration and Protection (June 10, 2022), *https://www.dhs.gov/news/2022/10/12/dhs-supplement-h-2b-cap-nearly-65000-additional-visas-fiscal-year-2023,* (last visited Nov. 30, 2022).

[134] *Id.*

[135] Department of State, *Additional $314 Million for U.S. Humanitarian Response to the Venezuela Regional Crisis* (June 10, 2022), *https://www.state.gov/additional-314-million-for-u-s-humanitarian-response-to-the-venezuela-regional-crisis/* (last visited Dec. 13, 2022).

[136] USAID, *The United States Announces Nearly $376 Million in Additional Humanitarian Assistance for People Affected by the Ongoing Crisis in Venezuela and the Region* (Sept. 22, 2022), *https://www.usaid.gov/news-information/press-releases/sep-22-2022-the-us-announces-nearly-376-million-additional-humanitarian-assistance-for-people-affected-by-ongoing-crisis-in-venezuela* (last visited Dec. 13, 2022).

[137] L.A. Declaration Fact Sheet; International Rescue Committee, *Asylum Seekers in Mexico Need Support to Join the Labor Market and Rebuild Their Lives, IRC and Citi Foundation Respond with a Project* (Dec. 7, 2022), *https://www.rescue.org/press-release/asylum-seekers-mexico-need-support-join-labor-market-and-rebuild-their-lives-irc-and* (last visited Dec. 13, 2022).

[138] *https://reliefweb.int/report/colombia/colombia-operational-update-january-february-2022Alvaro* Murillo et al., *Costa Rica Prepares Plan to Regularize Status of 200,000 Mostly Nicaraguan Migrants,* Reuters, Aug. 10, 2022, *https://www.reuters.com/world/americas/costa-rica-prepares-plan-regularize-status-200000-mostly-nicaraguan-migrants-2022-08-10/* (last visited Dec. 13, 2022).

[139] L.A. Declaration Fact Sheet.

[140] 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

[141] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114.

are viable for each migrant or asylum seeker, depending upon their individual circumstances. However, a location that may be unsafe for one person may not only be safe for, but offer a much-needed refuge to, others. While some of the countries below are the origin for sizable numbers of asylum seekers in the region, they also demonstrably provide protection for others who do consider those countries to be safe options where they are free from persecution or torture. Many such countries have stepped up in significant ways to address the unprecedented movement of migrants throughout the hemisphere—which has created a humanitarian challenge for almost every country in the region—by providing increased access to protection.

Mexico: The Government of Mexico has made notable strides in strengthening access to international protection through its Mexican Refugee Assistance Commission (''COMAR''), and as a result has now emerged as one of the top countries receiving asylum applications in the world.

COMAR now has staffing and field presence in seven COMAR offices and representation at three additional National Migration Institute offices.[142] According to the United Nations High Commissioner for Refugees (''UNHCR''), nearly 60,000 asylum seekers were assisted by a legal network comprising more than 100 lawyers and paralegals in 2021, and the Federal Public Defender's Office provides additional support to people with asylum claims before COMAR.[143] Applicants who do not qualify for asylum in Mexico are automatically considered for complementary protection if they possess a fear of harm in their country of origin, or if there is reason to believe that they will be subjected to torture or to cruel, inhuman, or degrading treatment, but do not meet the refugee definition. Complementary protection allows these beneficiaries to regularize their status.[144]

In 2021, COMAR received nearly 130,000 asylum applications—almost double the number of applications it processed in 2019, and the third most of any country in the world, after the United States and Germany.[145] Of those applications in 2021, COMAR granted asylum in 72 percent of cases; an additional two percent of applicants were granted complementary protection.[146] The average case takes 8–12 months to adjudicate.[147] With United States Government funding and the support of international organizations, Mexico also has substantially increased its Local Integration Program, which relocates and integrates individuals granted asylum in safe areas of Mexico's industrial corridor. These individuals are then matched with jobs and provided apartments, and their children are enrolled in local schools. In May 2022, the program reached the milestone of reintegrating its 20,000th asylum seeker in Mexico.[148] And in June 2022, Mexico committed to support local labor integration for an additional 20,000 asylees over the next three years.[149]

It is also notable that that the Government of Mexico has become a regional leader in providing labor pathways for individuals who are seeking economic opportunity. Mexico has committed to growing the Border Visitor Work Card program—which allows unlimited entry and exit for Guatemalans and Belizeans to cross Mexico's southern border and work in Southern Mexican states—from approximately 3,500 beneficiaries a year to 10,000–20,000 beneficiaries per year.[150] Mexico also announced the launch of a new temporary labor program for 15,000–20,000 Guatemalan workers. This will be expanded to Honduran and Salvadoran workers in the medium term and highlights the priority that the Government of Mexico is placing on providing lawful mechanisms for migrants to access opportunity, thus reducing the incentive to resort to irregular migration.[151]

Guatemala: Over the past two years, the Government of Guatemala has taken key steps to continue to develop its asylum system. In 2021, the Guatemalan Migration Institute (''IGM'') announced that it established the Refugee Status Recognition Department (''DRER'') to better receive and process asylum applications, in line with the concept of regional responsibility sharing to manage migration.[152] DRER is a specialized branch of IGM that has been created solely to receive asylum claims—a key improvement from its prior practice, where intake was not specialized for asylum seekers. The Government of Guatemala also partnered with the United States Government and international organizations, including UNHCR, IOM, and the United Nations International Children's Emergency Fund to establish a series of Attention Centers for Migrants and Refugees in Guatemala City, Tecun Uman, and Quetzaltenango.[153] These centers, located in key locations across Guatemala, provide individuals an

[142] COMAR witnessed a historically high level of asylum applications in 2021 with 129,791 cases—a level that was maintained through 2022, with 118,478 applications. Government of Mexico, *La COMAR en Números* (Dec. 2022), *https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022__31-Dic.__1.pdf* (last visited Feb. 1, 2023). Of the 419,337 individuals who have applied for asylum from COMAR from 2013 through the end of 2022, COMAR has granted asylum to 92,030 of these individuals. *Id.*

[143] United Nations High Commissioner for Refugees, *Protection and Solutions in the Pandemic* at 33 (2022), *https://www.acnur.org/6261d3ab4.pdf* (last visited Dec. 17, 2022); MIRPS, *MIRPS in Mexico, https://mirps-platform.org/en/mirps-by-country/mirps-in-mexico/* (last visited Dec. 17, 2022).

[144] Government of Mexico, *Ley sobre Refugiados, Protección Complementaria y Asilo Político* (Jan. 27, 2011), *https://www.gob.mx/cms/uploads/attachment/file/211049/08_Ley_sobre_Refugiados__Protecci_n_Complementaria_y_Asilo_Pol_tico.pdf* (last visited Dec. 17, 2022).

[145] Lizbeth Diaz, *Mexico Asylum Applications Surge in 2021, Haitians Top List,* Reuters, Jan. 3, 2022, *https://www.reuters.com/world/americas/mexico-asylum-applications-nearly-double-2021-haitians-top-list-2022-01-03/* (last visited Dec. 13, 2022); TeleSUR English, *Mexico was the Third Country with the Highest Number of Asylum Applications in 2021,* YouTube (Apr. 22, 2022), *https://www.youtube.com/watch?v=zD1jVg8CJ9s* (last visited Dec. 13, 2022).

[146] Lizbeth Diaz, *Mexico Asylum Applications Surge in 2021, Haitians Top List,* Reuters, Jan. 3, 2022, *https://www.reuters.com/world/americas/mexico-asylum-applications-nearly-double-2021-haitians-top-list-2022-01-03/* (last visited Dec. 13, 2022).

[147] Refugees International, *Mexico's Use of Differentiated Asylum Procedures: An Innovative Approach to Asylum Processing* (July 20, 2021), *https://www.refugeesinternational.org/reports/use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing-#_ftn5* (last visited Dec. 13, 2022).

[148] UNHCR, *Más de 20.000 Reubicaciones como Parte de los Esfuerzos de Integración de Personas Refugiadas en México* (May 25, 2022), *https://www.acnur.org/noticias/press/2022/5/628e4b524/mas-de-20000-reubicaciones-como-parte-de-los-esfuerzos-de-integracion-de.html* (last visited Dec. 13, 2022).

[149] L.A. Declaration Fact Sheet.

[150] Government of Mexico, Press Release, *Mexico to Expand Labor Mobility Programs and Integrate Refugees into its Labor Market* (June 10, 2022), *https://www.gob.mx/sre/prensa/mexico-to-expand-labor-mobility-programs-and-integrate-refugees-into-its-labor-market?idiom=en* (last visited Dec. 16, 2022); L.A. Declaration Fact Sheet.

[151] Unidad de Política Migratoria, *Boleti0301;n Mensual de Estadísticas Emigratorias* (Oct. 2022), *http://www.politicamigratoria.gob.mx/es/PoliticaMigratoria/Boletines_Estadisticos* (last visited Dec. 14, 2022); L.A. Declaration Fact Sheet.

[152] Government of Guatemala Ministry of Foreign Affairs, Comunicado, *Guatemala Fortalece Acción Institucional en Esfuerzo Regional por Atención y Dignificación de Refugiados con Apoyo de ACNU Guatemala* (Feb. 9, 2021), *https://prensa.gob.gt/guatemala-fortalece-accion-institucional-en-esfuerzo-regional-por-atencion-y-dignificacion-de-0* (last visited Dec. 13, 2022).

[153] The White House, *FACT SHEET: Update on the Collaborative Migration Management Strategy* (April 20, 2022), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/20/fact-sheet-update-on-the-collaborative-migration-management-strategy/* (last visited Dec. 15, 2022).

opportunity to have their protection, humanitarian, and economic needs evaluated in order to provide appropriate services and referrals. Since their inception, more than 32,000 individuals have accessed these centers.[154]

In 2019 and 2020, IGM received just under 500 asylum applications per year; however, that number doubled to 1,054 in 2021. As of March 2022, IGM had already received nearly 300 applications in 2022 and granted asylum to 590 individuals.[155] In addition, with support from the United States Government, UNHCR has helped Guatemala streamline the issuance of work permits for refugee and asylum seekers from 15 to 4 business days.[156]

Belize: Belize also has taken meaningful steps to expand protection for migrants. In December 2021, the Government of Belize announced an amnesty program for asylum seekers who registered before March 31, 2020 (but whose cases have not been adjudicated), and irregular migrants who have lived in the country before December 31, 2016.[157] Additionally, migrants can qualify for other reasons tied to their societal connections to Belize, such as having a Belizean child, marrying a Belizean, or completing school in Belize and continuing to reside in Belize. Recipients are immediately granted permanent residence with a path to citizenship.[158] UNHCR reports that, as of October 2022, a total of 4,130 individuals (primarily Guatemalans, Hondurans and Salvadorans) have been granted asylum in Belize.[159]

Costa Rica: Costa Rica has demonstrated its commitment to providing humanitarian and other protections to asylum seekers and displaced migrants over the past two years. It is currently hosting roughly 300,000 Nicaraguan nationals who have fled deteriorating economic and security conditions in that country—a number that constitutes about 75 percent of Costa Rica's migrant population.[160] As recently as September 2022, Costa Rican officials reported more than 200,000 pending applications and another 50,000 people waiting for their appointment to make a formal application. Nicaraguans account for nearly 9 out of 10 applicants.[161]

The Government of Costa Rica recently announced its intention to regularize the status of more than 200,000 mostly Nicaraguan migrants, providing them with access to jobs and healthcare as part of the process.[162] In addition, the Government of Costa Rica committed in its National Action Plan for the Comprehensive Regional Protection and Solutions Framework to ''establish complementary protection or other mechanisms to guarantee the non-refoulement principle for people who do not meet the requirements to be recognized as refugees but should not be returned to their country of origin, because of reasonable risk of suffering harm.'' [163]

On March 15, 2022, following extensive diplomatic engagement, the United States and the Government of Costa Rica signed a migration arrangement, the first such agreement in the region. This agreement outlines both countries' mutual commitment to work collaboratively to manage migration and expand legal pathways and access to protection.[164] Furthermore, through the L.A. Declaration, Costa Rica committed to renewing the temporary complementary protection category scheme for migrants of Cuba, Nicaragua, and Venezuela.[165] Making true on its commitment in the L.A. Declaration, Costa Rica has established a Temporary Complementary Protection Program, also known as a Special Temporary Category (''STC''), for Cuban, Nicaraguan, and Venezuelan migrants who applied for asylum between January 1, 2010, and September 30, 2022, and desire to withdraw their applications in lieu of permission to remain lawfully in Costa Rica, work, and receive other social services in the country. STC holders will be permitted to apply for residency after five years.

Colombia: Colombia has emerged as one of the leaders in the Western Hemisphere—and the world—in its response to the unprecedented surge in irregular migration from Venezuela. On February 8, 2021, the Government of Colombia announced an innovative program to provide temporary protected status for 10 years to Venezuelans residing in Colombia as of that date, as well those who enter the country and register through official ports of entry over the next two years. This form of complementary protection provides Venezuelan migrants with government identity documents, allowing them to work legally, access public and private services, and integrate and contribute to Colombia's economy and society.[166]

More than 2.3 million Venezuelans have registered for this complementary protection, and as of December 2022, the Government of Colombia had approved documents to provide temporary legal status to over 1.6 million Venezuelans and delivered them to nearly 1.5 million Venezuelans.[167] The new Petro Administration in Colombia has affirmed its commitment to continuing these efforts, and Colombia is working to expand measures that promote integration of these migrants in Colombian society.

Ecuador: The Government of Ecuador is hosting more than 500,000 displaced Venezuelans and has worked to meaningfully expand protection for migrants in recent months.[168] Ecuador has received nearly 12,000 asylum applications containing over 60,000 applicants since 2017 and granted

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[154] *Id.*

[155] Instituto Guatemalteco de Migración, *Información Sobre Personas Solicitantes y Refugiadas en Guatemala: Enero 2002–Marzo 2022* (Mar. 2022), *https://igm.gob.gt/wp-content/uploads/2022/04/Informe-con-Graficos-Marzo-2022.pdf* (last visited Dec. 13, 2022).

[156] Government of Guatemala, *Extranjeros Podrán Solicitar Permiso de Trabajo En Línea* (Feb. 28, 2022), *https://www.mintrabajo.gob.gt/index.php/noticias/356-extranjeros-podran-solicitar-permiso-de-trabajo-en-linea* (last visited Dec. 15, 2022).

[157] Government of Belize, *Announcement of Amnesty 2022* (Dec. 7, 2022), *https://www.pressoffice.gov.bz/announcement-of-amnesty-2022/* (last visited Dec. 8, 2022).

[158] *Id.*

[159] UNHCR, *Fact Sheet: Belize September–October 2022* (Nov. 28, 2022), *https://data.unhcr.org/en/documents/details/97161* (last visited Dec. 13, 2022).

[160] Nicaragua, *CIA World Factbook* (Dec. 2, 2022), *https://www.cia.gov/the-world-factbook/countries/nicaragua/#:~:text=Today%20roughly%20300%2C000%20Nicaraguans%20are,seasonally%20for%20work%2C%20many%20illegally* (last visited Dec. 15, 2022).

[161] Moises Castillo, *Fleeing Nicaraguans strain Costa Rica's asylum system,* Associated Press, Sept. 2, 2022, *https://apnews.com/article/covid-health-elections-presidential-caribbean-52044748d15dbbb6ca706c66cc7459a5* (last visited Dec. 15, 2022).

[162] Alvaro Murillo et al., *Costa Rica Prepares Plan to Regularize Status of 200,00 Mostly Nicaraguan Migrants,* Reuters, Aug. 10, 2022, *https://www.reuters.com/world/americas/costa-rica-prepares-plan-regularize-status-200000-mostly-nicaraguan-migrants-2022-08-10/* (last visited Dec. 13, 2022).

[163] *MIRPS National Action Plan: Belize, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama* 7, *https://globalcompactrefugees.org/sites/default/files/2021-04/MIRPS%20National%20commitments.pdf* (last visited Dec. 16, 2022).

[164] DHS, *Readout of Secretary Mayorkas's Visit to Mexico and Costa Rica* (Mar. 15, 2022), *https://www.dhs.gov/news/2022/03/16/readout-secretary-mayorkass-visit-mexico-and-costa-rica* (last visited Dec. 13, 2022); U.S. Embassy in Costa Rica, *United States and Costa Rica Sign Migration Arrangement* (Mar. 17, 2022), *https://cr.usembassy.gov/united-states-and-costa-rica-sign-migration-arrangement/* (last visited Dec. 13, 2022).

[165] L.A. Declaration Fact Sheet.

[166] UNHCR, *Temporary Protection Status in Colombia (November 2021)* (Dec. 3, 2021), *https://reliefweb.int/report/colombia/temporary-protection-status-colombia-november-2021-0* (last visited Dec. 13, 2022).

[167] Government of Colombia, *Visibles: Estado Temporal de Protección, https://www.migracioncolombia.gov.co/visibles* (last visited Dec. 15, 2022).

[168] UNHCR, *Ecuador: Monthly Update October 2022* (Nov. 10, 2022), *https://reporting.unhcr.org/document/3742* (last visited Dec. 13, 2022).

asylum to 12,643 individuals and complementary protection to another 195 individuals through mid-2022.[169] On September 1, 2022, it launched the first phase of its registration process, which will enable irregular migrants to gain a temporary resident permit—opening online registration to an estimated 120,000 Venezuelans who hold or previously held a regular migration status and all unaccompanied minors. More than 68,500 individuals registered within the first week. The second phase opened on November 16, 2022, to approximately 100,000 non-Venezuelan migrants (the majority of whom are Colombian) who entered regularly. As of November 25, 2022, more than 89,000 individuals had registered and over 22,000 have already received their temporary residency visa. The third phase will open February 17, 2023, to an estimated 350,000 Venezuelans who entered irregularly.

Canada: Canada operates a well-known Temporary Foreign Worker Program and expected to welcome 50,000 agricultural workers from Mexico, Guatemala, and the Caribbean in 2022.[170] In 2021, Canada admitted 61,735 workers specifically in the agricultural sector, 44 percent of whom were from Mexico and 23 percent from Guatemala.[171] This is in addition to its refugee resettlement program, which has received 17,687 referrals from the Western Hemisphere in 2022, of which 5,020 have been granted refugee status in Canada so far.[172]

IV. Description of the Proposed Rule

A. Rebuttable Presumption of Ineligibility for Asylum and Exceptions

Pursuant to section 208(b)(1)(A), (b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B), the Departments are proposing a condition on asylum eligibility, in the form of a new rebuttable presumption of ineligibility for asylum in proposed 8 CFR 208.33 and 8 CFR 1208.33 for certain noncitizens who enter the United States at the southwest land border. Under this NPRM, this rebuttable presumption would apply to certain noncitizens entering the United States at the southwest land border without documents sufficient for lawful admission as described in section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), on or after the date of termination of the Title 42 public health Order, after traveling through a country that is party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees. For purposes of proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1), the phrase ''enters the United States at the southwest land border'' would mean any crossing into the territorial limits of the United States, *i.e.,* physical presence, whether presenting at a U.S. port of entry or crossing into U.S. territory between ports of entry, without regard to whether the noncitizen has been inspected by an immigration officer, evaded inspection by an immigration officer, or was free from official restraint or surveillance. In other words, the term ''enters'' would not be intended to import the definitions of ''entry'' that have been used in certain other, unique immigration law contexts. *Cf., e.g., Matter of Martinez-Serrano,* 25 I&N Dec. 151, 153 (BIA 2009).

This rebuttable presumption would not apply to noncitizens who availed themselves of certain established processes to enter the United States or sought asylum in a third country and were denied. Proposed 8 CFR 208.33(a)(1), 8 CFR 1208.33(a)(1). Specifically, the rebuttable presumption would not be applicable to noncitizens who are provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process; presented at a port of entry at a pre-scheduled time and place, or presented at a port of entry, without a pre-scheduled time and place, if the noncitizen demonstrates that the DHS scheduling system (currently the CBP One app) was not possible for the noncitizen to access or use; or sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application. Proposed 8 CFR 208.33(a)(1)(i) through (iii), 1208.33(a)(1)(i) through (iii).[173]

A noncitizen could rebut this presumption by demonstrating exceptionally compelling circumstances by a preponderance of the evidence. The proposed rule lists three per se grounds for rebuttal: if a noncitizen demonstrates that, at the time of entry, they or a member of their family as described in 8 CFR 208.30(c) with whom the noncitizen is traveling faced an acute medical emergency; faced an imminent and extreme threat to their life or safety; or were a ''victim of a severe form of trafficking in persons'' as defined in 8 CFR 214.11. Proposed 8 CFR 208.33(a)(2)(i) through (iii), 1208.33(a)(2)(i) through (iii). Acute medical emergencies would include situations in which someone faces a life-threatening medical emergency or faces acute and grave medical needs that cannot be adequately addressed outside of the United States. Examples of imminent and extreme threats would include imminent threats of rape, kidnapping, torture, or murder that the noncitizen faced at the time the noncitizen crossed the SWB, such that they cannot wait for an opportunity to present at a port of entry in accordance with the processes outlined in this proposed rule without putting their life or well-being at extreme risk; it would not include generalized threats of violence. In addition to the per se grounds for rebuttal, the presumption also could be rebutted in other exceptionally compelling circumstances, as the adjudicators in the sound exercise of their judgment may determine.

One such additional exceptionally compelling circumstance that the proposed rule would recognize avoids a circumstance that may lead to the separation of a family. *See* proposed 8 CFR 1208.33(d). Those subject to the lawful pathways condition on asylum eligibility who do not rebut the presumption would be able to continue to apply for statutory withholding of removal and protection under the CAT. Unlike in asylum, spouses and minor children are not eligible for derivative grants of withholding of removal or CAT protection. *Compare* INA 208(b)(3)(A), 8 U.S.C. 1158(b)(3)(A) (''[a] spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien''), *with* INA 241(b)(3), 8 U.S.C. 1231(b)(3) (not providing for derivative statutory withholding of removal), *and* 8 CFR 1208.16(c)(2) (not providing for derivative CAT protection); *see also*

[169] UNHCR, *Ecuador: Monthly Update October 2022* (Nov. 10, 2022), *https://reporting.unhcr.org/document/3742* (last visited Dec. 13, 2022); UNHCR, *Refugee Data Finder; Asylum Applications, https://www.unhcr.org/refugee-statistics/download/?url=Lzen78* (last visited Dec. 13, 2022); UNHCR, *Refugee Data Finder; Asylum Decisions, https://www.unhcr.org/refugee-statistics/download/?url=U7qmaT* (last visited Dec. 13, 2022).

[170] L.A. Declaration Fact Sheet.

[171] Statistics Canada, *Countries of Citizenship for Temporary Foreign Workers in the Agricultural Sector* (June 13, 2022), *https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210022101* (last visited Dec. 13, 2022).

[172] Immigration and Refugee Board of Canada, *Claims by Country of Alleged Persecution 2022 (January to September)* (Nov. 22, 2022), *https://www.irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat2022.aspx* (last visited Dec. 13, 2022).

[173] The exemption for circumstances in which the DHS scheduling system was inaccessible or unusable is designed to capture a narrow set of cases in which it was truly not possible for the noncitizen to access or use the DHS system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.

Sumolang v. *Holder,* 723 F.3d 1080, 1083 (9th Cir. 2013) (recognizing that the asylum statute allows for derivative beneficiaries of the principal applicant for asylum, but that the withholding of removal statute makes no such allowance). Where a principal asylum applicant is eligible for statutory withholding of removal or CAT protection and would be granted asylum but for the lawful pathways rebuttable presumption, and where the denial of asylum on that ground alone would lead to the applicant's family being separated because at least one other family member would not qualify for asylum or other protection from removal on their own—meaning the entire family may not be able to remain together—the Departments have determined that the possibility of separating the family would constitute an exceptionally compelling circumstance that rebuts the lawful pathways presumption of ineligibility for asylum. *See* Executive Order 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273, 8273 (Feb. 5, 2021) (''It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States.'').

This family unity provision would appear in EOIR's regulations and not DHS's regulations. That is because only EOIR adjudicators are able to issue removal orders to noncitizens found to have a credible fear and thus, functionally, are the only adjudicators able to withhold or defer those orders under the statute or the regulations implementing the CAT. Hence, a key inquiry for this rebuttal circumstance—whether the principal applicant is eligible for statutory withholding of removal or CAT protection—would be one reserved for EOIR and made during removal proceedings even for those who are first processed through the asylum merits process. Thus, inquiry into this rebuttal circumstance is properly reserved for proceedings before EOIR. Importantly, the absence of this provision from the DHS regulations would not lead to the separation of families. When USCIS conducts a credible fear screening of a family unit, it will find that the entire family unit passes the screening if one member of the family is found to have a credible fear. *See* 8 CFR 208.30(c). USCIS will continue to process family claims in this manner even when applying the reasonable possibility standard.

The proposed rule also contains a specific exception to the rebuttable presumption for unaccompanied children. Recognizing Congress's attention to the particular vulnerability of unaccompanied children, *see* INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E) (exempting unaccompanied children from the safe-third-country bar); INA 208(b)(3)(C), 8 U.S.C. 1158(a)(2)(E) (permitting unaccompanied children to present their asylum claims in the first instance to an asylum officer in a non-adversarial interview),[174] unaccompanied children would be categorically excepted from the rebuttable presumption. *See* proposed 8 CFR 208.33(b)(1), 1208.33(b)(1). Moreover, applicability of the rebuttable presumption would be adjudicated during the credible fear process for noncitizens processed for expedited removal, as well as applied to merits adjudications, as discussed below. Pursuant to the Trafficking Victims Protection Reauthorization Act of 2008, unaccompanied children whom DHS seeks to remove cannot be processed for expedited removal and, thus, are never subject to the credible fear process. 8 U.S.C. 1232(a)(5)(D). As unaccompanied children are already precluded from expedited removal, which may already be an incentive for children to arrive unaccompanied at our border, the Departments do not expect—based on their experience implementing current law concerning expedited removal and asylum—that this exclusion of unaccompanied children from the rebuttable presumption would serve as a significant incentive for families to send their children unaccompanied to the United States. Moreover, under this NPRM, families would be able to avail themselves of lawful pathways and processes to enter the United States and not be subject to the rebuttable presumption.

B. Screening Procedures

Although the rebuttable presumption would apply to any noncitizen who is described in proposed 8 CFR 208.33(a)(1), it would most frequently be relevant for noncitizens who are subject to expedited removal under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1).[175] As described above, such noncitizens are subject to removal ''without further hearing or review'' unless they indicate an intention to apply for asylum or fear of persecution. INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i). Noncitizens in expedited removal who indicate an intention to apply for asylum or fear of persecution are referred to an asylum officer for an interview to determine if they have a credible fear of persecution and should accordingly remain in proceedings for further consideration of the application. INA 235(b)(1)(A)(ii), (b)(1)(B)(i)–(ii), 8 U.S.C. 1225(b)(1)(A)(ii), (b)(1)(B)(i)–(ii). In addition, asylum officers consider whether a noncitizen in expedited removal may be eligible for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or for protection under the regulations implementing U.S. non-refoulement obligations under the CAT. *See* 8 CFR 208.30(e)(2) and (3).

Accordingly, the proposed rule would implement changes to and build on this existing system and would instruct asylum officers to apply the lawful pathways rebuttable presumption during credible fear screenings. The proposed rule would establish procedures for asylum officers to follow when determining whether the rebuttable presumption applies to a noncitizen, *see* proposed 8 CFR 208.33(a)(1), and, if it does, whether the noncitizen has rebutted the presumption, *see* proposed 8 CFR 208.33(a)(2). In addition, for noncitizens found to be ineligible for asylum under the proposed rule, the proposed rule would establish procedures for asylum officers to further consider a noncitizen's fear of removal in the context of the noncitizen's eligibility for withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or for protection under the regulations implementing the CAT.

For each noncitizen referred to an asylum officer for a credible fear interview, the asylum officer would first determine if the noncitizen is covered by and fails to rebut the presumption of ineligibility at proposed 8 CFR 208.33(a)(1). If the asylum officer determines that the answer to both questions is ''yes,'' then the noncitizen would be ineligible for asylum under the lawful pathways condition, and the asylum officer would proceed to determine whether the noncitizen has established a reasonable possibility of persecution or torture[176] in order to

[174] *See also* 8 U.S.C. 1232(d)(8) (''Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.'').

[175] For a more complete description of the expedited removal process, see the Legal Authority section below.

[176] The Departments acknowledge that, in the Asylum Processing IFR, they recently rescinded changes made by the Global Asylum Rule that applied mandatory bars during credible fear screenings and subjected noncitizens' remaining claims for statutory withholding and CAT protection to the ''reasonable possibility'' of persecution or torture standard. As discussed in Part V.C.6.ii of this preamble, the Departments have

screen for withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or for withholding of removal under the regulations implementing the CAT as to the identified country of removal.[177] However, if the asylum officer determines that the answer to either question is ''no''—meaning the asylum officer has determined that the noncitizen is not covered by the lawful pathways condition (for example, because the noncitizen pursued a lawful pathway set forth in proposed 8 CFR 208.33(a)(1)) or is excepted pursuant to proposed 8 CFR 208.33(b)(2))[178] or the asylum officer determined that the noncitizen met the burden to rebut the presumption under proposed 8 CFR 208.33(a)(2)—then the asylum officer would follow the procedures in 8 CFR 208.30, which provide for a positive credible fear determination if the noncitizen establishes a significant possibility of establishing eligibility for asylum under section 208 of the INA, statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or withholding of removal under the regulations implementing the CAT.

In other words, if the asylum officer determines that the noncitizen is not subject to or has overcome the presumption described in this proposed rule and thus is otherwise potentially eligible for asylum, the asylum officer's credible fear determination would follow the procedures already in place, including the use of the ''significant possibility'' standard to screen for eligibility for asylum, statutory withholding of removal, and CAT protection. *See* 8 CFR 208.30(e)(2) and (3); *see also* 86 FR at 46914–15 (describing the history of the credible fear screening process and ''significant possibility'' standard). If, however, the asylum officer determines that the noncitizen is ineligible for asylum due to the lawful pathways condition, the asylum officer's review would be limited to whether the noncitizen has demonstrated a reasonable possibility of persecution or torture, in order to screen for statutory withholding of removal and CAT protection.

If the asylum officer finds that a noncitizen who is ineligible for asylum due to the lawful pathways condition establishes a reasonable possibility of persecution or torture, as with other credible fear interviews, DHS would issue the noncitizen a Form I–862, Notice to Appear, and thereby place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. During the course of removal proceedings, the noncitizen would be able to apply for asylum, statutory withholding of removal, and protection under the CAT by filing a Form I–589 in accordance with the form's and the court's instructions, and the noncitizen could also seek any other claims for relief they wish to pursue.[179] In adjudicating the noncitizen's application for asylum in section 240 proceedings, the IJ would use a de novo standard of review (meaning the judge considers the asylum officer's record, but rules without deferring to the asylum officer's factual findings or legal conclusions) in determining the applicability of the lawful pathways condition on eligibility for asylum.

If the asylum officer were to find that a noncitizen is ineligible for asylum due to the lawful pathways condition and fails to demonstrate a reasonable possibility of persecution or torture, the asylum officer would enter a negative credible fear determination, provide the noncitizen with a written notice of the decision, and inquire if the noncitizen wishes to seek further review of the asylum officer's determination before an IJ. The noncitizen would indicate whether or not he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge. If the noncitizen requests an IJ's review, the asylum officer would serve the noncitizen with a Form I–863, Notice of Referral, and provide the IJ with the record of the asylum officer's determination. A complete description of the proposed IJ review proceedings is set out in the next section. As relevant for the DHS procedures, however, the proposed rule provides that the case would be returned to DHS for removal of the noncitizen if the IJ affirms the asylum officer and issues a negative credible fear determination, either because (1) the IJ determined that the noncitizen is covered by the lawful pathways condition and did not rebut the presumption and that the noncitizen did not establish a reasonable possibility of persecution or torture, or (2) the IJ determined that the noncitizen was not covered by the lawful pathways condition or rebutted the presumption and that the noncitizen did not establish a significant possibility of qualifying for asylum, withholding of removal, or protection under the CAT. On the other hand, if the IJ issues a positive credible fear finding, DHS would initiate further proceedings that would allow the noncitizen the opportunity to pursue a claim for asylum, statutory withholding of removal, and CAT protection. Specifically, if the IJ finds that the noncitizen is not covered by the lawful pathways condition or successfully rebutted the condition's presumption of ineligibility for asylum and established a significant possibility of eligibility for asylum, withholding of removal, or CAT protection, DHS would have the discretion either to issue the noncitizen a Form I–862, Notice to Appear, and thereby place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a, or to refer the noncitizen for a merits interview before an asylum officer under newly established procedures. *See* 8 CFR 1208.30(g)(2)(iv)(B); Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078 (Mar. 29, 2022) (''Asylum Processing IFR''). Alternatively, if the IJ finds that the noncitizen is subject to the lawful pathways condition and did not rebut the presumption of ineligibility but determines that the noncitizen established a reasonable possibility of persecution or torture, DHS would file a Form I–862, Notice to Appear, and place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a.[180]

determined that in the unique circumstances discussed in this proposed rule, it would be appropriate to apply the lawful pathways additional limitation on asylum eligibility during the credible fear screening stage and to then apply the ''reasonable possibility'' of persecution or torture standard to screen the remaining applications for statutory withholding of removal and CAT protection, and that doing so in the way the Departments intend would lead to better allocation of resources overall.

[177] In most cases, the country of removal is the noncitizen's country of citizenship or nationality. However, DHS may identify one or more alternative countries of removal. *See* INA 241(b)(2), 8 U.S.C. 1231(b)(2) (designating countries of removal).

[178] For example, as discussed above, the proposed rule excepts unaccompanied children, but such exception is not relevant to the discussion here as unaccompanied children are ineligible for expedited removal. *See* 8 U.S.C. 1252(a)(5)(D).

[179] Specifically, the asylum officer's determination regarding the noncitizen's ineligibility for asylum due to the lawful pathways condition would not be controlling in section 240 removal proceedings, and the IJ would be able to consider the noncitizen's asylum eligibility using a de novo standard of review. In addition, the noncitizen could seek any other form of relief or protection available in section 240 proceedings, subject to the eligibility requirements for such relief or protection.

[180] The Departments note that this proposed rule would provide that DHS will refer all noncitizens subject to the lawful pathways limitation who establish a reasonable possibility of persecution or torture to removal proceedings under section 240 of the INA, 8 U.S.C. 1229a, even though the Credible Fear and Asylum Processing IFR provides that DHS has discretion to place other categories of screened-in noncitizens either in section 240 removal proceedings or in an asylum merits hearing before a USCIS asylum officer under newly established

Continued

C. IJ Review Procedure

Under longstanding regulations, IJs have had the authority to review, upon the request of a noncitizen, an asylum officer's negative credible fear determination. *See generally* 8 CFR 1003.42, 1208.30. Consistent with this practice, this proposed rule would provide for IJ review of asylum officers' negative credible fear determinations in cases governed by proposed 8 CFR 208.33. A negative credible fear determination encompasses findings that noncitizens have not established a significant possibility of eligibility for asylum or a reasonable fear of persecution or torture for purposes of statutory withholding under the INA or the regulations implementing CAT.

Thus, where an asylum officer issues a negative credible fear determination pursuant to this proposed rule, the asylum officer would inquire whether the noncitizen wishes for an IJ to review that determination. *See* proposed 8 CFR 208.33(c)(2)(iii). Where the noncitizen requests such review, the record would be referred to an IJ. *See* proposed 8 CFR 208.33(c)(2)(v). As required by the INA, IJ review will be held in-person, by video, or by telephone, and the noncitizen will have ''an opportunity . . . to be heard and questioned by the immigration judge.'' [181]

Consistent with established practice, the IJ would evaluate the case under a de novo standard of review. *See* 8 CFR 1003.42(d)(1), proposed 8 CFR 1208.33(c)(1). The IJ would first assess whether the rebuttable presumption of asylum ineligibility at proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1) applies and, if so, whether it was rebutted by the noncitizen. Where the IJ determines that the presumption applies and is not rebutted, the IJ would assess whether the noncitizen has established a reasonable possibility of persecution or torture in the country of removal. Where the IJ concludes that the noncitizen has established such a reasonable possibility, the IJ would issue a positive credible fear determination. *See* proposed 8 CFR 1208.33(c)(2)(ii). Where the IJ concludes that the noncitizen has not established such a reasonable possibility, the IJ would issue a negative credible fear determination. *See id.*

If the IJ determines that the presumption does not apply or that the noncitizen rebutted the presumption, the IJ would continue to determine whether the noncitizen has established a significant possibility of eligibility for asylum, withholding of removal under section 241(b)(3) of the Act, or withholding of removal under the CAT. Where the IJ determines that the noncitizen has established a significant possibility of eligibility, the IJ would issue a positive credible fear determination. *See* proposed 8 CFR 1208.33(c)(2)(i). Where the IJ determines that the noncitizen has not established a significant possibility of eligibility for asylum, withholding of removal under section 241(b)(3) of the Act, or withholding of removal under the CAT, the IJ would issue a negative credible fear determination. *See id.*

Where the IJ issues a positive credible fear determination based on the ''significant possibility'' standard, DHS would have the discretion either to refer the noncitizen for an asylum merits interview before an asylum officer, or to place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. *See* proposed 8 CFR 208.33(c)(2)(v)(A); Asylum Processing IFR. Where the IJ issues a positive credible fear determination based on the ''reasonable possibility'' standard, DHS would issue a Form I–862 and place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. *See* proposed 8 CFR 208.33(c)(2)(v)(B). In all cases, the noncitizen would have the ability to pursue their claims for asylum, withholding of removal under the Act, and protection under the CAT. Where the IJ issues a negative credible fear determination, the noncitizen would be removed by DHS, although USCIS has the discretion to reconsider its negative credible fear determination. *See* proposed 8 CFR 208.33(c)(2)(v)(C).

Consistent with longstanding practice, the IJ would be able to consider, in making the above determinations, the asylum officer's notes and summary of the material facts, and all other materials upon which the asylum officer's determination was based. *See* proposed 8 CFR 208.33(c)(2)(v). The IJ would also be able to consider any testimony from the noncitizen elicited at their hearing. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (stating that credible fear review ''shall include an opportunity for the alien to be heard and questioned by the IJ, either in person or by telephonic or video connection''). Where an adjudicator finds in credible fear proceedings that a noncitizen is ineligible for asylum under the rebuttable presumption at proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1), or that the noncitizen lacks a significant possibility of establishing eligibility for asylum, and the noncitizen is subsequently placed in removal proceedings, nothing in the INA or regulations would preclude the noncitizen from applying for asylum in those proceedings. In addition, nothing in the INA or regulations states that an IJ owes any deference in removal proceedings to determinations made by an adjudicator in credible fear proceedings, including as to whether the rebuttable presumption in proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1) applies, and as to the likelihood the noncitizen will be persecuted on account of a protected ground or tortured in the country at issue. Accordingly, a noncitizen in removal proceedings would not be precluded from receiving asylum simply because it was previously determined in credible fear proceedings that the rebuttable presumption in proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1) applied and was not rebutted, or that the noncitizen did not meet the burden of showing a significant possibility of eligibility for asylum.

Finally, the Departments emphasize that the proposed rule, if finalized, would not be applied indefinitely. The proposed rule would apply only to those who enter at the southwest land border during the 24-month period. After the sunset date, the proposed rule would continue to apply to those noncitizens. The Departments, however, will review the rule prior to the sunset date and will, at that point, decide whether to modify, extend, or maintain the sunset, consistent with the requirements of the APA, and in accordance with considerations discussed in Section E below.

D. Severability

The Departments intend for the provisions of this proposed rule to be severable from each other. Proposed 8 CFR 208.33 and 8 CFR 1208.33 each include a paragraph describing the Departments' intent. In short, if a court holds that any provision in a final 8 CFR 208.33 or 8 CFR 1208.33 is invalid or unenforceable, the Departments intend that the remaining provisions of a final 8 CFR 208.33 or 1208.33, as relevant, would continue in effect to the greatest extent possible. In addition, if a court holds that any such provision is invalid or unenforceable as to a particular

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procedures. *See generally* 87 FR 18078. The Departments believe this approach is the best use of resources because asylum officers could not grant the ultimate relief—withholding of removal under the Act or the Convention Against Torture—that noncitizens who have a reasonable fear of persecution but who are ineligible for asylum may be eligible for. In other words, because each such proceeding would have to go to an immigration judge, there would not be the same efficiency gained by allowing those cases to possibly proceed to an asylum merits interview before an asylum officer.

[181] INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 1003.42(c).

person or circumstance, the Departments intend that the provision would remain in effect as to any other person or circumstance. Remaining provisions of a final rule could continue to function sensibly independent of any held invalid or unenforceable. For example, the lawful pathways condition could be applied by asylum officers or IJs even if a court finds that the amended credible fear interview or review procedures, or a particular portion of those procedures, are facially invalid. Similarly, the proposed rule could be applied using the credible fear standard at 8 CFR 208.30(e)(2), (3), even if a court finds the ''reasonable possibility'' standard invalid.

E. Effective Date, Temporary Period, and Further Action

The Departments propose that, beginning on the rule's effective date, the rebuttable presumption of asylum ineligibility would apply to noncitizens who enter the United States after the end of implementation of the Title 42 public health Order. The Departments propose this approach because of—

- the high volume of encounters projected upon the lifting of the Title 42 public health Order absent a policy change;
- the need to process all migrants encountered without authorization at the SWB under Title 8 upon the lifting of the Title 42 public health Order; and
- the fact that the lifting of the Title 42 public health Order will result in ports of entry once again being open to all migrants, which enables the expansion of the CBP One app to provide for lawful, safe, and orderly processes for migrants in northern and central Mexico to schedule appointments to arrive at ports of entry and, where applicable, make asylum claims—a critically important lawful process that would support the implementation of the proposed rule.

Because the Departments intend for the rule to address the surge in migration that, in the absence of this rule, is anticipated to follow the lifting of the Title 42 public health Order, the Departments propose for the rule to be temporary in duration, applying to those who enter the United States at the SWB during the 24-month period following the rule's effective date.[182] During this time, the United States will continue to build on the multi-pronged, long-term strategy with our foreign partners throughout the region to support conditions that would decrease irregular migration, work to improve refugee processing and other immigration pathways in the region, and implement other measures as appropriate, including continued efforts to increase immigration enforcement capacity and streamline processing of asylum-seekers and other migrants. Although the Departments believe that aspects of the present situation at the border are likely to continue for some time and are unlikely to be significantly changed in a short period, the Departments believe that a 24-month period provides sufficient time to implement and assess the effects of the policy contained in this proposed rule. In addition, the Departments believe that a 24-month period is sufficiently long that it would be an effective deterrent to irregular migrants who might otherwise make the dangerous journey to the United States. Recognizing, however, that there is not a specific event or demarcation that would occur at the 24-month mark, the Departments specifically request comments on the proposal to have the rule apply for a 24-month period, including whether that period should be longer or shorter.

The Departments also will closely monitor conditions during this period. Before the period concludes, the Departments will conduct a review and make a decision, consistent with the requirements of the APA, whether additional rulemaking is appropriate to modify, terminate, or extend the rebuttable presumption and the other provisions of this rule.[183] Such review and decision would consider all relevant factors, which the Departments expect would include the following factors: [184]

- Current and projected migration patterns, including the number of migrants seeking to enter the United States or being encountered at the SWB. Shifts in the current or projected migration patterns could indicate that the rebuttable presumption is no longer required because a significant decrease in actual and expected migrants. Alternatively, if migration remains or is expected to remain at a sustained or heightened level, despite the Departments' actions, that could support a determination that the sunset provision should be lifted or extended.
- Resource limitations, including whether, absent the rebuttable presumption, the number of noncitizens seeking or expected to seek to enter the United States at the SWB exceeds or is likely to exceed the Departments' capacity to safely, humanely, and efficiently administer the immigration system, including the asylum system.
- The availability of lawful, safe, and orderly pathways to seek protection in the United States and partner nations, including meaningful pathways to seek asylum and other forms of protection in the United States, such as that provided by use of the CBP One app to schedule a time and place to present at the port of entry.
- Foreign policy considerations, including whether modifying, terminating, or extending the rule would further or hamper any United States foreign policy goals, as determined by ongoing engagement with key foreign partners.

In addition, the Departments would expect to consider their experience under the rule to that point, including the effects of the rebuttable presumption on those pursuing asylum claims.

Meanwhile, the Departments will continue to monitor all relevant circumstances during the period prior to the issuance of the rule. If the Title 42 public health Order is lifted prior to the issuance of the rule, or should conditions at the border otherwise necessitate immediate action and support the issuance of a rule under an exception to notice-and-comment and delayed effective date requirements,[185] the Departments could issue a temporary or interim final rule to deal with the immediate and urgent situation that they and their regional partners are facing.

F. Proposed Rescission of TCT Bar Final Rule and Proclamation Bar IFR

The Departments propose rescinding prior rules establishing bars to asylum that are currently subject to court orders rendering them ineffective. In Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018) (''Proclamation Bar IFR''), the Departments adopted a bar to asylum for noncitizens who enter the United States in contravention of certain

[182] The Departments note that, because the rebuttable presumption only applies subsequent to the end of the implementation of the Title 42 public health Order, the rebuttable presumption may only cover noncitizens who enter the United States for less than a 24-month period. For example, if the Title 42 public health Order is extended beyond its expected termination date such that it remains in effect for six months following the effective date of the final rule, noncitizens could be subject to the rebuttable presumption for 18 months, absent an extension by the Departments as discussed below.

[183] *See* 5 U.S.C. 551 *et seq.*

[184] In general, these factors represent the same considerations made by the Departments before preparing this proposed rule, and the Departments believe they represent relevant and important considerations that would relate to a future determination of whether to modify, terminate, or extend the lawful pathways limitation.

[185] *See* 5 U.S.C. 553(a), (b), (d).

presidential proclamations.[186] And in Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (''TCT Bar final rule''),[187] the Departments adopted a bar to asylum for those noncitizens who failed to apply for protection while in a third country through which they transited en route to the United States, with certain exceptions. As discussed in more detail in Part V.C.5 of this preamble, the Proclamation Bar IFR was vacated by *O.A.* v. *Trump,* 404 F. Supp. 3d 109 (D.D.C. 2019)[188] and is also subject to a preliminary injunction, *E. Bay Sanctuary Covenant* v. *Trump,* 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018). The TCT Bar final rule is preliminarily enjoined, *E. Bay Sanctuary Covenant* v. *Barr,* 519 F. Supp. 3d 663 (N.D. Cal. Feb. 16, 2021).

The Departments have reconsidered the approaches taken in those rules and now believe that the tailored, time-limited approach proposed here—which couples mechanisms for individuals to enter lawfully (and as appropriate make protection claims) with new conditions on asylum eligibility for those who enter without taking advantage of these and other lawful processes—is better suited to address increased flows across the SWB.

As an initial matter, the TCT Bar final rule would conflict with the carefully crafted provisions of the proposed rule. The proposed rule takes into account whether individuals sought asylum or other forms of protection in third countries en route to the United States but unlike the TCT Bar final rule, the proposed rule would not require that all noncitizens make such an application, as long as they pursue a lawful pathway or rebut the presumption. If the TCT Bar final rule were to become effective, it would interfere with this scheme by barring those who take advantage of a lawful pathway to enter along the SWB or who otherwise rebut the presumption. Although the TCT Bar final rule is preliminarily enjoined and thus not operative, proposing to rescind it alongside proposing this rule will eliminate confusion and the risk of the TCT Bar final rule becoming effective and interfering with the proposed rule.

Additionally, the Departments do not see the TCT Bar final rule as necessary for negotiations with other nations. A stated goal of the TCT Bar final rule was to ''facilitate ongoing diplomatic negotiations with Mexico and the Northern Triangle countries regarding general migration issues, related measures employed to control the flow of aliens (such as the Migrant Protection Protocols), and the humanitarian and security crisis along the southern land border between the United States and Mexico.'' 84 FR at 33840; *see* 85 FR at 82278. Since the TCT Bar IFR and final rule were published in 2019 and 2020, the nature of these negotiations has changed. And since the TCT Bar final rule has been enjoined, the Departments have not needed it to bolster such negotiations. Thus, the Departments do not view the TCT Bar final rule as a necessary component of negotiations with other nations.

Second, the Departments do not intend to adopt the Proclamation Bar IFR permanently, and therefore propose to rescind it, because the Departments believe the tailored approach proposed here is better suited to address current circumstances. The Proclamation Bar IFR conflicts with the tailored approach in this proposed rule because it sought to bar from asylum all individuals who did not cross at a port of entry. *See* 83 FR at 55935 (''The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner'').

For the above reasons, the Departments believe the TCT Bar final rule and the Proclamation Bar IFR would conflict with the approach taken in the proposed rule and would be unnecessary. And particularly given the injunctions against those rules, the Departments are not aware of any serious reliance interests in them. Thus, the Departments propose rescinding the amendments made by both the Proclamation Bar and the TCT Bar rulemaking to 8 CFR 208.13, 208.30, 1003.42, 1208.13, and 1208.30, as well as amendments made to those sections by Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020) (''Global Asylum Rule'') relating to the Proclamation Bar IFR and TCT Bar final rule. With respect to the proposed rescission of the Proclamation Bar IFR, the Departments will consider comments received in response to this NPRM alongside the comments already received in response to the Proclamation Bar IFR, and may issue a final rule as part of this rulemaking or as part of the original Proclamation Bar rulemaking.

V. Justification and Legal Authority

A. Justification

This proposed rule temporarily imposes a rebuttable presumption of asylum ineligibility for certain noncitizens who enter the United States outside of a lawful pathway or without first seeking protection in a third country in the region that they have traveled through. This condition is appropriately tailored to circumstances expected upon the lifting of the Title 42 public health Order, absent a policy change, including most notably (1) the additional number of migrants anticipated to arrive at the border following the eventual lifting of the Title 42 public health Order; (2) the severe strain this anticipated influx of migrants would place on DHS resources; (3) the availability of lawful options for some migrants seeking protection, in the United States and elsewhere in the region; and (4) the Departments' recent experience showing that an increase in lawful pathways coupled with consequences for evading them can significantly—and positively—affect behavior and undermine smuggling networks. The circumstances detailed above demand a shift in incentives and processes, coupled with meaningful opportunities for individuals to seek protection. The proposed rule strikes this balance, while also including appropriate safeguards for especially vulnerable individuals.

As discussed above, the United States was already experiencing high levels of migration throughout the end of 2022, and, absent further action akin to that proposed here, anticipates a surge in migration following the eventual lifting of the Title 42 public health Order. DHS was encountering an average of approximately 8,500 individuals per day at the beginning of December 2022, and while the implementation of the CHNV parole processes has supported a drop in encounter numbers, current DHS planning assumptions suggest that encounter numbers may increase to 11,000–13,000 per day following the termination of the Title 42 public health

[186] *See also* Executive Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border,* 86 FR 8267, 8270 (Feb. 2, 2021) (rescinding Proclamation 9880 of May 8, 2019 (Addressing Mass Migration Through the Southern Border of the United States), the last proclamation related to the Proclamation Bar IFR).

[187] The TCT Bar final rule amended an earlier IFR on the same topic. *See* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). As explained in more detail in Part V.C.5 of this preamble, the IFR was vacated prior to the issuance of the TCT Bar final rule.

[188] That ruling is subject to a pending appeal that is presently held in abeyance. *See O.A.* v. *Biden,* No. 19–5272 (D.C. Cir.).

Order absent a policy change.[189] As detailed above, such a sustained surge in migration would exceed DHS's current capacity to maintain the safe and humane processing of migrants at the border. Spurred by smugglers through social media, an increasing number of migrants are likely to put their lives at risk—and enrich smuggling networks as they do so—in attempts to unlawfully enter the United States.[190] The influx of migrants would likely also place additional strains on local communities that are already at or near their capacity to absorb releases from CBP border facilities.

This proposed rule seeks to disincentivize this expected surge of irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in third countries in the region. The proposed rule aims to achieve that shift in incentives by imposing a rebuttable presumption of asylum ineligibility, as well as an appropriate standard for screening for statutory withholding of removal or protection under the CAT, for noncitizens who enter the United States outside of a lawful pathway and without first seeking protection in a third country in the region. To respond to the expected increase in the numbers of migrants seeking to cross the border without authorization following the lifting of the Title 42 public health Order, this shift would be needed to prevent a severe strain on the immigration system and ensure that the Departments can continue to safely, humanely, and efficiently administer the immigration system, including the asylum system. Notably, as also detailed above, a substantial proportion of migrants who cross the SWB ultimately are not found to have a valid asylum claim. Yet absent this NPRM, the vast majority of the migrants expected to surge to the border and make a fear claim following the lifting of the Title 42 public health Order would be screened in and permitted to wait in the United States for years before their asylum or other protection claim could be adjudicated. In the Departments' judgment, this circumstance would impose severe costs on the asylum system and the immigration system as a whole, and would also likely be self-reinforcing: the expectation of a lengthy stay in the United States, regardless of the merit of an individual's case, risks driving even more migration.[191]

The Departments assess that the Government can reduce and redirect such migratory flows by coupling an incentive for migrants to pursue lawful pathways with a substantial disincentive for migrants to cross the land border unlawfully. The Venezuela process, for example, has sharply reduced Venezuelan migratory flows throughout the region and channeled these flows into a lawful process to come to the United States.[192] The U4U process also sharply reduced irregular flows of Ukrainian citizens to Mexico and to the SWB, and channeled them instead into a lawful process.[193] Likewise, though early in implementation, the processes established for nationals of Cuba, Haiti, and Nicaragua have signaled similar results in reducing encounters of such nationals. The Departments anticipate that the rebuttable presumption proposed by this rule, particularly in light of the innovative steps the United States Government and other governments are taking to provide other safe, lawful, and orderly pathways, would—as evidenced by the success of the Venezuela process and U4U—incentivize migrants to seek protection through such lawful pathways.

In conjunction with the proposed rule, the Departments will continue to work with foreign partners to expand their legal pathways and expand the Departments' own mechanisms for lawful processing.

As discussed in Part III.E.7 of this preamble, CBP will, upon the lifting of the Title 42 public health Order, expand access to the CBP One app, an innovative scheduling mechanism that will provide migrants a means to schedule a time and place to present themselves at a land border port of entry. CBP anticipates that using CBP One to permit noncitizens who lack documents sufficient for admission, including those who potentially wish to claim asylum, to schedule a time to arrive at a port of entry would allow CBP to process significantly more such individuals than it has been able to before. For comparison, from 2014 to 2019—before travel was curtailed by the COVID–19 pandemic and the application of the Title 42 public health Order at the border—CBP, on average, processed 326 inadmissible individuals each day at ports of entry along the entire SWB.[194] CBP expects to process multiple times more individuals on average per day using CBP One. This significant expansion of processing noncitizens at land border ports of entry, including those who may be seeking asylum, would ensure that a safe and orderly process exists for such noncitizens.

Notably, however, the level of resources required to expand port of entry processing in this way would only be feasible if, as DHS projects, encounters at the border are driven down by the application of a consequence for not taking advantage of the expanded range of procedures in partner countries or the United States. For instance, CBP has previously had to shift staffing and resources at the SWB away from ports of entry to help process the increased number of individuals seeking to cross between ports of entry, which directly impacts other CBP operations. In the fall of 2022, for example, CBP officers were shifted from duties at ports of entry to assist USBP in processing increased numbers of migrants crossing between ports of entry in El Paso and Del Rio, Texas. Shifting CBP's finite staff in this manner diminishes its ability to simultaneously execute its many critical mission sets at the ports of entry—and thus highlights the need to couple the increased processing at ports of entry with a disincentive for those who might otherwise cross without authorization between ports of entry. Absent this proposed rule, DHS anticipates that its ability to process noncitizens at ports of entry, as well as continue to facilitate lawful trade and travel and maintain border security, would be adversely impacted by the requirement to detail personnel from the ports of entry to help process individuals encountered between ports of entry.

The proposed rule's anticipated effect on migration flows would also be integrated into and advance key foreign policy goals relating to migration in the Western Hemisphere—including our efforts to encourage other countries to provide protection to migrants who

[189] DHS Post-Title 42 Planning Model generated January 6, 2023.

[190] Tech Transparency Project, *Inside the World of Misinformation Targeting Migrants on Social Media* (July 26, 2022), *https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media* (last visited Dec. 6, 2022).

[191] While not conclusive, the longer wait times and lower share of encounters being removed is correlated with an increase in flows. *See* Part III.A.6 of this preamble.

[192] Encounters of Venezuelan nationals between ports of entry fell from an average of 1,100 per day the week before the announcement of the Venezuela parole process on October 12, 2022, to an average of 67 per day the week ending November 29, 2022 and 28 per day the week ending January 22, 2023. OIS analysis of UIP data downloaded on January 23, 2023.

[193] Encounters of Ukrainian nationals fell from an average of 875 per day the week before the announcement of U4U on April 21, 2022, to an average of 10 per day the week ending May 2. OIS analysis of UIP data downloaded on December 9, 2022.

[194] OIS Persist Dataset based on data through November 2022.

need it. As described above, governments across the region have put in place new mechanisms to provide protection for millions of displaced migrants—often with support from U.S.-funded international organizations. These efforts include grants of temporary protection for millions of migrants in Colombia, Costa Rica, Ecuador, and Peru. They also include Mexico's commitment to strengthening its asylum system—which now processes the third most applications in the world, behind just the United States and Germany—and to providing labor pathways for migrants from Central America.[195] In issuing this proposed rule, the Departments have carefully considered the international efforts discussed above. In ways that have not been true even in the recent past, regional partners have taken meaningful steps over the last two years to increase the availability of and access to protection options. Indeed, access to protection is more available now throughout the region than at any time in the recent past. This proposed rule takes account of these regional efforts and is designed to promote their further development by demonstrating to partner countries and migrants that there are conditions on the United States' ability to accept and immediately process individuals seeking protection, and that partner countries should continue to enhance their efforts to share the burden of providing protection for those who qualify.

This proposed rule also would provide important built-in safeguards. First, this proposed rule would be temporary in nature, as is appropriate to respond to the predicted increase that would otherwise follow the lifting of the Title 42 public health Order. During the 24-month period in which the rule would be applied to noncitizens who enter the United States, the Departments will continue to work with foreign partners to expand their legal pathways, expand the Departments' own mechanisms for lawful processing, take account of the processes' successes and failures, and monitor both the numbers of expected and encountered migrants and the state of the Departments' resources, as the Departments decide whether to extend the rule's coverage, modify it, or allow it to sunset.

Second, as described above, the presumption proposed by this rule would be rebuttable in certain circumstances. In particular, the presumption would necessarily be rebutted in circumstances in which it would not be reasonable for a noncitizen to avail themselves of other options—including if, at the time of entering the United States, the noncitizen faced an acute medical emergency or an extreme and imminent threat to life or safety, or if the noncitizen was a victim of a severe form of trafficking. The proposed rule would also permit adjudicators to find the presumption rebutted in other exceptionally compelling circumstances, based on the sound exercise of their judgment.

Third, noncitizens to whom the proposed rule's presumption applies and is not rebutted would still be screened for eligibility for statutory withholding of removal and protections under the regulations implementing the CAT, which bar removal to a country where the noncitizen would be subject to persecution on protected grounds or to torture. Furthermore, if they receive a negative credible fear determination, they would be able to elect to have that determination swiftly reviewed by an IJ. Those whose negative determinations are upheld would be expeditiously removed from the United States. Those who receive a positive determination, however, would have the opportunity for further consideration of their protection claims in the course of a section 240 removal proceeding or asylum merits interview.

Fourth, the proposed rule includes an exception to ensure that the condition does not apply to unaccompanied children. The proposed rule would also protect family unity by providing that if one member of a family traveling together is excepted from the presumption that the condition applies or has rebutted the presumption, then the other members of the family as described in 8 CFR 208.30(c) are similarly treated as excepted from the presumption or as having rebutted the presumption.

Fifth, while the proposed rule is designed to encourage those who arrive at the ports of entry to use a DHS scheduling system (specifically, the CBP One app) to schedule an appointment to present themselves at a port of entry for processing, it also recognizes that there are certain circumstances in which use of that system is not possible, including for reasons of illiteracy or a language barrier. The proposed rule would except from the presumption those who presented at a port of entry without a scheduled appointment and established by a preponderance of the evidence that it was not possible to use the scheduling system for these and other compelling reasons.

In sum, the Departments have proposed an approach that strikes an appropriate balance between the compelling need to address current and impending exigent circumstances in a manner that prevents adverse consequences for the immigration system and migrants, on the one hand, and furnishing avenues for individual migrants to seek protection in the United States and other countries in the region.

B. Consideration of Alternatives

The Departments have considered several alternative approaches to managing the current and expected surge in migration, including those from CHNV countries. The Departments have assessed these alternative approaches with respect to the key goals of (1) providing that migrants, to the extent achievable, have meaningful opportunity to seek protection; (2) disincentivizing the expected surge in migration and preventing severe adverse consequences for the immigration system; (3) achieving core foreign policy goals in the region; and (4) providing individuals the opportunity to schedule a time to arrive at a port of entry to apply for admission and, once present in the United States, to apply for all available forms of relief and protection.

1. Maintaining the Status Quo

First, the Departments considered maintaining the status quo, consistent with the plan in place when CDC issued its now-enjoined Title 42 termination Order in April 2022. In preparation for the expected May 2022 termination, DHS published a DHS Plan for Southwest Border Security and Preparedness that set forth how the Department planned to manage an anticipated increase in migration.[196] That plan, which has been continually refined since it was introduced and continues to be in place, is predicated on 6 pillars: (1) surging resources to the border; (2) more efficiently processing

[195] L.A. Declaration Fact Sheet; International Rescue Committee, *Asylum Seekers in Mexico Need Support to Join the Labor Market and Rebuild Their Lives, IRC and Citi Foundation Respond with a Project* (Dec. 7, 2022), *https://www.rescue.org/press-release/asylum-seekers-mexico-need-support-join-labor-market-and-rebuild-their-lives-irc-and* (last visited Dec. 13, 2022).

[196] Memorandum for Interested Parties, from Alejandro N. Mayorkas, Secretary of Homeland Security, *Re: DHS Plan for Southwest Border Security and Preparedness* at 19 (Apr. 26, 2022), *https://www.dhs.gov/sites/default/files/2022-04/22_0426_dhs-plan-southwest-border-security-preparedness.pdf* (last visited Dec. 13, 2022); Department of Homeland Security, Update on Southwest Border Security and Preparedness Ahead of Court-Ordered Lifting of Title 42 (Dec. 13, 2022), *https://www.dhs.gov/publication/update-southwest-border-security-and-preparedness-ahead-court-ordered-lifting-title-42* (last visited Jan. 5, 2023).

individuals encountered at the SWB; (3) administering consequences, including ER and focused prosecutions; (4) bolstering NGO capacity to receive noncitizens released by DHS; (5) targeting and disrupting transnational organized crime; and (6) working with foreign partners to address migratory flows.

That plan remains an important part of DHS's response to the expected surge in migration following the lifting of the Title 42 public health Order. However, the numbers of migrants have increased, and demographics of encounters have shifted over the past nine months, as discussed above. As a result, the Departments have concluded that this plan alone would not be sufficient to shift incentives, and thus migratory flows, in a way that would ensure the safe, humane, and orderly processing of migrants.

As described above, DHS Office of Immigration Statistics projects that encounters could average 11,000–13,000 per day after the lifting of the Title 42 public health Order, absent additional policy changes.[197] These encounters, which are expected to be composed in significant part of Venezuelan, Nicaraguan, and Cuban nationals, are best addressed through the application of immediate consequences for unlawful entry, alongside the provision of lawful pathways, such as the CBP One app and the recently announced parole processes. The Departments emphasize, however, that the incentive structure created by such processes relies on the availability of an immediate consequence, such as the application of expedited removal under this NPRM, for those who do not have a valid protection claim or lawful basis to stay in the United States.

In addition, as described in greater detail above, nationals of these countries are more difficult to remove and as such put additional strain on DHS processes and resources, absent the willingness of the Government of Mexico or another third country to accept the return of these nationals. Such a sustained surge in encounters would strain the Departments' available resources and lead to increased numbers of noncitizens being released into the United States, in ways that strain the resources of States, local communities, and NGOs.[198] Absent material changes in policy, the United States would likely see a significant and challenging increase in migrants taking a dangerous journey towards the border.

Importantly, DHS has, through the success of the Venezuela process, and the initial success of the Cuban, Haitian, and Nicaraguan processes, demonstrated that the application of a significant consequence for bypassing lawful pathways, combined with the availability of lawful pathways, can fundamentally change migratory flows. Given the limitations on removing these nationals to their countries of origin, these processes have depended, in significant part, on the Government of Mexico's willingness to accept the returns of such nationals.

The Government of Mexico, for its part, has made clear that its willingness to accept the return of these nationals depends on the United States' willingness to continue the model that has proven successful—that is, to couple new pathways with meaningful, expeditious, and fairly-imposed consequences for bypassing lawful pathways.

For these reasons, DHS has concluded that maintaining the status quo is not a reasonable option and that a policy shift consistent with what is provided for in the proposed rule is needed to serve key foreign policy goals and address the expected flows.

2. Utilizing Contiguous-Territory Return Authority

The Departments considered whether returning noncitizens to Mexico under section 235(b)(2)(C) of the INA, 8 U.S.C. 1225(b)(2)(C), either through the Migrant Protection Protocols (''MPP'') or via another programmatic use of the contiguous-territory return authority, would have a similar effect to the proposed approach. In December 2022, a district court stayed Secretary Mayorkas's October 29, 2021, memorandum terminating MPP. *See* Dkt. 178, *Texas* v. *Biden,* No. 21–cv–67 (N.D. Tex. Dec. 15, 2022). For two reasons, DHS is responding to the current exigency with the approach reflected in this proposed rule rather than attempting to manage the current surge in migration by relying solely on the programmatic use of its contiguous-territory return authority.

First, the resources and infrastructure necessary to use contiguous-territory return authority at scale are not currently available. To employ the contiguous-territory return authority at a scale sufficient to meaningfully address the anticipated migrant flows, the United States would need to redevelop and significantly expand infrastructure for noncitizens to be processed in and out of the United States to attend immigration court hearings throughout the duration of their removal proceedings. This would require, among other things, the construction of substantial additional court capacity along the border. It would also require the reassignment of IJs and ICE attorneys to conduct the hearings and CBP personnel to receive and process those who are coming into and out of the country to attend hearings.

Second, programmatic implementation of contiguous-territory return authority requires Mexico's concurrence and support. When DHS was previously under an injunction requiring it to re-implement MPP, the Government of Mexico would only accept the return of MPP enrollees consistent with available shelter capacity in specific regions, and indeed had to pause the process at times due to shelter constraints. Notably, Mexico's shelter network is already strained from the high volume of northbound irregular migration we are seeing today.[199] The Government of Mexico announced the end of the court-ordered reimplementation of MPP on October 25, 2022.[200] Any potential re-starting of returns under MPP or another programmatic use of the contiguous-territory return authority would require the Government of Mexico to make an independent decision to accept noncitizens who would be returned under this authority and to date the Government of Mexico has made clear that it will not accept such returns.[201]

3. Employing Safe-Third-Country Authority

The Departments considered whether to use section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), by negotiating safe-third-country agreements or asylum cooperative agreements. Negotiating such agreements, however, is a lengthy

[197] DHS Post-Title 42 Planning Model generated January 6, 2023.

[198] Andy Newman and Raúl Vilchis, *A Migrant Wave Tests New York City's Identity as the World's Sanctuary,* New York Times, Aug. 24, 2022, *https://www.nytimes.com/2022/08/20/nyregion/nyc-migrants-texas.html* (last visited Dec. 16, 2022).

[199] Giovanna Dell'otro, *U.S. court rejects maintaining COVID–19 asylum restrictions,* WTOL11, Dec. 16, 2022, *https://www.wtol.com/article/news/nation-world/migrants-mexico-us-border-asylum-limits-end/507-02a353b7-d61f-4536-b3c9-bb45c3fbb388* (last visited Dec. 17, 2022).

[200] Government of Mexico, *Finaliza el programa de estancias migratorias en México bajo la Sección 235 (b)(2)(C) de la Ley de Inmigración y Nacionalidad de EE. UU,* Oct. 25, 2022, *https://www.gob.mx/sre/prensa/finaliza-el-programa-de-estancias-migratorias-en-mexico-bajo-la-seccion-235-b-2-c-de-la-ley-de-inmigracion-y-nacionalidad-de-ee-uu* (last visited Dec. 19, 2022).

[201] *See* Government of Mexico, Press Release, *Foreign Ministry rejects having migrants stay in Mexico under reimplementation of U.S. Immigration and Nationality Act Section 235 (b)(2)(C)* (Feb. 6, 2023), *https://www.gob.mx/sre/prensa/foreign-ministry-rejects-having-migrants-stay-in-mexico-under-reimplementation-of-us-immigration-and-nationality-act-section-235-b-2-c* (last visited Feb. 11, 2023).

and complicated process that depends on the agreement of other nations. Although the time between publication of an NPRM and promulgation of a final rule can be substantial, the time it takes to negotiate and finalize safe-third-country agreements remains even more protracted since they involve not only diplomatic and operational negotiations, but also, in many countries, approval of any such agreement by their respective legislatures.

Moreover, it would be particularly difficult (if possible at all) to negotiate a safe-third-country agreement that would provide the humanitarian protections, among other things, provided for by this proposed rule. The safe-third-country provision provides that ''if the Attorney General determines that [an] alien may be removed, pursuant to'' a safe-third-country agreement, ''to a country in which the alien's life or freedom would not be threatened'' based on a protected characteristic and ''where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection,'' then the noncitizen may not even apply for asylum ''unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.'' INA 208(a)(2)A), 8 U.S.C. 1158(a)(2)(A). This proposed rule, however, would continue to allow noncitizens to pursue asylum and other protection in the United States, and, while it would create a rebuttable presumption, it specifies circumstances in which that presumption is necessarily rebutted and other exceptions. Even if the safe-third-country provision could be used to achieve similar results, it could not do so without protracted bilateral or multilateral negotiations with foreign counterparts. Such agreements therefore would likely have limited short-term operational benefit as compared to this proposed rule and are not something that can be achieved within the time frame needed without significant bilateral efforts, particularly given partner countries' resistance to entering into such agreements.

4. Reducing Use of Credible Fear Interviews

The Departments considered whether to place individuals who claim fear directly into section 240 removal proceedings instead of the increased reliance on expedited removal as a processing pathway. This would free up USCIS adjudicators, who would otherwise be performing credible fear interviews, to work on reducing the affirmative asylum backlog.

This approach, however, would come with significant costs. It would put an increased strain on already stretched State and local governments, as well as supporting NGOs. And it would risk exacerbating the already anticipated surge in migratory flows. As described above, those placed in removal proceedings wait an average of 4 years before their proceedings are concluded. Given limited ICE detention capacity, individuals who are not determined to pose a national-security or public-safety threat generally are released during the course of these proceedings,[202] thus increasing pressures on States and local communities, as well as supporting NGOs. This framework, pursuant to which migrants know that they will likely be in the United States for years before any order of removal, also risks providing an increased incentive for individuals to come to the United States, thus leading to an increase in migratory flows at precisely the moment at which they need to be discouraged. For these reasons, this option is not a viable one.

For all the reasons above, the Departments have concluded that this proposed rule is the best option for responding to the current and impending exigent circumstances. The Departments invite comment on any other alternatives and their benefits and drawbacks.

C. Legal Authority

1. General Authorities

The Attorney General and the Secretary jointly issue this proposed rule pursuant to their shared and respective authorities concerning asylum, statutory withholding of removal, and CAT determinations. The Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135, as amended, created DHS and transferred to it many functions related to the administration and enforcement of Federal immigration law while maintaining many functions and authorities with the Attorney General, including concurrently with the Secretary. The HSA charges the Attorney General with ''such authorities and functions under [the INA] and all other laws relating to the immigration and naturalization of aliens as were [previously] exercised by the Executive Office for Immigration Review [(EOIR)], or by the Attorney General with respect to [EOIR].'' INA 103(g)(1), 8 U.S.C. 1103(g)(1); *see also* 6 U.S.C. 521; HSA 1102, 116 Stat. at 2274. In addition, under the HSA, the Attorney General retains authority to ''establish such regulations . . ., issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out'' his authorities under the INA. HSA 1102; INA 103(g)(2), 8 U.S.C. 1103(g)(2).

Under the HSA, the Attorney General retains authority over the conduct of removal proceedings pursuant to section 240 of the INA, 8 U.S.C. 1229a (''section 240 removal proceedings''). These adjudications are conducted by IJs within DOJ's EOIR. *See* 6 U.S.C. 521; INA 103(g), 8 U.S.C. 1103(g). This IJ authority includes adjudication of statutory withholding of removal, CAT protection, and certain asylum applications. With limited exceptions, IJs within DOJ adjudicate asylum, statutory withholding of removal, and CAT protection applications filed by noncitizens during the pendency of section 240 removal proceedings and asylum applications referred by USCIS to the immigration court. INA 101(b)(4), 8 U.S.C. 1101(b)(4); INA 240(a)(1), 8 U.S.C. 1229a(a)(1); INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 1208.2(b), 1240.1(a); *see also Dhakal* v. *Sessions,* 895 F.3d 532, 536–37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). The Board of Immigration Appeals (''BIA''), also within the DOJ, in turn hears appeals from IJ decisions. *See* 8 CFR 1003.1(b)(3); *see also Garland* v. *Ming Dai,* 141 S. Ct. 1669, 1677–78 (2021) (describing appeals from IJ to BIA). In addition, the INA provides that the ''determination and ruling by the Attorney General with respect to all questions of law shall be controlling.'' INA 103(a)(1), 8 U.S.C. 1103(a)(1).

The INA, as amended by the HSA, charges the Secretary ''with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens,'' INA 103(a)(1), 8 U.S.C. 1103(a)(1), and grants the power to take all actions ''necessary for carrying out'' the Secretary's authority under the immigration laws, INA 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3); *see also* 6 U.S.C. 202.

Section 208 of the INA authorizes the ''Secretary of Homeland Security or the Attorney General'' to ''grant asylum'' to a noncitizen ''who has applied for asylum in accordance with the

[202] OIS estimates that 88 percent of noncitizens encountered at the SWB in FY 2014–FY 2019 who were placed in expedited removal and made fear claims resulting in their referral to section 240 proceedings were released from detention prior to the completion of their removal proceedings. OIS analysis of Enforcement Lifecycle data as of September 30, 2022.

requirements and procedures established by'' the Secretary or the Attorney General under section 208 if the Secretary or the Attorney General determines that the noncitizen is a refugee. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). As detailed below, section 208 thereby authorizes the Secretary and the Attorney General to ''establish'' ''requirements and procedures'' to govern asylum applications. *Id.* The statute further authorizes them to ''establish,'' ''by regulation,'' ''additional limitations and conditions, consistent with'' section 208, under which a noncitizen ''shall be ineligible for asylum.'' INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see also* INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B) (authorizing the Secretary and the Attorney General to ''provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with [the INA]'').[203] The INA also provides authority to publish regulatory amendments governing the apprehension, inspection and admission, detention and removal, withholding of removal, deferral of removal, and release of noncitizens encountered in the interior of the United States or at or between the U.S. ports of entry. *See* INA 235, 236, 241, 8 U.S.C. 1225, 1226, 1231.

The HSA granted to DHS concurrent authority to adjudicate affirmative asylum applications—applications for asylum made outside the removal context—and authority to conduct credible fear interviews, make credible fear determinations in the context of expedited removal, and to establish procedures for further consideration of asylum applications after an individual is found to have a credible fear. INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* HSA 451(b), 6 U.S.C. 271(b) (providing for the transfer of adjudication of asylum and refugee applications from the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services, now USCIS). Some of those authorities have been delegated within DHS to the Director of USCIS, and USCIS asylum officers conduct credible fear interviews, make credible fear determinations, and determine whether a noncitizen's asylum application should be granted. *See* DHS, Delegation to the Bureau of Citizenship and Immigration Services, No. 0150.1 (June 5, 2003); 8 CFR 208.2(a), 208.9, 208.30.

Section 235(b)(1)(B)(ii) of the INA, 8 U.S.C. 1225(b)(1)(B)(ii), provides that if an asylum officer determines that a noncitizen subject to expedited removal has a credible fear of persecution, the noncitizen shall receive ''further consideration of the application for asylum.'' Section 208(d)(1) of the INA, 8 U.S.C. 1158(d)(1), provides the Departments with the authority to establish by regulation additional conditions or limitations on the consideration of asylum applications, including those filed in accordance with section 235(b) of the INA, 8 U.S.C. 1225(b). *See* INA 208(a), 8 U.S.C. 1158(a); INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).

The INA also authorizes the Secretary and the Attorney General to implement statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). INA 103(a)(1), (3), (g)(1)–(2), 8 U.S.C. 1103(a)(1), (3), (g)(1)–(2). The United States is a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 (''Refugee Protocol''), which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (''Refugee Convention''). Article 33 of the Refugee Convention generally prohibits parties to the Convention from expelling or returning (''refouler'') ''a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'' Congress codified these obligations in the Refugee Act of 1980, creating the precursor to what is now known as statutory withholding of removal.[204] The Supreme Court has long recognized that the United States implements its non-refoulement obligations under Article 33 of the Refugee Convention (via the Refugee Protocol) through the statutory withholding of removal provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), which provides that a noncitizen may not be removed to a country where their life or freedom would be threatened on account of one of the protected grounds listed in Article 33 of the Refugee Convention.[205] *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); *see also* 8 CFR 208.16, 1208.16.

The Departments also have authority to implement Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT''), Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). The Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA'') provides the Departments with the authority to ''prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.'' Public Law 105–277, div. G, sec. 2242(b), 112 Stat. 2681, 2681–822 (8 U.S.C. 1231 note). DHS and DOJ have promulgated various regulatory provisions implementing U.S. obligations under Article 3 of the CAT, consistent with FARRA. *See, e.g.,* 8 CFR 208.16(c) through 208.18, and 1208.16(c) through 1208.18; Regulations Concerning the Convention Against Torture, 64 FR 8478 (Feb. 19, 1999), as corrected by 64 FR 13881 (Mar. 23, 1999).

This proposed rule would not amend, or propose to amend, eligibility for statutory withholding of removal or CAT protection. As further discussed below, the proposed rule would apply a ''reasonable possibility'' standard in screenings for statutory withholding of removal and CAT protection in cases where the presumption of asylum ineligibility is applied and not rebutted. While this standard would be a change from the practice currently applied in the expedited removal context, it is the same standard used in protection screenings in other contexts and is consistent with both domestic and international law.[206]

2. Authority To Impose Additional Conditions on Asylum Eligibility

Asylum is a form of discretionary relief under section 208 of the INA, 8 U.S.C. 1158, that, when granted, protects a noncitizen from removal, creates a path to lawful permanent residence and U.S. citizenship, enables

[203] Under the HSA, the references to the ''Attorney General'' in the INA are understood also to encompass the Secretary, either solely or additionally, with respect to statutory authorities vested in the Secretary in the HSA or subsequent legislation, including in relation to immigration proceedings before DHS. HSA 1517, 6 U.S.C. 557.

[204] Public Law 96–212; 94 Stat. 102 (''Refugee Act'').

[205] *See INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 426–27 (1999); *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 440–41 (1987) (distinguishing between Article 33's non-refoulement prohibition, which aligns with what was then called withholding of deportation and Article 34's call to ''facilitate the assimilation and naturalization of refugees,'' which the Court found aligned with the discretionary provisions in section 208 of the INA, 8 U.S.C. 1158). It is well-settled that the Refugee Convention and Protocol are not self-executing. *E.g., Al-Fara* v. *Gonzales,* 404 F.3d 733, 743 (3d Cir. 2005) (''The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.'').

[206] *See* 8 CFR 208.31.

the noncitizen to receive authorization to work, and enables the noncitizen's eligible family members to seek lawful immigration status as derivatives. *See* INA 208–209, 8 U.S.C. 1158–1159. Any noncitizen ''who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .)'' may apply for asylum unless the noncitizen is subject to a statutory exception. INA 208(a)(1), 8 U.S.C. 1158(a)(1). A noncitizen applying for asylum must establish that he or she is a ''refugee'' who is not subject to a bar to asylum eligibility and who merits a favorable exercise of discretion. INA 208(b)(1), 8 U.S.C. 1158(b)(1); INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A); *see Moncrieffe* v. *Holder,* 569 U.S. 184, 187 (2013) (describing asylum as a form of ''discretionary relief from removal''); *Delgado* v. *Mukasey,* 508 F.3d 702, 705 (2d Cir. 2007) (''Asylum is a discretionary form of relief . . . . Once an applicant has established eligibility . . . it remains within the Attorney General's discretion to deny asylum.''). For a noncitizen to establish that he or she is a ''refugee,'' the noncitizen generally must be someone who is outside of his or her country of nationality and ''is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'' INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A).

Reflecting that asylum is a discretionary form of relief from removal, the INA provides that the noncitizen bears the burden of showing both eligibility for asylum and why the Attorney General or Secretary should exercise the discretion in favor of granting relief. *See* INA 208(b)(1), 240(c)(4)(A)(ii), 8 U.S.C. 1158(b)(1), 1229a(c)(4)(A)(ii); 8 CFR 1240.8(d); *see Romilus* v. *Ashcroft,* 385 F.3d 1, 8 (1st Cir. 2004). If evidence indicates that one or more of the grounds for mandatory denial may apply, *see* INA 208(b)(2)(A)(i)–(vi), 8 U.S.C. 1158(b)(2)(A)(i)–(vi), the asylum applicant also bears the burden of establishing that the bar at issue does not apply. 8 CFR 1240.8(d); *see also, e.g., Rendon* v. *Mukasey,* 520 F.3d 967, 973 (9th Cir. 2008) (applying 8 CFR 1240.8(d) in the context of the aggravated felony bar to asylum); *Chen* v. *U.S. Att'y Gen.,* 513 F.3d 1255, 1257 (11th Cir. 2008) (applying 8 CFR 1240.8(d) in the context of the persecutor bar); *Xu Sheng Gao* v. *U.S. Att'y Gen.,* 500 F.3d 93, 98 (2d Cir. 2007) (same).

The Attorney General and the Secretary have long exercised discretion, now expressly authorized by Congress, to create new rules governing the granting of asylum. When section 208 was first enacted as part of the Refugee Act of 1980, it simply provided that the Attorney General ''shall establish a procedure'' for a noncitizen ''to apply for asylum,'' and that the noncitizen ''may be granted asylum in the discretion of the Attorney General if the Attorney General determined that the noncitizen was a refugee.'' 8 U.S.C. 1158(a) (1982 ed.). In 1980, the Attorney General, in the exercise of that broad statutory discretion, established several mandatory bars to the granting of asylum. *See* 8 CFR 208.8(f) (1980); Aliens and Nationality; Refugee and Asylum Procedures, 45 FR 37392, 37392 (June 2, 1980). In 1990, the Attorney General substantially amended the asylum regulations, but exercised his discretion to retain the mandatory bars to asylum eligibility related to persecution of others on account of a protected ground, conviction of a particularly serious crime in the United States, firm resettlement in another country, and the existence of reasonable grounds to regard the noncitizen as a danger to the security of the United States. *See* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 FR 30674–01, 30678, 30683 (July 27, 1990); *see also Yang* v. *INS,* 79 F.3d 932, 936–39 (9th Cir. 1996) (upholding firm resettlement bar); *Komarenko* v. *INS,* 35 F.3d 432, 436 (9th Cir. 1994) (upholding particularly serious crime bar), *abrogated on other grounds by Abebe* v. *Mukasey,* 554 F.3d 1203 (9th Cir. 2009) (en banc).

In that 1990 rule, the Attorney General also codified another limitation that was first discussed in a published decision in *Matter of Chen,* 20 I&N Dec. 16 (BIA 1989). 55 FR at 30678. Specifically, although the statute defines as a ''refugee,'' and thus allows for asylum for, a noncitizen based on a showing of past ''persecution or a well-founded fear of persecution,'' INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), by regulation, a showing of past persecution only gives rise to a presumption of a well-founded fear of future persecution, which DHS can rebut by showing that circumstances have changed such that the noncitizen no longer has a well-founded fear of future persecution or that the noncitizen can relocate to avoid persecution and under all the circumstances it is reasonable to expect the noncitizen to do so.[207] 8 CFR 208.13(b)(1), 1208.13(b)(1). Where the presumption is rebutted, the adjudicator, ''in the exercise of his or her discretion, shall deny the asylum application.'' [208] 8 CFR 208.13(b)(1)(i), 1208.13(b)(1)(i). In 1990, Congress added a mandatory statutory bar for those with aggravated felony convictions. Immigration Act of 1990, Public Law 101–649, sec. 515, 104 Stat. 5053.

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), Congress added three categorical statutory bars on the ability even to apply for asylum, for (1) noncitizens who can be removed, pursuant to a bilateral or multilateral agreement, to a third country where they would not be persecuted on account of a specified ground; (2) noncitizens who failed to apply for asylum within one year of arriving in the United States; and (3) noncitizens who have previously applied for asylum and had the application denied. Public Law 104–208, div. C, sec. 604. Congress also adopted six mandatory bars to asylum eligibility that largely reflected the pre-existing, discretionary bars that had been set forth in the Attorney General's asylum regulations. These bars cover (1) noncitizens who ''ordered, incited, assisted, or otherwise participated'' in the persecution of others; (2) noncitizens convicted of a ''particularly serious crime'' in the United States; (3) noncitizens who committed a ''serious nonpolitical crime outside the United States'' before arriving in the United States; (4) noncitizens who are a ''danger to the security of the United States;'' (5) noncitizens who are removable under a set of specified grounds relating to terrorist activity; and (6) noncitizens who were ''firmly resettled'' in another country prior to arriving in the United States. *Id.* (codified at INA 208(b)(2), 8 U.S.C. 1158(b)(2) (1997)). Congress further added that aggravated felonies, defined in section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), would be considered ''particularly serious crime[s].'' *Id.* (codified at INA 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i) (1997)).

[207] As noted below, the internal relocation provision was added in 2000 by Asylum Procedures, 65 FR 76121, 76126 (Dec. 6, 2000).

[208] There is a narrow exception to this mandatory discretionary ground for denial, called ''humanitarian asylum,'' where the noncitizen establishes ''compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution'' or ''that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.'' 8 CFR 208.13(b)(1)(iii), 1208.13(b)(1)(iii).

In IIRIRA, Congress also made clear that the Executive Branch may continue to exercise its broad discretion in determining whether to grant asylum by creating additional limitations and conditions on the granting of asylum. The INA provides that the Attorney General and Secretary ''may by regulation establish additional limitations and conditions, consistent with [section 208], under which an alien shall be ineligible for asylum.'' INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see* 6 U.S.C. 552(d); INA 103(a)(1), 8 U.S.C. 1103(a)(1). In addition, while section 208(d)(5) of the INA, 8 U.S.C. 1158(d)(5), establishes certain procedures for consideration of asylum applications, Congress specified that the Attorney General and Secretary ''may provide by regulation for any other conditions or limitations on the consideration of an application for asylum,'' so long as those conditions or limitations are ''not inconsistent with this chapter,'' INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). In sum, the current statutory framework retains the broad discretion of the Attorney General (and, after the HSA, also the Secretary) to adopt additional conditions on the granting of asylum and procedures for implementing those conditions.

Previous Attorneys General and Secretaries have since invoked their authorities under section 208 of the INA to establish bars beyond those required by the statute itself. *See, e.g.,* Asylum Procedures, 65 FR 76121, 76126 (Dec. 6, 2000) (requiring consideration of the applicant's ability to relocate safely in his or her home country in assessing asylum eligibility); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018) (limit on eligibility for applicants subject to certain presidential proclamations); Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (limit on eligibility for certain noncitizens who failed to apply for protection while in a third country through which they transited en route to the United States); Procedures for Asylum and Bars to Asylum Eligibility, 85 FR 67202 (Oct. 21, 2020) (limits on eligibility for noncitizens convicted of certain criminal offenses); *see also* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10342 (Mar. 6, 1997) (IFR codifying mandatory bars and adding provision allowing for discretionary denials of asylum where ''the alien can be removed to a third country which has offered resettlement and in which the alien would not face harm or persecution''). Establishing additional conditions is also consistent with historical practice, as discussed above. *See, e.g.,* Aliens and Nationality; Refugee and Asylum Procedures, 45 FR 37392, 37392 (June 2, 1980); Asylum and Withholding of Deportation Procedures, 55 FR 30674, 30683 (July 27, 1990); *see also Yang,* 79 F.3d at 936–39 (upholding firm-resettlement bar); *Komarenko,* 35 F.3d at 436 (upholding particularly-serious-crime bar).

3. The Lawful Pathways Rebuttable Presumption

The rebuttable presumption set forth in this proposed rule is within the broad discretionary authority granted by section 208 of the INA. *See* INA 208(b)(1)(A), (b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B). The proposed rule serves to prioritize asylum for noncitizens who pursue lawful pathways. It is therefore consistent with the need for partner countries in the region to share in the undertaking to afford migrants lawful protection and the need to further the Departments' continued ability to enforce and administer U.S. immigration law, including provisions concerning asylum and removal, in a safe, orderly, expeditious, and effective manner in the face of exceptionally challenging circumstances. The presumption is also ''consistent with'' section 208 and with the INA. INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). ''Consistent with'' means ''compatible'' with. *Env't Def. Fund, Inc.* v. *E.P.A.,* 82 F.3d 451, 457 (D.C. Cir. 1996) (quoting 3 *Oxford English Dictionary* 773 (2d ed. 1989)). Particularly given the history detailed above, the INA generally and section 208 specifically afford the Attorney General and Secretary broad discretion to adopt new rules governing the consideration of claims for and granting of asylum—which is in all events a discretionary form of relief—so long as those rules do not conflict with the statute.

The presumption is also consistent with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), which permits noncitizens in the United States to apply for asylum ''whether or not at a designated port of arrival,'' for several reasons. First, the presumption would not prohibit noncitizens from applying for asylum. Section 208 draws a distinction between those permitted to apply for asylum and those eligible to receive a grant of asylum. While the Refugee Act dealt with these two issues in a single subsection, IIRIRA broke the two into separate subsections. Section 208(a) (titled ''Authority to apply for asylum'') governs who may apply for asylum and includes several categorical bars on applications (*e.g.,* a noncitizen present in the country for more than one year may not apply). INA 208(a)(1) and (2)(B), 8 U.S.C. 1158(a)(1) and (2)(B); *see* INA 241(a)(5), 8 U.S.C. 1231(a)(5). Section 208(b) (titled ''Conditions for granting asylum''), in turn, governs who is eligible to be granted asylum. Specifically, section 208(b)(1)(A) provides that the Attorney General or the Secretary ''may grant asylum to an alien who has applied.'' Section 208(b)(2) then specifies six categories of noncitizens to whom ''[p]aragraph (1)'' of section 208(b) (*i.e.,* the discretionary authority to grant asylum to an applicant) ''shall not apply.'' Any noncitizen falling within one of those categories may apply for asylum under section 208(a)(1) but is categorically ineligible to receive a grant of asylum under section 208(b). The text and structure of the statute thus show that there is nothing inconsistent in allowing an application for asylum to be made while also precluding a grant of asylum on the basis of that application. *See also R–S–C* v. *Sessions,* 869 F.3d 1176, 1187 & n.9 (10th Cir. 2017).

Second, the presumption would not exclude all noncitizens who arrive outside ports of entry; it would be limited to noncitizens who have traveled through a third country without seeking asylum or other protection or those who failed to avail themselves of lawful, safe, and orderly pathways into the United States. It would also apply to those who present at a port of entry without scheduling a time to do so, unless the noncitizen demonstrates that the DHS scheduling mechanism was inaccessible or unusable.

Third, the proposed rule would establish only a rebuttable presumption of asylum ineligibility, not a categorical bar. Nothing in section 208 precludes the Departments from exercising their broad authority to ''establish additional limitations and conditions'' on asylum eligibility, INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), or to establish ''any other conditions or limitations on the consideration of an application for asylum,'' INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B), that include rebuttable presumptions. Longstanding BIA precedent has treated manner of entry as a relevant discretionary factor in considering an asylum application. Specifically, in adopting the lawful pathways condition on asylum eligibility, the Departments have considered the BIA's decision in *Matter*

of Pula.[209] In *Matter of Pula,* the BIA held that a noncitizen's ''circumvention of orderly refugee procedures''—including their ''manner of entry or attempted entry,'' ''whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States''—are relevant factors with respect to whether an individual warrants the favorable exercise of discretion in granting asylum. 19 I&N Dec. 467, 473–74 (BIA 1987). Like *Matter of Pula,* the lawful pathways condition on asylum eligibility would consider manner of entry (as well as the other lawful pathways noncitizens may have availed themselves of) but would not treat it as dispositive of their asylum claims. The proposed rule here places more weight on manner of entry than the BIA did for the discretion analysis in *Matter of Pula. See* 19 I&N Dec. at 474 (holding that ''the danger of persecution should generally outweigh all but the most egregious of adverse factors''). But the Attorney General and Secretary, in exercising their broad discretion to issue regulations adopting additional limitations and conditions on asylum eligibility, are not bound by the approach in the BIA's decision in *Matter of Pula* under the regulatory regime then applicable. And under the proposed rule, noncitizens subject to the condition may overcome the presumption in exceptionally compelling circumstances. Additionally, in this specific context, and for the reasons provided throughout this preamble, the Departments have determined that placing greater weight on manner of entry is warranted in the interest of encouraging migrants to seek protection in other countries in the region and to use lawful pathways and processes to access the U.S. asylum system with an ultimate goal of promoting overall system efficiency so that the Departments can manage the anticipated surge of migrants in as fair and orderly a manner as possible.

Furthermore, the lawful pathways condition would not displace *Matter of Pula's* general application when considering whether an individual grant of asylum is warranted as a matter of discretion. *Matter of Pula* articulates principles to govern the exercise of discretion in individual cases in the absence of other measures instituted by the Attorney General or the Secretary guiding the exercise of discretion. Here, through the lawful pathways condition, the Attorney General and Secretary would exercise their general discretionary authority to issue additional conditions on asylum eligibility under section 208(b)(1)(A), (b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B). Moreover, the lawful pathways condition on eligibility would not displace *Matter of Pula's* application in an asylum adjudication where the condition is not implicated or its presumptive application is rebutted.

This proposed rule is also consistent with the safe-third-country and firm-resettlement bars at sections 208(a)(2)(A) and (b)(2)(A)(iv) of the INA, 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(iv). The proposed rule's scope and effect are significantly different than those bars. Unlike those bars, the presumption would not make asylum eligibility hinge exclusively on the availability of protection in a third country; whether an applicant applied for protection in a third country through which they traveled would only be relevant if the noncitizen did not avail themselves of one of the specified pathways or processes to enter the United States—*e.g.,* if the noncitizen entered the United States through a parole process or scheduled a time through the CBP One app to present themselves at a port of entry, then the condition does not apply to that noncitizen. Further, unlike those bars, the presumption would not operate as a categorical bar on asylum eligibility, but would merely operate as a rebuttable presumption that could be overcome in appropriate circumstances. Indeed, one of the grounds on which the presumption would necessarily be rebutted is that the noncitizen faced an imminent and extreme threat to life or safety at the time of entry into the United States—thereby advancing the purposes of the INA's protections against persecution. *See, e.g., Sall* v. *Gonzales,* 437 F.3d 229, 233 (2d Cir. 2006) (noting that the ''United States offers asylum to refugees not to provide them with a broader choice of safe homelands, but rather, to protect those arrivals with nowhere else to turn''); *Matter of A–G–G–,* 25 I&N Dec. 486, 503 (BIA 2011); *see also* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). Section 208 establishes the minimum statutory requirements for the discretionary grant of asylum, and permits the Departments to impose additional requirements for that discretionary benefit. *See* INA 208(b)(1)(A), (b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B); *see also Nijjar* v. *Holder,* 689 F.3d 1077, 1082 (9th Cir. 2012) (noting that fraud can be ''one of the 'additional limitations . . . under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by regulation''). Thus, the proposed rule is within the broad discretionary authority of the Attorney General and Secretary retained by section 208.

The lawful pathways condition proposed here would be a permissible exercise of the Departments' authority to impose a new condition on asylum that is designed to improve the overall functioning of the immigration system and to improve processing of asylum applications. Both of these purposes are consistent with the INA.

By channeling noncitizens seeking to travel to the United States, including to seek asylum, into lawful pathways and processes, the proposed rule would promote orderly processing and minimize the number of individuals who would be placed in lengthy section 240 removal proceedings and released into the United States pending such proceedings. And by reducing the number of noncitizens permitted to remain in the United States despite having non-meritorious asylum and protection claims, the proposed rule would reduce incentives for similarly situated noncitizens to seek to cross the border, thus reducing the anticipated surge that is expected to strain DHS resources.

The relevant provisions of the INA authorizing new asylum conditions permit the Departments to adopt conditions in order to improve the overall operation of the immigration system. Section 208(b)(2)(C) and (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C) and (d)(5)(B), broadly allow the Attorney General and Secretary to establish by regulation other ''limitations and conditions'' on asylum, as long as they are consistent with section 208 and the INA, respectively.

Neither provision imposes restrictions on the types of conditions the Departments may adopt, other than specifying that the conditions must be consistent with the statute. Nothing in the text or purpose of the provisions

[209] The Global Asylum Rule explicitly departed from *Matter of Pula* when it established regulatory factors to be considered in various ways that did not align with *Pula's* holdings. *See* 85 FR at 80342 (''Accordingly, the Departments properly and permissibly changed their policy from *Matter of Pula.*''); 85 FR at 80387–88 (adding 8 CFR 208.13(d)); 85 FR at 80396–97 (adding 8 CFR 1208.13(d)). However, those regulatory amendments have never taken effect because the Global Asylum Rule was enjoined before its effective date. *Pangea Legal Servs.* v. *DHS,* 512 F. Supp. 3d 966, 977 (N.D. Cal 2021). Accordingly, the Departments continue to follow *Matter of Pula.*

indicates that conditions may not be designed to improve the overall effectiveness of the immigration system, to encourage other countries in the region to share in the protection of migrants, and to encourage migrants to seek protection in those countries. That is, nothing in the INA requires asylum eligibility criteria to focus only on individual-specific considerations to the exclusion of other factors, such as the overall efficiency of the asylum system or the broader public interest.

Congress has put into place generally applicable filing requirements aimed at management of the asylum system, such as in IIRIRA when it amended section 208 to add a provision prohibiting an application for asylum more than one year after a noncitizen entered the United States as a measure responding in part to a ballooning asylum docket. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Although Congress included an exception to the bar where the applicant establishes ''the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within'' the one-year period, INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), it did not provide any exception based on the strength of the applicant's asylum claim alone. In other words, Congress concluded that the interest in ensuring overall system efficiency outweighed the fact that there would be applicants who would have received asylum but for the one-year deadline.[210] The Departments have made a similar calculation in the interest of system efficiency. Similar to the one-year filing deadline, the proposed lawful pathways condition on asylum eligibility is aimed at ensuring that those who follow the procedures set forth to allow for an orderly application process are able to access the full panoply of benefits available to asylees within the United States.

The lawful pathways condition, and the related modification of the withholding and CAT screening standard applied to noncitizens subject to the condition, would also improve overall asylum processing efficiency. As noted, the Departments recognize that operationalizing the lawful pathways condition would require more resources to implement because the credible fear interviews for those subject to the condition will take some additional time. Specifically, asylum officers would have to inquire into the applicability of any exceptions or rebuttal circumstances for the condition and then apply the higher ''reasonable possibility'' standard to determine the likelihood of persecution or torture for those whose asylum claims are precluded by the lawful pathways condition. At the end of this process, however, the Departments expect that fewer noncitizens would ultimately be placed in section 240 proceedings as fewer will pass the screening process. By applying more resources on the front end at the screening stage, the proposed rule would reduce the number of resource-intensive asylum applications that will need to be adjudicated by EOIR. And ICE would expend fewer resources litigating cases in immigration court and then locating, apprehending, and removing those with unsuccessful claims. Moreover, seeking to channel meritorious asylum claims for faster resolution is consistent with the purpose of the asylum provision as a whole.[211] And improving system efficiency is consistent with the longstanding and overarching principle articulated by the Board that ''[t]he ultimate consideration when balancing factors in the exercise of discretion is to determine whether a grant of relief'' like asylum ''appears to be in the best interest of the United States.'' *Matter of D–A–C–,* 27 I. & N. Dec. 575, 578 (BIA 2019).

Additionally, the proposed lawful pathways condition is expected to increase asylum processing efficiency by increasing to some degree the percentage of meritorious asylum claims that are considered. It rests in part on the understanding that many individuals who avail themselves of the credible fear process do not have meritorious claims, and that those who would circumvent orderly procedures and forgo readily available options may be less likely to have a well-founded fear of persecution than those individuals who do avail themselves of an available lawful opportunity. Moreover, it is permissible for the Attorney General and the Secretary to adopt a presumption, applicable only in emergent circumstances, under which those truly requiring protection from persecution or torture may properly be expected to either apply for asylum or other protection in the first safe harbor they find, *see Kalubi* v. *Ashcroft,* 364 F.3d 1134, 1140 (9th Cir. 2004) (noting that forum-shopping might be ''part of the totality of circumstances that sheds light on a request for asylum in this country''), or follow the procedures set forth for making an application rather than waiting until they are apprehended to do so. Of course, the Departments recognize it will not be the case for all noncitizens who do not avail themselves of alternative options in other countries or lawful pathways to enter the United States that they would not be found to have meritorious asylum claims. But the Attorney General and the Secretary believe, in light of the circumstances that the Departments faced in late November and December of 2022 and will likely face upon the lifting of the Title 42 public health Order, that it would be an appropriate exercise of their discretion to prioritize for consideration of a request for asylum those noncitizens who do pursue lawful pathways or processes in the United States or in other countries. In addition, the proposed rule would permit noncitizens to rebut the presumption of ineligibility by showing that they are deserving of being excused from the bar in exceptionally compelling circumstances despite their failure to pursue lawful pathways or processes. And, of course, the condition would not bar statutory withholding of removal or protection under the CAT, and thus those subject to the condition would remain eligible for protections from persecution and torture, consistent with the United States' statutory and international obligations.[212] Pursuing

[210] Indeed, despite coming after *Matter of Pula,* when Congress enacted the one-year bar in IIRIRA in 1996, it did not include any exception for those who meet the eligibility requirements for asylum but cannot meet the higher standard for future persecution for withholding and thus will be returned to a country where there they have a well-founded fear of future persecution solely because they filed their application more than one year after their last entry into the United States.

[211] Section 208 includes multiple provisions aimed at providing an orderly and expeditious process for asylum applications. *See, e.g.,* INA 208(d)(5)(A)(ii), 8 U.S.C. 1158(d)(5)(A)(ii) (''in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed''); INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) (''in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed'').

[212] Under both the INA and international law, providing asylum to individuals who do not meet the standards for withholding or CAT is discretionary rather than mandatory. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (''The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.''); *Cardoza-Fonseca,* 480 U.S. at 441 (noting that the asylum provision of the INA corresponds to Article 34 of the Refugee Convention, which is ''precatory'' and ''does not require the implementing authority actually to grant asylum to all those who are eligible''). Withholding and CAT protection are mandatory only for those

Continued

these improvements in the asylum processing system and the administration of the immigration laws more broadly is consistent with the INA.

In sum, the proposed rule permissibly pursues goals relating to both the functioning of the entire immigration system and the efficiency of asylum processing. In the current circumstances, while preserving core protections, the Departments believe either goal by itself would be sufficient to support the proposed rule. Thus, the proposal is within the authority conferred by section 208 of the INA.

4. Expedited Removal and Screenings in the Credible Fear Process

In IIRIRA, Congress established the expedited removal process. Public Law 104–208, div. C, 110 Stat. 3009, 3009–546. The process is applicable to noncitizens arriving in the United States (and, in the discretion of the Secretary, certain other designated classes of noncitizens) who are found to be inadmissible under either section 212(a)(6)(C) of the INA, 8 U.S.C. 1182(a)(6)(C), regarding material misrepresentations, or section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), regarding documentation requirements for admission. Under expedited removal, such noncitizens may be ''removed from the United States without further hearing or review unless the [noncitizen] indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.'' INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i).

The former INS and, later, DHS implemented the expedited removal statute by establishing a screening process, known as the ''credible fear'' screening, to identify potentially valid requests for asylum and claims for statutory withholding of removal and CAT protection. Currently, any noncitizen who expresses a fear of persecution or torture, a fear of return, or an intention to apply for asylum during the course of the expedited removal process is referred to a USCIS asylum officer for an interview to determine whether the noncitizen has a credible fear of persecution or torture. INA 235(b)(1)(A)(ii), (B), 8 U.S.C. 1225(b)(1)(A)(ii), (B); *see also* 8 CFR 235.3(b)(4), 1235.3(b)(4)(i). If the asylum officer determines that the noncitizen does not have a credible fear of persecution or torture, the noncitizen may request that an IJ review that determination. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 208.30(g), 1208.30(g).

If the asylum officer determines that a noncitizen subject to expedited removal has a credible fear of persecution or torture, DHS has discretion to issue a Notice to Appear to refer the noncitizen to the immigration court for full consideration of the asylum or statutory withholding claim in proceedings under section 240 of the INA, 8 U.S.C. 1229a, or to retain jurisdiction over the application for asylum pursuant to 8 CFR 208.2(a)(1)(ii) for consideration in a hearing pursuant to 8 CFR 208.9. *See* 8 CFR 208.30(f). If an IJ, upon review of the asylum officer's negative credible fear determination, finds that the noncitizen possesses a credible fear of persecution or torture, the IJ vacates the expedited removal order and refers the case back to DHS for further proceedings consistent with 8 CFR 1208.2(a)(1)(ii) or for commencement of removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. *See* 8 CFR 1208.30(g)(2)(iv)(B). As explained below, application of the proposed rule in the expedited removal process is consistent with these provisions.

5. Litigation History

i. Litigation Related to the Entry and Transit Rules

The Departments acknowledge prior precedent concerning the scope of the Departments' statutory rulemaking authority under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), *E. Bay Sanctuary Covenant* v. *Biden,* 993 F.3d 640 (9th Cir. 2021) (''*East Bay III*''); *E. Bay Sanctuary Covenant* v. *Garland,* 994 F.3d 962 (9th Cir. 2020) (''*East Bay I*''), and an injunction in *E. Bay Sanctuary Covenant* v. *Barr,* 519 F. Supp. 3d 663 (N.D. Cal. 2021) (''*East Bay II*'').

In *East Bay I,* 994 F.3d 962, the U.S. Court of Appeals for the Ninth Circuit affirmed a preliminary injunction and held that an IFR that categorically denied asylum to most persons entering the United States at the SWB if they had not first applied for asylum in Mexico or another third country through which they passed, known as the third-country-transit bar (the ''TCT Bar''), was inconsistent with section 208 of the INA, 8 U.S.C. 1158, because it was inconsistent with both the safe-third-country and the firm-resettlement provisions of section 208. *Id.* at 977.[213] That court concluded that ''[a] critical component of both [the safe-third-country and firm-resettlement] bars is the requirement that the alien's 'safe option' be genuinely safe,'' and that the transit rule did ''virtually nothing to ensure that a third country is a 'safe option.' '' *Id.*

And in *East Bay II,* 519 F. Supp. 3d 663, the district court preliminarily enjoined the TCT Bar final rule, concluding that although the rule ''avers to 'have addressed the Ninth Circuit's concerns by further explaining . . . how the transit bar is consistent' with § 1158, 85 FR 82267 n.18, . . . the Final Rule remains inconsistent with § 1158.'' *Id.* at 666. The court reasoned that ''[o]nce again, '[t]he sole protection provided by the [Final] Rule is its requirement that the country through which the barred alien has traveled be a 'signatory' to the 1951 Convention and the 1967 Protocol,' '' a requirement which the Ninth Circuit had already held '''does not remotely resemble the assurances of safety built into the two safe-place bars of § 1158,' and in fact is inconsistent with those provisions.'' *Id.* (quoting and citing *E. Bay,* 964 F.3d at 845–49). That court's injunction provides that ''Defendants are hereby ORDERED AND ENJOINED, pending final judgment herein or further order of the Court, from taking any action continuing to implement the Final Rule and ORDERED to return to the pre-Final Rule practices for processing asylum applications.'' *Id.* at 668.

Separately, in *East Bay III,* 993 F.3d 640, the Ninth Circuit affirmed a preliminary injunction against the Proclamation Bar IFR, which categorically rendered certain noncitizens ineligible for asylum if they

who meet the higher standards applicable to that relief. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3) (''the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of'' a protected ground''); *Cardoza-Fonseca,* 480 U.S. at 429 (explaining that withholding of removal corresponds to Article 33.1 of the Refugee Convention, which ''imposed a mandatory duty on contracting States not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons''); FARRA § 2242(a), 112 Stat. at 2681–822 (''It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.''); 8 U.S.C. 1231 note; 8 CFR 1208.16(d)(1).

[213] The district court in that case enjoined the interim final transit rule for similar reasons, directing that ''Defendants are hereby ORDERED AND ENJOINED, pending final judgment herein or further order of the Court, from taking any action continuing to implement the Rule and ORDERED to return to the pre-Rule practices for processing asylum applications.'' *E. Bay Sanctuary Covenant* v. *Barr,* 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). Another district court issued a final judgment vacating the interim final transit rule, concluding that the rule did not comply with the APA's notice-and-comment requirements. *Capital Area Immigrants' Rights Coal.* v. *Trump,* 471 F. Supp. 3d 25, 45–57 (D.D.C. 2020). That court did not address the substantive validity of the interim final transit rule. *Id.* at 32.

entered the United States in violation of a presidential proclamation or other presidential order suspending or limiting the entry of noncitizens along the SWB. The court held that the Proclamation Bar IFR was inconsistent with section 208(a), which provides that any migrant ''who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum.'' *Id.* at 670.[214] As explained above, that holding is incorrect.

The court also suggested that the rule is inconsistent with the United States' commitments under the 1967 Refugee Protocol, in which the United States adhered to specified provisions of the Refugee Convention. 993 F.3d at 972–75. That is incorrect. The United States' non-refoulment obligation under Article 33 of the Convention is implemented by statute through the provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3)(A), for mandatory withholding of removal. The proposed rule would specifically preserve the availability of that relief from removal. As discussed in Part V.C.3 of this preamble, the INA's provision in section 208 of the INA, 8 U.S.C. 1158, for the discretionary granting of asylum instead aligns with Article 34 of the Convention, which is precatory and does not require a party actually to grant asylum to all those who are eligible. *See, e.g., INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 440–441 (1987). The court also misread Article 31(1) of the Refugee Convention, which pertains only to ''penalties'' imposed ''on account of . . . illegal entry or presence'' on refugees who, among other criteria, are ''coming directly from a territory where'' they face persecution. *See, e.g., Singh* v. *Nelson,* 623 F. Supp. 545, 560–561 (S.D.N.Y. 1985). And a bar to the granting of the discretionary relief of asylum is not a penalty under Article 31(1), especially given that the noncitizen remains eligible to apply for withholding of removal under section 241(b)(3) of the INA, which implements U.S. nonrefoulement obligations under the Protocol. *See Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *Cazun* v. *U.S. Att'y Gen.,* 856 F.3d 249, 257 n.16 (3d Cir. 2017).

[214] The court also held that the Proclamation Bar IFR likely did not properly fall under the good cause or foreign affairs exceptions to notice-and-comment rulemaking under 5 U.S.C. 553(a)(1) and (b)(B). *See East Bay II,* 993 F.3d at 676–77.

Regardless, even accepting *East Bay III*'s reasoning on this point, that reasoning is limited to a categorical eligibility bar premised on manner of entry. The proposed rule does not implicate the same concerns as the prior categorical bar on ''manner of entry'' because it would operate only when noncitizens traveled through at least one third country without seeking relief there and would not treat the manner of entry as dispositive in determining eligibility, but instead as the basis for a rebuttable presumption. The circumvention of orderly refugee processing would only be relevant where the applicant cannot demonstrate compelling reason why they did not avail themselves of a growing number of lawful pathways to the United States, including by scheduling an appointment to present at a port of entry in the United States in an orderly fashion, or showing that the individual could not access or use the government scheduling system. That is entirely consistent with longstanding Board precedent discussed above, as recognized by the Ninth Circuit itself. *See E. Bay Sanctuary Covenant* v. *Trump,* 932 F.3d 742, 773 (9th Cir. 2018) (recognizing ''manner of entry'' ''may be considered''); *Matter of Pula,* 19 I. & N. Dec. at 473 (''circumvention can be a serious adverse factor'' so long as it ''is not [ ] considered in such a way that the practical effect is to deny relief in virtually all cases'').

The district court in that case enjoined the Proclamation Bar IFR for similar reasons, *E. Bay Sanctuary Covenant* v. *Trump,* 354 F. Supp. 3d 1094 (N.D. Cal. 2018), and issued an injunction directing that ''Defendants are hereby ORDERED AND ENJOINED, pending final judgment herein or other order, from taking any action continuing to implement the Rule and ORDERED to return to the pre-Rule practices for processing asylum applications.'' *Id.* at 1121.[215]

The preliminary injunctions in the *East Bay* cases dealt with different limitations on asylum and involved different factual circumstances, and hence do not preclude the issuance of this proposed rule. The injunctions bar the Departments from ''implement[ing]'' the specific rules enjoined in those cases. *East Bay II,* 519 F. Supp. 3d at 668; *East Bay,* 354 F. Supp. 3d at 1121. They do not preclude the Departments from issuing new rules with different substance and different effects and premised on different factual circumstances and on new reasoning. The APA authorizes judicial review of specific agency action, not abstract policies, 5 U.S.C. 702, and as the Supreme Court has explained, remedies do not operate '' 'on legal rules in the abstract.' '' [216]

The Departments respectfully disagree with some of the substantive holdings of the Ninth Circuit and the district court as described above. At the same time, the Departments view this proposed rule as fully consistent with those decisions, given the significant differences between the rebuttable presumption proposed here and the categorical bars at issue in those cases, particularly given the new and increased focus on available pathways and the ability to schedule a time to present at ports of entry.

To the extent the Ninth Circuit's conclusion in *East Bay III* was premised on a view that any limits on asylum based on a failure to seek protection in a third country needed to be derivative of section 208's safe-third-country provision and firm-resettlement bar, that

[215] Subsequently, another district court vacated the Proclamation Bar IFR for similar substantive reasons as the Ninth Circuit, concluding that a rule ''which renders all aliens who enter the United States across the southern border . . . *except at a designated port of entry,* ineligible for asylum'' is inconsistent ''with 8 U.S.C. 1158(a)(1), which provides that ''[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum.'' *O.A.* v. *Trump,* 404 F. Supp. 3d 109, 147 (D.D.C. 2019) (alterations in original). That ruling is subject to a pending appeal that is presently held in abeyance. *See O.A.* v. *Biden,* No. 19–5272 (D.C. Cir.).

[216] *California* v. *Texas,* 141 S. Ct. 2104, 2115 (2021) (citation omitted). For the same reason, the Departments do not view the permanent injunction in *Al Otro Lado, Inc.* v. *Mayorkas,* No. 17–CV–02366–BAS–KSC, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022), as prohibiting the Departments from issuing this NPRM or otherwise limiting the Departments' discretionary authority to apply new asylum limitations consistent with section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), to the injunction class. *See, e.g., Milliken* v. *Bradley,* 433 U.S. 267, 281–82 (1974) (''The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the [alleged wrongful conduct] itself.''); *Meinhold* v. *U.S. Dep't of Def.,* 34 F.3d 1469, 1480 (9th Cir. 1994); *see also, e.g., Thomas* v. *County of Los Angeles,* 978 F.2d 504, 509 (9th Cir. 1992) (reversing injunction that ''fail[ed] to specify the act or acts sought to be restrained as required by'' Federal Rule of Civil Procedure 65(d)). The Departments also disagree with the district court's rationale for the injunction and have appealed the order to the Ninth Circuit. *See Al Otro Lado, Inc.* v. *Mayorkas,* Case Nos. 22–55988, 22–56036 (9th Cir. 2022). Section 208 of the INA, 8 U.S.C. 1158, and section 235 of the INA, 8 U.S.C. 1225, do not require the Government to inspect and refer potential asylum-seekers who have not yet entered the territorial United States. These statutes, by their terms, apply only to individuals ''in the United States,'' so the Government does not withhold mandatory statutory processing by preventing someone outside the territorial United States from immediately crossing the border for inspection and referral for a fear screening.

view is incorrect. Nothing about the text or history of these provisions suggests that they were intended to set out the exclusive conditions relating to an individual seeking protection's ability to obtain relief in a third country, and therefore they do not prevent the Executive Branch from imposing additional requirements addressing that subject. To the contrary, those and other statutory bars establish minimum requirements for asylum eligibility that the Attorney General and Secretary may not disregard. They do not prevent the Attorney General and the Secretary from exercising their discretionary authority to adopt limitations and conditions on eligibility over and above the statutory minimum. Indeed, at the same time Congress codified those rules, it expressly preserved the Executive Branch's authority to ''establish additional limitations and conditions'' ''by regulation.'' INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). Thus, the enumerated statutory bars plainly do not occupy the field of bars related to applications or presence in a third country. The Executive Branch enjoys broad discretion to supplement those bars with additional conditions. Put simply, the INA's enumerated asylum bars do not foreclose the Executive Branch from imposing alternative conditions, even if those alternative conditions address subjects that are in some respects similar to those that Congress addressed in the asylum statute.

In any event, unlike the rules at issue in the *East Bay* cases (which, as noted above, the Departments propose to rescind), this proposed rule would not operate as a categorical bar on asylum for all covered noncitizens based either on manner of entry or whether the noncitizen sought asylum in at least one country through which they traveled en route to the United States. The proposed rule would not implicate the same concerns as the prior categorical bar based on ''manner of entry'' because it would operate only when noncitizens traveled through at least one third country without seeking protection there and would not treat the manner of entry as dispositive in determining eligibility, but instead as one part of the basis for a rebuttable presumption. And more clearly than the prior transit bar, the proposed rule addresses very different issues from those applicable to the safe-third-country or firm-resettlement bars. Again, it would yield only a presumption (which, unlike those bars, may be rebutted) and would apply only when noncitizens travel through a third country and also fail to pursue other lawful pathways, such as options for orderly processing at the port of entry.

In short, the proposed rule is more limited and less categorical than the prior bars, establishing only a rebuttable condition applicable to an individual noncitizen who, after traveling through a third country, fails to avail themselves of other options to request entry to the United States or to seek asylum or other protection in this country or elsewhere. Such a rebuttable presumption is supported by the longstanding view of the BIA that a noncitizen's ''circumvention of orderly refugee procedures,'' including their ''manner of entry or attempted entry,'' ''whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States'' are relevant factors that can be considered as part of the totality of circumstances with respect to whether an individual warrants the favorable exercise of discretion in granting asylum. *Matter of Pula,* 19 I&N Dec. at 473–74;[217] *see also, e.g., Haloci* v. *U.S. Att'y Gen.,* 266 F. App'x 145, 147 (3d Cir. 2008) (''In addition, the IJ found that Haloci's failure to seek asylum in Turkey or Holland, along with his admission that he had never considered any final destination other than the United States, further undercut his alleged fear. The record supports the IJ's findings.''); *Farbakhsh* v. *INS,* 20 F.3d 877, 882 (8th Cir. 1994) (''We also hold that the Board did not abuse its discretion in denying petitioner's application for asylum. Petitioner passed through several countries (Turkey, Italy, Spain, Portugal, Canada) en route to the United States; in Spain and Canada orderly refugee procedures were in fact available to him. He had applied for refugee status in Spain, and Canada had granted him temporary resident status and one year to apply for asylum.'').

Given that the Departments may take account of these factors in individual cases, *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), they may do so across a category of similarly situated cases as well, and give them the weight they deem appropriate. *See, e.g., Lopez* v. *Davis,* 531 U.S. 230, 244 (2001); *Reno* v. *Flores,* 507 U.S. 292, 313–14 (1993); *Yang,* 79 F.3d at 936–37. As noted, Congress clearly contemplated that the Attorney General and the Secretary would adopt generally applicable conditions on asylum eligibility by expressly authorizing the Executive Branch to establish further ''limitations and conditions'' on asylum eligibility ''by regulation,'' INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), so long as those limitations and conditions are ''consistent with'' the asylum statute. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see R–S–C,* 869 F.3d at 1187 & n.9 (''the statute clearly empowers'' the Attorney General and the Secretary to ''adopt[ ] further limitations'' on asylum eligibility); *see also* INA 208(d)(5)(A), 8 U.S.C. 1158(d)(5)(A). Reading that provision to bar any condition on asylum eligibility not already established by section 208—particularly a mere rebuttable presumption—''would mean that the Attorney General could not impose *any* limitations on asylum eligibility because any regulation that 'limits' eligibility *necessarily* undermines the statutory guarantee that 'any alien . . . irrespective of such alien's status' may *apply* for asylum.'' *R–S–C,* 869 F.3d at 1187 (third emphasis added).

Regardless, by taking account of various pathways for noncitizens fleeing persecution to obtain protection in the United States or other countries, including the avenues provided to gain entry to the United States, where they may thereafter seek asylum, the proposed rule in the current and impending exigent circumstances is consistent with what the Ninth Circuit viewed as the two categories of individuals whom section 208 excludes from asylum eligibility: those ''considered not to be deserving of international protection'' based on their actions, and those persons ''not considered to be in need of international protection'' because ''there is a 'safe option' in another country.'' *East Bay I,* 994 F.3d at 976, 979 (emphasis omitted). The presumption would apply only to noncitizens who have neither availed themselves of alternative options, including seeking asylum or protection

[217] As the Board further explained with respect to the asylum statute as it existed at the time, ''[a] careful reading of the language of [section 208(a)(1)] reveals that the phrase 'irrespective of such alien's status' modifies only the word 'alien.' '' *Pula,* 19 I&N Dec. at 473. ''The function of that phrase is to ensure that the procedure established by the Attorney General for asylum applications includes provisions for adjudicating applications from *any* alien present in the United States or at a land or port of entry, 'irrespective of such alien's status.' '' *Id.* (collecting cases). Thus, Congress made clear that noncitizens like stowaways, who, at the time the Refugee Act was passed, could not avail themselves of our immigration laws, would be eligible at least to apply for asylum ''irrespective of [their] status.'' *Id.* ''Thus, while section 208(a) provides that an asylum application be accepted from an alien 'irrespective of such alien's status,' no language in that section precludes the consideration of the alien's status in granting or denying the application in the exercise of discretion.'' *Id.*

elsewhere, nor availed themselves of safe and orderly processing, including mechanisms for seeking a lawful, safe, and orderly way to enter at a port of entry and any available parole processes. The presumption, moreover, could be rebutted, including on three per se grounds: if, at the time of entry, the noncitizen faced an acute medical emergency, faced an imminent and extreme threat to life or safety, or was a victim of a severe form of trafficking in persons.

Longstanding precedent recognizes that the ''ultimate consideration'' for whether someone is deserving of a discretionary asylum grant is whether granting relief ''appears to be in the best interest of the United States.'' *Matter of D–A–C–,* 27 I&N Dec. at 578. Here, the Departments propose that granting asylum to certain categories of noncitizens who have failed to avail themselves of lawful pathways or processes to enter the United States or seek asylum or other protection in other countries is not in the ''best interest of the United States.'' The Secretary and the Attorney General, in exercising their discretion, may consider, among other considerations, the current circumstances confronting the United States on the SWB, and their effect on the orderly and expeditious resolution of asylum claims.

The Secretary and the Attorney General may thus permissibly determine that, for a 24-month period as proposed by this rule, it is in the ''best interest of the United States'' to prioritize noncitizens who pursue lawful paths. Nothing in section 208 forecloses that view, and securing the best interests of the country is a reasonable policy goal under section 208 and thus ''consistent with'' section 208. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see Yang,* 79 F.3d at 939 (observing that ''it is precisely to cope with the unexpected that Congress deferred to the experience and expertise of the Attorney General in fashioning section 208''); *see also id.* at 935 (''We must reject the argument that [the] regulation [establishing a categorical discretionary bar to asylum eligibility] exceeds the authority of the Attorney General if we find that the regulation has a 'reasonable foundation . . . that is, if it rationally pursues a purpose that it is lawful for the [immigration agencies] to seek.'' (quoting *Reno* v. *Flores,* 507 U.S. at 309)).

Beyond the clear statutory text, settled principles of administrative law dictate that the Departments may adopt generally applicable eligibility requirements. Those principles establish that it is permissible for agencies to establish general rules, reasonable presumptions, or guidelines in lieu of case-by-case assessments, so long as those rules or guidelines are not inconsistent with statute. *See Lopez* v. *Davis,* 531 U.S. 230, 243–44 (2001) (rejecting the argument that the Bureau of Prisons was required to make ''case-by-case assessments'' of eligibility for sentence reductions and explaining that an agency ''is not required continually to revisit 'issues that may be established fairly and efficiently in a single rulemaking' '') (quoting *Heckler* v. *Campbell,* 461 U.S. 458, 467 (1983)); *Reno* v. *Flores,* 507 U.S. at 313–14 (holding that a statute requiring ''individualized determination[s]'' does not prevent immigration authorities from using ''reasonable presumptions and generic rules''); *Fook Hong Mak* v. *INS,* 435 F.2d 728, 730 (2d Cir. 1970) (upholding INS's authority to ''determine[ ] certain conduct to be so inimical to the statutory scheme that all persons who have engaged in it shall be ineligible for favorable consideration'' and observing that there is no legal principle forbidding an agency that is ''vested with discretionary power'' from determining that it will not use that power ''in favor of a particular class on a case-by-case basis''); *see also Singh* v. *Nelson,* 623 F. Supp. 545, 556 (S.D.N.Y. 1985) (''attempting to discourage people from entering the United States without permission . . . . provides a rational basis for distinguishing among categories of illegal aliens''); *Matter of Salim,* 18 I&N Dec. 311, 315–16 (BIA 1982) (before *Pula,* according manner of entry dispositive weight); *cf. Peulic* v. *Garland,* 22 F.4th 340, 346–48 (1st Cir. 2022) (rejecting challenge to *Matter of Jean,* 23 I&N Dec. 373 (A.G. 2002), which established strong presumption against a favorable exercise of discretion for certain categories of applicants for asylee and refugee adjustment of status under section 209(c) of the INA, 8 U.S.C. 1159(c) (citing cases)); *Cisneros* v. *Lynch,* 834 F.3d 857, 863–64 (7th Cir. 2016) (rejecting challenge to 8 CFR 1212.7(d), which established strong presumption against a favorable exercise of discretion for INA 212(h) waivers (8 U.S.C. 1182(h)) for certain classes of noncitizens, even if a few could meet the heightened discretionary standard (citing cases)). The authority to make discretionary denials of asylum, *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), thus further supports the condition proposed here.

Finally, to the extent *East Bay II* indicated that any limitation or condition on asylum eligibility premised on manner of entry is inconsistent with section 208(a)'s provision allowing for noncitizens to apply for asylum irrespective of their manner of entry, 993 F.3d at 670, the Departments disagree. As explained above, section 208(a)(1) by its plain terms requires only that a noncitizen be permitted to ''apply'' for asylum, regardless of the noncitizen's manner of entry. It does not require that a noncitizen be eligible to be granted asylum, regardless of their manner of entry.

ii. Litigation Related to the ''Global Asylum'' Rule

The Departments are also aware of the litigation related to the Global Asylum Rule and do not view this litigation as an impediment to the Executive's legal authority to issue this proposed rule. In June 2020, the Departments published an NPRM titled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020) (''Global Asylum NPRM''), in which they proposed changes to, *inter alia,* the credible fear and expedited removal process.

The Global Asylum NPRM proposed four changes to the credible fear and expedited removal processes. First, the NPRM proposed to apply the statutory bars to applying for asylum and the statutory and regulatory bars to eligibility for asylum during credible fear screenings. *Id.* at 36296 (proposing amendment to 8 CFR 208.30(e)(5)(i)). Second, where a noncitizen was found to be subject to such a bar, the NPRM proposed that a negative credible fear determination would be entered and that the noncitizen would be screened only for a ''reasonable possibility'' of persecution or torture. *Id.* Third, all claims for statutory withholding and CAT relief would be screened using a ''reasonable possibility'' of persecution or torture standard, rather than a ''significant possibility'' of establishing eligibility for the underlying protection as provided for previously. *Id.* Fourth, if a noncitizen was found to have a credible fear of persecution or a reasonable fear of persecution or torture, they would be referred for asylum-and-withholding-only proceedings, rather than section 240 proceedings, during which they could apply only for asylum, statutory withholding of removal, or protection under the CAT, and not any other forms of relief available under Title 8 of the United States Code. *Id.* at 36297. In December 2020, after considering public comments, the Departments published the Global Asylum Rule, in which they adopted the changes proposed in the Global Asylum NPRM.

The Global Asylum Rule was, and continues to be, the subject of multiple suits challenging the rule on multiple procedural and substantive grounds. *See Pangea Legal Servs.* v. *U.S. Dep't of Homeland Sec.,* No. 3:20–cv–09253 (N.D. Cal. filed Dec. 21, 2020); *Immigration Equality* v. *U.S. Dep't of Homeland Sec.,* No. 3:20–cv–09258 (N.D. Cal. filed Dec. 21, 2020); *Human Rights First* v. *Mayorkas,* No. 1:20–cv–3764 (D.D.C. filed Dec. 21, 2020); *Tahirih Justice Ctr.* v. *Mayorkas,* No. 1:21–cv–00124 (D.D.C. filed Jan. 14, 2021). In *Pangea Legal Servs.* and *Immigration Equality,* the U.S. District Court for the Northern District of California preliminarily enjoined the Departments from implementing the Global Asylum Rule in its entirety nationwide before it became effective. *Pangea Legal Servs.,* 512 F. Supp. 3d at 977. The court concluded that the plaintiffs were likely to succeed on the merits of their claim that the Global Asylum Rule ''was done without authority of law'' because the DHS official who approved it, then-Acting Secretary Chad Wolf, was not properly designated as Acting Secretary. *Id.* at 975. The court did not address any challenges to the rule's substance. Since the Global Asylum Rule was preliminarily enjoined, all four challenges to the rule have been stayed or held in abeyance.

In enjoining the Global Asylum Rule, the court ordered that the Departments and their employees ''are preliminarily enjoined from implementing, enforcing, or applying'' the Global Asylum Rule ''or any related policies or procedures.'' *Pangea Legal Servs.,* 512 F. Supp. 3d at 977. The Departments have construed this injunction as potentially interfering with the implementation of another rule that was also published in December 2020 and which, unlike this proposed rule, relied on specific text in the Global Asylum Rule allowing for the consideration of specific bars to asylum eligibility during credible fear. *See* Security Bars and Processing, 85 FR 84160 *et seq.* (Dec. 23, 2020) (''Security Bars Rule''); *see also, e.g.,* Security Bars and Processing; Delay of Effective Date, 86 FR 73615, 73617 (Dec. 28, 2021).

Most of the changes that the Global Asylum Rule made to the credible fear and expedited removal process were replaced by the Asylum Processing IFR. Regardless, the litigation over the Global Asylum Rule does not overlap or create a tension with the provisions in this NPRM. The Global Asylum Rule did not add any additional limitations on asylum eligibility. Moreover, this proposed rule would implement the new condition to credible fear screenings through a stand-alone provision rather than a catch-all as the Departments sought to do through the Global Asylum Rule (and which the Departments sought to use to operationalize the Security Bars Rule). Accordingly, although both the proposed rule and the Global Asylum Rule involve asylum, credible fear, and expedited removal, their provisions are distinct.

6. Consideration of Lawful Pathways Condition During Credible Fear Screening

Under the amendments proposed here, the lawful pathways condition on eligibility for asylum would be applied to noncitizens during credible fear screenings. Where a noncitizen is found subject to the lawful pathways condition on eligibility for asylum and where no exception applies and the noncitizen has not rebutted the presumption of the condition's application, the asylum officer would enter a negative credible fear determination. *See* proposed 8 CFR 208.33(c)(1). The asylum officer would then screen the noncitizen for statutory withholding of removal and protection under the CAT using the ''reasonable possibility'' standard. To do so, the officer would question the noncitizen to elicit facts regarding their past experiences and future fear of persecution and torture and then determine whether, based on those facts, the noncitizen has a ''reasonable possibility'' of persecution or torture in the country of removal. *See* proposed 8 CFR 208.33(c)(2).

As discussed in Part V.A. of this preamble, the Departments have determined that applying the lawful pathways condition on eligibility for asylum during credible fear screenings is necessary to ensure the Departments' continued ability to safely, humanely, and effectively enforce and administer U.S. immigration law, including provisions concerning asylum and removal, and to promote shared responsibility with our partner countries to address migration issues. Such application would be consistent with the statutory definition of ''credible fear,'' which asks whether there is ''a significant possibility . . . that the alien could establish *eligibility* for asylum under section 208.'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v) (emphasis added). If a noncitizen is subject to the lawful pathways condition on eligibility for asylum and not excepted and cannot rebut the presumption of the condition's applicability, there would not be a significant possibility that the noncitizen could establish eligibility for asylum.

The Departments have further determined that, where the proposed lawful pathways condition would apply, applying the ''reasonable possibility'' of persecution or torture standard to the remaining claims for statutory withholding of removal and CAT protection would better further the Departments' systemic goals of border security and lessening the impact on the immigration adjudication system overall. First, as to individuals subject to the lawful pathways condition, fewer with non-meritorious claims would be placed into section 240 proceedings if the ''reasonable possibility'' of persecution or torture standard is applied than if the lower ''significant possibility'' of establishing eligibility for the underlying protection standard is applied. The Departments acknowledge that this approach would differ from that articulated in the Asylum Processing IFR issued in March 2022, but as further discussed below assess that, to respond to the current and impending exigent circumstances, the interests balance differently and warrant a different approach from the one generally applied in credible fear screenings.

Second, the Departments believe that using the ''reasonable possibility'' standard to screen for statutory withholding and CAT protection in this context would further these systemic goals while remaining consistent with the INA, Congress's intent, the United States' treaty obligations, and decades of agency practice. When Congress established the expedited removal system in IIRIRA, it allowed those claiming a fear of persecution to seek asylum through the credible fear process. INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). If a noncitizen has a ''credible fear of persecution,'' the noncitizen is then ''detained for further consideration of the application for asylum.'' INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). The statute provides that '' 'credible fear of persecution' means that there is a significant possibility . . . that the alien could establish eligibility for asylum.'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). In none of those provisions did Congress refer to statutory withholding of removal or CAT protection. Thus, Congress clearly expressed its intent that the ''significant possibility'' standard be used to screen for asylum eligibility but did not express any clear intent as to which standard should apply to other applications—and indeed, as noted below, the Departments apply the

''reasonable possibility'' of persecution or torture standard to screen for statutory withholding of removal and CAT protection in reasonable-fear screenings, where applicants (who are in the reasonable-fear screening process after either having a prior removal order reinstated or being subject to a final administrative removal order) would not be eligible for asylum but nonetheless could be eligible for withholding or deferral of removal. Similarly, the legislative history regarding the credible fear screening process references only asylum.[218] The proposed rule would retain the ''significant possibility'' standard for asylum, as Congress mandated in section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v). But the Departments do not read the statute or legislative history as requiring that claims for statutory withholding of removal or CAT protection be screened under that same standard. As discussed in more detail below, the Departments have concluded that applying the reasonable possibility of persecution or torture standard in this context would better align the screening process for statutory withholding of removal and CAT protection for those who are subject to expedited removal but are presumptively ineligible for asylum with their implementation of such screenings in other contexts where noncitizens would also be ineligible for asylum.

Furthermore, a ''reasonable possibility'' standard would be consistent with the INA, the FARRA, and U.S. non-refoulement obligations under the CAT. Those sources do not dictate any particular screening standard or procedure, and the Departments believe that a ''reasonable possibility'' of persecution or torture standard is sufficient to identify individuals who will ultimately be able to satisfy the ''more likely than not'' burden applicable to claims for statutory withholding or CAT protection. A ''reasonable possibility'' of persecution or torture standard has been used in certain situations dating back to at least 1999. *See* Regulations Concerning the Convention Against Torture, 64 FR 8478–01, 8485, 8493 (Feb. 19, 1999); *see also id.* at 8479 (explaining that the screening process for noncitizens who were eligible only for statutory withholding or CAT protection is designed to ''allow for the fair and expeditious resolution'' of those claims ''without unduly disrupting the streamlined removal processes applicable to'' such individuals). Since 1999, regulations have provided for a ''reasonable fear'' screening process for certain noncitizens who are categorically ineligible for asylum and can thus make claims only for statutory withholding or CAT protection. *See* 8 CFR 208.31, 1208.31. Specifically, if a noncitizen is subject to having a previous order of removal reinstated or is a non-lawful permanent resident subject to an administrative order of removal resulting from an aggravated felony conviction, then they are categorically ineligible for asylum. *See id.* 208.31(a), (e). Such a noncitizen can be placed in withholding-only proceedings to adjudicate their statutory withholding or CAT claims, but only if they first establish a ''reasonable fear'' of persecution or torture through a screening process that tracks the credible fear process. *See id.* 208.31(c), (e).

To establish a reasonable fear of persecution or torture, a noncitizen must establish a ''reasonable possibility that [the noncitizen] would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.'' *Id.* 208.31(c). ''This . . . screening process is modeled on the credible-fear screening process, but requires the alien to meet a higher screening standard.'' 64 FR at 8485; *see also Garcia* v. *Johnson,* No. 14–CV–01775, 2014 WL 6657591, at *2 (N.D. Cal. Nov. 21, 2014) (describing the aim of the regulations as providing ''fair and efficient procedures'' in reasonable-fear screening that would comport with U.S. international obligations).

Significantly, when establishing the reasonable-fear screening process, DOJ explained that the two affected categories of noncitizens should be screened based on the higher reasonable-fear standard because, ''[u]nlike the broad class of arriving aliens who are subject to expedited removal, these two classes of aliens are ineligible for asylum,'' and may be entitled only to statutory withholding of removal or CAT protection. 64 FR at 8485. ''Because the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.'' *Id.*

Drawing on the established framework for considering the likelihood of a grant of statutory withholding of removal or CAT protection in the reasonable-fear context, the proposed rule would adopt the ''reasonable possibility'' of persecution or torture standard for screening the claims of those noncitizens who are subject to the lawful pathways condition on eligibility for asylum and who do not qualify for an exception or rebut the presumption of the condition's applicability. The Attorney General and Secretary have broad authority to implement the immigration laws, *see* INA 103, 8 U.S.C. 1103, including by establishing regulations, *see* INA 103(a)(3), 8 U.S.C. 1103(a)(3), and to regulate ''conditions or limitations on the consideration of an application for asylum,'' INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). Furthermore, the Secretary has the authority—in his ''sole and unreviewable discretion,'' the exercise of which may be ''modified at any time''—to designate additional categories of noncitizens who will be subject to expedited-removal procedures, so long as the designated noncitizens inadmissible on certain grounds who have not been admitted or paroled nor continuously present in the United States for two years. INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii). The Departments have frequently invoked these authorities to establish or modify procedures affecting noncitizens in expedited removal proceedings, as well as to adjust the categories of noncitizens subject to particular procedures within the expedited-removal framework.

This proposed rule would not change the standard for withholding or CAT screening for those who are not subject to the lawful pathways condition on eligibility for asylum. Those noncitizens who follow the pathways that have been prepared for those seeking to enter the United States at the U.S.-Mexico land border—or have sought but been denied asylum or other protection in a country through which they traveled—will continue to have their claims for

[218] For example, the Asylum Processing NPRM provided: ''The 104th Congress chose a screening standard 'intended to be a low screening standard for admission into the usual full asylum process.' '' 86 FR at 46914 (quoting 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch)). The NPRM provides additional discussion from various members of Congress about the compromise struck over the standard to apply during credible fear screenings, all of which refer to asylum. *See* 86 FR at 46914. When discussing the definition of ''refugee'' at section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), the legislative history does include the statement that ''[a]n asylum claim also is considered a claim for withholding of deportation under section 243(h) of the INA.'' H.R. Rep. No. 104–469, at 121 n.20. The Departments have found no similar discussion in the context of the nature of or procedure for the credible fear screening process.

statutory withholding of removal and CAT protection, as well as their claims for asylum, screened under the ''significant possibility'' of establishing eligibility for the underlying protection standard, in order to avoid requiring adjudicators to apply different standards to the same facts in the same screening. Furthermore, the proposed rule is not intended to change the entire credible fear process but rather would alter the manner of processing only for those subject to the lawful pathways condition.

The Departments acknowledge that, in the Asylum Processing IFR, they recently rescinded changes made by the Global Asylum Rule that subjected noncitizens' claims for statutory withholding and CAT protection to the ''reasonable possibility'' of persecution or torture standard and that altered the post-negative credible fear process. As discussed in the three subsections below, the considerations that led to those choices do not apply in the same way in this unique context or are outweighed here by other considerations. Considering the differences between the lawful pathways condition on asylum eligibility and the nature of the changes at issue in the Asylum Processing IFR, as well as the changed circumstances since March 2022, the Departments have determined that it would be appropriate to apply the lawful pathways additional condition on asylum eligibility during the credible fear screening stage and to then apply the ''reasonable possibility'' of persecution or torture standard to screen the remaining applications for statutory withholding of removal and CAT protection, and that doing so in the way the Departments intend would lead to better allocation of resources overall.

In addition, the Departments propose two changes to the post-credible fear determination process for those found subject to the lawful pathways limitation and who receive a negative credible fear determination from an asylum officer. First, unlike the process adopted by the Asylum Processing IFR, noncitizens must affirmatively elect immigration judge review of a negative credible fear determination when that choice is presented to them; noncitizens who fail or refuse to indicate a request for immigration judge review will not be considered to have requested such review. Second, noncitizens would not be permitted to submit a request to reconsider a negative credible fear determination with USCIS, although USCIS will still retain discretion to reconsider negative determinations sua sponte. As further explained below, the Departments have determined that the need for an expedited process under the current and anticipated exigent circumstances weighs against providing for immigration judge review where noncitizens do not request it and against allowing for requests to reconsider negative credible fear determinations after immigration judge review.

i. Application of Lawful Pathways Condition During Credible Fear Screening

When returning to the ''historical practice of not applying mandatory bars at the credible fear screening stage'' in the Asylum Processing IFR, 87 FR at 18135, the Departments explained that the bars the Global Asylum Rule would have applied during credible fear were generally legally and factually complicated and that screening for the bars would have required significant additional time in each screening interview for little operational benefit, 87 FR at 18093, 18094, 18134–35. The Departments further explained that they had come to believe that it was speculative that generally applying mandatory bars during the credible fear screening stage would ensure that noncitizens subject to those bars would be removed more quickly. 87 FR at 18094. These criticisms of the Global Asylum Rule's provision applying multiple mandatory bars during the credible fear screening process do not apply equally to the lawful pathways condition on asylum eligibility given the condition's stand-alone nature and its narrowly tailored applicability to the present and impending circumstances.

The lawful pathways condition on eligibility for asylum would be far simpler than the multiple, complex mandatory bars the Global Asylum Rule applied during the credible fear screening process. Specifically, the Global Asylum Rule would have applied multiple legally and factually complicated bars listed in section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A), including bars that render ineligible for asylum a noncitizen (1) who ''ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion''; (2) who, ''having been convicted by a final judgment of a particularly serious crime, constitute[ ] a danger to the community of the United States''; (3) for whom ''there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States''; (4) where ''there are reasonable grounds for regarding the alien as a danger to the security of the United States''; (5) who is described in specific portions of the provisions relating to terrorist activity in section 212(a)(3)(B)(i) of the INA, 8 U.S.C. 1182(a)(3)(B)(i); or (6) who ''was firmly resettled in another country prior to arriving in the United States.'' If required to screen for all of these bars in every credible fear interview, asylum officers would have to ask numerous additional questions aimed at eliciting information on a number of topics. Not only are each of these bars individually legally and factually complicated, but screening for all of them would indeed add significant time to each and every credible fear screening.

At bottom, as the Departments determined in the Asylum Processing IFR, screening for those bars is not currently a preferable use of the Departments' resources. The Departments continue to believe that it is inadvisable to apply these complex mandatory bars during the credible fear screening process.

In contrast, the lawful pathways condition on eligibility for asylum would be simpler to apply than multiple, legally complicated bars. Not only would it be a single, stand-alone condition, but at the outset of a credible fear interview, the asylum officer would know whether to inquire into the condition or not. Specifically, the officer would know whether the applicant entered the United States without documents sufficient for lawful admission as described in INA 212(a)(7), 8 U.S.C. 1182(a)(7), across the U.S.-Mexico land border. *See* proposed 8 CFR 208.33(a)(1). Only for such individuals would the asylum officer have to ask additional questions to determine whether the presumption applies and, if so, whether the noncitizen can rebut the presumption. Thus, the additional time commitment for applying the lawful pathways condition would not be universal, as it was for the multiple bars to eligibility under the Global Asylum Rule. That said, the Departments recognize that, where a noncitizen may be subject to the lawful pathways condition on asylum eligibility, asylum officers would be required to inquire into whether the enumerated exceptions or any basis for rebutting the presumption applies. At times, this questioning may require significant additional time during the credible fear interview. Regardless, as discussed throughout this preamble, the Departments assess that under the circumstances, the interests in ensuring orderly processing, expedited rejection of unmeritorious claims at the outset in the emergent circumstance addressed by this proposed rule and

overall system efficiencies would outweigh any costs resulting from increasing the length of some credible fear screening interviews.

The Departments expect that application of the lawful pathways condition on asylum eligibility for asylum would also differ materially from the Departments' experience applying the TCT Bar IFR, which the Departments discussed in the Asylum Processing IFR. The TCT bar applied to ''any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States'' unless certain exceptions applied. 8 CFR 208.13(c)(4), 1208.13(c)(4). By its terms, the bar applied to every noncitizen who presented at a port of entry or between ports of entry along the U.S.-Mexico land and maritime border and presumably, only Mexican nationals would be categorically exempt. Thus, asylum officers had to screen every applicant for application of the bar—specifically, to determine whether they transited through a third country and then whether one of several exceptions applied. As the Departments explained in the Asylum Processing IFR, applying that bar required additional time in each credible fear interview and led to operational inefficiencies. 87 FR at 18093, 18131, 18135. The Departments, however, have learned from that experience, and will do additional triaging on the front end, so that those who use the CBP One app or otherwise avail themselves of a safe, orderly process—which will be readily apparent upon encounter—will not be subject to the rebuttable presumption described by this proposed rule. This feature of the proposed rule would limit the operational inefficiencies identified in the Asylum Processing IFR.

In the specific circumstances here, moreover, the Departments have concluded that the approach taken in this proposed rule is the superior policy—all things considered—even in circumstances where applying the lawful pathways condition requires more resources than the TCT bar. In particular, the lawful pathways condition would function as a rebuttable presumption for which there are enumerated exceptions and circumstances that may rebut the presumption. Inquiry into those exceptions and rebuttal circumstances would require additional factual development that may significantly increase interview times for some noncitizens subject to the condition. However, as discussed throughout this preamble, the Departments believe that under the circumstances, the interests in ensuring lawful, safe, and orderly processing and overall system efficiencies—including screening out and removing those with non-meritorious claims more quickly—outweigh any costs resulting from increasing the length of some credible fear screening interviews, and expanding the operation of the credible fear screening program, if necessary.

Despite the difference in applicability, the Departments recognize the toll it took on their resources to apply the TCT bar. As the Departments explained in the Asylum Processing IFR, applying the TCT bar required additional time from their employees at various levels: asylum officers spent additional time ''conducting these screening interviews, making determinations, and recording their assessments''; ''supervisory asylum officers reviewing these cases spent additional time assessing whether the varying standards of proof were properly applied to the forms of relief for which asylum officers screened''; there was an ''additional investment of time and resources from Asylum Division headquarters, including training and quality assurance staff who had to develop and deliver guidance and trainings on the new process, monitor the work being conducted in the field to ensure compliance with regulations and administrative processes, and provide guidance to asylum officers and supervisory asylum officers on individual cases''; ''Attorneys from the USCIS Office of Chief Counsel had to spend time and resources reviewing and advising on training materials and guidance issued by the Asylum Division, as well as on individual cases on which legal advice was sought to ensure proper application of the divergent screening standards on various forms of relief''; and ''IJs reviewing negative determinations by asylum officers were also compelled to spend additional time ensuring the proper application of these screening standards.'' 87 FR at 18092.

The Departments recognize that procedural changes may require significant resources to implement. Indeed, the Departments continue to experience this as they work to operationalize the significant procedural changes made by the Asylum Processing IFR. Notably, however, the Departments implemented the TCT Bar IFR for less than a year—from July 16, 2019, until June 30, 2020—and it was the first time the Departments implemented such a bar during credible fear. *See Capital Area Immigrants' Rights Coal.* v. *Trump,* 471 F. Supp. 3d 25 (D.D.C. 2020) (vacating the TCT Bar IFR on June 30, 2020). Additionally, during that time there were disruptions to the bar's implementation due to fast-moving litigation that included an injunction that changed over time.[219] Thus, the Departments' experience of implementing the TCT bar was disrupted and marked by uncertainty and changing circumstances. Having had this experience along with implementing the Asylum Processing IFR, the Departments are equipped to operationalize a new condition on asylum eligibility during credible fear. Despite the additional time it will require to train officers and ensure proper application of the new procedure, the Departments believe the benefits of applying the lawful pathways condition on eligibility for asylum during the credible fear process outweigh the costs. Specifically, the Departments believe that in the current and impending circumstances, the interest in overall system efficiency outweighs the interest in minimizing the length of any given credible fear screening.

ii. Application of ''Reasonable Possibility'' Standard

In explaining the changes adopted in the Asylum Processing IFR, the Departments stated that using the ''significant possibility'' standard to screen for all three types of claims—asylum, statutory withholding of removal, and CAT protection—was preferable for multiple reasons, including because it aligned with Congress's intent that a low screening standard apply during the credible fear

[219] The TCT Bar IFR was published on July 16, 2019, and went into effect immediately. Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). Eight days later, on July 24, the IFR was preliminarily enjoined nationwide. *E. Bay,* 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). The government appealed and sought an emergency stay pending appeal, and the Ninth Circuit upheld the preliminary injunction but limited its geographical scope to just the Ninth Circuit on August 16. *E. Bay Sanctuary Covenant* v. *Barr,* 934 F.3d 1026, 1028 (9th Cir. 2019). On September 9, 2019, the district court reinstated its previously entered preliminary injunction, again applying it nationwide. *E. Bay Sanctuary Covenant* v. *Barr,* 391 F. Supp. 3d 974, 985 (N.D. Cal. 2019). The government again appealed, but before the Ninth Circuit entered a decision, the Supreme Court on September 11, 2019, issued an order staying the district court's order ''in full pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought.'' *Barr* v. *E. Bay Sanctuary Covenant,* 140 S. Ct. 3 (2019). The TCT Bar IFR then remained in effect until it was vacated on June 30, 2020. *Capital Area Immigrants' Rights Coal.* v. *Trump,* 471 F. Supp. 3d 25 (D.D.C. 2020).

process. *See, e.g.,* 87 FR at 18091–93; 86 FR at 46914. Although the Departments continue to believe that the credible fear screening process is by its nature a screening procedure, they also balance the nature of that screening procedure against the need to create efficiencies in the system overall. Specifically, screening out more non-meritorious claims means fewer additional cases that would result in a denial years down the road—and which, in the meantime, would add to the immigration court backlog. In other words, the Departments' goal for the process is not to conduct interviews as quickly as possible regardless of the downstream effects. A marginal increase in interview duration for some noncitizens that saves a significant amount of time later in the process is desirable as long as the screening is calibrated to protect individuals with viable statutory withholding or CAT claims. Although applying the ''reasonable possibility'' of persecution or torture standard may also take some additional time for those subject to the lawful pathways condition on eligibility for asylum and would make it more difficult for those with non-meritorious claims to pass the screening process, asylum officers and immigration judges have long applied the reasonable fear of persecution or torture standard successfully to noncitizens who are subject to administrative removal orders under section 238(b) of the INA, 8 U.S.C. 1228(b), or reinstated orders under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5).

The Asylum Processing NPRM and IFR included discussions regarding Congress's intent that the ''significant possibility'' standard be a ''low screening standard for admission into the usual full asylum process,'' 86 FR at 46914, and that it be employed so that the expedited removal process is efficient and expeditious, *see generally* 87 FR at 18091–94, 18135. The Departments believe that screening noncitizens' claims of fear of persecution and torture under the ''reasonable possibility'' standard where they are not eligible for asylum due to application of the lawful pathways condition on eligibility continues to align with the INA and Congress's general intent to create an asylum and protection system that adjudicates claims both expeditiously and fairly. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) (''[I]n the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.''). In their discussion in the Asylum Processing NPRM and IFR, the Departments did not intend to foreclose ever applying the ''reasonable possibility'' standard. Indeed, the Departments at no time indicated an intent to change the standard applied in reasonable-fear screenings.

In the Asylum Processing IFR, the Departments also included discussions regarding their experiences applying the TCT Bar IFR and the inefficiencies that resulted from applying the ''reasonable possibility'' standard in that context. 87 FR at 18131; *see also id.* at 18091. Specifically, the discussion of the burdens of applying divergent standards in the Asylum Procedures IFR stated that ''adjudicators were required to evaluate the same evidence twice for the same factual scenario.'' *Id.* at 18131; *cf. id.* at 18091 (''[T]he Departments believe that the efficiency gained in screening the same or a closely related set of facts using the same legal standard at the same time is substantial and should not be overlooked.''). By contrast, the Departments do not intend to implement the lawful pathways condition in this inefficient manner. Under the proposed rule, after a noncitizen is found subject to the lawful pathways condition on eligibility for asylum, a negative credible fear determination would be entered as to asylum, and the noncitizen's claims relating to persecution or torture would be considered only under the ''reasonable possibility'' of persecution or torture standard in order to screen for statutory withholding and CAT protection. And where the lawful pathways condition does not apply at all or the asylum officer determines that the noncitizen qualifies for an exception or has rebutted the presumption of its application, the asylum officer would apply the ''significant possibility'' standard to the screening for all three types of claims—asylum, statutory withholding of removal, and CAT protection. Thus, any inefficiencies that would have arisen from the manner in which the TCT Bar applied the ''significant possibility'' and ''reasonable possibility'' standards would not arise with respect to the application of the lawful pathways condition on eligibility for asylum.

The Asylum Processing IFR further described the burden on the Departments of implementing the ''reasonable possibility'' standard during credible fear screenings where the TCT bar applied. *See id.* at 18092 (''Having asylum officers apply varied legal standards would generally lead to the need to elicit additional testimony from noncitizens at the time of the credible fear screening interview, which lengthens credible fear interviews and increases adjudication times.''). The Departments continue to acknowledge that the ''reasonable possibility'' of persecution or torture standard is more time consuming to implement than the lower standard of ''significant possibility'' of establishing eligibility for the underlying protection. But the Departments believe that in the unique context of this proposed rule, the additional time it would require to train officers and ensure proper application of the standard would be outweighed by the systemic benefits of applying the ''reasonable possibility'' of persecution or torture standard to the screening for statutory withholding of removal and CAT protection for those ineligible for asylum due to operation of the lawful pathways condition. Specifically, the Departments believe that in the current circumstances, where immediately after the lifting of the Title 42 public health Order DHS may encounter 11,000–13,000 migrants per day,[220] many of whom will express fear of returning to their home countries and seek to apply for asylum in the United States, the interest in overall system efficiency for processing the claims of those who either are not subject to the condition or are screened-in despite its applicability outweighs the interest in minimizing the length of any given credible fear screening. This includes, to the extent possible and consistent with statutory and international obligations, minimizing the number of cases added to a system that is already overwhelmed.

Finally, the Asylum Processing IFR noted that ''while the TCT Bar IFR was in effect, no evidence [was] identified'' that applying the ''reasonable possibility'' standard for statutory withholding of removal and CAT protection claims ''resulted in more successful screening out of non-meritorious claims while ensuring the United States complied with its non-refoulement obligations.'' *Id.* at 18092. Because of the short and tumultuous life of the TCT Bar IFR, it was difficult for the Departments to gather reliable data on the efficacy of the particular processes adopted under that rule. Moreover, the Departments have long applied—and continue to apply—the higher ''reasonable possibility'' of persecution or torture standard in reasonable-fear screenings on the ground that this standard better predicts

[220] DHS SWB Encounter Planning Model generated January 6, 2023.

the likelihood of succeeding on the ultimate statutory withholding or CAT protection application than the ''significant possibility'' of establishing eligibility for the underlying protection standard, given the higher burden of proof. As noted above, there is no evidence that this standard is insufficient to identify individuals who will ultimately be able to show that they are more likely than not to be persecuted or tortured. Consistent with that settled judgment, which the Asylum Processing IFR did not question or disturb, the Departments believe that the ''reasonable possibility'' standard remains an appropriate standard in proceedings where the applicant is determined to be ineligible for asylum and the only potentially viable claims are for statutory withholding or CAT relief.

iii. Review After Asylum Officer's Negative Credible Fear Determination

In the Asylum Processing IFR, the Departments reversed a change made by the Global Asylum Rule that required an affirmative request for immigration judge review after a negative credible fear determination. *See* 87 FR at 18219 (amending 8 CFR 208.30(g)(1)). The Departments also adopted a provision limiting USCIS, in its discretion, to only considering a single request for reconsideration from a noncitizen after immigration judge review. *See id.* (amending 8 CFR 208.30(g)(1)(i)). For those subject to the lawful pathways limitation on asylum eligibility, as discussed below, the Departments believe that the need for expedition under the current and anticipated exigent circumstances weighs against granting IJ review where a noncitizen, having been told in a language they understand of their right for review and invited to choose whether or not to request review, has refused or failed to request it, and weighs in favor of imposing further limits on reconsideration than the Asylum Processing IFR imposed.

First, the Departments propose to ensure that noncitizens are given a written notice of the requirement to either request or decline immigration judge review, and are advised that failure or refusal to indicate a choice will be considered as declining such review, and provide for immigration judge review of a negative credible fear determination only where the noncitizen requests such review. *See* proposed 8 CFR 208.33(c)(2)(v), 1208.33(c)(1). In the Asylum Processing IFR, the Departments amended 8 CFR 208.30(g)(1) to provide that ''[a] refusal or failure by the alien to make such indication shall be considered a request for review.'' 87 FR at 18219. The Departments continue to recognize that there may be multiple explanations for a noncitizen's failure to indicate whether they would like to seek IJ review, *see id.* at 18094, and seek to ensure noncitizens are aware of the right to review and the consequences of failure to affirmatively request such review. Specifically, DHS intends to change the explanations it provides to noncitizens subject to the proposed rule to make clear to noncitizens that the failure to affirmatively request review will be deemed a waiver of the right to seek such review. Conversely, the Departments are facing an exigent circumstance, in which there is a critical need for proceedings to be expeditious, while also fair, and for those without meritorious claims to be removed quickly. Under the current and anticipated exigent circumstances described in the rule, the Departments have determined that the balance of interests should yield a different result here than in the Asylum Processing IFR, and that, taking into account considerations of both fairness and efficiency, immigration judge review should be provided only where a noncitizen affirmatively indicates a request for such review when invited to do so.

Second, the Departments propose to allow for reconsideration of a negative credible fear finding after immigration judge review in the sole discretion of USCIS. *See* proposed 8 CFR 208.33(c)(2)(v)(C). In the Asylum Processing IFR, the Departments amended 8 CFR 208.30(g)(1)(i) to provide that ''USCIS may, in its discretion, reconsider a negative credible fear finding that has been concurred upon by an immigration judge provided such reconsideration is requested by the alien or initiated by USCIS no more than 7 calendar days after the concurrence by the immigration judge, or prior to the alien's removal, whichever date comes first, and further provided that no previous request for reconsideration of that negative finding has already been made.'' 87 FR at 18219; *see* 8 CFR 1208.30(g)(2)(iv)(A) (''USCIS may nevertheless reconsider a negative credible fear finding as provided at 8 CFR 208.30(g)(1)(i).''). This was a change from prior practice, pursuant to which there was no limit on the number of requests for reconsideration that a noncitizen could submit; it was also a change from the NPRM, where the Departments proposed eliminating reconsideration entirely. *See* 86 FR at 46945 (proposing to amend 8 CFR 208.30(g)(1)(i) to add that ''[o]nce the asylum officer has served the alien with Form I–863, the immigration judge shall have sole jurisdiction to review whether the alien has established a credible fear of persecution or torture, and an asylum officer may not reconsider or reopen the determination''). The Departments' adoption of a provision allowing for one request for reconsideration within a short time frame was premised on the conclusion that allowing unlimited requests for reconsideration was inefficient but that, even after immigration judge review, ''in some rare instances USCIS may still want to reconsider the determination as a matter of discretion.'' 87 FR at 18132. Like the Asylum Processing IFR, the proposed rule would maintain USCIS' ability to reconsider negative determinations. *See* proposed 8 CFR 208.33(c)(2)(v)(C). However, due to the exigent circumstances discussed throughout this NPRM, the Departments believe it is necessary to bar noncitizens subject to the proposed rule from submitting requests for reconsideration; as noted in the Asylum Processing IFR, such requests require USCIS to ''devote time and resources that could more efficiently be used on initial credible fear and reasonable fear determinations,'' 87 FR at 18095, and very few such requests lead to a reversal of the negative determination, *see id.* at 18132 (providing the numbers of such requests received and the number that result in a changed result for the asylum offices that track such information). The Departments note that from October 1, 2022 through February 8, 2023, approximately 288 requests for reconsideration were received by USCIS and of those, 13 were changed to a positive credible fear determination and 4 were pending further information gathering as of February 8, 2023.[221] In addition, the provision proposed here would not eliminate reconsideration entirely but rather would provide that reconsideration remains available at USCIS' sole discretion.

VI. Regulatory Requirements

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

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs, benefits, and transfers of available

[221] USCIS Global Case Management System (data downloaded Feb. 8, 2023).

alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs of the Office of Management and Budget (''OMB'') reviewed the proposed rule as a significant regulatory action under section 3(f)(4) of the Executive Order.

The expected effects of this proposed rule are discussed above. The new condition described above would likely decrease the number of asylum grants and likely reduce the amount of time that noncitizens who are ineligible for asylum and who lack a reasonable fear of persecution or torture would be present in the United States. Noncitizens who establish a reasonable fear of persecution or torture would still be able to seek protection in proceedings before IJs. In addition, the proposed rule may result in significantly reduced incentives for irregular migration and illegal smuggling activity.

The benefits of the proposed rule are expected to include improved relationships with, and enhanced opportunities to coordinate with and benefit from the migration policies of, regional neighbors; large-scale reductions in strains on limited national resources; preservation of the Departments' continued ability to safely, humanely, and effectively enforce and administer the immigration laws; and a reduction in the role of exploitative transnational criminal organizations and smugglers. Some of these benefits would accrue to migrants who wish to pursue safe, orderly, lawful pathways and processes, such as the ability to schedule a time to apply for admission at a port of entry, whose ability to present their claim might otherwise be hampered by the severe strain that a further surge in irregular migration would impose on the Departments.

The costs of the proposed rule primarily are borne by migrants and the Departments. For migrants who would be made ineligible for asylum under the presumptive condition established by the rule, such an outcome would entail a loss of the benefits of asylum, although they would continue to be eligible for statutory withholding of removal and withholding under the CAT. Unlike asylees, noncitizens granted these more limited forms of protection do not have a path to citizenship and cannot petition for certain family members to join them in the United States. In addition, the proposed rule would require additional time for asylum officers, during fear screenings, to inquire into the applicability of the presumption and whether the presumption has been rebutted.

The lawful, safe, and orderly pathways described earlier in this preamble would be authorized separate from this proposed rule but are expected to yield significant benefits for noncitizens who might otherwise seek to migrate irregularly to the United States. For instance, the ability to schedule a time to arrive to apply for admission at ports of entry is expected to significantly improve CBP's ability to process noncitizens at ports of entry, and available parole processes allow prospective irregular migrants to avoid a dangerous and expensive overland journey in favor of an arrival by air to the United States.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. *See* 5 U.S.C. 601 *et seq.* ''Small entities'' are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This NPRM would not directly regulate small entities and would not be expected to have a direct effect on small entities. Rather, the NPRM would regulate individuals, and individuals are not defined as ''small entities'' by the RFA.[222] While some employers could experience costs or transfer effects, these impacts would be indirect. Based on the evidence presented in this analysis and throughout this preamble, the Departments certify that this proposed rule would not have a significant economic impact on a substantial number of small entities. The Departments nonetheless welcomes comments regarding potential impacts on small entities, which the Departments may consider as appropriate in a final rule.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (''UMRA'') is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.[223] The inflation-adjusted value of $100 million in 1995 was approximately $177.8 million in 2021 based on the Consumer Price Index for All Urban Consumers (CPI–U).[224]

The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate.[225] The term ''Federal intergovernmental mandate'' means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[226] The term ''Federal private sector mandate'' means, in relevant part, a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[227]

This proposed rule does not contain such a mandate, because it would not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this proposed rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA. The requirements of title II of UMRA, therefore, do not apply, and the Departments have not prepared a statement under UMRA.

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[222] *See* 5 U.S.C. 601(6).

[223] 2 U.S.C. 1532(a).

[224] *See* BLS, ''Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items by Month'' (Dec. 2021), *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202112.pdf*. Steps in calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the most recent current year available (2021); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100. Calculation of inflation: [(Average monthly CPI–U for 2021 − Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(270.970 − 152.383)/152.383] * 100 = (118.587/152.383) * 100 = 0.7782 * 100 = 77.82 percent = 77.8 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.778 = $177.8 million in 2021 dollars.

[225] 2 U.S.C. 1502(1), 658(6).

[226] 2 U.S.C. 658(5).

[227] 2 U.S.C. 658(7).

D. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Departments believe that this proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

E. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

F. Family Assessment

The Departments have reviewed this proposed rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999,[228] enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.[229] The Departments have reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the agency determines a regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

The Departments have determined that the implementation of this proposed rule would not impose a negative impact on family well-being or the autonomy or integrity of the family as an institution. Under the proposed rule, adjudicators would consider the circumstances of family members traveling together when determining whether noncitizens are not subject to the presumption in proposed section 208.33(a)(1) and 1208.33(a). The presumption would not apply to a noncitizen if the noncitizen or a member of the noncitizen's family establishes one of the conditions in proposed § 208.33(a)(1)(i) through (iii). Similarly, the presumption in paragraph (a)(1) of those sections would be rebutted if the noncitizen demonstrates that, at the time of entry, the noncitizen or a member of the noncitizen's family was subject to one of the circumstances enumerated in paragraph (a)(2).

Additionally, to protect against family separation, where a principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the lawful pathways rebuttable presumption, and where denial of asylum on that ground alone would lead to the applicant's family being separated because at least one other family member would not qualify for asylum or other protection from removal on their own—meaning the entire family may not be able to remain together—the Departments have determined that the possibility of separating the family would constitute an exceptionally compelling circumstance that rebuts the lawful pathways presumption of ineligibility for asylum. *See* Executive Order 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273, 8273 (Feb. 5, 2021) (''It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States.'').

G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule would not have ''tribal implications'' because it would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) requires no further agency action or analysis.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–12, the Departments must submit to OMB, for review and approval, any collection of information contained in a rule, unless otherwise exempt. *See* Public Law 104–13, 109 Stat. 163 (May 22, 1995). This proposed rule proposes a revision to a collection of information OMB Control Number 1651–0140 *Collection of Advance Information from Certain Undocumented Individuals on the Land Border.*

Comments on the revision are encouraged and will be accepted for 30 days from the publication date of the proposed rule. All submissions on the information collection specifically must include the words ''OMB Control Number 1651–0140'' in the body of the submission. Use only the method under the **ADDRESSES** and Public Participation sections of this proposed rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Collection of Advance Information from Certain Undocumented Individuals on the Land Border.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* CBP.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individual undocumented noncitizens. Under this collection, CBP collects certain biographic and biometric information from undocumented noncitizens prior to their arrival at a port of entry, to streamline their processing at the port of entry. The requested information is that which CBP would otherwise collect from these individuals during primary and/or secondary processing. This information is provided by undocumented noncitizens, directly or through NGOs and International Organizations. Providing this information reduces the amount of data entered by CBP Officers (CBPOs) and

[228] *See* 5 U.S.C. 601 note.

[229] Public Law 105–277, 112 Stat. 2681 (1998).

the corresponding time required to process an undocumented noncitizen.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection is 365,000 and the estimated time burden per response is 16 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 97,333 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is $1,985,593.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security proposes to amend 8 CFR part 208 as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; 8 CFR part 2; Pub. L. 115–218.

■ 2. Amend § 208.13 by adding and reserving paragraph (e) and adding paragraph (f), to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(e) [Reserved]

(f) *Lawful pathways condition.* For applications filed by aliens who entered the United States between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], also refer to the provisions on asylum eligibility described in § 208.33.

■ 3. Add subpart C, consisting of § 208.33, to read as follows:

Subpart C—Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE]

§ 208.33 Lawful pathways condition on asylum eligibility.

Notwithstanding any contrary section of this part, including §§ 208.2, 208.13, and 208.30—

(a) *Condition on eligibility.* (1) An alien who, between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], enters the United States at the southwest land border without documents sufficient for lawful admission as described in section 212(a)(7) of the Act subsequent to the end of implementation of the Centers for Disease Control and Prevention's Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, after traveling through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees is subject to a rebuttable presumption of ineligibility for asylum unless the alien, or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(i) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(ii) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(iii) Sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application.

(2) The presumption in paragraph (a)(1) of this section can be rebutted if an alien demonstrates by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien demonstrates that, at the time of entry, the alien or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(i) Faced an acute medical emergency;

(ii) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(iii) Satisfied the definition of ''victim of a severe form of trafficking in persons'' provided in § 214.11 of this chapter.

(3) The presumption in paragraph (a)(1) of this section shall necessarily be rebutted if an alien demonstrates by a preponderance of the evidence any of the circumstances in paragraphs (a)(2)(i) through (iii) of this section.

(b) *Exception.* Unaccompanied alien children, as defined in 6 U.S.C. 279(g)(2), are not subject to paragraph (a)(1) of this section.

(c) *Application in credible fear determinations.* (1) The asylum officer shall first determine whether the alien is covered by the presumption in paragraph (a)(1) of this section and, if so, whether the alien has rebutted the presumption in accordance with paragraph (a)(2) of this section.

(i) If the alien is covered by the presumption in paragraph (a)(1) of this section and fails to rebut the presumption in accordance with paragraph (a)(2) of this section, then the asylum officer shall enter a negative credible fear determination with respect to the alien's asylum claim and continue to consider the alien's claim under paragraph (c)(2) of this section.

(ii) If the alien is not covered by the presumption in paragraph (a)(1) of this section or has rebutted the presumption in accordance with paragraph (a)(2) of this section, the asylum officer shall follow the procedures in § 208.30.

(2)(i) In cases in which the asylum officer enters a negative credible fear determination under paragraph (c)(1)(i) of this section, the asylum officer will assess whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, political opinion, or membership in a particular social group) or torture, with respect to the prospective country or countries of removal identified pursuant to section 241(b) of the Act.

(ii) In cases described in paragraph (c)(2)(i) of this section, if the alien establishes a reasonable possibility of persecution or torture with respect to the identified country of removal, the Department will issue a Form I–862, Notice to Appear. In removal proceedings, the alien may apply for

asylum, withholding of removal under section 241(b)(3) of the Act, withholding of removal under the Convention Against Torture, or any other form of relief or protection for which they are eligible.

(iii) In cases described in paragraph (c)(2)(i) of this section, if an alien fails to establish a reasonable possibility of persecution or torture with respect to the identified country of removal, the asylum officer will provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative credible fear determinations.

(iv) The alien must indicate whether he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge.

(v) Only if the alien requests such review by so indicating on the Record of Negative Fear shall the asylum officer serve the alien with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. Immigration judges will evaluate the case as provided in 8 CFR 1208.33(c). The case shall then proceed as set forth in paragraphs (c)(2)(v)(A) through (C) of this section.

(A) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(c)(2)(i), the case shall proceed under 8 CFR 1208.30(g)(2)(iv)(B).

(B) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(c)(2)(ii), DHS shall issue a Form I–862, Notice to Appear, to commence removal proceedings under section 240 of the Act. In removal proceedings, the alien may apply for asylum, withholding of removal under section 241(b)(3) of the Act, withholding of removal under the Convention Against Torture, or any other form of relief or protection for which the alien is eligible.

(C) Where the immigration judge issues a negative credible fear determination, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision and no request for reconsideration may be submitted to USCIS. Nevertheless, USCIS may, in its sole discretion, reconsider a negative determination.

(d) *Severability.* The Department intends that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, the Attorney General proposes to amend 8 CFR part 1208 as follows:

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 4. The authority citation for part 1208 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; Pub. L. 115–218.

■ 5. Amend § 1208.13 by adding paragraph (f) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(f) *Lawful pathways condition.* For applications filed by aliens who entered the United States between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], also refer to the provisions on asylum eligibility described in § 1208.33.

■ 6. Add subpart C, consisting of § 1208.33, to read as follows:

Subpart C—Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE]

§ 1208.33 Lawful pathways condition on asylum eligibility.

Notwithstanding any contrary section of this part, including §§ 1208.2, 1208.13, and 1208.30—

(a) *Condition on eligibility.* (1) An alien who, between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], enters the United States at the southwest land border without documents sufficient for lawful admission as described in section 212(a)(7) of the Act subsequent to the end of implementation of the Centers for Disease Control and Prevention's Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, after traveling through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees is subject to a rebuttable presumption of ineligibility for asylum unless the alien, or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(i) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(ii) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry, without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(iii) Sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application.

(2) The presumption in paragraph (a)(1) of this section can be rebutted if an alien demonstrates by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien demonstrates that, at the time of entry, the alien or a member of the alien's family as described in 8 CFR 208.30(c) with whom the alien is traveling:

(i) Faced an acute medical emergency;

(ii) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(iii) Satisfied the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11.

(3) The presumption in paragraph (a)(1) of this section shall necessarily be rebutted if an alien demonstrates by a preponderance of the evidence any of the circumstances in paragraphs (a)(2)(i) through (iii) of this section.

(b) *Exception.* Unaccompanied alien children, as defined in 6 U.S.C. 279(g)(2), are not subject to paragraph (a)(1) of this section.

(c) *Application in credible fear determinations.* (1) Where an asylum

officer has issued a negative credible fear determination pursuant to 8 CFR 208.33(c), and the alien has requested immigration judge review of that credible fear determination, the immigration judge shall evaluate the case de novo, as specified in paragraph (c)(2) of this section. In doing so, the immigration judge shall take into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge.

(2) The immigration judge shall first determine whether the alien is covered by the presumption at 8 CFR 208.33(a)(1) and 1208.33(a)(1) and, if so, whether the alien has rebutted the presumption in accordance with 8 CFR 208.33(a)(2) and 1208.33(a)(2).

(i) Where the immigration judge determines that the alien is not covered by the presumption, or that the presumption has been rebutted, the immigration judge shall further determine, consistent with § 1208.30, whether the alien has established a significant possibility of eligibility for asylum under section 208 of the Act, withholding of removal under section 241(b)(3) of the Act, or withholding of removal under the Convention Against Torture. Where the immigration judge determines that the alien has established a significant possibility of eligibility for one of those forms of relief or protection, the immigration judge shall issue a positive credible fear finding. Where the immigration judge determines that the alien has not established a significant possibility of eligibility for any of those forms of relief or protection, the immigration judge shall issue a negative credible fear finding.

(ii) Where the immigration judge determines that the alien is covered by the presumption and that the presumption has not been rebutted, the immigration judge shall further determine whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, political opinion, or membership in a particular social group) or torture. Where the immigration judge determines that the alien has established a reasonable possibility of persecution or torture, the immigration judge shall issue a positive credible fear finding. Where the immigration judge determines that the alien has not established a reasonable possibility of persecution or torture, the immigration judge shall issue a negative credible fear finding.

(3) Following the immigration judge's determination, the case will proceed as indicated in 8 CFR 208.33(c)(2)(v)(A) through (C).

(d) *Family unity and removal proceedings.* Where a principal asylum applicant is eligible for withholding of removal under section 241(b)(3) of the Act or withholding of removal under § 1208.16(c)(2) and would be granted asylum but for the presumption in paragraph (a)(1) of this section, and where an accompanying spouse or child as defined in 208(b)(3)(A) of the Act does not independently qualify for asylum or other protection from removal, the presumption shall be deemed rebutted as an exceptionally compelling circumstance in accordance with 8 CFR 208.33(a)(2) and 1208.33(a)(2).

(e) *Severability.* The Department intends that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Dated: February 16, 2023.

Merrick B. Garland,

Attorney General, U.S. Department of Justice.

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Part VIII

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1, 53, 54, et al.
Electronic-Filing Requirements for Specified Returns and Other Documents; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 53, 54, and 301

[TD 9972]

RIN 1545–BN36

Electronic-Filing Requirements for Specified Returns and Other Documents

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations amending the rules for filing electronically and affects persons required to file partnership returns, corporate income tax returns, unrelated business income tax returns, withholding tax returns, certain information returns, registration statements, disclosure statements, notifications, actuarial reports, and certain excise tax returns. The final regulations reflect changes made by the Taxpayer First Act (TFA) and are consistent with the TFA's emphasis on increasing electronic filing.

DATES:

Effective date: These regulations are effective on February 23, 2023.

Applicability dates: For dates of applicability, see §§ 1.1461–1(j), 1.1474–1(j), 1.6033–4(b), 1.6037–2(b), 1.6045–2(i), 1.6045–4(s), 1.6050I–1(h), 1.6050I–2(f), 1.6050M–1(f), 53.6011–1(e), 54.6011–3(f), 301.1474–1(e), 301.6011–2(g), 301.6011–3(f), 301.6011–5(f), 301.6011–10(c), 301.6011–11(e), 301.6011–12(f), 301.6011–13(f), 301.6011–14(f), 301.6011–15(f), 301.6012–2(f), 301.6033–4(d), 301.6037–2(f), 301.6057–3(f), 301.6058–2(f), 301.6059–2(e), and 301.6721–1(h).

FOR FURTHER INFORMATION CONTACT: Casey R. Conrad of the Office of the Associate Chief Counsel (Procedure and Administration), (202) 317–6844 (not a toll-free number). The phone number above may also be reached by individuals who are deaf or hard of hearing or who have speech disabilities through the Federal Relay Service toll-free at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Regulations on Income Taxes (26 CFR part 1) under sections 1461 and 1474 of the Internal Revenue Code (Code), which provide that persons required to deduct and withhold tax are liable for such tax; under sections 6045 and 6050M of the Code, which require persons to file and furnish certain information with respect to transactions and contracts; and under section 6050I of the Code, which requires persons to report information about financial transactions to the IRS; to the Regulations on Pension Excise Taxes (26 CFR part 54) under section 6011 of the Code, which requires persons to report information for certain excise taxes related to employee benefit plans; to the Regulations on Foundation and Similar Excise Taxes (26 CFR part 53) under section 6011 of the Code to remove the option—available to a person required to report certain excise taxes on Form 4720, *Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code*—to designate a Form 4720 filed by a private foundation or trust as that person's return if the foundation is reporting the same transaction; and to the Regulations on Procedure and Administration (26 CFR part 301) under sections 1474, 6011, 6012, 6033, 6057, 6058, and 6059 of the Code for determining whether returns must be filed using magnetic media (references to ''electronic form'' are used in place of ''magnetic media'').

On July 1, 2019, the President signed into law the TFA, Public Law 116–25, 133 Stat. 981 (2019). Section 2301 of the TFA amended section 6011(e) by adding new paragraph 5 that authorizes the Secretary of the Treasury or her delegate (Secretary) to prescribe regulations that decrease, in accordance with the TFA, the number of returns a taxpayer may file without being required to file electronically. Section 3101 of the TFA amended section 6011 to require any charitable or other organization required to file an annual return that relates to any tax imposed by section 511 on unrelated business taxable income to file those returns in electronic form. Section 3101 of the TFA also amended section 6033 to require any organization required to file a return under section 6033 to file those returns in electronic form.

On July 23, 2021, the Department of the Treasury (Treasury Department) and the IRS published a notice of proposed rulemaking (NPRM) (REG–102951–16) in the **Federal Register** (86 FR 39910), providing guidance on the electronic-filing rules for partnership returns, corporate income tax returns, unrelated business income tax returns, withholding tax returns, certain information returns, registration statements, disclosure statements, notifications, actuarial reports, and certain excise tax returns. The 2021 proposed regulations also withdrew the proposed regulations published in the **Federal Register** on May 31, 2018, amending the rules for determining whether information returns must be filed electronically. The 2018 and 2021 proposed regulations are included in the rulemaking docket for this Treasury Decision on *www.regulations.gov.*

Summary of Comments and Explanation of Revisions

The Treasury Department and the IRS received 22 comments in response to the proposed regulations. All comments were considered and are available at *www.regulations.gov* or upon request. A public hearing was held on September 22, 2021. Three commenters testified at the public hearing. The comments that are within the scope of the regulations are summarized and discussed in this preamble.

After consideration of the comments, the Treasury Department and the IRS adopt the proposed regulations as revised by this Treasury Decision. To the extent not inconsistent with the Summary of Comments and Explanation of Revisions section of this preamble, the Explanation of Provisions section of the preamble to the proposed regulations is incorporated in this document.

I. The Applicability Date of the Final Regulations

A. Applicable for Returns Required To Be Filed in 2024

In general, the proposed regulations provide that the amended electronic-filing rules would be applicable to returns required to be filed during calendar years beginning after the date of publication of the Treasury Decision in the **Federal Register**. The proposed regulations provide for other applicability dates depending on the filing requirements for specific tax forms. For example, the proposed regulations provide that the changes to the electronic-filing rules would apply to returns required to be filed under § 301.6058–2 for plan years that begin on or after January 1, 2022, but only for filings with a filing deadline (not taking into account extensions) after July 31, 2022.

The majority of commenters recommended delaying the applicability of the proposed changes by at least one calendar year to provide time for their customers to adjust inventories; for software companies to adjust their programming; for paper filers and the IRS to adjust their processes; and for the IRS to communicate the changes to the public. One commenter, a manufacturer and supplier of tax forms, expressed concern that the timing of the proposed changes would impose financial

burdens on their customers, buyers, and resellers of tax forms, because planning and purchasing inventory had already begun when the proposed regulations were published. That commenter also was concerned that those filers needing a Transmitter Control Code (TCC), required for electronically filing most information returns, would not be able to obtain one for the 2022 filing season, because applications for a TCC were due by November 1, 2021. Another commenter, a seller of paper forms, similarly noted that demand for paper tax forms generally begins long before the filing season starts, and that tax professionals and suppliers had already begun ordering and shipping paper tax forms for the 2022 filing season before the proposed regulations were published. The commenters also asserted that changes in the electronic-filing rules made near the start of filing season have a substantial impact on tax-software companies that must adjust their systems to comply with the changes.

Other commenters supported the IRS's efforts to modernize the return-filing process to require withholding agents to electronically file Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,* and shared the IRS's desire to improve the timeliness and accuracy of refunds and credits claimed by foreign persons with amounts withheld. But they suggested that the IRS delay the applicability date of the proposed changes by at least one calendar year to provide time for the IRS and withholding agents to prepare for the electronic filing of Forms 1042. They requested that the IRS provide electronic-filing specifications for Forms 1042 as soon as possible, and once provided, allow additional time to create and test the required software.

The Treasury Department and the IRS understand the concerns raised by commenters with respect to applicability dates of the regulations contained in this Treasury Decision. The Treasury Department and the IRS believe that making the new provisions for electronic filing applicable to returns and other documents required to be filed during calendar year 2024 will give affected persons ample time to prepare. Accordingly, final regulations §§ 1.1461–1(j), 1.1474–1(j), 1.6037–2(b), 1.6045–2(i), 1.6045–4(s), 1.6050I–1(h), 1.6050I–2(f), 1.6050M–1(f)(4), 54.6011–3(f), 301.1474–1(e), 301.6011–2(g)(1), 301.6011–3(f), 301.6011–5(f), 301.6011–11(e), 301.6011–12(f), 301.6011–13(f), 301.6011–14(f), 301.6011–15(f), 301.6012–2(f), 301.6037–2(f), and 301.6721–1(h) provide that the new provisions for electronic filing will apply for returns and other documents required to be filed during calendar year 2024. Sections 301.6057–3(f), 301.6058–2(f), 301.6059–2(e) provide that the new provisions for electronic filing will apply for plan years that begin on or after January 1, 2024. To avoid partial retroactive effect with respect to certain non-calendar-year taxpayers, final regulations §§ 301.6011–12(f), 301.6011–13(f), and 301.6012–2(f) specify that these provisions apply to returns required to be filed for taxable years ending on or after December 31, 2023. In light of the applicability dates, the language ''but only for filings with a filing deadline (not taking into account extensions) after July 31, 2022'' that was included in proposed §§ 301.6057–3(f), 301.6058–2(f), and 301.6059–2(e) has been removed from the final regulations.

B. Applicability Date for Forms Under Section 3101 of the TFA

Section 3101 of the TFA amended section 6011 of the Code to require any organization required to file an annual return that relates to any tax imposed by section 511 on unrelated business taxable income to file the return in electronic form. Section 3101 of the TFA also amended section 6033 to require any organization required to file a return under section 6033 to file the return in electronic form. Unlike section 2301 of the TFA, the provisions in section 3101 of the TFA are self-executing and generally apply to taxable years beginning after July 1, 2019, in accordance with section 3101(d) of the TFA. The applicability date of final regulations §§ 1.6033–4(b), 53.6011–1(e), 301.6011–10(c), and 301.6033–4(d) (returns required to be filed during calendar years beginning after the date of publication of the Treasury Decision in the **Federal Register**) does not affect the requirements under section 3101 of the TFA.

II. The Electronic-Filing Rules for Information Returns

A. The Electronic-Filing Threshold

Proposed § 301.6011–2(b) and (c) provide that if a person is required to file, during calendar year 2022, a total of at least 100 information returns covered by § 301.6011–2(b)(1) and (2), and during calendar years 2023 and after, a total of at least 10 such returns, the person is required to file those information returns electronically (electronic-filing threshold for information returns). Because these final regulations are not applicable until calendar year 2024, the proposed electronic-filing thresholds of 100 for returns required to be filed in calendar year 2022, and 10 returns for returns required to be filed in calendar year 2023 are not adopted. The electronic-filing threshold for returns required to be filed in calendar years 2022 and 2023 remains at 250. The final regulations adopt, however, the proposed electronic-filing threshold of 10 for returns required to be filed on or after January 1, 2024, as authorized by Congress's enactment of section 2301 of the TFA.

Two commenters disagreed with the proposed reduction to 10 returns for small businesses. Both questioned the need for an electronic-filing rule at all and suggested that businesses should be afforded flexibility in how they file their returns, rather than be required to file returns electronically when they have filed paper returns for years. The first commenter supported the proposed reduction of the electronic-filing threshold for information returns from 250 to 100 returns but disagreed with the proposed reduction to 10 returns because it was ''unnecessary and lacks empathy for the challenges facing small businesses.'' The second believed that any reduction to the electronic-filing threshold should be a small, gradual reduction and added that some small businesses have little to no understanding of the internet and requiring these filers to electronically file their returns would be challenging.

The Treasury Department and the IRS disagree with the commenters' suggestions because electronic filing has become more common, accessible, and economical, as evidenced by the prevalence of tax-return preparers and third-party service providers who offer return-preparation and electronic-filing services; by the availability of tax-return-preparation software; and by the numbers of returns already being filed electronically on a voluntary basis. Although the Treasury Department and the IRS understand that these changes to the electronic-filing requirements may constitute a burden in the short term for some filers, the final regulations do not adopt these comments. To address any undue hardship that these changes to the electronic-filing rules may have on certain small businesses that are paper information-return filers, the IRS will continue to grant hardship waivers fairly and consistently and to grant reasonable-cause relief from penalties for failure to file returns electronically in appropriate cases. Additionally, the Treasury Department and the IRS expect the administrative costs to electronically file returns to be further reduced for taxable year 2022 and later years with the launch of the Information Returns

Intake System (IRIS) Taxpayer Portal, an internet platform for Form 1099 filings.

B. Filing Corrected Information Returns in Same Manner as Originals

Proposed § 301.6011–2(c)(4)(ii) provides a rule for the manner of filing corrected returns. Proposed § 301.6011–2(c)(4)(ii)(A) provides that if a person is required to file original information returns electronically, that person must file any corresponding corrected information returns electronically. Proposed § 301.6011–2(c)(4)(ii)(B) provides that, if a person is permitted to file information returns on paper and does file those information returns on paper, that person must also file any corresponding corrected information returns on paper.

One commenter generally supported the corrected-return rule, but expressed concern that the rule could occasionally be an inconvenience to some people or that an intervening event could occur that would require filers to change their method of filing. Two other commenters noted that the corrected-return rule would add an additional burden on filers because many software options provide electronic filing of original returns but not corrected ones. One of these commenters recommended that the Treasury Department and the IRS delay requiring filers to correct their electronically-filed returns electronically until the IRS has a platform in place (for example, the internet platform for Form 1099 filings required by section 2102 of the TFA) that will accept corrected information returns online. Another commenter opined that the IRS should not require corrected returns to be filed in a particular manner, but should instead ''encourage the most efficient way to serve the majority better.''

The final regulations do not adopt these comments. The Treasury Department and the IRS have determined that, because of the disparate procedures for processing paper and electronic information returns, the corrected-return rule will increase the IRS's timeliness and accuracy in processing information returns, which will improve tax administration with respect to corrected returns. The Treasury Department and the IRS expect that the number of software options providing electronic filing for corrected returns will increase to meet that expected increase in demand. The IRS will work with the tax-software community to encourage them to develop software options for corrections. If an intervening event or the cost to purchase electronic-filing software for corrected information returns would cause a filer undue hardship, the filer may request a waiver from the electronic-filing requirement for the corrected information returns. As discussed in this preamble, the changes to the information return electronic-filing rules, including the corrected-return rule, in this Treasury Decision will apply for returns required to be filed after December 31, 2023, which is after the launch of the Form 1099 filing platform. See section I.A. Applicable for Returns Required to be Filed in 2024.

C. TCC Issues for Non-United States (U.S.) Filers

The proposed regulations would increase the number of non-U.S. filers required to electronically file their information returns. On July 26, 2021, the IRS announced changes to the procedures for filers to authenticate their identities to create an account to apply for a TCC, which is required to electronically file most information returns. See FIRE System Update: Improving the Process and Security for Information Return (IR) Application for Transmitter Control Code (TCC), IRS (Oct. 1, 2021), *https://www.irs.gov/tax-professionals/fire-system-update-improving-the-process-and-security-for-information-return-ir-application-for-transmitter-control-code-tcc* (last visited January 13, 2023).

Several commenters expressed concern with the changes to the authentication identity-proofing procedures. One commenter mentioned that a significant number of qualified intermediaries and foreign filers would not be able to electronically file information returns, such as Forms 1042–S, *Foreign Person's U.S. Source Income Subject to Withholding,* and 1099, because the new authentication procedures require users to have U.S.-based information, such as a U.S. Taxpayer Identification Number, U.S. telephone number, or U.S. financial account, to authenticate their identity before obtaining a TCC. Two other commenters expressed similar concerns with respect to all non-U.S. filers, specifically noting that due to client confidentiality and related issues, it is not feasible to require non-U.S. filers to engage third parties to file returns on their behalf. Two of the commenters recommended the IRS exclude qualified intermediaries and other non-U.S. filers from the secure authentication identity-proofing procedures to ensure they can continue to submit their information returns electronically. The other commenters recommended that the IRS, without compromising the security objectives, make accommodations for foreign filers so they can continue to file their information returns electronically.

The Treasury Department and the IRS are aware of this authentication issue for non-U.S. filers, but the final regulations do not adopt the suggestion to provide a blanket electronic-filing exemption for non-U.S. filers. The IRS's preferred approach, in light of the TFA's emphasis to increase electronic filing, is to develop alternative authentication requirements for identity proofing in accordance with standards set forth by the U.S. Department of Commerce, National Institute of Standards and Technology (NIST). The IRS is thus actively working to develop updated authentication procedures for non-U.S. filers that comply with the NIST standards and will inform the public in subsequent guidance or public pronouncement when these procedures become available.

D. Form 1042–S Issues

Proposed § 301.6011–2(b)(1) includes Form 1042–S in the list of information returns covered by the electronic-filing rules set forth in that regulation. Form 1042–S has been included in the regulation since 1986. The proposed regulation, however, counts all the information returns in the aggregate to determine if the filer must electronically file. In addition, the proposed regulation decreases the number of information returns that can be filed on paper from 250 to 10, for returns required to be filed in calendar year 2023 and after. Two commenters requested that the Treasury Department and the IRS remove Form 1042–S entirely from the list of returns included in the proposed regulations because of the changes to Form 1042–S since 2013. For example, the 2013 Form 1042–S code for ''other income'' was income code 50, but the ''other income'' code was later changed to income code 23. The two commenters opined that changes to these codes could confuse filers and recipients of the form, and that updating the software to address these changes could present challenges to software providers. One of the commenters stated that the proposed regulations would disproportionately affect occasional and low-volume filers of the Form 1042–S who may not have sufficient resources to comply with the proposed regulations. Both commenters opined that, if Form 1042–S is removed from the aggregation rule, the IRS would not need as many resources to deal with improper filing errors and requests for a waiver from electronic filing for Forms 1042–S.

The final regulations do not adopt these comments. Although Form 1042–S underwent several changes for taxable

year 2014 to accommodate reporting of payments and amounts withheld under the provisions of the Foreign Account Tax Compliance Act, the form has not undergone a large number of changes since then. For example, the 2022 Form 1042–S added to the form four new codes, but each was assigned a completely new number that was not previously listed on the 2021 Form 1042–S. Absent extraordinary circumstances, such as relevant statutory changes, no substantial changes to the income codes on Form 1042–S are expected at this time. To the extent, however, that taxpayers receiving Forms 1042–S have questions about how to report the information, the IRS updates the Instructions for Form 1042–S and the instructions for income tax returns each year so that taxpayers will have the most up-to-date information. Finally, the Treasury Department and the IRS have determined that the benefits to be gained in the form of faster and more accurate return processing outweigh any concerns about IRS resources needed in processing electronic-filing waiver requests.

III. Waiver and Exemptions

As described in the preamble to the proposed regulations, many of the regulations imposing electronic-filing requirements also provide a waiver from electronic filing to any person who establishes undue hardship. The Treasury Department and the IRS specifically requested comments on how the hardship-waiver procedures should be administered, including suggestions for revising the procedures for requesting, and criteria for granting, a hardship waiver, and received several comments in response.

A. Cost Concerns

One commenter generally supported the proposed rules, noting that electronic filing not only significantly reduces paper waste but also is faster and more reliable than paper filings, which can get lost in the mail. Another commenter agreed that all persons should ''get on board with the digital age of tax record keeping and filing,'' but commented that new small businesses with little resources and businesses that have paper filed for years may not want to file electronically or may not know how. Both commenters expressed concern over the cost of electronic filing, suggesting that the IRS waive all or part of the cost for low-income taxpayers and others experiencing financial hardship.

The final regulations do not adopt these comments. The preamble to the proposed regulations describes the recent reduction in costs to electronically file and the significant benefits of moving to electronic filing. To address any undue hardship on certain small businesses arising from these changes to the electronic-filing rules, the Treasury Department and the IRS will continue to administer the hardship-waiver program fairly and consistently and to grant reasonable-cause relief from penalties for failure to file returns electronically in appropriate cases.

B. General Waiver and Exemption Procedures

Three commenters expressed concern that, unless the IRS provides administrative exemptions or hardship waivers, the proposed regulations under section 6011(e) would impose burdens upon discrete populations including, for example, members of certain religious communities; remote populations; and elderly individuals without adequate technological literacy.

With respect to religious communities, the commenters noted that members of certain religious communities, in accordance with their religious practices, generally do not use technology and have tenets and teachings that prohibit community members from having internet access or the technology required to electronically file tax returns. The commenters thus expressed concern that the reduction of the electronic-filing threshold to 10 returns with respect to information returns, partnership returns, corporate income tax returns, and electing small business income tax returns would now require many small business owners who are members of these religious communities to file these returns electronically, in violation of their religious practices. The commenters recommended two alternative changes to the waiver procedures: that the Treasury Department and the IRS expand the current waiver request form, Form 8508, *Request for Waiver From Filing Information Returns Electronically,* to include either a one-time or an annual application for exemption from electronic-filing requirements, based on religious beliefs, for any form the filer is required to file electronically; or that a new form be created, similar to Form 8948, *Preparer Explanation for Not Filing Electronically,* that could be attached to the paper-filed return to explain that the filer was filing on paper because of religious beliefs.

The Treasury Department and the IRS agree that filers for whom using the technology required to file in electronic form conflicts with their religious beliefs should be granted administrative exemptions from the electronic-filing requirements for information returns under § 301.6011–2; partnership returns under § 301.6011–3; corporate income tax returns under § 301.6011–5; electing small business income tax returns under § 301.6037–2; and other returns and statements that the IRS determines appropriate. To that end, final regulations §§ 301.6011–2(c)(6)(ii); 301.6011–3(b)(2); 301.6011–5(b)(2); and 301.6037–2(b)(2) provide that an exemption will be allowed for filers for whom using the technology required to file in electronic form conflicts with their religious beliefs. Additionally, except as described in section III.C. of this preamble, the final regulations authorize the Commissioner to provide exemptions from the electronic-filing requirements to promote effective and efficient tax administration. Finally, these final regulations clarify that a submission claiming an exemption should be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including posting to the *IRS.gov* website. In general, exemptions will be made available on a form-by-form basis rather than on a per-filer basis to allow the IRS to appropriately address differences in filing requirements and filer populations.

With respect to remote populations, one of the commenters expressed concern that many Native tribes, such as Native Alaskan tribes, lack access to internet and computers and that the reduction of the electronic-filing threshold for information returns would impact some of these Native Alaskans, for example, a commercial fishing captain. This commenter also stated that a disproportionate number of Americans in business age 65 or older may lack the ability or accessibility to electronically file tax returns and that the cost for these older taxpayers to pay a third party to electronically file could force them out of business. The commenter asked whether factors other than financial cost, such as a filer's lack of access to digital technology or a filer's age, are factored into the IRS's decision on whether to grant a waiver request. The commenter further expressed concern that granting a hardship waiver is discretionary and that the procedures do not include an objective threshold or standard on how much the cost to electronically file must exceed the cost to paper file for the IRS to grant an electronic-filing waiver. The commenter thus recommended that the Treasury Department and the IRS expand or

clarify that the hardship-waiver procedures to include Native tribes and other persons with difficulty accessing or using technology.

The Treasury Department and the IRS expect rural filers without access to internet and older filers that lack digital literacy to make good faith efforts to comply with the electronic-filing requirements of these regulations, which may require obtaining additional assistance to electronically file. To the extent the burden of obtaining the necessary assistance to file returns would cause undue hardship, the filers may submit a hardship-waiver request from the electronic-filing requirements.

Under section 6011(e)(2)(B) of the Code, the IRS must consider (among other relevant factors) the taxpayer's ability to comply at a reasonable cost with the requirements of such regulations. To determine whether a taxpayer can comply with the electronic-filing requirements at a reasonable cost, the IRS requires the taxpayer to provide two estimates of the cost that the taxpayer would incur to convert to electronic filing. Financial cost, however, is not the only factor that the IRS may consider. Under current procedures, for example, the IRS will consider granting a waiver from the electronic-filing requirements for information returns covered under § 301.6011–2(b) if a fire, casualty, or natural disaster affected the operation of the business. The proposed hardship-waiver language, for example in proposed § 301.6011–2(c)(6)(i), provides that ''[t]he principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper.'' Because the IRS takes other factors into consideration when analyzing a request for a waiver from electronic-filing requirements, the final regulations are modified to read, ''One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper.'' The Treasury Department and the IRS anticipate that additional details on the specific hardship-waiver procedures for each form affected by this Treasury Decision will be included in future public releases of IRS forms and instructions. After considering public comments, the IRS revised the Form 8508 in January 2023 to clarify the circumstances the IRS may accept to justify a waiver from the e-filing requirement for the information returns listed on the Form, including hardships other than financial hardship. The Treasury Department and the IRS have thus determined that the IRS's current hardship-waiver procedures provide appropriate relief to rural and older taxpayers from any undue burdens arising from these changes to the electronic-filing rules. Reasonable cause relief from penalties may also be available for these filers.

The final regulations also clarify that, if the IRS's systems do not support electronic filing for a specific return required to be filed electronically with the IRS, a taxpayer will not be required to file the return electronically. Several of the final regulations require the electronic filing of returns that were previously filed on paper only. If the IRS's systems do not have the capacity to accept a particular type of return electronically when the electronic-filing requirements become applicable, this provision clarifies that a taxpayer will not be required to file that type of return electronically. In such situations, a taxpayer will not be required to submit a request for a hardship waiver to file that type of return on paper.

Finally, one of the commenters expressed concern with the statement in the proposed regulations that ''a request for a hardship waiver must be made in accordance with postings, guidance, forms or instructions, including those *on the IRS.gov website*'' because these discrete populations, without access to the website, might not have the latest guidance posted to the website, and so might be filing a hardship-waiver request based on outdated guidance from paper forms and instructions. The commenter thus recommended that the IRS be lenient in imposing penalties on taxpayers of faiths who avoid technology, filers that lack access to technology, and older Americans who in good faith request a hardship waiver in compliance with outdated guidance.

The Treasury Department and the IRS have determined that to the extent that a taxpayer can show reasonable cause for failure to file electronically, including valid impediments to making a proper waiver request, the penalty for failure to file will not apply.

C. Exceptions to General Waiver and Exemption Procedures

The final regulations do not provide for waivers and exemptions in all circumstances or for all tax forms required to be electronically filed.

1. Returns Required Under Section 3101 of the TFA

Section 3101 of the TFA sets forth two requirements for mandatory electronic filing by tax-exempt organizations: under new section 6011(h), organizations with returns relating to any tax imposed under section 511 on unrelated business taxable income ''shall file such return in electronic form,'' and under new section 6033(n), organizations with returns required to be filed under section 6033 ''shall file such return in electronic form.'' Thus, the TFA amendments expand the class of forms that tax-exempt entities are currently required to file electronically, such as the Form 990–N, *Electronic Notice (e-Postcard),* and Form 8871, *Political Organization Notice of Section 527 Status.*

Section 3101 of the TFA states that organizations required to file a return under sections 6011(h) or 6033(n) ''shall'' file such return in electronic form and does not provide for any waiver or alternative method to meet the electronic-filing requirements. The legislative history to section 3101 of the TFA explains that mandatory electronic filing by all tax-exempt organizations required to file returns will improve efficiency, reduce costs, and generally improve oversight of tax-exempt organizations. H. Rep. No. 116–39, at 97–98 (2019). Section 3101 of the TFA also amended section 6104(b) to provide that ''[a]ny annual return required to be filed electronically under section 6033(n) shall be made available by the Secretary to the public as soon as practicable in a machine-readable format.'' The legislative history explains that it is important to increase the transparency of, and enhance public access to, information about tax-exempt organizations, particularly charitable organizations. *Id.* The legislative history further explains that this will expedite the publication of the information required to be disclosed by the IRS and will enhance its usability by stakeholders attempting to exercise oversight of tax-exempt organizations. *Id.* Such stakeholders include not only members of the public who may support or donate to an organization, but also state and local officials charged with oversight responsibilities and responsibility for prosecuting fraudulent charities.

In contrast to forms affected by section 2301 of the TFA, there is no requirement that an alternate paper filing process be provided for certain filers of forms affected by section 3101 of the TFA (such as for filers filing fewer than 10 returns). Further, in contrast to forms affected by section 2301 of the TFA, information returns affected by section 3101 of the TFA are required to be released to the public in machine-readable format under section 6104(b), a process that would be hampered if the

IRS were required to accept paper returns and frustrate the intent of Congress to expedite the publication of those returns. Proposed §§ 301.6011–10 and 301.6033–4, consistent with the statutory mandate to require all forms affected by section 3101 of the TFA to be electronically filed, did not provide for any waiver or exemption from the electronic filing requirements.

While public comments generally requesting waivers or exemptions from the electronic filing requirements under certain circumstances were received, §§ 301.6011–10 and 301.6033–4 are finalized without waiver or exemption provisions because providing a waiver or exemption provision would be contrary to the plain language of section 3101 of the TFA and inconsistent with the legislative history to that section. Notwithstanding that, the Religious Freedom Restoration Act of 1993, Public Law 103–141 (107 Stat. 1488), may provide an exemption for any filer for whom using the technology required to file electronically conflicts with their religious beliefs.

2. Qualified Plan Returns Filed Through EFAST2

On July 21, 2006, the Department of Labor (DOL) published a final rule in the **Federal Register** (71 FR 41359), requiring electronic filing of the Form 5500, *Annual Return/Report of Employee Benefit Plan,* and Form 5500–SF, *Short Form Annual Return/Report of Small Employee Benefit Plan,* for plans covered by Title I of the Employee Retirement Income Security Act, Public Law 93–406 (88 Stat. 854), as amended (ERISA) for plan years beginning on or after January 1, 2008. On November 16, 2007, the DOL published a final rule in the **Federal Register** (72 FR 64710), postponing the effective date of the electronic filing mandate so that the mandate applies to plan years beginning on or after January 1, 2009. See 29 CFR 2520.104a–2.

Filers of the Form 5500 and Form 5500–SF are required to file electronically through DOL's computerized ERISA Filing Acceptance System (EFAST2). Rev. Proc. 2015–47, 2015–39 IRB 419, sets forth procedures to request a waiver of the electronic-filing requirement due to economic hardship for plan administrators of retirement plans (or, in certain situations, employers maintaining retirement plans) that are required to file electronically certain employee benefit plan returns. Section 3 of Rev. Proc. 2015–47 provides that, because filers of Form 5500 and Form 5500–SF are required to file those returns electronically through DOL's EFAST2, a waiver of the electronic-filing requirement for those forms will not be granted. Because an actuarial report required under section 6059 is filed with Form 5500 or Form 5500–SF as a schedule and is also required to be filed electronically through DOL's EFAST2, a waiver of the electronic-filing requirement for the actuarial report also will not be granted. Sections 301.6058–2 and 301.6059–2 of the final regulations continue to provide that the Commissioner may waive the electronic-filing requirements under sections 6058 and 6059 in cases of undue economic hardship, and that a request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. However, pursuant to section 3 of Rev. Proc. 2015–47, waivers of the electronic-filing requirement for Forms 5500 and 5500–SF (and related actuarial reports) will continue to not be granted. In addition, §§ 301.6058–2 and 301.6059–2 of the final regulations do not provide for any exemptions to the electronic-filing requirement for Forms 5500 and 5500–SF (and related actuarial reports) because, unlike other filings described in this Treasury Decision, Forms 5500 and 5500–SF (and related actuarial reports) are required to be filed electronically through DOL's EFAST2.

3. Form 8300

If filed electronically, Forms 8300, *Report of Cash Payments Over $10,000 Received in a Trade or Business,* are not filed electronically with the IRS; rather they are filed electronically through the Financial Crimes Enforcement Network's (FinCEN) BSA E-Filing System. The Treasury Department, FinCEN, and the IRS have determined that most Form 8300 filers who might have difficulty filing electronically and might therefore need a waiver, would likely not be required to file electronically in the first place because they would not meet the electronic-filing threshold in § 301.6011–2(c), even after that threshold is reduced to 10 returns. See section II.A. Accordingly, the Treasury Department, FinCEN, and the IRS have determined that there is no need for a separate waiver process for Form 8300 filers. Instead, Form 8300 filers who request and receive a waiver under § 301.6011–2(c) for any return required to be filed under § 301.6011–2(b)(1) or (2) will automatically be deemed to have received an electronic-filing waiver for any Forms 8300 the filer is required to file for the duration of the calendar year.

IV. Form 1042 Substantiation Requirements To Claim Credit on Line 67

Proposed §§ 301.1474–1(a) and 301.6011–15(a) would require certain filers to electronically file Forms 1042. Forms 1042 have previously been filed only on paper. For Form 1042 filers that claim a credit on line 67 for taxes withheld by other withholding agents, the filers substantiate this credit by attaching, to the Form 1042, paper copies of the Forms 1042–S they received from those other withholding agents.

In light of the electronic-filing requirements for Form 1042, two commenters requested the IRS remove the requirement to provide paper copies of Forms 1042–S to support the claim made on line 67 of the Form 1042, suggesting that the IRS would already have electronic copies of the Forms 1042–S filed by the other withholding agents, making the requirement duplicative.

The final regulations do not adopt these comments as they are outside the scope of these regulations, which do not impose the requirement to provide paper copies. Nonetheless, the IRS is actively working to develop programming that would allow filers to electronically attach or submit Forms 1042–S with their Forms 1042 to substantiate their claimed credit on Line 67. The IRS expects to have programming in place consistent with the applicability dates in these final regulations.

V. Regulatory Flexibility Act Certification

One commenter expressed concern that, although the proposed regulations certify that they will not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act, the regulations will in fact have a ''significant economic impact'' on small entities.

The Treasury Department and the IRS maintain their certification that the final rules will not have a significant economic impact on a substantial number of small entities for the reasons discussed in subsection II, Regulatory Flexibility Act, of the following Special Analyses section of this preamble.

VI. Clarification on a Failure To File Electronically When Required

The proposed regulations provide that if a filer fails to file a return or report electronically when required to do so by the regulations, the filer is ''deemed'' to have failed to file the return or report.

The word ''deemed'' is superfluous because a taxpayer who fails to file electronically when required to do so by these regulations has failed to file. Therefore, for sake of clarification, the Treasury Department and the IRS have made minor edits to remove the word deemed from final regulations §§ 54.6011–3(c), 301.1474–1(c), 301.6011–10(b), 301.6011–12(c), 301.6011–13(c), 301.6011–14(c), 301.6011–15(c), 301.6012–2(c), 301.6033–4(b), and 301.6721–1(a)(2)(ii).

VII. Clarification on 10-Return Calculation for Material Advisor Disclosure Statements

Under section 6111 and § 301.6111–3(a) and (e), each material advisor is required to file a Form 8918, *Material Advisor Disclosure Statement,* with respect to any reportable transaction by the last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor with respect to the reportable transaction or in which the circumstances necessitating an amended disclosure statement occur. Thus, a material advisor may not know the number of Forms 8918 it will be required to file during a calendar year until after the end of the third quarter of the calendar year. On the other hand, other returns—for example, Forms 1099, income tax returns, employment tax returns, and excise tax returns–have fixed due dates by which those returns must be filed each calendar year. A filer of those returns will therefore know at the beginning of the calendar year whether the filer is required to file at least 10 returns of those types. Thus, the Treasury Department and the IRS clarify in these final regulations that a material advisor will be required to file its Forms 8918 electronically or in other machine-readable form in accordance with revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website, during the calendar year only if the material advisor is required to file at least 10 returns of any type, other than Forms 8918. This clarification will help ensure material advisors understand early in the calendar year whether any Forms 8918 must be filed electronically or in other machine-readable form without complications of being unable to determine at the beginning of a calendar year the number of Forms 8918 that may need to be filed during the calendar year.

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including (i) potential economic, environmental, and public health and safety effects, (ii) potential distributive impacts, and (iii) equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

These final regulations have been designated as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) (MOA) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. The Office of Information and Regulatory Affairs has designated these final regulations as significant under section 1(b) of the MOA.

A. Background, Need for the Final Regulations, and Economic Analysis of Final Regulations

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Public Law 97–248, (96 Stat. 610), first directed the Secretary to prescribe regulations for requiring returns to be filed on magnetic media, a term generally used to refer to electronic filing at that time. TEFRA prohibited the Secretary from requiring income tax returns of individuals, estates, and trusts to be filed in a manner other than on paper forms. In 1998, Congress amended section 6011(e) of the Code to prohibit the Secretary from requiring the electronic filing of a return unless the filer is required to file at least 250 returns during the calendar year. The Treasury Department and the IRS subsequently issued regulations that required a person to file information returns electronically if that person is required to file 250 or more information returns in a calendar year. The regulations provide that the 250-return threshold applied separately to each type of information return covered under the regulations. The Treasury Department and the IRS also issued regulations that set a 250-return threshold in determining whether large corporation tax returns, S corporation tax returns, and other returns must be electronically filed.

Since 1998, the technology underlying electronic filing has become much more widely available, both in the form of tax return preparation software and electronic filing services offered by tax return preparers and other service providers. By 2019, over 98.8 percent of information returns were already being filed electronically. In July of that year, the President signed into law the Taxpayer First Act (TFA). The TFA authorizes the Secretary to prescribe regulations that decrease the number of returns a filer may file without being required to file electronically from 250 to 10.

When returns are filed on paper, the IRS transcribes much of the input data to electronic format. In some cases, employees must manually input this data, requiring significant IRS resources to be spent on otherwise needless processing and data entry rather than serving taxpayers in other ways. Manual data entry can cause delays in the input and retrieval of data, affecting the timeliness and accuracy of processing these forms. This can lead to delays or other disadvantageous outcomes for taxpayers. In some cases, manual data entry can cause delays in the information available for law enforcement and other users to detect potential money laundering, terrorist financing, and other tax and financial fraud. Moreover, the increased accuracy of the data received from electronic filing reduces transcription errors and the cost for the IRS and taxpayers to resolve these errors.

These final regulations impose electronic-filing requirements on persons required to file certain returns, including partnership returns, corporate income tax returns, unrelated business income tax returns, withholding tax returns, and certain information returns, registration statements, disclosure statements, notifications, actuarial reports, and certain excise tax returns. Specifically, the final regulations reduce the 250-return threshold enacted in 1998 to the 10-return threshold provided by the TFA. Under current regulations, the 250-return threshold applies separately to each type of information return covered under the regulations. The final regulations require filers to aggregate across returns types to determine whether a filer meets the 10-return threshold and is thus required to file electronically.

The IRS receives nearly 4 billion information returns per year and projects that by 2028, it will receive over 5 billion information returns each year. See *https://www.irs.gov/statistics/soi-tax-stats-calendar-year-projections-publication-6961* (last visited January 13, 2023). In 2019, the IRS received nearly 40 million paper information

returns even though approximately 99 percent of all information returns for that year were filed electronically.

For taxable year 2020, the data shows that creating a 50-return threshold would require 1–2 percent of the largest paper information return filers to file electronically, resulting in approximately 23 percent of all paper information returns currently filed to be filed electronically. For the same year, a 25-return threshold would require approximately 4–5 percent of the largest paper information return filers to file electronically, resulting in approximately 39–41 percent of paper information returns currently filed to be filed electronically. At the 10-return threshold, the IRS is only requiring 13–16 percent of the largest paper information return filers to file electronically, but this will result in 62–64 percent of all outstanding paper information returns to be filed electronically.

In 2020, approximately 13 million out of 35 million paper information returns were filed by filers filing 1–10 returns and these filers averaged 2.78 returns each. This means approximately 85 percent of all paper information return filers would not be subject to the electronic-filing mandate at a 10-return threshold based on the 2020 data, yet nearly two-thirds of all paper information returns would then be required to be filed electronically. Thus the high rate of electronic filing does not negate the need for regulations to further reduce the number of paper returns the IRS is required to manually process each year.

Because the vast majority of returns subject to these final regulations are already filed electronically, the Treasury Department and the IRS expect that the final regulations will not have any meaningful impact on economic behavior. Electronic filing has become more common, accessible, and economical. The table below shows recent trends in the electronic-filing rates of tax returns and information returns. Eighty-one percent of all tax returns, including 95 percent of individual income tax returns, were filed electronically in fiscal year 2020, rising from 68 percent for all tax returns and 87 percent for individual income tax returns in 2016. Nearly all information returns submitted to the IRS were filed electronically.

Fiscal Year	2016	2017	2018	2019	2020
All tax returns	68%	70%	71%	73%	81%
Individual income tax returns	87%	88%	88%	90%	95%
Information returns, excluding forms processd by the Social Secuirty Administration (Form SSA-1099, Form RRB-1099, and W-2)	99%	99%	99%	99%	100%

Data source: IRS Publication 6292 and IRS Data Book

In the limited circumstances in which the cost to comply with these electronic-filing requirements would cause undue hardship, many of these regulations provide a waiver from electronically filing. The IRS routinely grants meritorious hardship waiver requests. According to the regulations, such undue hardship could be caused by a range of factors that are not limited to the financial cost that would be incurred by the filer. For example, a hardship to comply with the electronic-filing requirements can apply to remote populations with limited online access and filers who lack adequate technological proficiency. Regardless of the factors, little economic burden is expected for the waiver process because submitting a hardship waiver requires no more technology than filing paper returns. For information returns, waiver requests can be made for many returns on the same Form 8508. (See instructions for Form 8508.)

In addition to hardship waivers, the final regulations provide exemptions for religious communities for whom using the technology required to file in electronic form conflicts with their religious beliefs. An exemption means that filers do not have to be pre-approved to paper file. Thus, filers that are eligible for an exemption would not experience additional burden under the regulations.

In enacting TFA, Congress made clear its intention to broaden the requirements to file returns electronically. However, the broadened requirements intended by Congress will not occur without final regulations. In the absence of these regulations, the IRS would continue to devote resources to costly and inefficient processing of paper filings, resources that could be allocated to modernization of IT infrastructure.

Significant administrative costs include the time it takes an IRS employee to manually process paper information returns. First, the IRS employee must open and inspect the mail to determine what type of return or other form is in the envelope, re-route the form if needed, ensure the return is processable and includes a Taxpayer Identification Number (TIN), and then date stamp the return. This initial step must take place within 30 days of receipt to allow timely correspondence with the filer of processable returns to give the filer time to correct the mistakes and re-file.

The IRS employee must next review the return to determine whether it is scannable or non-scannable, which includes removing staples and taping any cuts or torn portions of the document. The IRS employee must then cross check the information on the returns against the parent transmittal return (Form 1096) for the payer's TIN, payer's name, and if either is missing or illegible, cross check other submissions for the information or send correspondence to the filer.

Scannable submissions are then prepared for processing through the Service Center Recognition/Image Processing System (SCRIPS). Non-scannable submissions are sorted, coded, and batched after ensuring all necessary information is included, which varies between types of information returns. The batched information returns are then forwarded to the appropriate IRS facility for Integrated Submission and Remittance Processing (ISRP). The ISRP employee must manually enter all required fields and add the appropriate document and format codes in accordance with the Internal Revenue Manual.

In August 2020, the IRS projected the potential cost and savings for implementation of the reduction of the electronic-filing threshold. The IRS estimated that the savings for IRS Submission Processing (IRS SP) due to fewer paper information returns to process when the electronic-filing threshold was reduced from 250 to 100 returns is 35 full-time equivalents (FTEs), or $2 million. This savings would be offset by the cost to enroll new participants in the FIRE System, which the IRS estimated would cost 9 FTEs, or

$500,000. Thus, the IRS's net savings as a result of the reduction to the electronic-filing threshold from 250 to 100 returns is estimated to be 26 FTEs, or $1.5 million.

The IRS estimated that the savings for IRS SP due to fewer paper information returns to process when the electronic filing threshold was reduced from 100 to 10 returns is 147 FTEs, or $8.3 million. This savings would be offset by the cost to enroll new participants in the FIRE System, which the IRS estimated would cost 40 FTEs, or $2.3 million. Thus, the IRS's net savings as a result of the reduction to the electronic-filing threshold from 100 to 10 returns is estimated to be 107 FTEs, or $6 million. Finally, the IRS estimated that the savings for IRS SP due to fewer paper information returns to process when the electronic-filing threshold was reduced from 250 to 10 returns is 182 FTEs, or $10.3 million. For the first year of the reduction, the savings would be offset by the cost to enroll new participants in the FIRE System, which the IRS estimated would cost 49 FTEs, or $2.8 million. Thus, for the first year of implementation, the IRS's net savings as a result of the reduction to the electronic-filing threshold from 250 to 10 returns is estimated to be 133 FTEs, or $7.5 million.

For each subsequent year, the IRS estimated that the savings for IRS SP due to fewer paper information returns to process is 147 FTEs, or $8.3 million, which would be offset by some cost for telephone support.

An increase in electronic filing percentage rates change will result in millions fewer paper documents, freeing up valuable IRS resources for other tasks. Based on taxable year 2020 data, a 10-return electronic-filing threshold would have resulted in approximately 21 million fewer paper information returns. While the IRS projects the number of paper returns will continue to decrease even absent changes to the regulations, the decrease is projected to be gradual.

Requiring more electronic filing would increase the timeliness and accuracy of data entry, reduce postage costs, promote IT modernization efforts, reallocate IRS staff for priority assignments, and provide IRS criminal and civil investigators and other agencies with access to the data with more up-to-date and accurate information. Moreover, increased efficiency in processing returns will allow the IRS to provide faster and better customer service to taxpayers. Given the increasing prevalence of electronic filings in recent years, the final regulations reduce the 250-return threshold enacted in 1998 to the 10-return threshold provided by the TFA.

II. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. Although these rules may affect a substantial number of small entities, for the reasons discussed in the following paragraphs, the economic impact is not significant.

Under section 6011(e) of the Code and §§ 1.6050M–1, 301.6011–2, 301.6011–3, 301.6011–5, 301.6037–2, 301.6057–3, 301.6058–2, and 301.6059–2, filers are already required to file returns and statements electronically if, during a calendar year, they are required to file 250 or more returns. The eight rules—§§ 1.6050M–1, 301.6011–2, 301.6011–3, 301.6011–5, 301.6037–2, 301.6057–3, 301.6058–2, and 301.6059–2—will lower the 250-return threshold to 10, as authorized by section 6011(e), as amended by section 2301 of the TFA. A filer may request that the IRS waive the electronic-filing requirement if the filer's cost to comply with the rule would cause a financial hardship. The cost to electronically-file for a filer varies by form and by how many types of forms the filer is required to file. For example, low volume information return filers can electronically-file for approximately $3.25 per form, with options available for filing an unlimited number of information returns starting at $120. Commercial software is available for business returns such as Forms 1120 for as low as $125. The IRS routinely grants meritorious hardship-waiver requests. Accordingly, the economic burden on the limited number of small entities that are not currently filing electronically will be slight; small entities that would experience a financial hardship because of these eight rules may seek a waiver. Requesting a waiver will impose a minor cost in the form of time to read the expanded instructions, gather and prepare for submission the information and documents substantiating the request (if needed), and to complete the form itself.

Under section 6050I of the Code and §§ 1.6050I–1 and 1.6050I–2, filers are required to file Forms 8300 if, in the course of their trade or business, they receive more than $10,000 in cash (as that term is defined in section 6050I(d)) in one transaction or in two or more related transactions. The rule under § 301.6011–2(b)(3) requires filers of Forms 8300 to file those forms electronically if such filers are also required to file returns electronically under paragraphs (b)(1) and (2) of § 301.6011–2. The Treasury Department and the IRS expect filers of Form 8300 to use FinCEN's BSA E-Filing System, which is free and may be accessed with an internet connection. See *https://bsaefiling.fincen.treas.gov/main.html* (last visited January 13, 2023). The filers may incur minor costs in the form of time needed to enroll in FinCEN's BSA E-Filing System and to become familiar with the system, but the enrollment process should only take several minutes. The economic impact on small entities should thus not be significant.

Under section 6011(e)(4) of the Code and § 301.1474–1, financial institutions defined in section 1471(d)(5) of the Code already are required to electronically file Forms 1042–S. The rule under § 301.1474–1(a) extends this filing requirement to Forms 1042 filed by the same financial institutions. Small entities that would experience a financial hardship because of this rule may seek a hardship waiver.

Under section 6011(h) of the Code, as amended by section 3101 of the TFA, organizations required to file annual returns relating to any tax imposed by section 511 must file those returns in electronic form. Because the regulation § 301.6011–10 implements this statutory requirement, the economic impact of the regulation on small organizations should thus be insignificant.

Under section 6033(n), as amended by section 3101 of the TFA, organizations required to file returns under section 6033 must file those returns in electronic form. Because the regulations under §§ 1.6033–4, 53.6011–1, and 301.6033–4 implement this statutory requirement, the economic impact of these regulations on small organizations should thus be insignificant.

The seven regulations under §§ 54.6011–3, 301.6011–11, 301.6011–12, 301.6011–13, 301.6011–14, 301.6011–15, and 301.6012–2 require electronic filing for certain returns not currently required to be filed electronically. Because electronic filing has become more common, accessible, and economical, the economic impact of these rules on small entities should be insignificant. Moreover, as discussed above, if the cost to comply with these electronic-filing requirements would cause a financial hardship, an entity may request a waiver. The IRS routinely grants meritorious hardship waiver requests. Accordingly, the burden on small entities affected by these rules will be slight.

Accordingly, it is hereby certified that these regulations will not have a significant economic impact on a

substantial number of small entities within the meaning of section 601(6) of the RFA.

Pursuant to section 7805(f) of the Internal Revenue Code, the NPRM preceding this regulation was submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This regulation does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

IV. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

V. Congressional Review Act

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

Statement of Availability of IRS Documents

IRS revenue procedures, notices, and other guidance cited in this document are published in the Internal Revenue Bulletin and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

Drafting Information

The principal author of these final regulations is Casey R. Conrad of the Office of the Associate Chief Counsel (Procedure and Administration). Other personnel from the Treasury Department and the IRS participated in the development of the regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 53

Excise taxes, Foundations, Investments, Lobbying, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 53, 54, and 301 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding the following entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 1.6033–4 also issued under 26 U.S.C. 6033.

* * * * *

Section 1.6037–2 also issued under 26 U.S.C. 6037.

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■ **Par. 2.** Section 1.1461–1 is amended by removing paragraph (c)(5); redesignating paragraph (i) as paragraph (j); adding a new paragraph (i); and revising newly redesignated paragraph (j).

The addition and revision read as follows:

§ 1.1461–1 Payment and returns of tax withheld.

* * * * *

(i) *Reporting in electronic form.* See §§ 301.6011–2(b) and 301.6011–15 of this chapter for the requirements of a withholding agent that is not a financial institution with respect to the filing of Forms 1042–S and 1042 in electronic form. See § 301.1474–1(a) of this chapter, which applies for purposes of this section to a withholding agent that is a financial institution with respect to the filing of Forms 1042 and 1042–S in electronic form.

(j) *Applicability date.* The rules of this section apply to returns required to be filed for taxable years ending on or after December 31, 2023. (For returns required to be filed for taxable years ending before December 31, 2023, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2022.)

■ **Par. 3.** Section 1.1471–0 is amended by revising:

■ a. The entries in the table of contents for § 1.1474–1(e) and (j);

■ b. The heading for § 301.1474–1; and

■ c. § 301.1474–1(d)(1) and (e).

The revisions read as follows:

§ 1.1471–0 Outline of regulation provisions for sections 1471 through 1474.

* * * * *

§ 1.1474–1 Liability for withheld tax and withholding agent reporting.

* * * * *

(e) Reporting in electronic form.

* * * * *

(j) Applicability date.

* * * * *

§ 301.1474–1 Required use of electronic form for financial institutions filing Form 1042, Form 1042–S, or Form 8966.

* * * * *

(d) * * *

(1) Magnetic media or electronic form.

* * * * *

(e) Applicability date.

■ **Par. 4.** Section 1.1474–1 is amended by revising paragraphs (e) and (j) to read as follows:

§ 1.1474–1 Liability for withheld tax and withholding agent reporting.

* * * * *

(e) *Reporting in electronic form.* See §§ 301.6011–2(b) and 301.6011–15 of this chapter, which apply for purposes of this section, for the requirements of a withholding agent that is not a financial institution with respect to the filing of Forms 1042–S and Form 1042 in electronic form. See § 301.1474–1(a) of this chapter for the requirements applicable to a withholding agent that is a financial institution with respect to the filing of Forms 1042 and 1042–S in electronic form.

* * * * *

(j) *Applicability date.* The rules of this section apply to returns required to be filed for taxable years ending on or after December 31, 2023. (For returns required to be filed for taxable years ending before December 31, 2023, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2022.)

■ **Par. 5.** Section 1.6033–4 is revised to read as follows:

§ 1.6033–4 Required filing in electronic form for returns by organizations required to file returns under section 6033.

(a) *In general.* The return of an organization that is required to be filed in electronic form under § 301.6033–4 of this chapter must be filed in accordance with IRS revenue procedures, publications, forms, instructions, or other guidance.

(b) *Applicability date.* The rules of this section apply for returns required to be filed for taxable years ending on or after February 23, 2023.

■ **Par. 6.** Section 1.6037–2 is revised to read as follows:

§ 1.6037–2 Required use of electronic form for income tax returns of electing small business corporations.

(a) *In general.* The return of an electing small business corporation that is required to be filed electronically under § 301.6037–2 of this chapter must be filed in accordance with IRS revenue procedures, publications, forms, or instructions, including those posted electronically.

(b) *Applicability date.* The rules of this section apply to returns required to be filed for taxable years ending on or after December 31, 2023.

■ **Par. 7.** Section 1.6045–2 is amended by revising paragraphs (g)(2) and (i) to read as follows:

§ 1.6045–2 Furnishing statement required with respect to certain substitute payments.

* * * * *

(g) * * *

(2) *Reporting in electronic form.* For information returns filed after December 31, 1996, see § 301.6011–2 of this chapter for rules relating to filing information returns in electronic form and for rules relating to waivers granted for undue hardship. A broker or barter exchange that fails to file a Form 1099 electronically, when required, may be subject to a penalty under section 6721 for each such failure. See paragraph (g)(4) of this section.

* * * * *

(i) *Applicability date.* This section applies to substitute payments received by a broker after December 31, 1984. Section 1.6045–2(c) (as contained in 26 CFR part 1, revised July 15, 2014) applies to payee statements due after December 31, 2014. For payee statements due before January 1, 2015, § 1.6045–2(c) (as contained in 26 CFR part 1, revised April 2013) applies. Paragraph (g)(2) of this section applies to information returns required to be filed during calendar years beginning after December 31, 2023.

■ **Par. 8.** Section 1.6045–4 is amended by removing and reserving paragraph (k) and revising paragraph (s).

The revision reads as follows:

§ 1.6045–4 Information reporting on real estate transactions with dates of closing on or after January 1, 1991.

* * * * *

(s) *Applicability date.* This section applies for real estate transactions with dates of closing (as determined under paragraph (h)(2)(ii) of this section) that occur on or after January 1, 1991. Section 1.6045–4(b)(2)(i)(E), (b)(2)(ii), and (c)(2)(i) (as contained in 26 CFR part 1, revised May 28, 2009) applies to sales or exchanges of standing timber for lump-sum payments completed after May 28, 2009. Section 1.6045–4(m)(1) (as contained in 26 CFR part 1, revised July 15, 2014) applies to payee statements due after December 31, 2014. For payee statements due before January 1, 2015, § 1.6045–4(m)(1) (as contained in 26 CFR part 1, revised April 2013) applies. The removal of paragraph (k) of this section applies for information returns required to be filed during calendar years beginning after December 31, 2023.

■ **Par. 9.** Section 1.6050I–0 is amended by revising the entry in the table of contents for § 1.6050I–1(d)(2)(ii) to read as follows:

§ 1.6050I–0 Table of contents.

* * * * *

§ 1.6050I–1 Returns relating to cash in excess of $10,000 received in a trade or business.

* * * * *

(d) * * *

(2) * * *

(ii) Casinos exempt under 31 CFR 1010.970(c).

* * * * *

■ **Par. 10.** Section 1.6050I–1 is amended by:

■ a. Revising paragraphs (a)(3)(ii), (c)(1)(iv), and (d)(2)(i) and (ii).

■ b. In paragraph (d)(2)(iv), redesignating the example as paragraph (d)(2)(iv)(A).

■ c. Revising newly redesignated paragraph (d)(2)(iv)(A) and adding a reserved paragraph (d)(2)(iv)(B).

■ d. Revising paragraphs (e)(1) and (e)(3)(i).

■ e. Adding paragraph (h).

The revisions and additions read as follows:

§ 1.6050I–1 Returns relating to cash in excess of $10,000 received in a trade or business.

(a) * * *

(3) * * *

(ii) *Exception.* An agent who receives cash from a principal and uses all of the cash within 15 days in a cash transaction (second cash transaction) which is reportable under section 6050I or section 5331 of title 31 of the United States Code and the corresponding regulations (31 CFR Chapter X), and who discloses the name, address, and taxpayer identification number of the principal to the recipient in the second cash transaction need not report the initial receipt of cash under this section.

* * * * *

(c) * * *

(1) * * *

(iv) *Exception for certain loans.* A cashier's check, bank draft, traveler's check, or money order received in a designated reporting transaction is not treated as cash pursuant to paragraph (c)(1)(ii)(B)(*1*) of this section if the instrument constitutes the proceeds of a loan from a bank (as that term is defined in 31 CFR Chapter X).

* * * * *

(d) * * *

(2) * * *

(i) *In general.* If a casino receives cash in excess of $10,000 and is required to report the receipt of such cash directly to the Department of the Treasury (Treasury Department) under 31 CFR 1021.310 or 1010.360 and is subject to the recordkeeping requirements of 31 CFR 1021.400, then the casino is not required to make a return with respect to the receipt of such cash under section 6050I and these regulations.

(ii) *Casinos exempt under 31 CFR 1010.970(c).* Under the authority of section 6050I(c)(1)(A), the Secretary may exempt from the reporting requirements of section 6050I casinos with gross annual gaming revenue in excess of $1,000,000 that are exempt under 31 CFR 1010.970(c) from reporting certain cash transactions to the Treasury Department under 31 CFR 1021.310 or 1010.360. The determination whether a casino which is granted an exemption under 31 CFR 1010.970(c) will be required to report under section 6050I will be made on a case-by-case basis, concurrently with the granting of such an exemption.

* * * * *

(iv) * * *

(A) *Example.* A and B are casinos having gross annual gaming revenue in excess of $1,000,000. C is a casino with gross annual gaming revenue of less than $1,000,000. Casino A receives $15,000 in cash from a customer with respect to a gaming transaction which the casino reports to the Treasury Department under 31 CFR 1021.310 and 1010.360. Casino B's hotel division receives $15,000 in cash from a customer in payment for

accommodations provided to that customer at Casino B's hotel. Casino C receives $15,000 in cash from a customer with respect to a gaming transaction. Casino A is not required to report the transaction under section 6050I or these regulations because the exception for certain casinos provided in paragraph (d)(2)(i) of this section (casino exception) applies. Casino B's hotel division is required to report under section 6050I and these regulations because the casino exception does not apply to the receipt of cash by a nongaming business division. Casino C is required to report under section 6050I and these regulations because the casino exception does not apply to casinos having gross annual gaming revenue of $1,000,000 or less which do not have to report to the Treasury Department under 31 CFR 1021.310 and 1010.360.

(B) [Reserved]

* * * * *

(e) * * *

(1) *Time of reporting.* The reports required by this section must be filed in accordance with the Form 8300 instructions and related publications by the 15th day after the date the cash is received. However, in the case of multiple payments relating to a single transaction (or two or more related transactions), see paragraph (b) of this section.

* * * * *

(3) * * *

(i) *Where to file.* A person making a return of information under this section must file Form 8300 in accordance with the form instructions and related publications.

* * * * *

(h) *Applicability date.* The rules of this section apply for returns required to be filed during calendar years beginning after December 31, 2023.

■ **Par. 11.** Section 1.6050I–2 is amended by revising paragraphs (c)(1)(i), (c)(3)(i), and (f) to read as follows:

§ 1.6050I–2 Returns relating to cash in excess of $10,000 received as bail by court clerks.

* * * * *

(c) * * *

(1) * * *

(i) *In general.* The information return required by this section must be filed in accordance with the Form 8300 instructions and related publications by the 15th day after the date the cash bail is received.

* * * * *

(3) * * *

(i) *Where to file.* Returns required by this section must be filed in accordance with the Form 8300 instructions and related publications. A copy of the information return required to be filed under this section must be retained for five years from the date of filing.

* * * * *

(f) *Applicability date.* The rules of this section apply for returns required to be filed during calendar years beginning after December 31, 2023.

■ **Par. 12.** Section 1.6050M–1 is amended by revising paragraphs (d)(2) and (3) and (f) to read as follows:

§ 1.6050M–1 Information returns relating to persons receiving contracts from certain Federal executive agencies.

* * * * *

(d) * * *

(2) *Form of reporting*—(i) *General rule concerning electronic filing.* The information returns required by this section with respect to contracts of a Federal executive agency for each calendar quarter must be made in one submission (or in multiple submissions if permitted by paragraph (d)(4) of this section). Except as provided in paragraph (d)(2)(ii) of this section, the required returns must be made in electronic form (within the meaning of § 301.6011–2(a)(1) of this chapter) in accordance with any applicable revenue procedure or other guidance promulgated by the Internal Revenue Service for the filing of such returns under section 6050M.

(ii) *Exceptions from electronic filing.* Any Federal executive agency that, on October 1, has a reasonable expectation of entering into, during the one-year period beginning on that date, fewer than 10 contracts subject to the reporting requirements under this section that are to be filed during the calendar years after 2023, may make the information returns required by this section for each quarter of that one-year period on the prescribed paper Form 8596 in accordance with the instructions accompanying such form.

(iii) *Exclusions from electronic-filing requirements*—(A) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under paragraph (a) of this section) and the period to which it applies.

(B) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Place of filing*—(i) *Returns in electronic form.* Information returns made under this section in electronic form must be filed with the Internal Revenue Service in accordance with any applicable revenue procedure or other guidance promulgated by the Internal Revenue Service relating to the filing of returns under section 6050M.

(ii) *Form 8596.* Information returns made on paper Form 8596 must be filed with the Internal Revenue Service at the location specified in the instructions for that form.

* * * * *

(f) *Applicability date*—(1) *Contracts required to be reported.* Except as otherwise provided in this paragraph (f), this section applies to each Federal executive agency with respect to its contracts entered into on or after January 1, 1989 (including any increase in amount obligated on or after January 1, 1989, that is treated as a new contract under paragraph (e) of this section).

(2) *Contracts not required to be reported.* A Federal executive agency is not required to report—

(i) Any basic or initial contract entered into before January 1, 1989,

(ii) Any increase contract action occurring before January 1, 1989, that is treated as a new contract under paragraph (e) of this section, or

(iii) Any increase contract action that is treated as a new contract under paragraph (e) of this section if the basic or initial contract to which that contract action relates was entered into before January 1, 1989, and—

(A) The increase occurs before April 1, 1990, or

(B) The amount of the increase does not exceed $50,000.

(3) *Illustration.* (i) If a Federal executive agency enters into an initial contract on December 1, 1988, and the amount of money obligated under the contract is increased by $55,000 on April 15, 1990, then there is no reporting requirement with respect to the contract when entered into on December 1, 1988. However, the April 15, 1990, increase, which is treated as a new contract under paragraph (e) of

this section, is subject to the reporting requirements of this section because it is considered to be a new contract entered into on April 15, 1990.

(ii) If the $55,000 increase had occurred before April 1, 1990, there would not have been a reporting requirement with respect to that increase.

(4) *Filing requirements for contracts required to be reported.* Section 1.6050M–1(d)(2) and (3) (as contained in 26 CFR part 1, revised *February 23, 2023*) applies to information returns required to be filed during calendar years beginning after December 31, 2023.

PART 53—FOUNDATION AND SIMILAR EXCISE TAXES

■ **Par. 13.** The authority citation for part 53 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 53.6011–1 also issued under 26 U.S.C. 6011.

* * * * *

■ **Par. 14.** Section 53.6011–1 is amended by:

■ a. Removing paragraph (c).

■ b. Redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively.

■ c. Adding a new paragraph (e).

The addition reads as follows:

§ 53.6011–1 General requirement of return, statement or list.

* * * * *

(e) The rules of this section apply to any returns required to be filed under this section on or after January 11, 2021.

PART 54—PENSION EXCISE TAXES

■ **Par. 15.** The authority citation for part 54 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 54.6011–3 also issued under 26 U.S.C. 6011.

* * * * *

■ **Par. 16.** Section 54.6011–3 is added to read as follows:

§ 54.6011–3 Required use of electronic form for the filing requirements for the return for certain excise taxes related to employee benefit plans.

(a) *Excise tax returns required in electronic form.* Any employer or individual required to file an excise tax return on Form 5330, *Return of Excise Taxes Related to Employee Benefit Plans,* under § 54.6011–1 of this chapter must file the excise tax return electronically if the filer is required by the Internal Revenue Code or regulations to file at least 10 returns of any type during the calendar year that the Form 5330 is due. The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic-filing requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with the applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under § 54.6011–1 of this chapter) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

(c) *Failure to file.* If a filer required to file the Form 5330 fails to file the report electronically when required to do so by this section, the filer has failed to file the report. See generally section 6651(a)(1) for the penalty for the failure to file a tax return or to pay tax. For general rules relating to the failure to file a tax return or to pay tax, see the regulations under 26 CFR 301.6651–1 (Regulations on Procedure and Administration).

(d) *Meaning of terms.* The following definitions apply for purposes of this section:

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

(2) *Calculating the number of returns a filer is required to file*—(i) *In general.* For purposes of this section, a filer is required to file at least 10 returns during a calendar year if the filer is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns.

(ii) *Definition of filer.* For purposes of this section, the term *filer* means the person required to report the tax on the Form 5330. For general rules on who is required to report the tax on the Form 5330, see the Instructions to the Form 5330.

(e) *Example.* The following example illustrates the provisions of paragraph (d)(2) of this section:

(1) In 2023, Employer A (the plan sponsor and plan administrator of Plan B) is required to file Form 5330 for its nondeductible contribution under section 4972 to Plan B. During the 2024 calendar year, Employer A is required to file 20 returns (including 19 Forms 1099–R *Distributions From Pensions, Annuities, Retirement, Profit-Sharing Plans, IRAs, Insurance Contracts, etc.,* and one Form 5500 series, *Annual Return/Report of the Employee Benefit Plan*). Plan B's plan year is the calendar year. Because Employer A is required to file at least 10 returns during the 2024 calendar year, Employer A must file the 2023 Form 5330 for Plan B electronically.

(2) [Reserved]

(f) *Applicability date.* The rules of this section apply to any Form 5330 required to be filed for taxable years ending on or after December 31, 2023.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 17.** The authority citation for part 301 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.6011–10 also issued under 26 U.S.C. 6011.

Section 301.6011–11 also issued under 26 U.S.C. 6011.

Section 301.6011–12 also issued under 26 U.S.C. 6011.

Section 301.6011–13 also issued under 26 U.S.C. 6011.

Section 301.6011–14 also issued under 26 U.S.C. 6011.

Section 301.6011–15 also issued under 26 U.S.C. 6011.

Section 301.6012–2 also issued under 26 U.S.C. 6012.

* * * * *

Section 301.6057–3 also issued under 26 U.S.C. 6011 and 6057.

Section 301.6058–2 also issued under 26 U.S.C. 6011 and 6058.

Section 301.6059–2 also issued under 26 U.S.C. 6011 and 6059.

* * * * *

Section 301.6721–1 also issued under 26 U.S.C. 6011 and 6721.

* * * * *

■ **Par. 18.** Section 301.1474–1 is amended by revising the section heading and paragraphs (a) through (c), (d)(1), and (e) to read as follows:

§ 301.1474–1 Required use of electronic form for financial institutions filing Form 1042, Form 1042–S, or Form 8966.

(a) *Financial institutions filing certain returns.* If a financial institution is required to file a Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,* (or successor form) under § 1.1474–1(c) of this chapter, the financial institution must file the return information required by the applicable forms and schedules electronically. If a financial institution is required to file a Form 1042–S, *Foreign Person's U.S. Source Income Subject to Withholding,* (or such other form as the IRS may prescribe) under § 1.1474–1(d) of this chapter, the financial institution must file the information required by the applicable forms and schedules electronically. Additionally, if a financial institution is required to file Form 8966, *FATCA Report,* (or such other form as the IRS may prescribe) to report certain information about U.S. accounts, substantial U.S. owners of foreign entities, or owner-documented FFIs as required under this chapter, the financial institution must file the required information in electronic form. Returns filed electronically must be made in accordance with applicable regulations, revenue procedures, publications, forms, instructions, and the *IRS.gov* internet site. In prescribing regulations, revenue procedures, publications, forms, and instructions, including those on the *IRS.gov* internet site, the Commissioner may direct the type of electronic filing.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under § 1.1474–1(c) or (d) of this chapter, or a Form 8966) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional Exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

(c) *Failure to file.* If a financial institution fails to file a Form 1042 electronically when required to do so by this section, the financial institution has failed to file the return. See section 6651 for the addition to tax for failure to file a return. In determining whether there is reasonable cause for failure to file the return, § 301.6651–1(c) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns electronically) will apply. If a financial institution fails to file a Form 1042–S or a Form 8966 electronically when required to do so by this section, the financial institution has failed to comply with the information reporting requirements under section 6721 of the Code. See section 6724(c) for failure to meet magnetic media requirements. In determining whether there is reasonable cause for failure to file the return, § 301.6651–1(c) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns on magnetic media) will apply.

(d) * * *

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

* * * * *

(e) *Applicability date.* This section applies to any Form 1042 (or successor form) required to be filed for taxable years ending on or after December 31, 2023. This section applies to any Form 1042–S or Form 8966 (or any other form that the IRS may prescribe) filed with respect to calendar years ending after December 31, 2013, except that paragraph (b)(2) of this section only applies to Forms 1042–S or Forms 8966 required to be filed for taxable years ending on or after December 31, 2023.

■ **Par. 19.** Section 301.6011–2 is amended by revising the section heading and paragraphs (a)(1), (b), (c), and (g) to read as follows:

§ 301.6011–2 Required use of electronic form.

(a) * * *

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures or publications, or, in the case of returns filed with the Social Security Administration, Social Security Administration publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, or publications.

* * * * *

(b) *Returns required electronically.* (1) If the use of Form 1042–S, Form 1094 series, Form 1095–B, Form 1095–C, Form 1097–BTC, Form 1098, Form 1098–C, Form 1098–E, Form 1098–Q, Form 1098–T, Form 1099 series, Form 3921, Form 3922, Form 5498 series, Form 8027, or Form W–2G is required by the applicable regulations or revenue procedures for the purpose of making an information return, the information required by the form must be submitted electronically, except as otherwise provided in paragraph (c) of this section. Returns filed electronically must be made in accordance with applicable revenue procedures, publications, forms, or instructions.

(2) If the use of Form W–2 (Wage and Tax Statement), Form 499R–2/W–2PR (Withholding Statement (Puerto Rico)), Form W–2VI (U.S. Virgin Islands Wage and Tax Statement), Form W–2GU (Guam Wage and Tax Statement), or Form W–2AS (American Samoa Wage and Tax Statement) is required for the purpose of making an information return, the information required by the form must be submitted electronically, except as otherwise provided in

paragraph (c) of this section. Returns described in this paragraph (b)(2) must be made in accordance with applicable Social Security Administration procedures or publications (which may be obtained from the local office of the Social Security Administration).

(3) If a person is required to make a return for the purpose of section 6050I, and such person is required to file returns described in paragraphs (b)(1) and (2) of this section electronically, then such person must also file the information required by section 6050I electronically. Returns described in this paragraph (b)(3) must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website, as well as instructions and guidance on the *FinCEN.gov* website.

(4) The Commissioner may exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(c) *Electronic-filing threshold*—(1) *In general.* No person is required to file information returns electronically in a calendar year unless the person is required to file at least 10 returns during that calendar year. Persons required to file fewer than 10 returns during the calendar year may make the returns on the prescribed paper form or, alternatively, electronically in accordance with paragraph (b) of this section.

(2) *Machine-readable forms.* Returns made on a paper form under paragraph (c)(1) of this section must be machine-readable, as described in paragraph (a)(2) of this section, if applicable revenue procedures provide for a machine-readable paper form.

(3) *Special rule for partnerships.* Notwithstanding paragraph (c)(1) of this section, a partnership with more than 100 partners is required to file its information returns covered under paragraph (b) of this section electronically.

(4) *Calculating the number of returns*—(i) *Aggregation of returns.* In calculating whether a person is required to file at least 10 returns under paragraph (c)(1) of this section, all the information returns described in paragraphs (b)(1) and (2) of this section required to be filed during the calendar year are counted in the aggregate. Neither corrected information returns, information returns described in paragraph (b)(3) of this section, nor returns other than those described in paragraphs (b)(1) and (2) of this section are taken into account in calculating whether a person is required to file at least 10 returns.

(ii) *Corrected returns.* (A) If an original information return covered by paragraph (b) of this section is required to be filed electronically, any corrected information return corresponding to that original return must also be filed electronically.

(B) If an original information return is permitted to be filed on paper and is filed on paper, any corrected information return corresponding to that original return must be filed on paper.

(5) *Examples.* The provisions of paragraphs (c)(3) and (4) of this section are illustrated by the following examples:

(i) *Example 1.* During the 2024 calendar year, Company W, is required to file five Forms 1099–INT, *Interest Income,* and five Forms 1099–DIV, *Dividends and Distributions,* for a total of 10 returns covered by paragraphs (b)(1) and (2) of this section. Because Company W is required to file 10 returns as calculated under paragraph (c)(4) of this section during the 2024 calendar year, Company W must file all its 2023 Forms 1099–INT and 1099–DIV electronically.

(ii) *Example 2.* Same facts as paragraph (c)(5)(i) of this section (*Example 1*), except after electronically filing its 10 Forms 1099–DIV and 1099–INT, Company W files two corrected Forms 1099–DIV and four corrected Forms 1099–INT. Because Company W electronically filed its original 2023 Forms 1099–DIV and 1099–INT, Company W must electronically file its corrected 2023 Forms 1099–DIV and 1099–INT.

(iii) *Example 3.* Same facts as paragraph (c)(5)(i) of this section (*Example 1*), except on May 16, 2024, Company W received cash in excess of $10,000 and must file a Form 8300 by May 31, 2024. Because Company W is required to file information returns covered under paragraphs (b)(1) and (2) of this section electronically during the 2024 calendar year, Company W must also file all its Forms 8300 electronically during the 2024 calendar year.

(iv) *Example 4.* Same facts as paragraph (c)(5)(i) of this section (*Example 1*), except Company W is not required to file any Forms 1099–INT during calendar year 2024. On December 19, 2023, Company W receives cash in excess of $10,000 and must file a Form 8300 by January 3, 2024. Because Company W is not required to file information returns covered under paragraphs (b)(1) and (2) of this section electronically during the 2024 calendar year, Company W is not required to file this Form 8300 electronically.

(v) *Example 5.* During the 2024 calendar year, Partnership P, a partnership with 15 partners, is required to file eight Forms 1099–MISC, *Miscellaneous Information,* and five Forms 1099–INT. Because Partnership P is required to file at least 10 returns covered by paragraphs (b)(1) and (2) of this section during the 2024 calendar year, Partnership P must electronically file all its 2022 Forms 1099–MISC and 1099–INT.

(6) *Exclusions from electronic-filing requirements*—(i) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under paragraph (b) of this section) and the period to which it applies. For purposes of paragraph (b)(3) of this section, a waiver granted for a return under paragraph (b)(1) or (2) will be deemed to have waived the electronic-filing requirement for any returns required to be filed under section 6050I.

(ii) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. An exemption will be allowed for filers for whom using the technology required to file in electronic form conflicts with their religious beliefs. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(iii) *Additional Exclusion.* If an employer is required to make a final return on Form 941, or a variation thereof, and expedited filing of Forms W–2, Forms 499R–2/W–2PR, Forms W–2VI, Forms W–2GU, or Form W–2AS is required, if the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically (see § 31.6071(a)–1(a)(3)(ii) of this chapter).

* * * * *

(g) *Applicability date.* The rules of this section apply to information returns required to be filed during calendar

years beginning after December 31, 2023.

■ **Par. 20.** Section 301.6011–3 is amended by:
■ a. Revising the section heading.
■ b. Revising paragraphs (a), (b), and (d)(1).
■ c. Redesignating paragraph (d)(5) as (d)(6) and adding new paragraph (d)(5).
■ d. Revising newly redesignated paragraph (d)(6).
■ e. Revising paragraphs (e) and (f).

The revisions and addition read as follows:

§ 301.6011–3 Required use of electronic form for partnership returns.

(a) *Partnership returns required electronically.* (1) Except as otherwise provided in paragraph (b) of this section, a partnership required to file a partnership return pursuant to § 1.6031(a)–1 of this chapter, must file the information required by the applicable forms and schedules electronically, if

(i) the partnership is required by the Internal Revenue Code or regulations to file at least 10 returns (as described in paragraph (d)(5) of this section) during the calendar year ending with or within the taxable year of the partnership, or

(ii) the partnership has more than 100 partners during the partnership's taxable year.

(2) The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with the applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under § 1.6031(a)–1 of this chapter) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. An exemption will be allowed for filers for whom using the technology required to file in electronic form conflicts with their religious beliefs. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional Exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

* * * * *

(d) * * *

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

* * * * *

(5) *Calculating the number of returns.* For purposes of this section, a partnership is required to file at least 10 returns if, during the calendar year ending with or within the taxable year of the partnership, the partnership is required to file at least 10 returns of any type, including income tax returns, employment tax returns, excise tax returns, and information returns (for example, Forms W–2 and Forms 1099, but not including schedules required to be included with a partnership return). In the case of a short-period return, a partnership is required to file at least 10 returns if, during the calendar year in which the partnership's short taxable year ends, the partnership is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099, but not including schedules required to be included with a partnership return), income tax returns, employment tax returns, and excise tax returns.

(6) *Partnerships with more than 100 partners.* A partnership has more than 100 partners if, over the course of the partnership's taxable year, the partnership had more than 100 partners, regardless of whether a partner was a partner for the entire year or whether the partnership had over 100 partners on any particular day in the year. For purposes of this paragraph (d)(6), however, only those persons having a direct interest in the partnership must be considered partners for purposes of determining the number of partners during the partnership's taxable year.

(e) *Examples.* The following examples illustrate the provisions of this section. In the examples, the partnerships' taxable year is the calendar year 2023 and the partnerships had fewer than 10 returns required to be filed during calendar year 2023:

(1) *Example 1.* Partnership P had five general partners and 90 limited partners on January 1, 2023. On March 15, 2023, 10 more limited partners acquired an interest in P. On September 29, 2023, the 10 newest partners sold their individual partnership interests to C, a corporation which was one of the original 90 limited partners. On December 31, 2023, P had the same five general partners and 90 limited partners it had on January 1, 2023. P had a total of 105 partners over the course of partnership taxable year 2023. Therefore, P must file its 2023 partnership return electronically.

(2) *Example 2.* Partnership Q is a general partnership that had 95 partners on January 1, 2023. On March 15, 2023, 10 partners sold their individual partnership interests to corporation D, which was not previously a partner in Q. On September 29, 2023, corporation D sold one-half of its partnership interest in equal shares to five individuals, who were not previously partners in Q. On December 31, 2023, Q had a total of 91 partners, and on no date in 2023 did Q have more than 100 partners. Over the course of the year, however, Q had 101 partners. Therefore, Q must file its 2023 partnership return electronically.

(3) *Example 3.* Partnership G is a general partnership with 100 partners on January 1, 2023. There are no new partners added to G in 2023. One of G's partners, A, is a partnership with 53 partners. A is one partner, regardless of the number of partners A has. Therefore, G has 100 partners and is not required to file its 2023 partnership return electronically.

(4) *Example 4.* Same facts as paragraph (e)(3) of this section (*Example 3*), except partnership G is also required to file nine Forms 1099–MISC during calendar year 2023 in addition to its 2022 partnership return. Because partnership G is required to file at least 10 returns of any type during calendar year 2023, partnership G must file its 2023 partnership return electronically.

(f) *Applicability date.* The rules of this section apply to partnership returns required to be filed during calendar years beginning after December 31, 2023.

■ **Par. 21.** Section 301.6011–5 is amended by revising the section

heading, and paragraphs (a), (b), (d)(1) and (5), (e), and (f) to read as follows:

§ 301.6011–5 Required use of electronic form for corporate income tax returns.

(a) *Corporate income tax returns required electronically.* (1) A corporation required to file a corporate income tax return on Form 1120, *U.S. Corporation Income Tax Return,* under § 1.6012–2 of this chapter must file its corporate income tax return electronically if the corporation is required by the Internal Revenue Code or regulations to file at least 10 returns (as defined in paragraph (d)(5) of this section) during the calendar year ending with or within the taxable year of the corporation.

(2) All members of a controlled group of corporations must file their corporate income tax returns electronically if the aggregate number of returns required to be filed by the controlled group of corporations is at least 10 (as defined in paragraph (d)(5) of this section) during the calendar year ending with or within the taxable year of the controlled group of corporations.

(3) The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with the applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under § 1.6012–2 of this chapter) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. An exemption will be allowed for filers for whom using the technology required to file in electronic form conflicts with their religious beliefs. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional Exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

* * * * *

(d) * * *

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

* * * * *

(5) *Calculating the number of returns.* For purposes of this section, a corporation or controlled group of corporations is required to file at least 10 returns if, during the calendar year ending with or within the taxable year of the corporation or the controlled group, the corporation or the controlled group is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns. In the case of a short-period return, a corporation is required to file at least 10 returns if, during the calendar year in which the corporation's short taxable year ends, the corporation is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns. If the corporation is a member of a controlled group, calculating the number of returns the corporation is required to file includes all returns required to be filed by all members of the controlled group during the calendar year ending with or within the taxable year of the controlled group.

(e) *Example.* The following example illustrates the provisions of this section:

(1) The taxable year of Corporation X, a fiscal-year taxpayer, ends on September 30. During the calendar year ending December 31, 2023, X was required to file one Form 1120, *U.S. Corporation Income Tax Return,* six Forms W–2, *Wage and Tax Statement,* three Forms 1099–DIV, *Dividends and Distributions,* one Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return,* and four Forms 941, *Employer's Quarterly Federal Tax Return.* Because X is required to file 10 returns of any type during calendar year 2023, the calendar year that ended within its taxable year ending September 30, 2024, X is required to file its Form 1120 electronically for its taxable year ending September 30, 2024.

(2) [Reserved]

(f) *Applicability date.* The rules of this section apply to corporate income tax returns required to be filed during calendar years beginning after December 31, 2023.

■ **Par. 22.** Section 301.6011–10 is added to read as follows:

§ 301.6011–10 Certain organizations, including trusts, required to file unrelated business income tax returns in electronic form.

(a) *Unrelated business income tax returns required in electronic form.* (1) Organizations, including trusts, subject to tax under section 511 that are required to file a return under § 1.6012–2(e) or § 1.6012–3(a)(5) of this chapter to report gross income included in computing unrelated business taxable income, as defined in section 512, or that are otherwise required to file Form 990–T, *Exempt Organization Business Income Tax Return (and proxy tax under section 6033(e)),* are required to file that return in electronic form.

(2) Returns filed in electronic form must be filed in accordance with applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Failure to file.* If an organization or trust fails to file an unrelated business income tax return in electronic form when required to do so by this section, the organization or trust has failed to file the return. See section 6651 for the addition to tax for failure to file a return. In determining whether there is reasonable cause for failure to file the return, § 301.6651–1(c) will apply.

(c) *Applicability date.* The rules of this section apply to unrelated business income tax returns required to be filed during calendar years beginning after *February 23, 2023.*

■ **Par. 23.** Section 301.6011–11 is added to read as follows:

§ 301.6011–11 Required use of electronic form for certain returns for tax-advantaged bonds.

(a) *Return for credit payments to issuers of qualified bonds.* (1) An issuer of a qualified bond required to file a return for credit payments on Form 8038–CP, *Return for Credit Payments to Issuers of Qualified Bonds,* must file the return electronically if the issuer is required to file at least 10 returns (as

determined under paragraph (d) of this section) during the calendar year.

(2) Returns filed electronically must be completed in accordance with applicable revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing a paper return. An issuer's request for a waiver must be submitted in accordance with applicable revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request must specify the type of filing (that is, the return required to be filed electronically under this section), the name of the issuer, the name of the bond issue, the issue date of the tax-advantaged bond (as defined in § 1.150–1(b) of this chapter), and any other information specified in the applicable revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(2) *Exemptions.* The Commissioner may provide an exemption from the electronic-filing requirement of paragraph (a)(1) of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website, to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional Exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file a return electronically under this section.

(c) *Meaning of terms.* The following definitions apply for purposes of this section:

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

(2) *Qualified bond.* The term *qualified bond* means a tax-advantaged bond that is a taxable bond that provides a refundable Federal tax credit payable directly to the issuer of the bond under former section 6431 or any other tax-advantaged bond (as defined in § 1.150–1(b) of this chapter) that provides a refundable Federal tax credit payment to an issuer of such bond.

(3) *Return for credit payments to issuers of qualified bonds.* The term *return for credit payments to issuers of qualified bonds* means a Form 8038–CP, *Return for Credit Payments to Issuers of Qualified Bonds,* or such other form prescribed by the Commissioner for the purpose of filing a return for credit payment with respect to a qualified bond.

(d) *Calculating the number of returns*—(1) *Aggregation of returns.* For purposes of this section, an issuer of a tax-advantaged bond is required to file at least 10 returns if, during the calendar year, the issuer is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns.

(2) *Corrected returns.* (i) If an original return covered by this section is required to be filed electronically, any corrected return corresponding to that original return must also be filed electronically.

(ii) If an original return covered by this section is permitted to be filed on paper and is filed on paper, any corrected return corresponding to that original return must be filed on paper.

(e) *Applicability date.* The rules of this section apply to returns for tax-advantaged bonds filed after December 31, 2023.

■ **Par. 24.** Section 301.6011–12 is added to read as follows:

§ 301.6011–12 Required use of electronic form for returns of certain excise taxes under Chapters 41 and 42 of the Internal Revenue Code.

(a) *Excise tax returns required electronically.* (1) Any person required to file an excise tax return on Form 4720, *Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code,* under § 53.6011–1 of this chapter must file its excise tax return electronically if the person is required by the Internal Revenue Code or regulations to file at least 10 returns (as defined in paragraph (d)(3) of this section) during the calendar year.

(2) The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with the applicable revenue procedures, publications, forms, instructions, or other guidance.

(3) Paragraph (a)(1) of this section is not applicable to private foundations that are subject to the filing requirements of § 301.6033–4.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under § 53.6011–1 of this chapter) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

(c) *Failure to file.* If a person fails to file an excise tax return electronically when required to do so by this section, the person has failed to file the return. See section 6651 for the addition to tax for failure to file a return. In determining whether there is reasonable cause for failure to file the return, § 301.6651–1(c) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns electronically) will apply.

(d) *Meaning of terms.* The following definitions apply for purposes of this section:

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These

generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

(2) *Excise tax return.* The term *excise tax return* means a Form 4720, *Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code,* along with all other related forms, schedules, and statements that are required to be attached to the Form 4720, including amended and superseding returns.

(3) *Calculating the number of returns.* For purposes of this section, a person is required to file at least 10 returns if, during the calendar year ending with or within the person's taxable year, the person is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns. In the case of a short-period return, a person is required to file at least 10 returns if, during the calendar year in which the person's short taxable year ends, the person is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns.

(e) *Example.* The following example illustrates the provisions of this section:

(1) During the calendar year ending December 31, 2023, Trust X was required to file one Form 4720, *Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code,* which related to the 2022 taxable year, and 10 Forms W–2, *Wage and Tax Statement,* which reported wages paid to employees during 2022. Because X is required to file 11 returns during calendar year 2023, X is required to file its Form 4720 electronically for its taxable year ended December 31, 2023.

(2) [Reserved]

(f) *Applicability date.* The rules of this section apply to excise tax returns required to be filed for taxable years ending on or after December 31, 2023.

■ **Par. 25.** Section 301.6011–13 is added to read as follows:

§ 301.6011–13 Required use of electronic form for split-interest trust returns.

(a) *Split-interest trust returns required electronically.* (1) Any trust required to file an information return on Form 5227, *Split-Interest Trust Information Return,* under § 53.6011–1 of this chapter must file its return electronically if the trust is required by the Internal Revenue Code or regulations to file at least 10 returns (as defined in paragraph (d)(3) of this section) during the calendar year.

(2) The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with applicable revenue procedures, publications, forms, or instructions.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under § 53.6011–1 of this chapter) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

(c) *Failure to file.* If a trust fails to file an excise tax return electronically when required to do so by this section, the trust has failed to file the return. See section 6652 for the addition to tax for failure to file a return. In determining whether there is reasonable cause for failure to file the return, § 301.6652–1(f) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns electronically) will apply.

(d) *Meaning of terms.* The following definitions apply for purposes of this section:

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

(2) *Split-Interest Trust return.* The term *split-interest trust return* means a Form 5227, *Split-Interest Trust Information Return,* along with all other related forms, schedules, and statements that are required to be attached to the Form 5227, including amended and superseding returns.

(3) *Calculating the number of returns.* For purposes of this section, a trust is required to file at least 10 returns if, during the calendar year ending with or within the trust's taxable year, the trust is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns. In the case of a short-period return, a trust is required to file at least 10 returns if, during the calendar year in which the trust's short taxable year ends, the trust is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns.

(e) *Example.* The following example illustrates the provisions of this section:

(1) During the calendar year ending December 31, 2023, Trust X was required to file one Form 5227, *Split-Interest Trust Information Return,* one Form 4720, *Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code,* and 10 Forms 1099–DIV, *Dividends and Distributions.* Because X is required to file 12 returns during the calendar year 2023, X is required to file its Form 5227 electronically for its taxable year ending December 31, 2023.

(2) [Reserved]

(f) *Applicability date.* The rules of this section apply to Split-Interest Trust returns required to be filed for taxable years ending on or after December 31, 2023.

■ **Par. 26.** Section 301.6011–14 is added to read as follows:

§ 301.6011–14 Required use of electronic form or other machine-readable form for material advisor disclosure statements.

(a) *Material advisor disclosure statements required electronically or in other machine-readable form.* (1) Any material advisor required to file a return on Form 8918, *Material Advisor Disclosure Statement,* under § 301.6111–3(a) of this chapter must file its return electronically or in other machine-readable form, in accordance

with revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website, if the material advisor is required by the Internal Revenue Code or regulations to file at least 10 returns (as determined under paragraph (d)(4) of this section) during the calendar year.

(2) The Commissioner may direct the type of electronic or other machine-readable form through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically or in other machine-readable form must be made in accordance with applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under § 301.6111–3(a) of this chapter) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional Exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

(c) *Failure to file.* If a material advisor fails to file Form 8918 electronically or in other machine-readable form when required to do so by this section, the material advisor has failed to file the return. See section 6707 for the penalty for failure to file the return.

(d) *Meaning of terms.* The following definitions apply for purposes of this section:

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

(2) *Machine-readable form.* The term *machine-readable form* means any machine-readable form specifically permitted under applicable regulations, procedures, publications, forms, instructions, or other guidance.

(3) *Material advisor disclosure statement.* The term *material advisor disclosure statement* means a Form 8918, *Material Advisor Disclosure Statement,* along with all other related forms, schedules, and statements that are required to be attached to the Form 8918, including amended material advisor disclosure statements.

(4) *Calculating the number of returns.* (i) Except as provided in paragraph (d)(4)(ii) of this section, for purposes of this section, a material advisor is required to file at least 10 returns if during the calendar year the material advisor is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns.

(ii) Form 8918 is not taken into account in calculating whether a material advisor is required to file at least 10 returns during a calendar year.

(e) *Example.* The following example illustrates the provisions of this section:

(1) During the calendar year ending December 31, 2024, Material Advisor X was required to file one Form 1040, *U.S. Individual Income Tax Return,* and 10 Forms 1099–NEC, *Nonemployee Compensation.* Because Material Advisor X is required to file 11 returns during the calendar year 2024, X is required to file its Forms 8918 electronically or in other machine-readable form, in accordance with revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website, during the calendar year ending December 31, 2024.

(2) [Reserved]

(f) *Applicability date.* The rules of this section apply to Material Advisor Disclosure Statements required to be filed after December 31, 2023.

■ **Par. 27.** Section 301.6011–15 is added to read as follows:

§ 301.6011–15 Required use of electronic form for withholding tax returns.

(a) *Withholding tax returns required electronically.* (1) A withholding agent required to file an income tax return on Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,* under § 1.1461–1(b) of this chapter must file its return electronically if the withholding agent is required by the Internal Revenue Code or regulations to file at least 10 returns (as defined in paragraph (d)(5) of this section) during the calendar year in which the Form 1042 is required to be filed. Notwithstanding the previous sentence, a withholding agent that is an individual, estate, or trust is not required to file its Form 1042 electronically.

(2) The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with the applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under § 1.1461–1 of this chapter) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

(c) *Failure to file.* If a withholding agent fails to file a withholding tax return electronically when required to do so by this section, the withholding agent has failed to file the return. See section 6651 for the addition to tax for failure to file a return. In determining whether there is reasonable cause for

failure to file the return, § 301.6651–1(c) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns electronically) will apply.

(d) *Meaning of terms.* The following definitions apply for purposes of this section:

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, and diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, or instructions.

(2) *Withholding agent.* The term *withholding agent* means a withholding agent as defined in § 1.1441–7(a) of this chapter.

(3) *Withholding tax return.* The term *withholding tax return* means a Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,* along with all other related forms, schedules, and statements that are required to be attached to the Form 1042, including amended and superseding returns.

(4) *Special rule for partnerships.* Notwithstanding paragraph (d)(5) of this section, a withholding agent that is a partnership with more than 100 partners (as determined under § 301.6011–3(d)(6)) is required to file a return described in paragraph (a) of this section electronically.

(5) *Calculating the number of returns.* For purposes of this section, a withholding agent is required to file at least 10 returns if, during the calendar year in which the Form 1042 is required to be filed, the withholding agent is required to file at least 10 returns of any type, including information returns (for example, Forms W–2, Forms 1099, Forms 1042–S), income tax returns (for example, Form 1042), employment tax returns, and excise tax returns.

(e) *Special rule for returns filed by financial institutions.* For rules that require withholding agents that are financial institutions to file returns electronically, see § 301.1474–1.

(f) *Applicability date.* The rules of this section apply to withholding tax returns required to be filed for taxable years ending on or after December 31, 2023.

■ **Par. 28.** Section 301.6012–2 is added to read as follows:

§ 301.6012–2 Required use of electronic form for income tax returns of certain political organizations.

(a) *Income tax returns of certain political organizations required electronically.* (1) Any organization required to file an income tax return on Form 1120–POL, *U.S. Income Tax Return for Certain Political Organizations,* under § 1.6012–6 of this chapter must file its income tax return, along with all other related forms, schedules, and statements that are required to be attached to the Form 1120–POL, including amended and superseding returns, electronically if the organization is required by the Internal Revenue Code or regulations to file at least 10 returns of any type (as defined in paragraph (d)(2) of this section) during the calendar year.

(2) The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with the applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under § 1.6012–6 of this chapter) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

(c) *Failure to file.* If an organization fails to file an income tax return electronically when required to do so by this section, the organization has failed to file the return. See section 6651 for the addition to tax for failure to file a return. In determining whether there is reasonable cause for failure to file the return, § 301.6651–1(c) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns electronically) will apply.

(d) *Meaning of terms.* The following definitions apply for purposes of this section:

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

(2) *Income tax return for certain political organizations.* The term *income tax return for certain political organizations* means a Form 1120–POL, *U.S. Income Tax Return for Certain Political Organizations,* along with all other related forms, schedules, and statements that are required to be attached to the Form 1120–POL, including amended and superseding returns.

(3) *Calculating the number of returns.* For purposes of this section, an organization is required to file at least 10 returns if, during the calendar year ending with or within the organization's taxable year, the organization is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns. In the case of a short-period return, an organization is required to file at least 10 returns if, during the calendar year in which the organization's short taxable year ends, the organization is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns.

(e) *Example.* The following example illustrates the provisions of this section:

(1) During the calendar year ending December 31, 2023, Organization X was required to file one Form 1120–POL, *U.S. Income Tax Return for Certain Political Organizations,* four (quarterly) Forms 8872, *Political Organization Report of Contributions and Expenditures,* two Forms W–2, *Wage and Tax Statement,* one Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return,* and four Forms 941, *Employer's Quarterly Federal Tax Return.* Because X is required to file 12 returns during the

calendar year, X is required to file its Form 1120–POL electronically for its taxable year ending December 31, 2023.

(2) [Reserved]

(f) *Applicability date.* The rules of this section apply to income tax returns required to be filed for taxable years ending on or after December 31, 2023.

■ **Par. 29.** Section 301.6033–4 is revised to read as follows:

§ 301.6033–4 Required filing in electronic form for returns by organizations required to file returns under section 6033.

(a) *Returns by organizations required to file returns under section 6033 in electronic form.* (1) An organization required to file a return under section 6033 must file its return in electronic form.

(2) Returns filed in electronic form must be filed in accordance with applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Failure to file.* If an organization required to file a return under section 6033 fails to file an information return in electronic form when required to do so by this section, the organization has failed to file the return. See section 6652 for the addition to tax for failure to file a return. In determining whether there is reasonable cause for failure to file the return, § 301.6652–2(f) will apply.

(c) *Meaning of terms.* For purposes of this section the term *return required under section 6033* means a Form 990, *Return of Organization Exempt From Income Tax;* Form 990–EZ, *Short Form Return of Organization Exempt From Income Tax;* and Form 990–PF, *Return of Private Foundation or Section 4947(a)(1) Trust Treated as Private Foundation,* along with all other related forms, schedules, and statements that are required to be attached to the Form 990, Form 990–EZ, or Form 990–PF, and all members of the Form 990 series of returns, including amended and superseding returns. A Form 4720 filed by a private foundation is a form required to be filed under section 6033.

(d) *Applicability date.* The rules of this section apply to any returns under section 6033 required to be filed during calendar years beginning after February 23, 2023.

■ **Par. 30.** Section 301.6037–2 is amended by revising the section heading and paragraphs (a), (b), (d)(1) and (5), (e), and (f) to read as follows:

§ 301.6037–2 Required use of electronic form for returns of electing small business corporation.

(a) *Returns of electing small business corporation required electronically.* (1) An electing small business corporation required to file an electing small business return on Form 1120–S, *U.S. Income Tax Return for an S Corporation,* under § 1.6037–1 of this chapter must file its Form 1120–S electronically if the small business corporation is required by the Internal Revenue Code and regulations to file at least 10 returns during the calendar year.

(2) The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with the applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under section 6037) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. An exemption will be allowed for filers for whom using the technology required to file in electronic form conflicts with their religious beliefs. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional Exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

* * * * *

(d) * * *

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

* * * * *

(5) *Calculating the number of returns.* For purposes of this section, a corporation is required to file at least 10 returns if, during the calendar year ending with or within the corporation's taxable year, the corporation is required to file at least 10 returns of any type, including income tax returns, employment tax returns, excise tax returns, and information returns (for example, Forms W–2, Forms 1099, but not including schedules required to be attached to an S corporation return). In the case of a short-period return, a corporation is required to file at least 10 returns if, during the calendar year in which the corporation's short taxable year ends, the corporation is required to file at least 10 returns of any type, including information returns (for example, Forms W–2, Forms 1099, but not including schedules required to be attached to an S corporation return), income tax returns, employment tax returns, and excise tax returns.

(e) *Example.* The following example illustrates the provisions of this section. In the example, the corporation is a calendar-year taxpayer.

(1) In 2023, Corporation S, an electing small business corporation, is required to file one 2022 Form 1120–S, *U.S. Income Tax Return for an S Corporation,* two Forms W–2, *Wage and Tax Statement,* two Forms 1099–DIV, *Dividends and Distributions,* one Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return,* and four Forms 941, *Employer's Quarterly Federal Tax Return.* Because S is required to file 10 returns during the calendar year 2023, S is required to file its 2023 Form 1120–S electronically.

(2) [Reserved]

(f) *Applicability date.* The rules of this section apply to electing small business corporation returns required to be filed during calendar years beginning after December 31, 2023.

■ **Par. 31.** Section 301.6057–3 is amended by:

■ a. Revising the section heading.

■ b. Revising paragraphs (a), (b), and (d)(1).

■ c. Revising the heading of paragraph (d)(4) and revising paragraph (d)(4)(i).

■ d. In paragraph (e), redesignating the example as paragraph (e)(1).

■ e. Revising newly redesignated paragraph (e)(1).

■ f. Adding a reserved paragraph (e)(2).

■ g. Revising paragraph (f).

The revisions and addition read as follows:

§ 301.6057–3 Required use of electronic form for filing requirements relating to deferred vested retirement benefit.

(a) *Electronic-filing requirements under section 6057.* A registration statement required under section 6057(a) or a notification required under section 6057(b) with respect to an employee benefit plan must be filed electronically if the filer is required by the Internal Revenue Code or regulations to file at least 10 returns during the calendar year that includes the first day of the plan year. The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Exclusions from electronic-filing requirements*—(1) *Waivers.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a registration statement or notification under section 6057) and the period to which it applies.

(2) *Exemptions.* The Commissioner may provide exemptions from the requirements of this section to promote effective and efficient tax administration. A submission claiming an exemption must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website.

(3) *Additional Exclusion.* If the IRS's systems do not support electronic filing, taxpayers will not be required to file electronically.

* * * * *

(d) * * *

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

* * * * *

(4) *Calculating the number of returns*—(i) *In general.* For purposes of this section, a filer is required to file at least 10 returns if, during the calendar year that includes the first day of the plan year, the filer is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns.

* * * * *

(e) * * *

(1) *Example.* In 2024, P, the plan administrator of Plan B, is required to file 12 returns (including Forms 1099–R, *Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.;* Form 8955–SSA; Form 5500, *Annual Return/Report of Employee Benefit Plan;* and Form 945, *Annual Return of Withheld Federal Income Tax*). Plan B's plan year is the calendar year. Because P is required to file at least 10 returns during the 2024 calendar year, P must file the 2024 Form 8955–SSA for Plan B electronically.

(2) [Reserved]

(f) *Applicability date.* The rules of this section apply to registration statements and other notifications required to be filed under section 6057 for plan years that begin on or after January 1, 2024.

■ **Par. 32.** Section 301.6058–2 is amended by:

■ a. Revising the section heading.

■ b. Revising paragraphs (a), (b), and (d)(1).

■ c. Revising the heading of paragraph (d)(3).

■ d. Revising paragraphs (d)(3)(i) and (iii), (e), and (f).

The revisions read as follows:

§ 301.6058–2 Required use of electronic form for filing requirements relating to information required in connection with certain plans of deferred compensation.

(a) *Electronic-filing requirements under section 6058.* A return required under section 6058 with respect to an employee benefit plan must be filed electronically if the filer is required by the Internal Revenue Code or regulations to file at least 10 returns during the calendar year that includes the first day of the plan year. The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Returns filed electronically must be made in accordance with the applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Undue hardship.* The Commissioner may waive the requirements of this section in cases of undue economic hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the return electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, a return required under section 6058) and the period to which it applies.

* * * * *

(d) * * *

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

* * * * *

(3) *Calculating the number of returns*—(i) *In general.* For purposes of this section, a filer is required to file at least 10 returns if, during the calendar year that includes the first day of the plan year, the filer is required to file at least 10 returns of any type, including information returns (for example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns. See section 6011(e)(6), Application of numerical limitation to returns relating to deferred compensation plans.

* * * * *

(iii) *Special rules relating to calculating the number of returns.* For purposes of applying paragraph (d)(3)(ii) of this section, the aggregation rules of section 414(b), (c), (m), and (o) will apply to a filer that is or includes an employer. Thus, for example, a filer that is a member of a controlled group of corporations within the meaning of section 414(b) must file the Form 5500 series electronically if the aggregate number of returns required to be filed by all members of the controlled group of corporations is at least 10 returns.

(e) *Example.* The following example illustrates the provisions of paragraph (d)(3) of this section:

(1) In 2024, Employer X (the plan sponsor and plan administrator of Plan A) is required to file 12 returns. The sole shareholder of X and his spouse are the only participants in Plan A. Employer X is required to file the following: one Form 1120, *U.S. Corporation Income Tax Return;* two Forms W–2, *Wage and Tax Statement;* one Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return;* four Forms 941, *Employer's Quarterly Federal Tax Return;* one Form 945, *Annual Return of Withheld Federal Income Tax;* and two Forms 1099–DIV, *Dividends and Distributions.* Employer X is required to file one Form 5500–EZ. Plan A's plan year is the calendar year. Because Employer X is required to file at least 10 returns during the 2024 calendar year, the 2024 Form 5500–EZ must be filed electronically.

(2) [Reserved]

(f) *Applicability date.* This section is applicable for returns required to be filed under section 6058 for plan years that begin on or after January 1, 2024.

■ **Par. 33.** Section 301.6059–2 is amended by:

■ a. Revising the section heading.

■ b. Revising paragraphs (a), (b), and (d)(1).

■ c. Revising the heading for paragraph (d)(3) and revising paragraph (d)(3)(i).

■ d. Removing paragraph (e) and redesignating paragraph (f) as paragraph (e).

■ e. Revising newly redesignated paragraph (e).

The revisions read as follows:

§ 301.6059–2 Required use of electronic form for filing requirements relating to periodic report of actuary.

(a) *Electronic-filing requirements under section 6059.* An actuarial report required under section 6059 with respect to an employee benefit plan must be filed electronically if the filer is required by the Internal Revenue Code or regulations to file at least 10 returns during the calendar year that includes the first day of the plan year. The Commissioner may direct the type of electronic filing and may also exempt certain returns from the electronic requirements of this section through revenue procedures, publications, forms, instructions, or other guidance, including postings on the *IRS.gov* website. Actuarial reports filed electronically must be made in accordance with the applicable revenue procedures, publications, forms, instructions, or other guidance.

(b) *Undue hardship.* The Commissioner may waive the requirements of this section in cases of undue economic hardship. One principal factor in determining hardship will be the amount, if any, by which the cost of filing the reports electronically in accordance with this section exceeds the cost of filing the return on paper. A request for a waiver must be made in accordance with applicable IRS revenue procedures, publications, forms, instructions, or other guidance, including postings to the *IRS.gov* website. The waiver request will specify the type of filing (that is, an actuarial report required under 6059) and the period to which it applies.

* * * * *

(d) * * *

(1) *Magnetic media or electronic form.* The terms *magnetic media or electronic form* mean any media or form permitted under applicable regulations, revenue procedures, or publications. These generally include electronic filing, as well as magnetic tape, tape cartridge, diskette, and other media specifically permitted under the applicable regulations, procedures, publications, forms, instructions, or other guidance.

* * * * *

(3) *Calculating the number of returns*—(i) *In general.* For purposes of this section, a filer is required to file at least 10 returns if, during the calendar year that includes the first day of the plan year, the filer is required to file at least 10 returns of any type, including information returns (or example, Forms W–2 and Forms 1099), income tax returns, employment tax returns, and excise tax returns.

* * * * *

(e) *Applicability date.* This section is applicable for actuarial reports required to be filed under section 6059 for plan years that begin on or after January 1, 2024.

■ **Par. 34.** Section 301.6721–1 is amended by:

■ a. Revising paragraphs (a)(2)(ii) and (b)(5) introductory text.

■ b. Redesignating *Examples 1* through *4 in paragraph (d)(5)* as paragraphs (b)(5)(i) through (iv).

■ c. Revising newly designated paragraphs (b)(5)(iii) and (iv).

■ d. Adding paragraphs (b)(5)(v) and (vi) and (h).

The revisions and additions read as follows:

§ 301.6721–1 Failure to file correct information returns.

(a) * * *

(2) * * *

(ii) A failure to include all the information required to be shown on the return or including incorrect information (failure to include correct information). A failure to file timely includes a failure to file in the required manner, for example, electronically or in other machine-readable form as provided under section 6011(e). However, no penalty is imposed under paragraph (a)(1) of this section solely by reason of any failure to comply with the requirements of section 6011(e)(2), except to the extent that the failure occurs with respect to more than 10 returns, or with respect to a return described in section 6011(e)(4). If a partnership return under section 6031(a) is required to be filed electronically, each schedule required to be included with such return with respect to each partner will be treated as a separate information return for purposes of this section. See section 6724(e). Filers who are required to file information returns electronically and who file those information returns electronically are considered to have satisfied the electronic-filing requirement. Except as provided in paragraph (c)(1) or (e)(1) of this section, a failure to include correct information encompasses a failure to include the information required by applicable information-reporting statutes or by any administrative pronouncements (such as regulations, revenue rulings, revenue procedures, or information-reporting forms, and form instructions). A failure to include information in the correct format may be either a failure to file timely an information return or a failure to include correct information on an information return. For example, an error on an electronic submission to the Internal Revenue Service that prevents processing by the Internal Revenue Service may constitute a failure to file timely. However, if information is set forth on the wrong field of the electronic submission, that error may constitute a failure to file timely or a failure to include correct information, depending upon the extent of the failure. For purposes of paragraph (b) of this section, a failure to file corrected information returns in the format required under § 301.6011–2(c)(4)(ii) is a failure to correct the corresponding original information returns.

(b) * * *

(5) *Examples.* The provisions of paragraphs (a) and (b)(1) through (4) of this section may be illustrated by the following examples. These examples do not take into account any possible application of the *de minimis* exception under paragraph (d) of this section, the lower small-business limitations under paragraph (e) of this section, the penalty for intentional disregard under

paragraph (f) of this section, adjustments for inflation under section 6721(f), or the reasonable-cause waiver under § 301.6724–1(a):

* * * * *

(iii) *Example 3.* In calendar year 2024, Corporation U timely files on paper 12 Forms 1099–MISC for the 2023 calendar year with correct information. Under § 301.6011–2, a person required to file at least 10 returns during calendar year 2024 must file those returns electronically. Corporation U does not correct its failures to file these returns electronically by August 1, 2024. See section 6721(b)(2). Corporation U is therefore subject to a penalty for a failure to file timely under paragraph (a)(2) of this section. However, under section 6724(c) and paragraph (a)(2) of this section, the penalty for a failure to file timely electronically applies only to the extent the number of returns exceeds 10. As Corporation U was required to file 12 returns electronically, it is subject to a penalty of $500 for two returns ($250 × 2 = $500).

(iv) *Example 4.* In calendar year 2024, Corporation W timely electronically files 25 Forms 1099–B (relating to proceeds from broker and barter exchange transactions) with incorrect information. On August 1, 2024, Corporation W discovers the errors and files 25 corrected Forms 1099–B on paper. Under § 301.6011–2(c)(4)(ii)(A), a person required to file an original information return covered by § 301.6011–2(b) electronically must file any corrected information return corresponding to that original return electronically. Under paragraph (a)(2)(ii) of this section, a failure to file a corrected information return electronically when required to do so is a failure to correct the corresponding original information return. As Corporation W was required to file its 25 corrected information returns electronically, it has failed to correct the original information returns and is subject to a penalty of $6,250 for failure to include correct information on its 25 original Forms 1099–B ($250 × 25 = $6,250), without any reductions for correcting the information on or before August 1.

(v) *Example 5.* During the 2024 calendar year, Corporation V files 25 Forms 1099–B (relating to proceeds from broker and barter exchange transactions) on paper. The forms were filed on March 15, 2024, rather than on the required filing date of February 28, 2024. Under § 301.6011–2, a person required to file at least 10 returns during calendar years 2024 and after must file those returns electronically. Corporation V does not correctly file these returns electronically by August 1, 2024. See section 6721(b)(2). Corporation V is subject to a penalty of $500 for filing 10 of the returns late, but within 30 days after the required filing date ($50 × 10). In addition, Corporation V is subject to a penalty of $3,750 for failing to file 15 returns electronically ($250 × 15).

(vi) *Example 6.* Partnership X has 120 partners in calendar year 2023. In calendar year 2024, it timely filed on paper its 2023 Form 1065 and 230 accompanying Schedules K–1 and Schedules K–3 (120 Schedules K–1 and 110 Schedules K–3). Partnership X filed no other returns during calendar year 2024. Under § 301.6011–3(a)(1)(ii), a partnership with more than 100 partners must electronically file its partnership return, including Schedules K–1 and K–3. Under section 6724(e), Schedules K–1 and K–3 are treated as separate information returns for purposes of penalties under section 6721, even though they are not listed under § 301.6011–2(b) as information returns required to be filed electronically and are not defined as information returns under section 6724(d). Under section 6724(c) and paragraph (a)(2) of this section, the penalty for a failure to file timely electronically applies only to the extent the number of returns exceeds 10. Partnership X would be subject to a penalty of $55,000 for failing to electronically file 220 Schedules K–1 and K–3 required to be included with the partnership return: the 11th through the 230th of the required schedules ($250 × 220 = $55,000). See section 6698 for the penalty for the failure to file the partnership return.

* * * * *

(h) *Applicability date.* The rules of paragraph (a)(2)(ii) of this section apply to information returns required to be filed during calendar years beginning after December 31, 2023. For the rules that apply under paragraph (a)(2)(ii) of this section to information returns required to be filed during calendar years beginning before January 1, 2024, see 26 CFR part 301, revised as of April 1, 2022.

Melanie R. Krause,

Acting Deputy Commissioner for Services and Enforcement.

Approved: August 7, 2022.

Lily Batchelder,

Assistant Secretary of the Treasury (Tax Policy).

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