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DEPARTMENT OF DEFENSE

Office of the Secretary

5 CFR Part 3601

[Docket ID: DoD–2021–OS–0032]

RIN 0790–AL21

Supplemental Standards of Ethical Conduct for Employees of the Department of Defense

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The DoD, with the concurrence of the U.S. Office of Government Ethics (OGE), is finalizing amendments to its Supplemental Standards of Ethical Conduct for Employees of the Department of Defense (DoD Supplemental Regulation). The amendments revise and update the DoD Supplemental Regulation originally written in 1993, to supplement the OGE Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards). Amendments include changes in the following areas: designation of separate agency components for the purposes of gifts and teaching, speaking, and writing; additional exceptions for gifts from outside sources; additional limitations on gifts between DoD employees; and authority to waive any of the provisions of the DoD Supplemental Regulation.

DATES: This rule is effective on March 30, 2023.

FOR FURTHER INFORMATION CONTACT: Karen Dalheim, Standards of Conduct Office, Office of the Secretary of Defense, Office of the General Counsel; telephone: 703–695–3422.

SUPPLEMENTARY INFORMATION:

I. Background

Executive Order 12674, as amended by Executive Order 12731, authorized OGE to establish a single, comprehensive, and clear set of Executive Branch standards of conduct. On August 7, 1992, OGE published the Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards), as codified at 5 CFR part 2635. (*See* 57 FR 35006, as corrected at 57 FR 48557 and 57 FR 52583.) The OGE Standards, effective February 3, 1993, established uniform ethical conduct rules applicable to all officers and employees.

With the concurrence of OGE, 5 CFR 2635.105 authorizes executive branch agencies to publish agency-specific supplemental regulations necessary and appropriate to implement their respective ethics programs. Pursuant to this authority, DoD, with OGE's concurrence and co-signature, published on September 10, 1993, a final rule to establish its supplemental standards of ethical conduct for DoD personnel (58 FR 47619, 58 FR 47622). DoD, with OGE's concurrence and joint issuance, amends the DoD Supplemental Regulation. An update to the DoD Supplemental Regulation is necessary to effectively administer DoD's ethics program and address changes to DoD's programs and operations which have ensued in the 29 years since the publication of the Supplemental Regulation in 1993 for the reasons explained below.

II. Explanation of Changes With This Rule

The provision at 5 CFR 3601.102 currently designates components as separate agencies for the purposes of accepting gifts from non-Federal sources, and for outside teaching, speaking, and writing activities, two components have been added to the list, the National Reconnaissance Office (NRO), and DoD (Office of the Secretary of Defense (OSD) remainder agency). Although the concept of the OSD remainder agency is not novel, listing the OSD remainder agency and explaining that officers and employees of other DoD components not designated as separate agencies will be treated as officers and employees of the OSD remainder agency will clarify the application of the gift and teaching, speaking, and writing rules for these components.

The other amended sections relate to additional gift exceptions from outside sources and additional limitations on gifts between DoD employees. Finally, the addition of examples in the DoD Supplemental Regulation serves to illustrate the application of the rules.

DoD removes two sections from the 1993 DoD Supplemental Regulation, 5 CFR 3601.105, ''Standards for accomplishing disqualifications''; and 5 CFR 3601.106, ''Limitation on solicited sales.'' Regarding the ''[s]tandards for accomplishing disqualification,'' DoD believes that following the OGE government-wide standard at 5 CFR part 2635, subpart D and §§ 2635.502, 2635.604, and 2635.606, which require oral notification of disqualification, sufficiently protect DoD interests without concurrently creating an administrative burden. Irrespective of whether a written disqualification is required, employees remain obligated to disqualify themselves from participating in matters affecting their financial interests, pursuant to 18 U.S.C. 208 and OGE's implementing regulations at 5 CFR part 2635, subpart D. The elimination of the written disqualification requirement does not preclude employees from choosing to provide a written disqualification to a supervisor. The written disqualification will remain a best practice in internal guidance.

Regarding the ''[l]imitation on solicited sales,'' this section is not a supplementation of the OGE Standards, 5 CFR part 2635, and is, therefore, being removed consistent with the guidance in OGE Legal Advisory, LA–11–07 (2011), *https://www2.oge.gov/web/oge.nsf/Resources/LA-11-07:+The+OGE+Supplemental+Agency+Regulation+Process*. The subject matter of this section falls outside of OGE's authority and, therefore, cannot be included in the DoD Supplemental Regulation. The requirement, however, remains in effect in internal DoD issuances.

Updates to 5 CFR 3601.106 (formerly § 3601.107) take into consideration advances in technology related to financial disclosure reporting and remove the requirement that the prior approval be written. The original DoD Supplemental Regulation, requiring written prior approval of business activities or compensated outside employment with a prohibited source, was deemed necessary in an era when paper documentation was the norm.

Beginning in 2016, DoD mandated the electronic filing of all financial disclosure reports, with a built-in

mandatory supervisory review function. Financial disclosure forms are filed annually and supervisors are required, as a part of their review, to determine if an employee's business activity or outside employment conflicts with the employee's official duties. Prior to certifying a filer's report, the supervisor will be required by departmental guidance to annotate their approval of the filer's business activity or outside employment on the report.

This electronic filing system is easily accessible and follows employees in DoD's mobile workforce. Using the electronic filing system ensures supervisors will have access to an employee's prior financial disclosure reports and consequently, information on their business activity and outside employment.

Finally, DoD adds one new section entitled ''[w]aiver'' that allows the DoD General Counsel to waive any provision of the DoD Supplemental Regulation upon finding that doing so would not be inconsistent with 5 CFR part 2635 and is not otherwise prohibited by law. This provision also allows the DoD General Counsel to withdraw a waiver when it is no longer necessary.

The amendments also incorporate a number of changes that are technical in nature, (*e.g.,* updating agency names and addressing typographical errors that do not affect the substance of the DoD Supplemental Regulation).

III. Section by Section Discussion

The following is a section-by-section overview of the amendments in this rulemaking.

Section 3601.102—Designation of DoD components as separate agencies for purposes of gifts, and teaching, speaking, and writing. Section 3601.102 is amended to update the list of components, designated as separate agencies for the purpose of accepting gifts from non-Federal sources and outside teaching, speaking, and writing activities. DoD previously designated 16 DoD components as separate agencies and the remainder of the DoD components as a separate single agency, the OSD remainder agency. The amendment designates two additional separate agencies, the NRO, consistent with NRO's designation as a separate component in appendix B to 5 CFR part 2641 and DoD OSD. For these purposes, use of the term ''agency'' does not carry the responsibilities of a ''defense agency'' as set forth in 10 U.S.C. 191–197 (2019). The amendment also updates the name of the Defense Security Service, which was renamed the Defense Counterintelligence and Security Agency in 2019. To further illustrate the components concept, examples were added. DoD also included clarifying discussion about the OSD remainder agency for post-government employment restrictions.

Section 3601.103—Additional exceptions for gifts from outside sources. Section 3601.103 clarifies and amends the current DoD Supplemental Regulation that provides an additional exception to the gift prohibition in 5 CFR 2635.202(a). Specifically, § 3601.103(a) highlights that officers and employees may accept an unsolicited gift of free attendance at certain events sponsored by a State or local government or by certain civic organizations when their personal attendance has been determined to serve a community relations interest of their agency. The § 3601.103(a) exception amendment is intended to clarify and emphasize the continuing community relations interest DoD has in the communities where DoD activities operate. The addition of examples further illustrates these concepts. The amendment also requires that the community relations interest outweigh any concern that acceptance would cause a reasonable person with knowledge of the relevant facts to question the employee's integrity or impartiality. This new step in the gift acceptance analysis models OGE's framework for considering otherwise permissible gifts in 5 CFR 2635.201(b). Finally, the § 3601.103(a) exception amendment permits attendance by an employee's guest, not just his or her spouse. This change creates consistency between DoD's Supplemental Regulation and OGE's 2016 revision of 5 CFR part 2635, subpart B, which uses the phrase ''spouse or other guest'' in the context of gifts. Section 3601.103(b) reassigns approval authority for acceptance of educational scholarships or grants from the Secretary of Defense, or Secretary of the Military Department concerned, to the Designated Agency Ethics Official (DAEO) or the DAEO's designee. Experience indicates that the DAEO, as opposed to the Secretary of Defense or the Secretary of a Military Department, is in a better position to evaluate and review the acceptance of educational scholarships or gifts by employees or dependents of employees. The amendment also more closely tracks the standard for an ''established program of recognition'' in 5 CFR 2635.204(d)(2) and requires the DAEO or the DAEO's designee to make the determination in writing. The updates are consistent with the process for reviewing awards accepted using 5 CFR 2635.204(d), which requires an agency ethics official to review the acceptance of certain gifts. Establishing the approval authority at the DAEO or designee level fully protects DoD interests and ensures that the reviews are done in a timely manner.

Section 3601.104—Additional limitations on gifts between employees. Section 3601.104(a) modifies the current $300 limit on gifts from a group that includes an employee's subordinate. This limit has not been increased since the implementation of the DoD Supplemental Regulation in September 1993. The new rulemaking uses the ''minimal value'' threshold established in the Foreign Gifts and Decorations Act, 5 U.S.C. 7342(a)(5) (2019), which is adjusted every three years by the General Services Administration.

Section 3601.105—Disclaimer for teaching, speaking, and writing in a personal capacity related to official duties. Section 3601.105 is renumbered from the existing regulation because of the deletion of § 3601.105 (Standards of accomplishing disqualification), § 3601.106 (Limitation on solicited sales), and § 3601.107 (Prior approval for outside employment and business activities). Additionally, § 3601.105 makes minor non-substantive changes and includes examples to further illustrate application of the regulation.

Section 3601.106—Prior approval for outside employment and business activities. Section 3601.106 is renumbered from the existing regulation because of the deletion of previous chapters as described above. Section 3601.106 removes the requirement for written prior approval that certain employees must receive to engage in outside employment or business activities. The requirement for prior approval is retained and will be documented annually in the applicable electronic financial disclosure filing system. Additionally, two non-substantive changes were made to correctly identify OGE documents.

Section 3601.107—Waiver. Section 3601.107 authorizes the DoD General Counsel (DoD Designated Agency Ethics Official) to waive any provision of this part, provided that a waiver is not inconsistent with 5 CFR part 2635 or otherwise prohibited by law, and issuance of the waiver will not undermine public confidence. This section also contains guidance pertaining to the contents of the waiver. The DoD General Counsel may withdraw the waiver if he or she determines that it is no longer necessary.

IV. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(a)(2), DoD was not required to provide a general notice of proposed rulemaking, opportunity for advance comment, and a 30-day delay in effectiveness because the proposed rule was a matter relating to Federal personnel. This rulemaking contains statements of policy, interpretive rules, and conduct regulations related to DoD personnel. However, because this rulemaking may be improved, it was published in the **Federal Register** on June 10, 2022 (87 FR 35460–35465). DoD received one set of timely and responsive comments, which were submitted by an individual.

The first comment suggested mandatory involvement from public affairs to assist in determining whether the community relations interest of the agency will be served by DoD employee attendance. DOD believes, the agency designee has sufficient knowledge to make the determination that attendance by agency personnel at a community event sponsored by a State or local government, or by a civic organization exempt from taxation under 26 U.S.C. 501(c)(4) will serve an agency interest. While a designees are encouraged to consult with their public affairs officer, DoD believes making consultation mandatory is not necessary.

The second comment suggested the $300 limit on gifts from groups of subordinates to superiors on special infrequent occasions be amended and capped at $415, rather than linked to the Foreign Gifts and Decorations Act. In consultation with the OGE, DoD determined that modifying the current $300 limit on gifts from a group that includes an employee's subordinate is not likely to lead to inappropriate gifts to superiors. Increasing the limit, which was established in 1993 and has not been updated since, appropriately accounts for inflation that has occurred over the last 29 years. Setting a limit that is consistent with the ''minimal value'' threshold established in the Foreign Gifts and Decorations Act tracks language in the Ethics in Government Act (5 U.S.C. app. 102(a)(2)(A) and (B)). This language ties the gift reporting threshold for purposes of financial disclosure reporting to that in the Foreign Gifts and Decorations Act.

The third comment suggested the requirement for prior written approval of outside employment and business activity remain in the rule. As stated in proposed rule 5 CFR 3601.106(a), ''[n]othing in this regulation precludes a supervisor from providing the employee with written approval.'' Furthermore, the requirement for prior approval is retained and documented annually in the applicable electronic financial disclosure, which is reviewed by the supervisor and follows employees in DoD's mobile workforce.

After carefully considering the set of comments DoD is publishing this final rule with no changes

Congressional Review

This rulemaking relates to agency personnel and does not substantially affect the rights or obligations of non-agency parties. Therefore, it does not meet the definition of a ''rule'' at 5 U.S.C 804 and is not subject to the procedures of the Congressional Review Act.

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

These Executive orders direct agencies to assess all costs, benefits, and available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, safety effects, distributive impacts, and equity). These Executive orders emphasize the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' as supplemented by Executive Order 13563, ''Improving Regulation and Regulatory Review.'' Accordingly, the Office of Management and Budget has not reviewed this rulemaking.

Executive Order 12988, ''Civil Justice Reform''

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform.''

Paperwork Reduction Act

The amended regulations contain no additional information-collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

Regulatory Flexibility Act (RFA)

As required by the RFA, DoD certifies this regulation will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 5 CFR Part 3601

Conflict of interests, Executive branch standards of conduct, Government employees.

■ For the reasons discussed in the preamble, DoD revises 5 CFR part 3601 to read as follows:

PART 3601—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF DEFENSE

Sec.

Authority: 5 U.S.C. 301, 7301, 7351, 7353; 5 U.S.C. Chapter 131; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.203(a), 2635.204(k), 2635.803, 2635.807.

§ 3601.101 Purpose.

In accordance with 5 CFR 2635.105, the regulations in this part apply to employees of the Department of Defense (DoD) and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635. DoD employees are required to comply with part 2635, this part, and implementing guidance and procedures.

§ 3601.102 Designation of DoD components as separate agencies for purposes of gifts from outside sources, and teaching, speaking, and writing.

(a) Pursuant to 5 CFR 2635.203(a), each of the following DoD components is designated as a separate agency for purposes of the regulations in subpart B of 5 CFR part 2635 governing gifts from outside sources and 5 CFR 2635.807 governing teaching, speaking, and writing:

(1) Armed Services Board of Contract Appeals;

(2) Department of the Army;

(3) Department of the Navy;

(4) Department of the Air Force;

(5) Defense Commissary Agency;

(6) Defense Contract Audit Agency;

(7) Defense Finance and Accounting Service;

(8) Defense Information Systems Agency;

(9) Defense Intelligence Agency;
(10) Defense Logistics Agency;
(11) Defense Counterintelligence and Security Agency;
(12) Defense Threat Reduction Agency;
(13) National Geospatial-Intelligence Agency;
(14) National Security Agency;
(15) Office of Inspector General;
(16) Uniformed Services University of the Health Sciences;
(17) National Reconnaissance Office; and
(18) Office of the Secretary of Defense remainder agency.

Example 1 to paragraph (a). For paragraph (a)(1) of this section [Teaching, Speaking, or Writing]: An Armed Services Board of Contract Appeals (ASBCA) employee is asked to give a compensated speech on prisoners of war, a topic on which he has a personal interest. While the Department of Defense has ongoing policies, programs, or operations related to this topic, the ASBCA does not. The employee may give the speech in a personal capacity and receive compensation because the ASBCA is a designated separate agency, the speech is not related to an ongoing program or operation of the ASBCA, and the speech is not otherwise related to the employee's official duties.

Example 2 to paragraph (a). For paragraphs (a)(2) and (18) of this section [Separate component—gift]: An employee of the Department of the Army (Army) and an employee of the Office of the Joint Chiefs of Staff (JCS) are each offered a ticket to a football game by a company that contracts with OSD. As long as the contractor is not a prohibited source for the Army and the gift is not offered because of the employee's official position, the Army employee may accept the ticket because the Army is designated as a separate agency under paragraph (a)(2). The JCS employee may not accept the ticket because JCS is not designated as a separate agency and, therefore, is part of the ''OSD remainder agency.'' The OSD contractor is therefore a prohibited source for the JCS employee or for any employee of any of the other organizations that are part of the OSD remainder agency.

Example 3 to paragraph (a). For paragraph (a)(11) of this section [Agency designation]: An employee of the Department of the Air Force is offered a gift by a company that only does business with the Defense Counterintelligence and Security Agency, which is designated as a separate agency. The company would be a prohibited source of gifts for employees of the Defense Counterintelligence and Security Agency but not for employees of the Department of the Air Force or for any other component which has been designated as a separate agency.

(b) Employees of DoD components not designated as separate agencies, including employees of the Office of the Secretary of Defense, will be treated as employees of the ''Office of the Secretary of Defense (OSD) remainder agency.'' The OSD remainder agency shall itself be treated as a separate DoD agency for purposes of determining whether the donor of a gift is a prohibited source under 5 CFR 2635.203(d) and for identifying the employee's agency under 5 CFR 2635.807 governing teaching, speaking, and writing.

(1) The use of the term ''agency'' in this part does not carry with it the designation and responsibilities of a ''defense agency'' as set forth in 10 U.S.C. 191–197 (2019).

(2) For purposes of this part, ''prohibited source'' is defined at 5 CFR 2635.203(d), except that ''agency'' shall mean the employee's component.

Note 1 to paragraph (b). All DoD organizations not individually listed in paragraph (a) of this section are part of the OSD remainder agency.

Note 2 to paragraph (b): Prohibited sources for each component for purposes of gifts and teaching, speaking, and writing are exclusive to that component and are not imputed to OSD.

Note 3 to paragraph (b). An employee who is detailed to another component will use the prohibited source list of the component to which they are detailed for purposes of gifts, teaching, speaking, and writing.

(c) The designations in this section shall only apply for purposes of gifts under 5 CFR 2635.203(a) and teaching, speaking, and writing under 5 CFR 2635.807, and are distinct from the designations approved by the Office of Government Ethics for purposes of the post-Government employment restrictions in 18 U.S.C. 207(c). *See* 5 CFR 2641.302 and appendix B to part 2641.

§ 3601.103 Additional exceptions for gifts from outside sources.

In addition to the gift exceptions in 5 CFR 2635.204, which authorize acceptance of certain gifts from outside sources, and subject to all provisions of 5 CFR part 2635, subpart B, an employee may accept unsolicited gifts from outside sources otherwise prohibited by 5 CFR 2635.202 as detailed in this section. For purposes of this section, the term ''agency'' is defined in § 3601.102, and the term ''free attendance'' is defined in 5 CFR 2635.203(g).

(a) *Community relations events.* (1) An employee may accept an unsolicited gift of free attendance for himself or herself and a guest at a community relations event sponsored by a State or local government, or by a civic organization exempt from taxation under 26 U.S.C. 501(c)(4), when:

(i) The cost of free attendance is provided by the sponsor of the event; and

(ii) The employee's agency designee determines that the community relations interests of the agency will be served by the employee's attendance in his or her personal capacity, and the employee's attendance outweighs any concern that acceptance would cause a reasonable person with knowledge of the relevant facts to question the employee's integrity or impartiality.

(2) Refer to 5 CFR 2635.204(g)(5) in determining whether the cost of attendance may be considered to be provided by the sponsor of the event.

Example 1 to paragraph (a) [Community relations interest]: The City of Jacksonville, Florida, hosts a Military Appreciation Day event. Members of the general public are charged an admission fee to attend. Department of the Navy employees who have recently returned from deployment are invited and offered free admission for themselves and a guest. These Navy employees may personally accept the gift of free attendance for themselves and a guest, if their agency designee determines that their attendance at the event will serve a community relations interest and that employees' attendance outweighs concerns that acceptance would call into question their integrity or impartiality.

Example 2 to paragraph (a) [No community relations interest]: A foundation that provides grants to non-profit organizations focusing on environmental initiatives is sponsoring a fundraising golf tournament. The foundation is offering to waive the entry fee for military personnel at the local installation. Military personnel may not accept the offer by the sponsor to waive the entry fee under paragraph (a) of this section, because participation in this event does not further local community relations interests for the DoD installation. While the community relations exception may not be used to accept the gift, nothing in this section precludes an employee from accepting the gift if another gift exclusion, exception, or authority would apply.

(b) *Scholarships and grants.* An employee and his or her dependents

may accept an educational scholarship or grant from an entity that does not have interests that may be substantially affected by the performance or non-performance of the employee's official duties, or from an association or similar entity that does not have a majority of members with such interests, if the Designated Agency Ethics Official (DAEO) or the DAEO's designee makes a written determination that the scholarship or grant is made pursuant to an established program of recognition, including those established for the benefit of employees, or the dependents of employees. A scholarship or grant is made pursuant to an established program of recognition if:

(1) Scholarships or grants have been made on a regular basis or, if the program is new, there is a reasonable basis for concluding that scholarships or grants will be made on a regular basis based on funding or funding commitments; and

(2) Selection of recipients is made pursuant to written standards.

§ 3601.104 Additional limitations on gifts between employees.

The following limitations apply to gifts from groups of employees that include a subordinate and to voluntary contributions to gifts for superiors permitted under 5 CFR 2635.304(c)(1):

(a) *Gifts from a group that includes a subordinate.* Regardless of the number of employees contributing to a gift on a special, infrequent occasion as permitted by 5 CFR 2635.304(c)(1), an employee may not accept a gift or gifts, including indirectly within the meaning of 5 CFR 2635.203(f), from a donating group if the aggregate market value exceeds the minimal value, as established by 5 U.S.C. 7342(a)(5), and if the employee knows or has reason to know that any member of the donating group is a subordinate.

(1) The cost of items excluded from the definition of a gift by 5 CFR 2635.203(b) and the cost of food, refreshments, and entertainment provided to mark the occasion for which the gift is given shall not be included in determining whether the value of a gift or gifts exceeds the aggregate minimal value limit.

(2) The value of a gift or gifts from two or more donating groups will be aggregated and will be considered to be from a single donating group if the employee who is offered the gift knows or has reason to know that an individual who is his or her subordinate is a member of more than one of the donating groups.

(b) *Voluntary contribution.* For purposes of 5 CFR 2635.304(c)(1), the nominal amount of a voluntary contribution that an employee may solicit from another employee for a group gift to the contributory employee's superior for any special, infrequent occasion will not exceed $10. A voluntary contribution of a nominal amount for food, refreshments, and entertainment at an event to mark the occasion for which a group gift is given may be solicited as a separate, voluntary contribution not subject to the $10 limit.

§ 3601.105 Disclaimer for teaching, speaking, and writing in a personal capacity related to official duties.

An employee who uses or permits the use of his or her military rank or who includes or permits the inclusion of his or her title or position as one of several biographical details given to identify himself or herself in connection with teaching, speaking, or writing, in accordance with 5 CFR 2635.807(b), must make a disclaimer if the subject of the teaching, speaking, or writing deals in significant part with any ongoing or announced policy, program, or operation of the employee's agency, as defined in § 3601.102, and the employee has not been authorized by appropriate agency authority to present that material as the agency's position. The disclaimer must be made as follows:

(a) The required disclaimer must expressly state that the views presented are those of the speaker or author and do not necessarily represent the views of DoD or its components.

(b) When a disclaimer is required for an article, book, or other writing, the disclaimer will be printed in a reasonably prominent position in the writing itself.

(c) When a disclaimer is required for a speech or other oral presentation, the disclaimer may be given orally provided it is given at the beginning of the oral presentation.

Example 1 to § 3601.105 [Disclaimer Required]: An employee is asked to provide unpaid personal remarks at a local university on a DoD matter she handled in the past year. As part of her introduction, the university facilitator identifies the employee by her official title. Since the subject matter of her speech is related to her official duties, and her official title is used, she must provide a reasonably prominent disclaimer at the beginning of her remarks.

Example 2 to § 3601.105 [Disclaimer Not Required]: An employee is invited in his personal capacity to speak at his alma mater on Career Day about his personal experiences as a Government employee, but will not discuss the ongoing or announced policy, program, or operation of his agency. The introduction to his talk only mentions that he is a graduate of the school and currently a ''DoD employee,'' but does not use his official title, rank, or position. No disclaimer would be necessary because the introduction to the employee's speech did not include his official title or position and the subject of the speech does not deal in significant part with any ongoing or announced policy, program or operation of the relevant DoD agency.

Note 1 to § 3601.105. Ethics review of whether a disclaimer is necessary or prudent is not a substitute for compliance with other DoD requirements such as obtaining a security review of the content of the teaching, speaking, or writing.

§ 3601.106 Prior approval for outside employment and business activities.

(a) A DoD employee, other than a special Government employee who is required to file a financial disclosure report (OGE Forms 450 or 278e), shall obtain approval from the agency designee before engaging in a business activity or compensated outside employment with a prohibited source, unless general approval has been given in accordance with paragraph (b) of this section. Approval shall be granted unless a determination is made that the business activity or compensated outside employment is expected to involve conduct prohibited by statute or regulation. Approval of the DoD employee's business activity or compensated outside employment with a prohibited source will be annotated on the employee's annual financial disclosure report. Nothing in this part precludes a supervisor from providing the employee with written approval. For purposes of this section, the following definitions apply:

(1) *Business activity.* Any business, contractual, or other financial relationship not involving the provision of personal services by the DoD employee. It does not include a routine commercial transaction or the purchase of an asset or interest, such as common stock, that is available to the general public.

(2) *Employment.* Any form of non-Federal employment or business relationship involving the provision of personal services by the DoD employee. It includes, but is not limited to, personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, or trustee.

(3) *Prohibited source. See* 5 CFR 2635.203(d) (modified by the separate DoD component agency designations in § 3601.102).

(b) The DoD component DAEO or designee may, by a written notice, exempt categories of business activities or employment from the requirement of paragraph (a) of this section based on a determination that business activities or employment within those categories would generally be approved and are not likely to involve conduct prohibited by statute or regulation.

§ 3601.107 Waiver.

(a) The DoD General Counsel may waive any provision of this part based upon a determination that the waiver is not inconsistent with 5 CFR part 2635 or otherwise prohibited by law, and that waiver of the provision will not undermine public confidence in the integrity of Government programs or operations. The waiver must be:

(1) In writing;

(2) Supported by a detailed statement of facts and findings; and

(3) Narrow in scope and limited in duration.

(b) The DoD General Counsel may withdraw the waiver, in writing, if it is determined to no longer be necessary.

(c) The authority for granting and withdrawing a waiver cannot be delegated below the DoD Alternate DAEO.

Caroline Krass,

General Counsel, U.S. Department of Defense.

Emory Rounds,

Director, U.S. Office of Government Ethics.

[FR Doc. 2023–03797 Filed 2–27–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1297; Project Identifier MCAI–2022–00570–T; Amendment 39–22336; AD 2023–03–11]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Dassault Aviation Model FALCON 7X airplanes. This AD was prompted by a report of smoke in the flightdeck and loss of the right-hand (RH) primary display unit (PDU) and the secondary flight display (SFD). This AD requires inspecting the two electrical power feeders for damage (deterioration), measuring the clearance between the two electrical power feeders and the forward lavatory bulkhead, and applicable corrective actions, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 4, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 4, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1297; 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, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2022–1297.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th Street, Des Moines, WA 98198; telephone 206–231–3226; email *tom.rodriguez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Dassault Aviation Model FALCON 7X airplanes. The NPRM published in the **Federal Register** on October 21, 2022 (87 FR 63978). The NPRM was prompted by AD 2022–0073, dated April 27, 2022, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2022–0073) (also referred to as the MCAI). The MCAI states that a report was received of smoke in the flightdeck and loss of the RH PDU and the SFD. The subsequent investigation determined that chafing and arcing of the electrical power feeders with the forward lavatory bulkhead led to smoke and loss of the RH PDU and the SFD power supply.

In the NPRM, the FAA proposed to require inspecting the two electrical power feeders for damage (deterioration), measuring the clearance between the two electrical power feeders and the forward lavatory bulkhead, and applicable corrective actions, as specified in EASA AD 2022–0073. The FAA is issuing this AD to address chafing and arcing of the electrical power feeders with the forward lavatory bulkhead, which could lead to loss of systems supporting flight automation and flight displays and reduced situational awareness, possibly resulting in a significant increase of flightcrew workload and injury to occupants.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1297.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from an anonymous commenter. The following presents the comment received on the NPRM and the FAA's response to the comment.

Request To Clarify Manufacturer Involvement

The anonymous commenter supported the NPRM without change. However, the commenter also wanted to know if manufacturers that make and design the aircraft are involved in the resolution of an unsafe condition on their product.

The FAA acknowledges that all manufacturers are always involved in the resolution of any unsafe condition associated with their product.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting this AD

as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

EASA AD 2022–0073 specifies procedures for inspecting the two electrical power feeders for damage (deterioration), measuring the clearance between the two electrical power feeders and the forward lavatory bulkhead, and applicable corrective actions. The corrective actions include repairing any electrical power feeder with deterioration and modifying the forward lavatory bulkhead. If a clearance of more than 1 millimeter (mm) but less than or equal to 13 mm is detected, the corrective action includes installing ROUNDIT200NX sheath on the affected electrical power feeder using white binding braid. If a clearance of more than 13 mm is detected, the corrective action includes looking for the presence of a blue cable grip around the electrical power feeders and installing it if it is missing. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 45 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × $85 per hour = $170	$0	$170	$7,650

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 33 work-hours × $85 per hour = $2,805	Up to $431	Up to $3,236.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all 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,

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–03–11 Dassault Aviation: Amendment 39–22336; Docket No. FAA–2022–1297; Project Identifier MCAI–2022–00570–T.

(a) Effective Date

This airworthiness directive (AD) is effective April 4, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 7X airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2022–0073, dated April 27, 2022 (EASA AD 2022–0073).

(d) Subject

Air Transport Association (ATA) of America Code: 24, Electrical power.

(e) Unsafe Condition

This AD was prompted by a report of smoke in the flightdeck and loss of the right-hand primary display unit (PDU) and the secondary flight display (SFD). The FAA is issuing this AD to address chafing and arcing of the electrical power feeders with the forward lavatory bulkhead, which could lead to loss of systems supporting flight automation and flight displays and reduced situational awareness, possibly resulting in a significant increase of flightcrew workload and injury to occupants.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2022–0073.

(h) Exceptions to EASA AD 2022–0073

(1) Where EASA AD 2022–0073 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2022–0073 does not apply to this AD.

(i) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(j) Additional Information

For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th Street, Des Moines, WA 98198; telephone 206–231–3226; email *tom.rodriguez@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2022–0073, dated April 27, 2022.

(ii) [Reserved]

(3) For EASA AD 2022–0073, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued on February 7, 2023.

Christina Underwood,

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

[FR Doc. 2023–04025 Filed 2–27–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1152; Project Identifier MCAI–2022–00260–T; Amendment 39–22323; AD 2023–02–16]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain BAE Systems (Operations) Limited Model Avro 146–RJ series airplanes. This AD was prompted by a report that certain inertial reference units (IRUs) have out-of-date magnetic variation (MagVar) tables. This AD requires assessing the values between the MagVar tables of the affected IRUs and the most recently published MagVar data tables, and corrective actions if necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 4, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 4, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1152; 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, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email *RApublications@baesystems.com;* website *regional-service.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2022–1152.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone: 206–231–3228; email *Todd.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain BAE Systems (Operations) Limited Model Avro 146–RJ airplanes. The NPRM published in the **Federal Register** on November 16, 2022 (87 FR 68644). The NPRM was prompted by AD G–2022–0005, dated February 24, 2022, issued by United Kingdom Civil Aviation Authority (U.K. CAA), which is the aviation authority for the United Kingdom (U.K. CAA AD G–2022–0005) (referred to after this as the MCAI). The MCAI states that the navigation system for Model Avro 146–RJ series airplanes has an inertial reference system (IRS) that uses true

north to calculate magnetic heading and track. The IRS includes IRUs with MagVar data tables that correct the heading/track for the effects of magnetic variation. Due to the change in the location of magnetic north over time, the level of IRS accuracy diminishes in certain geographical locations if an IRU's MagVar data table is not kept up to date with current WMM MagVar data tables. Consequently, certain airplanes may have IRUs with MagVar tables that are out of date and which can lead to inaccurate heading, course and bearing calculations. This condition, if not corrected, may result in an increased risk of controlled flight into terrain, or collision with another airplane, possibly resulting in damage to the airplane and injury to occupants.

In the NPRM, the FAA proposed to require assessing the values between the MagVar tables of the affected IRUs and the most recently published MagVar data tables, and corrective actions if necessary. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1152.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

BAE Systems has issued All Operator Message 21–011V–1, Issue 1, dated September 27, 2021. This service information describes, among other actions, procedures for assessing the accuracy of an affected IRU's MagVar data table when compared to the current World Magnetic Model (WMM) MagVar data tables, and corrective actions if the MagVar is greater than 2 degrees. The corrective actions include either updating an affected IRU's MagVar data tables, or operating an airplane only if the terrain awareness warning system (TAWS) and traffic collision avoidance system (TCAS) are installed and operative, and revising the operator's FAA-approved minimum equipment list (MEL) to prohibit dispatch unless both TAWS and TCAS are installed and operative. BAE Systems All Operator Message 21–011V–1, Issue 1, dated September 27, 2021, also specifies that updating the data tables would terminate the MEL prohibition provided the airplane has operative TAWS and TCAS.

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 the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 10 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

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

The FAA has received no definitive data on which to base the cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–02–16 BAE Systems (Operations) Limited: Amendment 39–22323; Docket No. FAA–2022–1152; Project Identifier MCAI–2022–00260–T.

(a) Effective Date

This airworthiness directive (AD) is effective April 4, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to BAE Systems (Operations) Limited Model Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes, certificated in any category, equipped with Honeywell inertial reference unit (IRU) part number (P/N) HG2001BC02 or P/N HG2001BC04.

(d) Subject

Air Transport Association (ATA) of America Code 34, Navigation.

(e) Unsafe Condition

This AD was prompted by a report that certain IRUs have out-of-date magnetic variation (MagVar) tables. The FAA is issuing this AD to address IRUs having outdated MagVar lookup tables, which could lead to inaccurate inertial reference system calculations, possibly resulting in increased risk of controlled flight into terrain, or collision with another airplane and injury to occupants.

(f) Compliance

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

(g) Definitions

For the purpose of this AD, the following definitions apply:

(1) *Affected IRU:* A Honeywell IRU having P/N HG2001BC02 using a MagVar lookup table from 1990, or P/N HG2001BC04 using a MagVar lookup table from 1995.

(2) *WMM:* World Magnetic Model, which is the standard model for navigation, altitude, and heading referencing systems using the geomagnetic field. The WMM is produced at 5-year intervals. The existing WMM as of November 16, 2022 was released December 10, 2019.

(h) Magnetic Variation Assessment

Within 3 months after the effective date of this AD, and thereafter at intervals not to exceed 5 years, assess the accuracy of an affected IRU's MagVar data table, in accordance with the Recommendations of BAE Systems All Operator Message 21–011V–1, Issue 1, dated September 27, 2021.

(1) If the difference between an affected IRU's MagVar data table and the existing WMM MagVar data tables is less than or equal to 2 degrees for the routes that the airplane may operate, no further action is required until the assessment is repeated, as required by the introductory text to paragraph (h) of this AD.

(2) If the difference between an affected IRU's MagVar data table and the existing WMM MagVar data tables is greater than 2 degrees for the routes that the airplane may operate: Do the actions required by paragraph (h)(2)(i) or (ii) of this AD.

(i) Within three months after the effective date of this AD or before further flight after the assessment in the introductory text to paragraph (h) of this AD, whichever occurs later: Update the airplane's affected IRU MagVar data tables in accordance with the Recommendations of BAE Systems All Operator Message 21–011V–1, Issue 1, dated September 27, 2021.

(ii) Comply with the provisions specified in, and at the times specified in, paragraphs (h)(2)(ii)(A) and (B) of this AD.

(A) Further flight is prohibited in areas where the difference between the installed and the existing MagVar values exceeds the 2 degree tolerance unless both terrain awareness warning system (TAWS) and traffic collision avoidance system (TCAS) are installed and operative.

(B) Before further flight, revise the operator's existing FAA-approved minimum equipment list (MEL) to prohibit dispatch unless both TAWS and TCAS are installed and operative.

(3) If an affected IRU's MagVar data table cannot be determined, follow the procedures specified in the Recommendations of BAE Systems All Operator Message 21–011V–1, Issue 1, dated September 27, 2021.

(4) This AD does not require operators to provide flightcrews with certain operating procedures as those actions are already required by existing FAA operating regulations (see 14 CFR part 91).

(i) Terminating Action for MEL Prohibition

Updating both affected IRUs, as specified in paragraph (h)(2)(i) of this AD, terminates the MEL prohibition specified in paragraph (h)(2)(ii)(B) of this AD, provided both TAWS and TCAS are installed and operative.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or the UK CAA; or BAE Systems (Operations) Limited's UK CAA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(k) Additional Information

(1) Refer to U.K. CAA AD G–2022–0005, dated February 24, 2022, for related information. This U.K. CAA AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2022–1152.

(2) For more information about this AD, contact Todd Thompson, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3228; email *Todd.Thompson@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) BAE Systems All Operator Message 21–011V–1, Issue 1, dated September 27, 2021.

(ii) [Reserved]

(3) For service information identified in this AD, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email *RApublications@baesystems.com;* website *regional-service.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(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 January 27, 2023.

Christina Underwood,

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

[FR Doc. 2023–04030 Filed 2–27–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0810; Project Identifier AD–2021–01238–T; Amendment 39–22329; AD 2023–03–04]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all The Boeing Company Model 777 airplanes. This AD was prompted by fuel system reviews conducted by the manufacturer.

This AD requires, depending on the airplane configuration, installation of Teflon sleeves, cap sealing of fasteners, detailed inspections, and corrective actions. This AD also requires revising the existing maintenance or inspection program, as applicable, to incorporate more restrictive airworthiness limitations (AWLs). The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 4, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 4, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–0810; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2022–0810.

FOR FURTHER INFORMATION CONTACT: Kevin Nguyen, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3555; email: *kevin.nguyen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all The Boeing Company Model 777 airplanes. The NPRM published in the **Federal Register** on July 26, 2022 (87 FR 44285). The NPRM was prompted by fuel system reviews conducted by the manufacturer. In the NPRM, the FAA proposed to require, depending on the airplane configuration, installation of Teflon sleeves, cap sealing of fasteners, detailed inspections, and corrective actions. The FAA also proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate more restrictive AWLs. The FAA is issuing this AD to address arcing inside the main and center fuel tanks in the event of a fault current or lightning strike, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from The Air Line Pilots Association, International (ALPA), who supported the NPRM without change.

The FAA received additional comments from seven commenters, including American Airlines (AAL), Boeing, Emirates, Royal Dutch Airlines (KLM), Air France Industries (AFA), FedEx, and United Airlines (UAL). The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Require a Later Revision of the Service Information

AFA, KLM, and UAL requested that Boeing Alert Service Bulletin 777–57A0050, Revision 7 (SB 777–57A0050, Revision 7), be mandated by the final rule instead of Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021 (SB 777–57A0050, Revision 6). AFA asserted that following release of SB 777–57A0050, Revision 6, they discussed with Boeing certain errors in SB 777–57A0050, Revision 6, that will be corrected in SB 777–57A0050, Revision 7.

KLM explained that the NPRM contains technical detail that should not be included in a high level regulation such as an AD, and that it could possibly lead to confusion and mistakes by airline staff. KLM stated that, for example, in paragraphs (h)(2), (3), and (4) of the proposed AD, it does not specify exactly which seven fasteners should be inspected and sealed. KLM noted that according to Figures 172, 173, 174, 175, 176, 179 and 180 of SB 777–57A0050, Revision 6, there are more than seven fasteners located on the inboard side of rib no. 9 and the proposed AD does not specify exactly which seven fasteners should be inspected/sealed. KLM requested that the FAA clarify which seven fasteners should be inspected/sealed exactly and recommend that the service information should first be revised by the original equipment manufacturer (OEM) and requested that the FAA allow the OEM to revise the service information before issuing the final rule.

UAL requested that the final AD mandate SB 777–57A0050, Revision 7, to ensure an additional work package is included for airplanes that accomplished SB 777–57A0050, Revision 6, without the exceptions specified in paragraph (h) of the proposed AD. UAL explained that paragraph (h) of the proposed AD provides exceptions to SB 777–57A0050, Revision 6, for known errors within the service bulletin. UAL stated that since SB 777–57A0050, Revision 6, was an alternative method of compliance (AMOC) to paragraphs (g)(1), (i), (j), and (k)(1) through (3) of AD 2017–11–14, Amendment 39–18913 (82 FR 25954, June 6, 2017) (AD 2017–11–14), operators may have previously complied with it without the deviations or exceptions provided in paragraph (h) of the proposed AD. UAL stated this proposed AD does not address how to correct that condition. UAL noted that Boeing is developing SB 777–57A0050, Revision 7, to address the exceptions in paragraph (h) of the proposed AD, and to include new Groups and Configurations for airplanes that have accomplished SB 777–57A0050, Revision 6. UAL further stated that an additional work package is required to inspect and/or correct the erroneous work instructions from SB 777–57A0050, Revision 6.

The FAA does not agree with the request to refer to SB 777–57A0050, Revision 7, because it is not known when Revision 7 will be available. The FAA is aware of the errors of SB 777–57A0050, Revision 6, as identified by the commenters, and the exceptions specified in paragraph (h) of this AD address errors that affect addressing the unsafe condition. The FAA notes that paragraphs (h)(2) through (4) of the proposed AD provided adequate information to identify the location of the fasteners in Figures 172, 173, 174, 175, 176, 179 and 180 of SB 777–57A0050, Revision 6. However, the FAA has added additional information to paragraphs (h)(2) through (4) of this AD to help clarify the location of the affected fasteners by specifying if the fasteners are adjacent to the right or left side of the identified fasteners. As specified in the comment responses that follow, other errors are addressed by the exceptions specified in paragraphs (h)(5) through (7) of this AD. The FAA

considers SB 777–57A0050, Revision 6, and the information provided in paragraphs (h)(2) through (7) of this AD as adequate accomplishment instructions to correct the unsafe condition. As specified in paragraph (l)(1) of this AD, accomplishment of the actions required by paragraph (g) of this AD terminates the requirements of paragraphs (g)(1), (i), and (j) of AD 2017–11–14. Therefore, the FAA considers that delaying this AD action until the availability of Revision 7 of SB 777–57A0050 would not be warranted.

Request To Include Service Bulletin Revision Information

AFA expressed that certain airplane maintenance manual (AMM) task instructions relating to ''POST–SB'' should include information about the revision of Boeing Alert Service Bulletin 777–57A0050 that was accomplished. As part of AFA's request to mandate SB 777–57A0050, Revision 7, AFA explained that the AMM TASK 28–22–00–210–801 instructions, related to Airworthiness Limitations (AWLs) 28–AWL–31 and 28–AWL–32, depend on the service bulletin status. However, AFA noted the AMM task is only marked ''POST–SB,'' and there is no mention of the service bulletin revision.

The FAA does not agree with this request because AMM task 28–22–00–210–801 is not required by this AD. AMM task 28–22–00 is referenced in AWLs 28–AWL–31 and 28–AWL–32, which specify in the applicability column ''Airplanes that have incorporated Service Bulletin 777–57A0050.'' As required by paragraph (i) of this AD, operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information for 28–AWL–31 and 28–AWL–32. However, AWLs 28–AWL–31 and 28–AWL–32 do not specify the service bulletin revision in the applicability column; therefore, there is not a requirement to identify AMMs as ''POST–SB'' with a service bulletin revision. No changes have been made to this AD based on this request.

Request To Clarify Compliance Time

AFA requested additional clarification of the compliance time. AFA stated that earlier revisions of SB 777–57A0050, have different scheduling rules, and that the instructions given in SB 777–57A0050, Revision 6, depend on the accomplished work.

The FAA agrees with providing clarification regarding the compliance time. The FAA has previously issued AD 2011–26–03, Amendment 39–16893 (76 FR 78138, December 16, 2011) (AD 2011–26–03), which mandated Boeing Alert Service Bulletin 777–57A0050, Revision 2, dated May 14, 2009 (SB 777–57A0050, Revision 2). Boeing Alert Service Bulletin 777–57A0050, Revision 3, dated February 18, 2014 (777–57A0050, Revision 3) was approved as an AMOC with the requirements of AD 2011–26–03. That AD was superseded by AD 2017–11–14, which retained the requirements of AD 2011–26–03 and also mandated Boeing Alert Service Bulletin 777–57A0050, Revision 4, dated September 28, 2015 (SB 777–57A0050, Revision 4) for certain groups of airplanes specified in that revision. After issuance of AD 2017–11–14, the FAA determined that a new AD would be necessary to mandate a later revision of Boeing Alert Service Bulletin 777–57A0050 because more airplanes are affected by the identified unsafe condition, and additional work is required for airplanes on which earlier revisions of the service information has been incorporated.

Paragraph 1.E., ''Compliance,'' of SB 777–57A0050, Revision 6, specifies the compliance times for all groups and configurations, except as specified in paragraph (h)(1) of this AD. For example, for those airplanes in SB 777–57A0050, Revision 6, that have already been identified in SB 777–57A0050, Revisions 2, 3, or 4, the compliance times specified in AD 2017–11–14 would apply. Specifically, for airplanes identified in SB 777–57A0050, Revision 2 or 3, the actions specified in SB 777–57A0050, Revision 2 or 3 should have been accomplished within 60 months after January 20, 2011 (the effective date of AD 2010–24–12, Amendment 39–16531 (75 FR 78588, December 16, 2010)). For airplanes identified in SB 777–57A0050, Revision 4 but not in earlier revisions, the actions specified in SB 777–57A0050, Revision 4 should have been accomplished within 60 months after July 11, 2017 (the effective date of AD 2017–11–14). For the rest of the airplane groups and configurations identified in SB 777–57A0050, Revision 6, the actions specified must be accomplished within 60 months after the effective date of this AD. Operators should also note that paragraph (l)(1) of this AD explains that accomplishment of the actions required by paragraph (g) of this AD terminates paragraphs (g)(1), (i), and (j) of AD 2017–11–14.

Request To Add Credit for Previous Actions

FedEx requests the addition of a ''Credit for Previous Action'' paragraph to any final AD to ensure previous modifications per SB 777–57A0050, Revision 5, or earlier revisions do not have to be repeated. FedEx stated that they are already doing the applicable added tasks from the SB 777–57A0050, Revision 6, which has been approved as an AMOC to AD 2017–11–14 and expressed concern that the required actions in paragraph (g) of the proposed AD do not account for prior maintenance actions done to comply with AD 2017–11–14.

The FAA declines to provide credit for the accomplishment of an earlier service bulletin revision, because accomplishing the actions specified in a revision earlier than SB 777–57A0050, Revision 6, on an airplane does not necessarily mean that all applicable actions specified in SB 777–57A0050, Revision 6, were accomplished on that airplane to address the unsafe condition. The groups and configuration in SB 777–57A0050, Revision 6, are dependent on which actions have already been accomplished in accordance with earlier revisions. Operators are required to determine whether additional work is required by SB 777–57A0050, Revision 6, on each affected airplane that has incorporated the actions specified in an earlier revision of the service bulletin. If no additional work is required to address the unsafe condition, then that airplane is in compliance with this new AD. This AD has not been changed with regard to this request.

Request To Include a New Exception

AAL requested that paragraph (h) of the proposed AD include an exception to exclude Group 1 through 4 from Work Package 28 of Boeing Alert Service Bulletin 777–57A0050, Revision 6, because that work package is not applicable to Groups 1 through 4. AAL stated that Boeing has confirmed this to be accurate. AFA also stated that Work Package 28 is not applicable to Group 1 through 4.

The FAA has confirmed with Boeing that the error described by the commenters exists in the service information. The FAA has added paragraph (h)(5) to this AD, which reads ''Where Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, specifies Work Package 28 as applicable to Group 1 through 4, and Group 8, this AD does not require accomplishment of Work Package 28 for Group 1 through 4.''

Request To Clarify Access Steps for Work Packages 37, 38 and 39

AFA requested that the access steps for Work Packages 37, 38, and 39 of Boeing Alert Service Bulletin 777–57A0050, Revision 6, be clarified. AFA stated that for Model 777–200, –200ER, and –300 series airplanes, the rib 9 cap

sealing location is located in the dry-bay. AFA stated that Boeing confirmed that access door 532AB for the dry bay should be used to access the location for Figure 172, and confirmed fuel tank purging is not necessary for Work Package 37. AFA also stated that for Model 777–200LR and –300ER series airplanes, the rib 9 cap sealing location is located in the center fuel tank. AFA stated that Boeing confirmed that access door 531AB for the center fuel tank should be used to access the location for Figure 172, and confirmed the center fuel tank should be purged for Work Package 37.

AFA also stated that for Group 12, 14 through 41, 44 through 48, 55 through 57, 59–83, in Work Packages 38 and 39 of Boeing Alert Service Bulletin 777–57A0050, Revision 6, Boeing agreed that at the rib 9 front spar location, access door 531CB/631CB would be sufficient, and purge/ventilation of the center tank would be necessary.

The FAA acknowledges that different access doors might be used for certain airplanes for a given work package. As specified in Note 11. of paragraph 3.A. ''General,'' of Boeing Alert Service Bulletin 777–57A0050, Revision 6: ''If it is necessary to remove more parts for access, you can remove those parts. If you can get access without removing identified parts, it is not necessary to remove all of the identified parts.'' The removal of access doors and purging of fuel tanks are not actions that address the identified unsafe condition. The FAA has determined delaying this final rule by adding exceptions to identity applicable access doors and corresponding fuel tanks, as well as corresponding procedures, is not warranted. The FAA has not changed this AD in this regard. However, in order to not purge a specific tank that is specified in a work package or purge the tank for a different access door, the FAA has added paragraph (h)(7) to this AD that specifies ''Where the Accomplishment Instructions of Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, specifies to purge specific fuel tanks (right, left, or center), operators must purge the applicable fuel tank for which access inside the fuel tank is needed to apply cap sealing on the affected fasteners.''

Request To Not Require Work Package 38 for Certain Groups

AFA stated that Boeing confirmed that for Group 1 through 4 airplanes, Work Package 38 of Boeing Alert Service Bulletin 777–57A0050, Revision 6, provides the same instructions as Work Package 37, and is not needed if Work Package 37 is accomplished.

The FAA confirmed with Boeing that Work Package 38 is not necessary for Group 1 to 4 provided Work Package 37 has been accomplished. The FAA has added paragraph (h)(6) to this AD to clarify that for Group 1 through 4 airplanes on which Work Package 37 has been accomplished, Work Package 38 is not required.

Request To Refer to Latest Maintenance Planning Document (MPD) or Delay Publication of the Final Rule

Boeing, and Emirates requested that the proposed AD be revised to refer to the latest MPD. In addition, KLM, requested that the final rule be delayed until a later MPD is published that addresses certain discrepancies.

Boeing requested that the final rule be issued after the latest MPD revision has been approved by the FAA and published, and that paragraph (j) of the proposed AD be deleted. Boeing requested that the AD be posted following the approval of the revised MPD. Boeing explained that paragraph (j) of the proposed AD refers to changes prescribed by the FAA within AWL No. 28–AWL–31 and 28–AWL–32. Since these changes will have likely been approved by the FAA and published in the 777 MPD prior to the AD being posted, Boeing asserted that there will be no need for these AWL sub-paragraphs to be specifically called out in the AD.

Emirates requested that the Boeing MPD document D622W001–9, dated March 2022, referenced in paragraphs (i) and (j) of the proposed AD be replaced by the revision dated July 2022. Emirates explained that paragraphs (i) and (j) of the proposed AD refer to ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622W001–9, dated March 2022'' while the latest revision of this MPD document is dated July 2022.

KLM requested that the AD not be issued until after the subject MPD is revised by the OEM or that the FAA explain the reason why it should not be delayed.

The FAA agrees to refer to the latest MPD. Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622W001–9, dated August 2022, of Boeing 777 200/200LR/300/300ER/777F Maintenance Planning Data (MPD) Document, has been published, and it contains corrections that address the exceptions given in paragraph (j) of the proposed AD. Paragraph (i) of this AD has been updated to include this revision. Paragraph (j) of this AD has also been changed to give credit for the March 2022, June 2022, and July 2022 revisions of the MPD, provided that the corrections specified in paragraphs (j)(1) through (4) of this AD are met.

Request To Clarify Applicability for an AWL Task

KLM requested that the FAA clarify an applicability for an AWL task. KLM stated paragraphs (j)(1) through (4) of the proposed AD provides details of changes to the content of the MPD document (ALI and CMR), which includes changes to the applicability for certain paragraphs of that document. KLM stated AWL 28–AWL–32 was already part of AD 2021–24–12, Amendment 39–21833 (86 FR 73660, December 28, 2021) (AD 2021–24–12), which has an applicability of ''The Boeing Company Model 777–200, –200LR, –300, –300ER, and 777F series airplanes, certificated in any category, having line numbers (L/Ns) 1 through 1609 inclusive.'' KLM stated paragraphs (j)(1) through (4) of the proposed AD narrow this applicability down or widens it without AD 2021–24–12 being superseded. KLM concluded this will lead to confusion.

The FAA notes that paragraph (j) of the proposed AD does not affect any aspect of AD 2021–24–12. The applicability of AD 2021–24–12 identifies the airplanes affected by the requirements of that AD. Paragraph (j) of the proposed AD clarifies information for certain steps within an AWL. Compliance with each AWL must be accomplished based on the applicability specified in the Applicability block of each AWL. The applicability of the AD affects whom must incorporate that AWL into their maintenance or inspection program. The applicability of an AWL neither affects nor is affected by the applicability of the AD that mandated the incorporation of that AWL into the maintenance or inspection program, unless specifically stated in an exception of the regulatory text of an AD.

Paragraph (j) of the proposed AD does not change the applicability block of AWL No. 28–AWL–31 and No. 28–AWL–32. Paragraph (j) of the proposed AD is just intended to provide a clear definition of the affected models and affected airplane line number ranges for certain paragraphs or steps within AWL No. 28–AWL–31 and 28–AWL–32. Due to unclear title descriptions, there was confusion as to what the applicable affected models were for those paragraphs. As a result, paragraph (j) was added to the proposed AD to provide clarification on the affected models.

As stated previously, the FAA has redesignated paragraph (j) of the proposed AD as a credit paragraph since the latest revision of the MPD incorporates those changes. The information in paragraph (j) of this AD will only be necessary if an MPD dated earlier than August 2022 is used. Compliance with the requirements of both paragraph (i) of this AD and paragraph (g) of AD 2021–24–12 can be accomplished by using Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622W001–9, dated August 2022, of Boeing 777 200/200LR/300/300ER/777F Maintenance Planning Data (MPD) Document. Paragraph (l)(2) of this AD specifies that accomplishment of the revision required by paragraph (i) of this AD to incorporate the information for 28–AWL–31 and 28–AWL–32 terminates the requirements of paragraphs (g)(6) and (h) of AD 2021–24–12.

Request for Clarification of Compliance Time

Emirates asked whether airplanes need to be inspected again within 60 months after the effective date of the proposed AD per paragraph (i)(2) of the proposed AD when those airplanes have already been inspected in accordance with AWL No. 28–AWL–32 based on the initial compliance time specified in paragraph (g)(6) of AD 2021–24–12. Emirates did not ask for any specific change.

Although the commenter did not ask for a change, the FAA notes that paragraph (i)(1) and (2) of the proposed AD should provide credit for the inspection that has already been performed under the initial compliance time specified in paragraph (g)(6) of AD 2021–24–12. Without this credit, an airplane inspected under the initial compliance time specified in paragraph (g)(6) of AD 2021–24–12 may need to be re-inspected under the initial compliance time specified in paragraph (i)(1) or (2) of the proposed AD. This is not the intent of paragraphs (i)(1) and (2) of the proposed AD. To give credit for the inspection already accomplished under the initial compliance time specified in paragraph (g)(6) of AD 2021–24–12, the FAA has revised paragraphs (i)(1) and (2) of this AD to include ''within 3,750 days after the most recent inspection was performed as specified in AWL No. 28–AWL–32'' as part of the initial compliance time.

Request for Alternate Teflon Sleeve Solution

Emirates stated that an alternate sleeve should be part of the next service bulletin revision, and accepted as an alternative in the proposed AD. Emirates stated that following release of SB 777–57A0050, Revision 6, there was a worldwide material shortage of TFE–2X Standard Wall—TEFLON SLEEVE 1 inch diameter. Emirates stated that Boeing identified M23053/12 Class 2 and M23053/12 Class 5 as suitable alternatives, depending on the diameter of the wire bundles.

According to Emirates, Boeing stated the following: M23053/12 Class 2 sleeves are a suitable alternative for the TFE–2X Standard Wall sleeve for wire bundles up to 1 inch in diameter and noted the sleeves are listed as an alternative in the standard wiring practices manual (SWPM) Section 20–00–11 Table 31. Boeing advised that they are working on a Global AMOC for alternative sleeve options for wire bundles greater than 1 inch in diameter. For the larger bundles, Boeing proposed using thinner M23053/12 Class 5 sleeves (for example M23053/12–519–C) and wrapping them twice around the bundle, which provides the same wall thickness as the Class 2 Standard Wall sleeves. Boeing concluded that because this double-wrapped installation will require an FAA AMOC approval, Boeing needs to be notified of this deviation.

The FAA does not agree to include alternative sleeving in this AD. The FAA will review alternative sleeving if it is included in the next service bulletin revision or if Boeing or an operator submits an AMOC request under the provisions of paragraph (m) of this AD. The FAA will consider requests for alternate sleeving if sufficient data are submitted to substantiate that the change would provide an acceptable level of safety.

Request To Remove ''Before Further Flight''

FedEx objected to the last sentence of paragraph (g) of the proposed AD, ''Do all applicable corrective actions before further flight.'' The FAA infers that FedEx requested that the FAA remove the sentence. FedEx asserted that the last sentence of paragraph (g) of the proposed AD is ambiguous since SB 777–57A0050, Revision 6, does not specifically define what actions are ''corrective actions,'' and it has the potential to immediately ground aircraft. As an example, FedEx noted that for Work Package 23 of the Accomplishment Instructions of SB 777–57A0050, Revision 6, requires installation of teflon sleeves in accordance with multiple figures without any prior inspection. Thus, Work Package 23 could be interpreted as a ''corrective action'' which is required prior to further flight. FedEx stated that the requirement in paragraph (g) of the proposed AD to ''do all applicable actions'' is sufficient since the associated service bulletin has specific actions to cap seal fasteners before putting the aircraft back to a serviceable condition.

The FAA acknowledges that the last sentence in paragraph (g) of the proposed AD, ''Do all applicable corrective actions before further flight,'' is confusing as used in this AD. In certain ADs, the standard language, ''corrective actions,'' is defined in the preamble of the AD and those are typically ''on-condition'' actions required to be performed after the primary action (*e.g.,* inspections). The ''before further flight'' compliance time is included to make sure that the corrective actions would be accomplished without any delay once the inspection is accomplished. The FAA has determined that this requirement is not necessary for this AD. The service information mandated by this AD requires an inspection for certain groups of airplanes to determine the installation configuration. Such an inspection is not required for certain other groups of airplanes since their installation configuration is already known. For all groups of airplanes, the FAA has determined that accomplishing all applicable actions within the compliance time would adequately address the safety concern. Therefore, the FAA has removed the sentence ''Do all applicable corrective actions before further flight'' from paragraph (g) of this AD. The ''applicable corrective actions'' are included in the ''all applicable actions (*i.e.,* installation of Teflon sleeves, cap sealing of fasteners, detailed inspections, and corrective actions)'' language specified in paragraph (g) of this AD and therefore must be done within the applicable compliance time specified in Boeing Alert Service Bulletin 777–57A0050, Revision 6.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021. This service information specifies applicable actions that vary depending on the airplane configuration, such as procedures for the installation of Teflon sleeves, cap sealing of fasteners, detailed inspections, and corrective actions. The detailed inspection of and installation of Teflon sleeves includes various locations, such as the rear spar wire bundles, inboard and outboard front spar wire bundles, wing-to-body fairing and environmental control system (ECS) bay wire bundles, front and rear spar bulkhead wire bundles, and wing rear spar wire bundles. The detailed inspection of and cap sealing of fasteners include fasteners in the center fuel tank, left and right main fuel tanks, and right cheek portion of the center fuel tank. Corrective actions include installing Teflon sleeve, installing clamp, and cap sealing fasteners.

The FAA also reviewed Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622W001–9, dated August 2022, of Boeing 777 200/200LR/300/300ER/777F Maintenance Planning Data (MPD) Document. This service information specifies, among other airworthiness limitations, 28–AWL–31 and 28–AWL–32 that address cushion clamps and Teflon sleeving installed on out-of-tank wire bundles installed on brackets that are mounted directly on the fuel tanks. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Costs of Compliance

The FAA estimates that this AD affects 282 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS *

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Installations, cap sealing, and inspections.	Up to 545 work-hours × $85 per hour = $46,325.	Up to $3,510	Up to $49,835 ...	Up to $14,053,470.

* Table does not include estimated costs for revising the existing maintenance or inspection program.

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the FAA estimates the average total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

The FAA estimates the following costs to do any necessary corrective actions that would be required based on the results of the inspections. The agency has no way of determining the number of aircraft that might need these actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Corrective actions	Up to 26 work-hours × $85 per hour = $2,210	Up to $3,510	Up to $5,720.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–03–04 The Boeing Company: Amendment 39–22329; Docket No.

FAA–2022–0810; Project Identifier AD–2021–01238–T.

(a) Effective Date

This airworthiness directive (AD) is effective April 4, 2023.

(b) Affected ADs

(1) This AD affects AD 2017–11–14, Amendment 39–18913 (82 FR 25954, June 6, 2017) (AD 2017–11–14).

(2) This AD also affects AD 2021–24–12, Amendment 39–21833 (86 FR 73660, December 28, 2021) (AD 2021–24–12).

(c) Applicability

This AD applies to all The Boeing Company Model 777–200, –200LR, –300, –300ER, and 777F series airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by fuel system reviews conducted by the manufacturer. The FAA is issuing this AD to prevent arcing inside the main and center fuel tanks in the event of a fault current or lightning strike, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

(f) Compliance

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

(g) Required Actions for Certain Airplanes

For airplanes identified in Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021: Except as specified in paragraph (h) of this AD, at the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, do all applicable actions (*i.e.,* installation of Teflon sleeves, cap sealing of fasteners, detailed inspections, and corrective actions) identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021.

(h) Exceptions to Service Information Specifications

(1) Where Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, uses the phrase ''the revision 5 date of this service bulletin'' or ''the revision 6 date of this service bulletin,'' this AD requires using ''the effective date of this AD.''

(2) Where circle symbol 1 of sheet 2 of Figures 172, 173, and 174 of Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, points to the outboard side of rib no. 9 for the locate and cap seal task or the inspection task, as applicable, in step 1 of sheet 3, for this AD, circle symbol 1 points to the seven fasteners located at the inboard side of rib no. 9 (adjacent to the right side of the identified seven fasteners).

(3) Where circle symbol 1, next to the text ''7 locations,'' of sheet 2 of Figure 175 and Figure 176 of Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, points to the outboard side of rib no. 9 for the locate and cap seal task or the inspection task, as applicable, in step 1 of sheet 3, for this AD, circle symbol 1, next to the text ''7 locations,'' points to the seven fasteners located at the inboard side of rib no. 9 (adjacent to the right side of the identified seven fasteners).

(4) Where circle symbol 1, next to the text ''7 locations,'' of sheet 4 of Figure 179 and Figure 180 of Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, points to the outboard side of rib no. 9 for the locate and cap seal task or the inspection task, as applicable, in step 1 of sheet 6, for this AD, circle symbol 1, next to the text ''7 locations,'' points to the seven fasteners located at the inboard side of rib no. 9 (adjacent to the left side of the identified seven fasteners).

(5) Where Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, specifies Work Package 28 is applicable to Group 1 through 4, and Group 8, this AD does not require accomplishment of Work Package 28 for Group 1 through 4 only.

(6) For Group 1 through 4 airplanes identified in Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, on which the actions specified in Work Package 37 of Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, have been accomplished, the actions specified in Work Package 38 are not required.

(7) Where the Accomplishment Instructions of Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021, specifies to purge specific fuel tanks (right, left, or center), operators must purge the applicable fuel tank for which access inside the fuel tank is needed to apply cap sealing to the affected fasteners.

(i) Maintenance or Inspection Program Revision

Within 60 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information for 28–AWL–31 and 28–AWL–32 specified in Section D, ''Airworthiness Limitations-Systems,'' including Subsections D.1, of Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622W001–9, dated August 2022, of Boeing 777–200/200LR/300/300ER/777F Maintenance Planning Data (MPD) Document. The initial compliance time for doing airworthiness limitation instructions (ALI) task 28–AWL–32 is at the applicable time specified in paragraph (i)(1) or (2) of this AD:

(1) For airplanes having line number (L/Ns) 1 through 503 inclusive: Within 3,750 days after accomplishment of the actions specified in Boeing Service Bulletin 777–57A0050; within 60 months after the effective date of this AD; or within 3,750 days after the most recent inspection was performed as specified in AWL No. 28–AWL–32; whichever is latest.

(2) For airplanes having L/Ns 504 and subsequent: Within 3,750 days after the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness; within 60 months after the effective date of this AD; or within 3,750 days after the most recent inspection was performed as specified in AWL No. 28–AWL–32; whichever is latest.

(j) Credit for Previous Actions

This paragraph provides credit for the maintenance or inspection program revision specified in paragraph (i) of this AD, if the revision was performed before the effective date of this AD using Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622W001–9, dated March 2022, dated June 2022, or dated July 2022, of Boeing 777 200/200LR/300/300ER/777F Maintenance Planning Data (MPD) Document; provided that the corrections specified in paragraphs (j)(1) through (4) of this AD were also incorporated. The following exceptions apply to 28–AWL–31 and 28–AWL–32 of Section D, ''Airworthiness Limitations—Systems,'' including Subsections D.1 of Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622W001–9, of Boeing 777–200/200LR/300/300ER/777F Maintenance Planning Data (MPD) Document.

(1) In paragraph 1.i., change ''Front Spar Bulkhead (Center Tank)'' to ''Front Spar Bulkhead (Center Wing Tank Fuel Quantity Greater than 12,400 Gallons).''

(2) In paragraph 1.i.II, change ''For 777–200, 777–200LR, 777–300, and 777–300ER airplanes, L/N 562 and on'' to ''L/N 562 and on, except 777F.''

(3) In paragraph 1.i.III., change ''For 777F airplanes, L/N 718 and on'' to ''For 777F airplanes.''

(4) In paragraph 1.j., change ''Rear Spar Bulkhead (Center Tank)'' to ''Rear Spar Bulkhead (Center Wing Tank Fuel Quantity Greater than 12,400 Gallons).''

(k) No Alternative Actions, Intervals, or Critical Design Configuration Control Limitations (CDCCLs)

After the existing maintenance or inspection program has been revised as required by paragraph (i) of this AD, no alternative actions (*e.g.,* inspections), intervals, or CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (m) of this AD.

(l) Terminating Action for Certain Requirements of AD 2017–11–14 and AD 2021–24–12

(1) Accomplishment of the actions required by paragraph (g) of this AD terminates the requirements of paragraphs (g)(1), (i), and (j) of AD 2017–11–14.

(2) Accomplishment of the revision required by paragraph (i) of this AD terminates the requirements of paragraphs (g)(6) and (h) of AD 2021–24–12.

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle 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 responsible Flight Standards 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 (n) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(n) Related Information

For more information about this AD, contact Kevin Nguyen, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3555; email: *kevin.nguyen@faa.gov.*

(o) 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) Boeing Alert Service Bulletin 777–57A0050, Revision 6, dated August 18, 2021.

(ii) Section 9, Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D622W001–9, dated August 2022, of Boeing 777 200/200LR/300/300ER/777F Maintenance Planning Data (MPD) Document.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com*.

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(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, *fr.inspection@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on February 2, 2023.

Christina Underwood,

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

[FR Doc. 2023–04024 Filed 2–27–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1480; Project Identifier MCAI–2022–00548–T; Amendment 39–22343; AD 2023–03–18]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bombardier, Inc., Model BD–100–1A10 airplanes. This AD was prompted by reports of cracks found in the tailcone upper firewall where the auxiliary power unit (APU) muffler electrical bonding strap is attached. This AD requires a detailed visual inspection of the tailcone upper firewall for defects, rework by replacement of the APU electrical bonding strap, and repair if necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 4, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 4, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1480; 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, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Bombardier Business Aircraft Customer Response Center, 400 Côte Vertu Road West, Dorval, Québec H4S 1Y9, Canada; phone: (514) 855–2999; email: *ac.yul@aero.bombardier.com;* website: *bombardier.com*.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call (206) 231–3195. It is also available at *regulations.gov* under Docket No. FAA–2022–1480.

FOR FURTHER INFORMATION CONTACT: Yaser Osman, Aerospace Engineer, Airframe and Propulsion Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228–7300; email: *9-avs-nyaco-cos@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Bombardier, Inc., Model BD–100–1A10 airplanes. The NPRM published in the **Federal Register** on November 18, 2022 (87 FR 69225). The NPRM was prompted by AD CF–2022–19, dated April 19, 2022, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that cracks were found in the tailcone upper firewall where the APU muffler electrical bonding strap is attached. Crack initiation is related to the rigid electrical bonding strap. A crack in this area, if not addressed, could result in a breach of the firewall, which could allow a fire to propagate; reduced lightning strike protection, which could affect the airplane's grounding and potentially cause a fire; and increased radio interference during flight, which could reduce the ability of the flightcrew to maintain the safe flight and landing of the airplane.

In the NPRM, the FAA proposed to require a detailed visual inspection of the tailcone upper firewall for defects, rework by replacement of the APU electrical bonding strap, and repair if necessary. The FAA is issuing this AD to address cracking in the tailcone upper firewall. The unsafe condition, if not addressed, could result in a breach of the firewall, which could allow a fire to propagate; reduced lightning strike protection, which could affect the airplane's grounding and potentially cause a fire; and increased radio interference during flight, which could reduce the ability of the flightcrew to maintain the safe flight and landing of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1480.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

This products has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Bombardier Service Bulletin 100–53–35, dated December 6, 2021; and Service Bulletin 350–53–004, dated December 6, 2021. This service information specifies procedures for doing a detailed visual inspection of the tailcone upper firewall for defects, including cracking, reworking the APU electrical bonding strap by replacing it with a new flexible APU muffler jumper cable assembly, and repairing the tailcone upper firewall. These documents are distinct since they apply to different airplane configurations.

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

Costs of Compliance

The FAA estimates that this AD affects 691 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
1 work-hour × $85 per hour = $85	$36	$121	$83,611

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
24 work-hours × $85 per hour = $2,040	$0 *	$2,040

* The FAA has received no definitive data on which to base the cost estimates for the parts specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–03–18 Bombardier, Inc.: Amendment 39–22343; Docket No. FAA–2022–1480; Project Identifier MCAI–2022–00548–T.

(a) Effective Date

This airworthiness directive (AD) is effective April 4, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model BD–100–1A10 airplanes, certificated in any category, serial numbers 20003 through 20500 inclusive and 20501 through 20916 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by reports of cracks found in the tailcone upper firewall where the auxiliary power unit (APU) muffler electrical bonding strap is attached. The FAA is issuing this AD to address cracking in the tailcone upper firewall. The unsafe condition, if not addressed, could result in a breach of the firewall, which could allow a fire to propagate; reduced lightning strike protection, which could affect the airplane's grounding and potentially cause a fire; and increased radio interference during flight, which could reduce the ability of the flightcrew to maintain the safe flight and landing of the airplane.

(f) Compliance

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

(g) Inspection, Replacement, and Corrective Actions

Within 48 months after the effective date of this AD: Do a detailed visual inspection of the tailcone upper firewall for defects, including cracking, rework the APU electrical bonding strap by replacing with a new flexible APU muffler jumper cable assembly, and repair the tailcone upper firewall, as applicable, in accordance with paragraphs 2.B., 2.C., and 2.D., of the Accomplishment Instructions of the applicable service information specified in figure 1 to paragraph (g) of this AD. Do all applicable repairs before further flight.

Figure 1 to paragraph (g)—*Service Information*

Airplane Serial Number–	Bombardier Service Bulletin–
20003 through 20500 inclusive	100-53-35, dated December 6, 2021
20501 through 20916 inclusive	350-53-004, dated December 6, 2021

(h) Additional AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York 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 responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the New York ACO Branch, mail it to ATTN: Program Manager, Continuing Operational Safety, at the address identified in paragraph (i)(2) of this AD or email to: *9-avs-nyaco-cos@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada; or Bombardier, Inc.'s Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(i) Additional Information

(1) Refer to Transport Canada AD CF–2022–19, dated April 19, 2022, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2022–1480.

(2) For more information about this AD, contact Yaser Osman, Aerospace Engineer, Airframe and Propulsion Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228–7300; email: *9-avs-nyaco-cos@faa.gov.*

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference 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) Bombardier Service Bulletin 100–53–35, dated December 6, 2021.

(ii) Bombardier Service Bulletin 350–53–004, dated December 6, 2021.

(3) For Bombardier service information identified in this AD, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; phone: (514) 855–2999; email: *ac.yul@aero.bombardier.com;* website: *bombardier.com.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call (206) 231–3195.

(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 10, 2023.

Christina Underwood,

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

[FR Doc. 2023–04026 Filed 2–27–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5 and 960

[Docket No. FR–6057–C–04]

RIN 2577–AD03

Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104; Correction

AGENCY: Office of General Counsel, Department of Housing and Urban Development (HUD).

ACTION: Final rule; correction.

SUMMARY: The Department of Housing and Urban Development is correcting a final rule entitled ''Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104'' that published on February 14, 2023.

DATES: *Effective date:* The correction to § 5.603 is effective January 1, 2024, and the correction to § 960.509 is effective March 16, 2023.

FOR FURTHER INFORMATION CONTACT: For information regarding this correction, contact Aaron Santa Anna, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 7th Street SW, Room 10238, Washington, DC 20410; telephone number 202–708–1793 (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*.

SUPPLEMENTARY INFORMATION: On February 14, 2023 (88 FR 9600) (FR Doc. 2023–01617), HUD published a final rule implementing sections 102, 103, and 104 of the Housing Opportunity Through Modernization Act of 2016 (HOTMA) (Pub. L. 114–201, 130 Stat. 782). In addition to amending regulations for HUD's public housing, Section 8 programs, and multifamily HUD programs including Section 202 and Section 811, the rule also amends HUD's Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Housing Trust Fund (HTF), and Housing Opportunities for Persons with AIDS (HOPWA) programs to implement statutory changes made by HOTMA. Among other changes, HUD's February 14, 2023, final rule amended the definition of ''dependent'' at § 5.603. The final rule also added a new section, § 960.509, *Lease requirements for nonpublic housing over-income families.*

In reviewing the February 14, 2013, final rule, HUD identified two inadvertent errors, one in an amendatory instruction related to the revision of § 5.603, and the second in the regulatory text related to the addition of § 960.509. Initially, in amendatory instruction 10, HUD states that it is revising several definitions. The amendatory instruction, however, failed to include direction to revise the definition for ''dependent''. HUD's preamble text discusses this revised definition and the regulatory text for § 5.603 included the revised definition.

Second, § 960.509(b)(6) incorrectly contains two paragraphs designated ''(b)(6)(xii)''. The second paragraph designated ''(b)(6)(xii)'' is incorrectly designated and should be designated ''(b)(6)(xiii)''.

Correction

Accordingly, FR Doc. 2023–01617, ''Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104,'' published on February 14, 2023 (88 FR 9600) is corrected as follows:

§ 5.603 [Corrected]

■ 1. Effective January 1, 2024, on page 9656, in the first column, amendatory instruction 10 for § 5.603 is corrected to read as follows:

■ 10. Effective January 1, 2024, amend § 5.603(b) by:

■ a. Adding in alphabetical order the definition for ''Day laborer'';

■ b. Revising the definition of ''Dependent'';

■ c. Adding in alphabetical order the definitions for ''Foster adult'', ''Foster child'', ''Health and medical care expenses'', ''Independent contractor'', and ''Minor'';

■ d. Revising the definitions for ''Net family assets'' and ''Responsible entity''; and

■ e. Adding in alphabetical order the definition of ''Seasonal worker''.

The additions and revisions read as follows:

§ 960.509 [Corrected]

■ 2. Effective March 16, 2023, on page 9673, in the third column, in § 960.509, the second paragraph (b)(6)(xii) is redesignated as paragraph (b)(6)(xiii).

Aaron Santa Anna,

Associate General Counsel for Legislation and Regulations.

[FR Doc. 2023–03965 Filed 2–27–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2021–0007]

RIN 0651–AD54

USPTO Officially Transitions to Issuing Electronic Patent Grants in 2023

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (USPTO) is implementing electronic patent issuance to reduce pendency of patent applications, foster a green economy by reducing paper waste, and permit complete issued patents to be viewable and printable by both the applicants as well as the public immediately upon issuance in Patent Center, the USPTO's electronic patent application filing and management system. Patent grants will no longer be issued on paper, and as a result, they will no longer be mailed to the correspondence address of record as part of the patent issuance process. During a transition period, the USPTO will provide a paper copy of the electronic patent grant as a courtesy ceremonial copy, delivered to the patentee's correspondence address of record. After the transition period, a selection of patent grant copies, including the ceremonial copy, will be available for purchase at a nominal charge. The electronic patent grant will be the official statutory patent grant.

DATES: This rule is effective on April 18, 2023.

FOR FURTHER INFORMATION CONTACT: Matthew Sked, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patents, at 571–272–7627. For technical questions, contact the Patent Electronic Business Center (EBC) at 1–866–217–9197 (toll-free), 571–272–4100 (local), or *ebc@uspto.gov*. The EBC is open from 6 a.m. to midnight ET, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

The USPTO will begin issuing and publishing patent grants electronically via the USPTO's electronic patent application filing and management system, Patent Center.[1] By doing so, the USPTO is continuing with its efforts to move to fully electronic processing of patent applications.

One of the specific powers granted to the USPTO by 35 U.S.C. 2(b)(1) is to ''adopt and use a seal of the Office, which shall be judicially noticed and with which letters patent . . . issued by the Office shall be authenticated.'' Currently, the USPTO issues ''letters patent'' (hereafter, patents) as paper patents under the seal of the USPTO. These paper patents are bound with a cover sheet that has both an embossed seal and the signature of the USPTO Director. Beginning on the effective date of this final rule, the USPTO will issue patents electronically under a new digital USPTO seal and bearing the digital signature from the USPTO Director. The patents will be available to applicants and the public via Patent Center upon patent issuance. In Patent Center, a patentee and the public will be able to view and print the patent, including the cover sheet, front page, drawings, specification, and claims.

In order to implement electronic patent issuance, the USPTO is removing and reserving 37 CFR 1.315, which states that ''[t]he patent will be delivered or mailed upon issuance to the correspondence address of record.'' Because patents will be issued electronically rather than on paper, the USPTO will no longer physically deliver the patent grant by mailing it to the correspondence address. Instead, the

[1] References to Patent Center herein refer to Patent Center and any updated document viewing systems that may replace Patent Center in the future.

USPTO will issue the patent electronically via Patent Center.[2]

On August 1, 2022, the USPTO replaced the legacy Public Patent Application Information Retrieval tool (Public PAIR) with Patent Center for electronic filing and management of patent applications. Patent Center has a private view and a public view. The public view provides any member of the public access to a display of the information contained in applications that have been patented, published, or otherwise made available pursuant to 37 CFR 1.14. The public view does not provide public access to non-patent literature or information concerning applications that are maintained in confidence under 35 U.S.C. 122(a). In private view, an authorized registered user may access a display of the information contained in their application, regardless of whether it is being maintained in confidence under 35 U.S.C. 122(a) or has been published under 35 U.S.C. 122(b). To access the private view of Patent Center, the registered user must sign in using a two-step authentication process for secure communication with the USPTO. For further information, contact the Customer Support Center of the EBC via the methods described above in the information contact section.

In continuing its efforts to streamline service delivery processes, the USPTO is implementing electronic patent issuance and providing access to patents in Patent Center.

I. Previous Paper Patent Issuance Process: Under the previous patent issuance process, electronic capture of the information needed to issue a patent began shortly after mailing the notice of allowance. Generally, an Issue Notification is mailed several weeks prior to the issue date to inform the applicant of the patent number and issue date. The Issue Notification is also available electronically in Patent Center. The paper patent (including its cover sheet) was then prepared and mailed to the patentee. On the issue date, the USPTO's Official Gazette publication included the patent number, title of the patent, names and residences of the inventors, the applicant, the assignee (if applicable), the filing and priority dates, the text of the first claim of the patent, the total number of claims in the patent, and the representative figure (if applicable). Upon issuance of a paper patent, a copy of the patent (without its cover sheet) was available for viewing and printing by the public on the USPTO's website at *www.uspto.gov/patents/search.*

II. Electronic Patent Issuance Process: Electronic patent publication will result in electronic patent issuance under the USPTO seal including the Director's digital signature shortly after the patent number and issue date are assigned, which will result in the reduction of pendency for allowed patent applications. Applicants and the public will benefit from having access to the patent at an earlier time. Patentees will be able to view and print their electronically issued patents (including their cover sheets) through Patent Center, rather than waiting for their paper patent to arrive by mail. The USPTO will make electronic patent grants available in both the public and private views of Patent Center on the issue date. Therefore, the public will also be able to view the official electronic patent grant (including its cover sheet).

Additionally, the USPTO will continue to print the detailed patent information in the Official Gazette and make the patent available at *www.uspto.gov/patents/search* on the issue date.

Patentees may exercise the legal rights granted by the patent without physical possession of the patent because the patent right exists independently of the physical possession of the patent. *See* Changes to Support Implementation of the United States Patent and Trademark Office 21st Century Strategic Plan, 69 FR 56481, 56521 (Sept. 21, 2004); 1287 Off. Gaz. Pat. Office 67, 98 (Oct. 12, 2004). Furthermore, patentees, who want a copy of the electronically issued patent, will be able to access patent grants through Patent Center and print the patent at no additional charge.

The USPTO will issue the patent shortly after the payment of the issue fee. As a result, applicants will have less time, after the payment of the issue fee, to file continuing applications, Quick Path Information Disclosure Statements, or petitions under 37 CFR 1.313(c) to withdraw an application from issue. Therefore, the best practice would be for applicants to file these submissions as early as possible. Preferably, continuing applications should be filed before the payment of the issue fee. *See* Manual of Patent Examining Procedure (9th ed. Rev. 10.2019) (MPEP) sec. 211.01(b)(I).

Patents will be issued on a Tuesday shortly after the patent number is assigned. Issue Notifications will be available electronically via Patent Center after the payment of the issue fee, usually on the Wednesday or Thursday before the patent issues. For those applicants who participate in the e-Office action program, the USPTO emails notification of the Issue Notification to the applicant's designated email address. For more information regarding the e-Office action program, *see* Electronic Office Action, 1342 Off. Gaz. Pat. Office 45 (June 2, 2009). For those who do not participate in the e-Office action program, the USPTO foresees the possibility that a patent may issue electronically before the applicant receives a mailed Issue Notification. The USPTO encourages applicants to use the e-Office action program to avoid this possibility. Alternatively, once an issue fee has been paid, the application should be diligently monitored for assignment of a patent number and issue date.

III. Electronic Patent Grant May Be Viewed and Printed Via Patent Center: The USPTO will upload the patent (including its cover sheet) electronically, thereby making the patent available to the patentee and the public through Patent Center. Patentees and the public will be able to print an unlimited number of copies of the electronically issued patent (including its cover sheet in color and any color drawings) at no charge through Patent Center on or after the issue date of the patent. Additionally, the electronically issued patent will provide the patentee greater control and flexibility in printing their issued patent.

IV. Cover Sheet of Electronic Patent Grant: The electronic patent grant cover sheet will be nearly identical in appearance to the cover sheets currently used for paper patents, except that the seal and Director's signature will be in digital form. Importantly, the digital seal and electronic signature of the Director on the electronic patent grant cover sheet will be in conformance with 35 U.S.C. 153, which requires that patents be issued ''under the seal of the Patent and Trademark Office, and shall be signed by the Director or have [her or] his signature placed thereon and shall be recorded in the Patent and Trademark Office.'' The new seal will not simply be an electronic image, but rather an official USPTO seal in digital form that serves to authenticate the patent, in conformance with 35 U.S.C. 2(b)(1). An encrypted digital signature that may be used to validate the electronic patent document as the issued patent will be embedded within the seal.

V. Elimination of Advance Copies: Under electronic patent issuance, the USPTO will no longer accept orders for Advance copies of issued patents. Advance copies were unbound and unsealed and printed on regular 8.5″ by

[2] Since Patent Center will fully replace Private PAIR in the future, the issued patent will not be available in Private PAIR.

11″ copy paper. The USPTO typically received 100–200 orders per week for Advance copies when patents were issued on paper. As previously mentioned, any electronically issued patent, including its cover sheet, may be printed directly through Patent Center, making the option for ordering Advance copies obsolete. Accordingly, the Issue Fee Transmittal form, PTOL–85B, will be revised to eliminate the option for ordering Advance copies of patents.

VI. Transition Period: Once the USPTO begins issuing patents electronically via Patent Center, it will, concurrently during a transition period, and in addition to the electronic patent grant, mail a ceremonial paper copy (see Section VII) of the issued patent to the correspondence address of record, free-of-charge. The ceremonial paper copy will be mailed shortly after the patent is issued. During and after this transition period, the electronic patent grant is the official patent grant under 35 U.S.C. 153. The ceremonial paper copy is provided as a courtesy. No requests for additional ceremonial paper copies will be entertained during this transition period, though presentation copies will continue to be available for a fee. A presentation copy is a certified copy of the first page of an issued patent, and has a unique certification statement with a special ribbon and seal, and is suitable for framing and display.

The duration of the transition period is not determined, but the public will be provided prior notice of when the transition period ends. After the transition period, the USPTO will offer the presentation copy, certified copy, and ceremonial copy, each for a nominal fee.

VII. Ceremonial Paper Copy: The USPTO will provide patentees a ceremonial paper copy of the patent during the transition period, free of charge. The ceremonial paper copy will be a copy of the electronically issued patent reminiscent of the paper patents, bound with a cover sheet with both an embossed seal and the signature of the USPTO Director. The ceremonial paper copy will indicate that this is a ceremonial copy of a patent that was officially issued in electronic form. As explained above, the ceremonial paper copy will be provided free-of-charge during the transition period as a temporary courtesy.

In addition to the ceremonial paper copy, the USPTO will still offer certified copies in accordance with 37 CFR 1.13 as well as presentation copies. The certified copies and presentation copies may be ordered for a fee. As explained above, the presentation copy is a certified copy of the first page of an issued patent, and has a unique certification statement with a special ribbon and seal, and is suitable for framing and display. For further information, visit the USPTO Certified Copy Center web page at *https://certifiedcopycenter.uspto.gov/.*

The ceremonial paper copy will be available for purchase for a nominal fee after the transition period, in addition to the presentation copy and certified copy. Further information on how the ceremonial copy can be requested after the transition period ends and the corresponding fee will be provided at a future time.

Comments and Responses

The USPTO published proposed changes to the rules of practice to implement electronic patent issuance. *See* Electronic Patent Issuance, 86 FR 71209 (2021). In response to the notice of proposed rulemaking, the USPTO received twenty-one comments from a diverse group of stakeholders. The USPTO received two comments from intellectual property (IP) organizations, two from law firms, thirteen from individuals, and four anonymously. Overall, most of the comments were supportive of implementing electronic patent issuance, but included specific suggestions and questions. The comments and the USPTO's responses thereto follow:

Opposition

Comment 1: Some comments argue that the USPTO should not implement electronic patent issuance. The comments state that the paper bound copy has sentimental value for small companies and independent inventors that an electronic document from the internet would not provide. Several comments had the opposing view and support the USPTO's implementation of electronic patent issuance pointing to the cost and time savings for the USPTO and applicants and the potential positive environmental impact.

Response: The USPTO believes electronic patent issuance will provide various benefits for the USPTO as well as stakeholders. For example, electronic patent issuance should reduce pendency of patent applications and permit granted patents to be viewable and printable by both the applicant as well as the public in Patent Center at an earlier time. While the USPTO appreciates the concerns raised by the comments opposing electronic patent issuance, the USPTO believes the ceremonial paper copy of the electronic grant offered as a courtesy during the transition period, and the presentation copy, certified copy, and ceremonial copy that will continue to be available for nominal fees after the transition period, will alleviate many of the issues raised. The ceremonial copy provides customers a patent copy that resembles the previous paper patents to bestow upon applicants a symbolic recognition of their achievement.

Comment 2: Some comments suggest providing applicants the option to have the patent issue electronically or to issue physically in paper.

Response: It would be against the public interest to issue patents in multiple formats. Historically, the USPTO has only issued patents in a single format, as paper patents. The USPTO would incur significantly more costs to have two different procedures for issuing patents in electronic and physical formats and the increased costs would be passed to patent applicants. In addition, the option would increase patent pendency for applications issued as paper patents compared to the electronic patents.

Paper Copy

Comment 3: Multiple comments requested that the USPTO provide the applicant the option for a bound paper copy of the patent grant. Some comments pointed out that the symbolic nature of the paper patent grant today is very special for many applicants and inventors, especially individual inventors and small companies. One comment remarked that the bound printed patent is a powerful tool in negotiation and potential litigation with competitors.

Response: The USPTO will provide patentees a ceremonial paper copy of the issued patent during the transition period as a courtesy, free of charge. The ceremonial paper copy resembles the paper patent that the USPTO traditionally provided to patent applicants as the issued patent. The ceremonial paper copy will be bound with a cover sheet with both an embossed seal and the signature of the USPTO Director. Further, the patentee will still be able to order presentation copies and certified copies of the patent for a fee. As described above, a presentation copy is a certified copy of the first page of an issued patent, and has a unique certification statement with a special ribbon and seal, and is suitable for framing and display. The ceremonial paper copy will be available for purchase for a nominal fee after the transition period, in addition to the presentation copy and certified copy.

Comment 4: Some comments noted that the current presentation and certified copies do not provide the same sentimental value that a bound paper

grant provides. Therefore, the current presentation and certified copies are not a meaningful substitute for the bound paper grant.

Response: During the transition period, a ceremonial paper copy will be provided as a courtesy, free of charge. The ceremonial paper copy will be available for purchase for a nominal fee after the transition period, in addition to the presentation copy and certified copy. The ceremonial paper copy will resemble the paper patents that are being replaced by electronic patent grants and contain features not available in the presentation and certified copies. The ceremonial paper copy will be bound with a cover sheet that has both an embossed seal and the signature of the USPTO Director. Accordingly, the USPTO believes that offering the ceremonial copy, in addition to the presentation and certified copies, will meet our stakeholders' diverse needs.

Comment 5: Some comments suggest an applicant could ''opt in'' or ''opt out'' of additionally receiving a printed bound paper grant by checking a box on the Issue Fee Transmittal.

Response: During the transition period, the USPTO will provide a ceremonial paper copy of the patent to all patentees as a courtesy, free of charge. The ceremonial paper copy will be available for purchase for a nominal fee after the transition period, in addition to the presentation copy and certified copy. After the transition period, the USPTO will provide guidance on how paper copies can be requested.

Comment 6: One comment suggests that the bound paper copy of the patent is needed in certain foreign countries to prove they have a patent.

Response: The comment has not specifically identified any particular country that requires the paper patent to show proof of patenting, and the USPTO is not aware of any country with such a requirement. Certified copies of the patent grant may be ordered from the Certified Copy Center.

Comment 7: One comment requested that when the applicant chooses to receive a bound paper copy of the patent, the USPTO permit the applicant to specify a ''Paper Patent Address'' where the bound paper copy would be sent. This would reduce time and costs for law firms that act as the correspondence address from having to receive and re-mail the bound paper copy.

Response: According to 37 CFR 1.33(a), all USPTO correspondence, including the paper patent grants, are directed to the correspondence address of record. The USPTO will continue this practice for mailing the ceremonial paper copies during the transition period.

Fees

Comment 8: Several comments suggested the USPTO charge a fee for a bound paper copy of the patent grant. Alternatively, some comments suggested that due to the cost savings of implementing electronic patent issuance the bound paper copy should be offered free of charge or subject to small and micro entity discounts.

Response: During the transition period, the USPTO will not charge a fee for the ceremonial paper copy. The ceremonial paper copy will be available for purchase for a nominal fee after the transition period, in addition to the presentation copy and certified copy.

Comment 9: Several comments requested the USPTO reduce the issue fee payment to account for the cost savings of no longer printing the bound paper grant. Some comments suggest a tiered issue fee structure where applicants who choose not to receive a bound paper copy will pay a lower issue fee.

Response: Section 10 of the America Invents Act, Public Law 112–29, 125 Stat. 284, as amended by Public Law 115–273, 132 Stat. 4158 (the SUCCESS Act) prescribes that fees may be set or adjusted only to recover the aggregate estimated costs for the USPTO for processing, activities, services, and materials relating to patents, including administrative costs of the USPTO with respect to such patent fees. Therefore, fees charged by the USPTO, including the issue fee, are not itemized to recover the specific cost for which they are charged. Instead, they are designed such that the fees in total recover the aggregate costs. The USPTO will continue to ensure compliance with the SUCCESS Act.

Continuation Practice

Comment 10: Some comments argue the time between the Issue Notification and patent issuance should not be shortened because it leaves too little time to determine a continuation filing strategy. The comments make several additional arguments including: the additional two weeks of pendency is minor given the entire length of prosecution, the shortened period will cause more applicants to file continuing applications with dummy claims, small businesses and independent inventors do not commonly make the decision to file a continuing application until after the Issue Notification, the change will result in some entities not pursuing continuing applications, increases the stress on legal support staff, and may cause unintended issues with foreign applicants who may not be able to comply with the truncated timeline. In contrast, some comments state that the shortened time period to file a continuing application is a minor burden and applicants will quickly adjust to the new timeline.

Response: The USPTO is under a statutory obligation to issue patents as timely as possible. See 35 U.S.C. 154. Therefore, the USPTO is taking steps to reduce the pendency of applications, as warranted. In implementing electronic patent issuance, the USPTO is able to reduce the time to issuance. Delaying issuance to counteract this time savings because applicant may possibly choose to file a continuing application is not in accordance with the statutory directive. The USPTO appreciates this may cause a change in some applicant's practice, but agrees with the comments that state that applicants will adapt to the new timeline. Applicants should file their continuing applications as early as possible, preferably prior to payment of the issue fee to avoid any loss of rights.

Comment 11: One comment asks whether the copendency requirements of MPEP 211.01(b) will still be valid such that the later-filed application may claim benefit to a prior filed nonprovisional application on the date of electronic patent issuance of the prior filed application. The comment goes on to also ask if there will be a time associated with the electronic patent issuance and will this publication time affect the ''1 year or less'' and ''before'' exceptions under 35 U.S.C. 102 now that the exact time of filing and publication times would be known.

Response: In order to claim the benefit of an earlier filed application in the United States, the continuing application must be filed ''before the patenting or abandonment or termination of proceedings on the first application.'' 35 U.S.C. 120. This requirement has been interpreted such that the continuing application is copending if it is filed on the same date or before the date the earlier filed application issues as a patent. See *Immersion Corp.* v. *HTC Corp.,* 826 F.3d 1357, 1359, 119 USPQ2d 1083, 1084 (Fed Cir. 2016). The USPTO is not making any changes that would impact this statutory construction. Additionally, the electronic patent grant will include an issue date, but it will not include an issue time. Therefore, there will be no impact on 35 U.S.C. 120.

Comment 12: One comment requests the USPTO create a fixed and definite time period a patent will issue after

payment of issue fee. The comment also asks the USPTO to address what happens when a patent electronically issues on a holiday or weekend for purposes of pendency with respect to filing continuing applications.

Response: There are numerous factors that impact the issue date of a patent (*e.g.,* data capture processing, post allowance amendments, timing of issue fee payment, etc.). Therefore, it is difficult for the USPTO to create a fixed time for issuance. Consistent with current practice, applicants will be provided the projected issuance date on the Issue Notification. The USPTO encourages applicants to use the e-Office action program to ensure receipt of the Issue Notification prior to issuance of the patent. Patents will continue to issue weekly on Tuesdays, therefore, there will be no changes for purposes of filing continuing applications.

Electronic Document Issuance

Comment 13: Some comments request the USPTO electronically issue certificates of correction similar to patent grants. Another comment asks how certificates of correction will be issued. Other comments suggest the USPTO extend the electronic issuance to other post-issuance patent documents including reexamination certificates.

Response: At this time, certificates of correction will continue to issue by mailing the certificate of correction to the correspondence address of record. However, the USPTO is making efforts to also issue certificates of corrections electronically via Patent Center with the electronic patent grant. The USPTO will provide public notice before these certificates are issued electronically. As for post-issuance patent documents, the USPTO will continue to explore the feasibility of providing these documents electronically as well.

Comment 14: Some comments ask the USPTO to make certified copies of U.S. applications as filed available electronically in Patent Center rather than providing such requested certified copies as paper copies or on CD–ROM.

Response: The USPTO has no plans to make certified copies available electronically beyond the current practice of using CD–ROM media. The USPTO may consider this in the future as it continues to move to beginning-to-end electronic processing of patent applications.

Rulemaking Considerations

A. Administrative Procedure Act

The changes in this rulemaking involve rules of agency practice and procedure, and/or interpretive rules. See *Bachow Commc'ns Inc.* v. *FCC,* 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are procedural under the Administrative Procedure Act); *Inova Alexandria Hosp.* v. *Shalala,* 244 F.3d 342, 350 (4th Cir. 2001) (rules for handling appeals are procedural where they do not change the substantive standard for reviewing claims); *Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001) (rule that clarifies interpretation of a statute is interpretive).

Accordingly, prior notice and opportunity for public comment for the changes in this rulemaking were not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. See *Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice and comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'' (quoting 5 U.S.C. 553(b)(A))). However, the USPTO chose to seek public comment before implementing the rule to benefit from the public's input.

B. Regulatory Flexibility Act

For the reasons set forth herein, the Senior Counsel for Regulatory and Legislative Affairs of the USPTO has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b).

The USPTO is amending the rules of practice to implement electronic publication, that is, issuing patents electronically through the USPTO's Patent Center rather than mailing a copy of the patent to the correspondence address on record. Patentees would then be able to print a copy of the issued patent in its entirety, including the cover sheet that matches the color and design currently used for patent grants on paper, directly from Patent Center.

This change is procedural and is not expected to have a direct economic impact on small entities. The discontinuation of the paper patent grant is not expected to impact the ability of a patent owner to exercise their patent rights as a paper patent grant is not necessary to enforce or license a patent. Once issued, the paper patent grant is merely commemorative. Under electronic patent issuance, patent owners will be able to access their granted patent at any time. This includes the ability to print their own hard copy. Only when a patent owner would like the Office to print them a hard copy would any additional fee need to be paid (*i.e.,* for a presentation copy or certified copy for submission to a legal proceeding). The additional fees for presentation and certified copies already exist today and would remain unchanged under this final rule. Therefore, for the reasons above, the changes in this final rule are not expected to negatively impact small entities.

C. Executive Order 12866 (Regulatory Planning and Review)

This rulemaking has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

D. Executive Order 13563 (Improving Regulation and Regulatory Review)

The USPTO has complied with Executive Order 13563 (Jan. 18, 2011). Specifically, to the extent feasible and applicable, the USPTO has: (1) reasonably determined that the benefits of the rule justify its costs; (2) tailored the rule to impose the least burden on society consistent with obtaining the agency's regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole, and provided online access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across Government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens while maintaining flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

E. Executive Order 13132 (Federalism)

This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

F. Executive Order 13175 (Tribal Consultation)

This rulemaking will not (1) have substantial direct effects on one or more Indian tribes, (2) impose substantial direct compliance costs on Indian tribal governments, or (3) preempt tribal law. Therefore, a tribal summary impact

statement is not required under Executive Order 13175 (Nov. 6, 2000).

G. Executive Order 13211 (Energy Effects)

This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

H. Executive Order 12988 (Civil Justice Reform)

This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

I. Executive Order 13045 (Protection of Children)

This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

J. Executive Order 12630 (Taking of Private Property)

This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

K. Congressional Review Act

Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), the USPTO will submit a report containing the final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this rulemaking are not expected to result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this rulemaking is not expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

L. Unfunded Mandates Reform Act of 1995

The changes set forth in this rulemaking do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of $100 million (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of $100 million (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. See 2 U.S.C. 1501 *et seq.*

M. National Environmental Policy Act of 1969

This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. See 42 U.S.C. 4321 *et seq.*

N. National Technology Transfer and Advancement Act of 1995

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions that involve the use of technical standards.

O. Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501) requires that the USPTO consider the impact of paperwork and other information collection burdens imposed on the public. This rule does not involve an information collection requirement that is subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

P. E-Government Act Compliance

The USPTO is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Biologics, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble and under the authority contained in 35 U.S.C. 2, as amended, the USPTO amends 37 CFR part 1 as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

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

Authority: 35 U.S.C. 2(b)(2), unless otherwise noted.

§ 1.315 [Removed and Reserved]

■ 2. Section 1.315 is removed and reserved.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–03809 Filed 2–27–23; 8:45 am]

BILLING CODE 3510–16–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WP Docket No. 07–100; FCC 23–3; FR ID 126043]

Improving Public Safety Communications in the 4.9 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC) adopts rules establishing a comprehensive and coordinated nationwide approach to managing the 4.9 GHz (4940–4990 MHz) band while retaining its locally controlled, public safety nature. In doing so, the Commission solidifies the band's status as public safety spectrum, while also allowing secondary, non-public safety use as agreed to by public safety licensees through a new leasing model. This Report and Order adopts rules permitting a nationwide Band Manager, which will be selected based on its expertise and connections to the public safety community, to coordinate all operations in the band ensuring that any non-public safety use remains fully secondary to, and preemptible by, public safety operations. Furthermore, these new rules will optimize public safety use and enable the integration of the latest commercially available technologies, such as 5G. This Report and Order released on January 18, 2023, was corrected by an erratum released on February 22, 2023. The changes made by the erratum are included in this document.

DATES: Effective March 30, 2023.

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

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Jon Markman of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418–7090 or

Jonathan.Markman@fcc.gov or Brian Marenco of the Public Safety and Homeland Security Bureau, at (202) 418–0838 or *Brian.Marenco@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of Commission's Seventh Report and Order, in WP Docket No. 07–100; FCC 23–3, adopted and released on January 18, 2023. The full text of this document is available for public inspection online at *https://docs.fcc.gov/public/attachments/FCC-23-3A1.pdf.*

1. In this Seventh Report and Order the Commission creates a comprehensive and coordinated nationwide approach to the 4.9 GHz band, centralizing management in a single Band Manager, while retaining local control over operations conducted by individual public safety licensees. This framework will retain the band's existing status as a locally controlled public safety band, but with more rationalized and coordinated public safety operations on a nationwide level. These expanded operations will encompass both primary public safety use and, subject to coordination by the Band Manager, secondary non-public safety use, the latter of which will be subject to preemption by public safety operations.

2. In particular, the Commission adopts a single, nationwide framework for the 4.9 GHz band, that is centered around a new Band Manager, which will be equipped with additional information about the current public safety use of the band and empowered to work with public safety licensees to ensure efficient use of this spectrum and enable new, non-commercial operations on a secondary, preemptable basis. The Commission stated in this Seventh Report and Order that it believes a nationwide Band Manager will be able to effectively protect the interests of incumbent public safety users by establishing consistent, nationwide rules governing use of the band and providing new opportunities for non-public safety access to the band. It also stated it believes this approach will spur innovation and drive down costs while ensuring full protection for authorized public safety operations. Crucially, the Commission noted that the Band Manager will ensure that local governments can continue to use the band to suit their unique spectrum needs, while promoting the most efficient use of spectrum and creating a consistent and clear band framework nationwide. Therefore, the Commission concluded that designating a nationwide Band Manager to coordinate public safety access and facilitate the introduction of non-public safety services to the band will best serve the public interest.

3. The Commission also stated in this Seventh Report and Order that it would be in the public interest for the Band Manager to be chosen by a selection committee that represents and ensures the involvement of the relevant stakeholders, in particular the public safety community. Once selected, the Band Manager will have three primary responsibilities: (1) frequency coordination; (2) incentivizing the use of the latest commercially available technologies, including 5G; and (3) facilitating secondary non-public safety use.

4. In this Seventh Report and Order, the Commission also adopted its proposal to collect more granular data on public safety deployments. It will continue using the Universal Licensing System (ULS) as the licensing database for public safety operations in the 4.9 GHz band. Incumbent licensees will have at least one year from the publication of this Seventh Report and Order in the **Federal Register** to provide the required data in ULS. Nonetheless, the Commission encourages licensees to enter their data into ULS as soon as the Wireless Telecommunications Bureau and the Public Safety and Homeland Security Bureau jointly announce that the ULS is prepared to accept the granular data and OMB has completed its review of any new collection requirements.

5. The Commission also adopted a part 90 formal frequency coordination requirement for public safety applicants seeking to license facilities in the 4.9 GHz band and assigned nationwide authority to the Band Manager to perform the coordination function. Under the part 90 coordination framework, the Band Manager will review applications from public safety entities seeking to license new or modify existing facilities in the 4.9 GHz band before they are filed with the Commission. As frequency coordinator, the Band Manager will perform an analysis to determine if the proposed operation would cause interference to incumbent licensees or previously filed applicants.

6. Alongside its decision to adopt a nationwide Band Manager framework for the 4.9 GHz band, the Commission also amended its rules to allow non-public safety use of the band as authorized by the Band Manager. Specifically, it removed the restriction that 4.9 GHz band operations be in support of public safety, provided that any non-public safety operations must: (1) be authorized by the Band Manager; and (2) fully protect and, where necessary, be subject to preemption by, public safety operations in the band. The Commission emphasized that it will not license non-public safety operators, and licensed operations will remain exclusively in support of public safety.

7. The Commission also stated that it can meet its goal of promoting increased access to the 4.9 GHz band generally, in addition to promoting and protecting public safety use, by allowing non-public safety entities to lease unused spectrum from the public safety licensees through the Band Manager. The Commission noted that this model will ensure that leased operations will be on a non-interference basis, thereby, fully protecting public safety operations and providing a mechanism to enable preemption by public safety licensees. The Band Manager will evaluate all potential non-public safety operations based on consistent technical parameters and use restrictions deemed necessary to ensure full protection of public safety operations. Allowing the Band Manager to centrally coordinate non-public safety access will promote a standardized set of rules and contractual provisions for such access, which ensure that public safety retains priority and preemption rights. Furthermore, the Commission clarified that leases to non-public safety entities will only be permitted if they are coordinated and approved by the Band Manager, subject to any requirements the Commission adopts pursuant to a Ninth Further Notice of Proposed Rulemaking (Ninth Further Notice).

8. The Commission also stated in this Seventh Report and Order that it will ensure public safety entities have priority access to the 4.9 GHz band through licensing on a primary basis, while non-public safety users will be permitted to operate in the band only on a secondary basis. It also adopted an annual reporting requirement that will allow the Commission to oversee the Band Manager, ensure its activities advance the Commission's stated goals for this band, and provide greater transparency, certainty, and predictability in the 4.9 GHz band. Furthermore, it declined to adopt a spectrum management role for Regional Planning Committees (RPCs) in this band given the lack of necessary funding and resources for RPCs nationwide, lack of expertise in much of the new technology likely to be deployed in the band, and lack of consensus in the record that regional planning is consistent with our goal of establishing a nationwide framework for the band.

9. Furthermore, the Commission stated that given the wide variety of uses and potential uses of the band, it believed imposing interoperability standards at this juncture could lead to fewer equipment options thereby potentially stifling innovation and contradicting our goal of reducing equipment costs. Nonetheless, in this Seventh Report and Order, the Commission adopted a number of technical rule proposals from a Sixth Further Notice to increase utilization of the 4.9 GHz band.

10. Finally, the Commission retained a freeze for all applicants who are not already 4.9 GHz licensees pending resolution of issues raised in a Ninth Further Notice.

Procedural Matters

Paperwork Reduction Act

11. The requirements in Sections 90.175(g)(2) and 90.1207(e)–(f) constitute new or modified collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. They will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, the Commission notes that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission previously sought, but did not receive, specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. The Commission describes impacts that might affect small businesses, which includes more businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis.

Final Regulatory Flexibility Analysis

12. The Regulatory Flexibility Act (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of the rule changes contained in this *Seventh Report and Order* on small entities. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Eighth Further Notice of Proposed Rulemaking* (*Eighth FNPRM*) released in October 2021 in this proceeding (86 FR 59934, Nov. 29, 2021). The Commission sought written public comment on the proposals in the *Eighth FNPRM,* including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Congressional Review Act

13. The Commission will send a copy of the Seventh Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

Final Regulatory Flexibility Analysis

14. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Eighth Further Notice of Proposed Rulemaking (Eighth FNPRM) in October 2021. The Commission sought written public comment on the proposals in the Eighth FNPRM, including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Final Rules

15. In the Seventh Report and Order, the Commission takes a number of actions to advance its goals for a comprehensive and integrated approach to the 4.9 GHz band which emphasizes public safety needs while spurring innovation and driving down costs in the band. As an initial matter, the Commission establishes a nationwide Band Manager which will coordinate public safety operations in the band, ensuring protection of public safety operations, and promoting more efficient use of spectrum resources while facilitating non-public safety use of the band through spectrum leasing. The Commission also adopts its proposal to collect more granular data on public safety deployments in the Commission's Universal Licensing System (ULS) and provide incumbent licensees a one-year period to submit the necessary technical detail. Furthermore, the Commission adopts formal frequency coordination procedures for public safety applicants seeking to license new or modify existing facilities in the band and assigns authority to the Band Manager to perform the frequency coordination function. Additionally, the Commission adopts certain technical rules it sought comment on in the Eighth Further Notice to increase use of the band while declining to adopt technical standards to promote interoperability or a spectrum management role for Regional Planning Committees (RPCs). Finally, the Commission retains the freeze for all applicants who are not already 4.9 GHz licensees. Consequently, the rules we adopt in the Seventh Report and Order further our goal to maximize use of the 4.9 GHz band to support public safety while opening the door for limited non-public safety use and a more robust equipment market.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

16. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

C. Response to Comments by Chief Counsel for Advocacy of the Small Business Administration

17. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.

18. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

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

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

20. Small Businesses, Small Organizations, Small Governmental Jurisdictions. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset,

three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 32.5 million businesses.

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

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

23. *Frequency Coordinators.* Frequency coordinators are entities or organizations certified by the Commission to recommend frequencies for use by licensees in the Private Land Mobile Radio Services (PLMR) that will most effectively meet the applicant's needs while minimizing interference to licensees already operating within a given frequency band. Neither the Commission nor the SBA have developed a small business size standard specifically applicable to spectrum frequency coordinators. Business Associations which comprises establishments primarily engaged in promoting the business interests of their member, is the closest applicable industry with a SBA small business size standard.

24. The SBA small business size standard for Business Associations classifies firms with annual receipts of $8 million or less as small. For this industry, U.S. Census Bureau data for 2017 show that there were 14,540 firms that operated for the entire year. Of these firms, 11,215 had revenue of less than $5 million. Based on this data, the majority of firms in the Business Associations industry can be considered small. However, the Business Associations industry is very broad and does not include specific figures for firms that are engaged in frequency coordination. Thus, the Commission is unable to ascertain exactly how many of the frequency coordinators are classified as small entities under the SBA size standard. According to Commission data, there are 13 entities certified to perform frequency coordination functions under Part 90 of the Commission's rules. For purposes of this FRFA the Commission estimates that a majority of the 13 FCC-certified frequency coordinators are small.

25. *Private Land Mobile Radio Licensees.* Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. Companies of all sizes operating in all U.S. business categories use these radios. Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications, is the closest industry with an SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates licensees in this industry can be considered small.

26. Based on Commission data as of December 14, 2021, there are approximately 387,370 active PLMR licenses. Active PLMR licenses include 3,577 licenses in the 4.9 GHz band; 19,011 licenses in the 800 MHz band; and 2,716 licenses in the 900 MHz band. Since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard. Nevertheless, the Commission believes that a substantial number of PLMR licensees are small entities.

27. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA small business size standard for this industry classifies businesses having 1,250 employees or less as small. U.S. Census Bureau data for 2017 show that there were 656 firms in this industry that operated for the entire year. Of this number, 624 firms had fewer than 250 employees. Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

28. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 797 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 715 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

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

29. *Band Manager.* In the Seventh Report and Order, the Commission adopted a single, nationwide framework for the 4.9 GHz band, that is centered

around a new Band Manager, which will be equipped with additional information about the current public safety use of the band and empowered to work with public safety licensees to ensure efficient use of this spectrum and enable new, non-commercial operations on a secondary, preemptable basis. Once selected, the Band Manager will have three primary responsibilities: (1) frequency coordination; (2) incentivizing the use of the latest commercially available technologies, including 5G; and (3) facilitating secondary non-public safety use.

30. *Licensing Database.* In the Seventh Report and Order, the Commission adopts a requirement to collect more granular data on public safety deployments in ULS. We require small and other incumbent licensees and future applicants to supply complete microwave path data for fixed links, and to license base stations (currently authorized under the geographic license scheme) on a site-by-site basis. Specifically, we require applicants for and current licensees of point-to-point (P–P), point-to-multipoint (P–MP), and fixed receivers to provide the following information: transmitter and receiver antenna coordinates, azimuth (direction), polarization, beamwidth, physical dimensions, gain, and height above ground, as well as transmit details such as power, channel, bandwidth, and emissions. These requirements are consistent with existing Commission microwave radio service rules. We require applicants for and current licensees of base/mobile operations to provide the following information: coordinates (base), height above average terrain (base), number of units (mobile), mobile area of operation, power, channels, and emissions. These requirements are consistent with existing Commission private land mobile radio service rules.

31. The Commission directed the Public Safety and Homeland Security Bureau and the Wireless Telecommunications Bureau to make necessary enhancements to ULS and announce by public notice when ULS is prepared to accept more granular data on public safety operations in the 4.9 GHz band. Incumbent licensees and future applicants seeking to license point-to-point, point-to-multi-point, and fixed receivers as well as base/mobile, mobile-only or temporary fixed operations are required to use FCC Form 601. There will not be any application fees associated with this information collection for public safety entities because they are exempt from application fees pursuant to 47 CFR 1.1116(b).

32. The Seventh Report and Order gives incumbent geographic licensees one year to identify and submit the necessary technical data into the ULS, including P–P links, P–MP hubs, fixed receivers, base stations, and mobiles that are not currently licensed site-by-site. We believe that collecting this data will improve the level of interference protection licensees receive in the band; and will create a more predictable and transparent spectrum environment for any current and future users of the band, including potential non-public safety users. The Commission estimates the average burden for each applicant completing FCC Form 601 and associated schedules to be 1.25 hours, which includes ''the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response.''

33. *Frequency Coordination.* In the Seventh Report and Order, the Commission adopts a part 90 formal frequency coordination requirement for public safety applicants seeking to license facilities in the 4.9 GHz band and assigns nationwide authority to the Band Manager to perform the coordination function. Specifically, the Band Manager will review applications from public safety entities seeking to license facilities in the 4.9 GHz band before they are filed with the Commission. It will perform an interference analysis and recommend to applicants the most appropriate channel(s), bandwidth, operating power, area of operation (if mobile or temporary fixed operation is requested), or any other technical criteria which promotes robust use of the band while minimizing interference to incumbent licensees. Furthermore, once a Band Manager is in place, all applications filed with the Commission via ULS which seek to license new facilities or modify existing facilities in the 4.9 GHz band must include a showing of frequency coordination by the Band Manager. Finally, we allow the Band Manager to outsource the interference analysis portion of its frequency coordination duties to third parties.

34. *Non-Public Safety Use of the Band.* We amended our rules in the Seventh Report and Order to allow non-public safety use of the band by small and other non-public safety operators as authorized by the Band Manager. Non-public safety operations are required to fully protect and, when necessary, abide by preemption rules regarding the public safety operations which will remain the primary use of the band. Non-public safety operators will not be licensed. Licensed operations will remain exclusively in support of public safety. Further, the Band Manager will centrally coordinate non-public safety access and will create a standardized set of rules and contractual provisions for such access by small and other non-public safety operators, which will ensure that public safety retains priority and preemption rights.

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

35. The RFA requires an agency to provide, ''a description of the steps the agency has taken to minimize the significant economic impact on small entities . . . including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the 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.''

36. The Commission's actions in the Seventh Report and Order require small and other public safety incumbents and future applicants for the 4.9 GHz band to submit more granular data on FCC Form 601, however, the economic impact will be minimized since, as noted above, there aren't any application fees associated with filing this information in the ULS. We have also taken steps to minimize the burden of submitting the data by collecting the technical information on forms which licensees in the public safety community are already familiar with because they use these same forms to file license applications in other frequency bands. Furthermore, we provide small and other incumbent licensees a one-year period to submit the necessary technical details into the ULS. As we note in the Seventh Report and Order, collecting the additional technical data on public safety operations will benefit public safety licensees operating in the band because it will improve interference protection and give public safety licensees more confidence in the band without adding a significant burden on licensees or applicants to submit the data.

37. While small and other public safety applicants seeking to license facilities in the 4.9 GHz band will be subject to formal frequency coordination procedures, the economic impact will be minimized since we adopt a frequency coordination process which public safety licensees operating PLMR facilities in other frequency bands are familiar. Once in place, the formal frequency coordination process will ensure the efficient assignment and use

of spectrum by public safety licensees while minimizing interference to incumbent public safety licensees. Consequently, the frequency coordination process will improve interference protection and give public safety licensees more confidence in the band without adding a significant burden on applicants.

38. The Commission considered but declined to adopt a more active form of frequency coordination for public safety operations in the 4.9 GHz band, such as the automated frequency coordination in the 6 GHz band or the spectrum access system that facilitates dynamic spectrum sharing in the Citizens Broadband Radio Service (CBRS). No comments were filed specifically addressing the costs associated with more active forms of frequency coordination, both in terms of setup and implementation going forward, compared to traditional part 90 frequency coordination. Thus, given the lack of record on costs associated with more active forms of frequency coordination, and the likelihood of considerable disruption to small and other incumbent licensees caused by the need to upgrade or replace all of their equipment currently in use, the Commission determined the public interest is best served by adopting the part 90 frequency coordination framework which does not require any modification of or replacement to equipment currently in use in the band.

39. In the Seventh Report and Order we also declined to adopt a spectrum management role at 4.9 GHz for RPCs given the lack of necessary funding and resources for RPCs nationwide, the lack of expertise in the types of technology likely to be deployed in the band, and a lack of consensus in the record that regional planning is consistent with our goal of establishing a national framework for the band. This decision imposes zero burdens and costs and thus imposes no significant economic impact on RPCs and the NRPC, all of which we estimate to be small entities.

40. Further, we believe our decision to allow small and other non-public safety operators use of the 4.9 GHz band as detailed in the Seventh Report and Order will provide economic benefits for small entities and strikes the proper balance between allowing localized control of 4.9 GHz band operations by public safety licensees and reducing interference, while also ensuring consistent, nationwide rules that will promote overall spectral efficiency, foster innovation, and drive down equipment costs.

41. Finally, the Commission also considered but declined to: (1) impose an interoperability standard in light of the wide variety of uses and potential uses of the band, imposing such standards at this juncture could lead to fewer equipment options thereby potentially stifling innovation and contradicting our goal of reducing equipment costs; (2) adopt our proposal to limit temporary P–P operations to thirty days maximum over a given path over a one-year period because such a limitation would limit flexibility in the band, and (3) adopt our proposal to require a minimum antenna gain for P–P antennas because commercially available antennas would be rendered non-compliant such a limitation could inhibit development of a robust and affordable equipment market for the band that leverages commercially available antennas and technologies.

G. Report to Congress

42. The Commission will send a copy of the Seventh Report and Order and Ninth Further Notice, including this FRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Seventh Report and Order and Ninth Further Notice, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Seventh Report and Order and Ninth Further Notice, and FRFA (or summaries thereof) will also be published in the **Federal Register**.

Ordering Clauses

43. Accordingly, *it is ordered* that, pursuant to the authority found in sections 4(i), 302, 303(b), 303(f), 303(g), 303(r), 309(j), 316, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 302a, 303(b), 303(f), 303(g), 303(r), 309(j), 316, and 405, this Seventh Report and Order and Ninth Further Notice of Proposed Rulemaking *is hereby adopted*.

44. *It is further ordered* that this Report and Order *shall be effective* 30 days after publication in the **Federal Register**. Compliance with section 90.175(g)(2) and section 90.1207(e)–(f) of the Commission's rules, 47 CFR 90.175(g)(2) and 47 CFR 90.1207(e)-(f), which may contain new or modified information collection requirements, will not be required until the date specified in the Public Notice to be issued by the Public Safety and Homeland Security Bureau and the Wireless Telecommunications Bureau announcing that the Office of Management and Budget has completed review of any information collection requirements associated with this Report and Order or that they have determined such review is not required, which date shall be no earlier than one year after the publication of this Report and Order in the **Federal Register**. The Commission directs the Public Safety and Homeland Security Bureau and the Wireless Telecommunications Bureau to announce the compliance date for section 90.175(g)(2) and section 90.1207(e)–(f) by subsequent Public Notice and to cause section 90.175 and section 90.1207 to be revised accordingly.

45. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Seventh Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 90

Private Land Mobile Radio Services.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 90 as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 1. The authority citation for part 90 continues to read as follows:

Authority: 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7), 1401–1473.

■ 2. Amend § 90.155 by revising paragraph (a) to read as follows:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in §§ 90.528, 90.529, 90.629, 90.631(f), 90.665, and 90.685 must be placed in operation within twelve (12) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

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■ 3. Amend § 90.175 by revising paragraph (g) and removing and reserving paragraph (j)(22).

The revision reads as follows:

§ 90.175 Frequency coordinator requirements.

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(g) *For frequencies between 1427–1432 MHz and 4940–4990 MHz:* A statement is required as follows.

(1) *For frequencies between 1427–1432 MHz:* A statement is required from

the coordinator recommending the most appropriate frequency, operating power and area of operation in accordance with the requirements of § 90.259(b).

(2) *For frequencies between 4940–4990 MHz:* A statement is required from the nationwide band manager recommending the most appropriate channel(s), bandwidth, operating power, and any other technical parameter which promotes robust and efficient use of the band while minimizing interference based on the standard for harmful interference specified in § 90.1211(a).

(3) *Compliance date.* Paragraph (g)(2) of this section may contain information collection and/or recordkeeping requirements. Compliance with paragraph (g)(2) will not be required until this paragraph (g)(3) is removed or contains a compliance date, which will not occur until the date specified in a final rule published by the FCC announcing that the Office of Management and Budget has completed review of any information collection requirements associated with paragraph (g)(2) of this section or that they have determined such review is not required, which date shall be no earlier than February 28, 2024.

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■ 4. Amend § 90.1207 by revising paragraph (d) and adding paragraphs (e), (f), and (g) to read as follows:

§ 90.1207 Licensing.

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(d) Permanent fixed point-to-point and point-to-multipoint stations in the 4940–4990 MHz band must be licensed individually on a site-by-site basis. Such fixed stations are accorded primary status. Permanent fixed point-to-point and point-to-multipoint stations must use directional antennas with gains greater than 9 dBi.

(e) Applications for license in the 4940–4990 MHz band must include the following technical information.

(1) The license for base/mobile, mobile-only or temporary fixed (1 year or less) stations will specify, among other parameters, the following technical information:

(i) Coordinates (base).

(ii) Antenna height-to-tip (base and temporary fixed).

(iii) Antenna height above average terrain (base).

(iv) Center frequency, emission designator, and ERP.

(v) Number of units (mobile and temporary fixed).

(vi) Area of operation (mobile and temporary fixed), which shall be limited to the geographic area encompassing the legal jurisdiction of the licensee or, in case of a nongovernmental organization, the legal jurisdiction of the state or local governmental entity supporting the nongovernmental organization. However, applicants may define their areas of operation outside of their areas of legal jurisdiction to assist public safety operations with the permission of the jurisdiction(s) in which the mobile and/or temporary fixed stations are to be operated.

(2) The license for permanent fixed point-to-point, point-to-multipoint and fixed receiver stations must include, among other parameters, the following technical information:

(i) Transmitting station coordinates.

(ii) Frequencies and polarizations.

(iii) For the transmitting equipment, the tolerance, effective isotropic radiated power, emission designator, and type of modulation (digital).

(iv) For the transmitting antenna(s), the model, gain, antenna center line height(s) above ground level and ground elevation above mean sea level.

(v) Receiving station coordinates.

(vi) For the receiving antenna(s), the model, gain, antenna center line height(s) above ground level and ground elevation above mean sea level.

(vii) Path azimuth and distance.

(f) Licensees holding active authorizations for the 4940–4990 MHz band on March 30, 2023 shall file the complete site-by-site information described in paragraph (e) of this section for their existing radio systems in the Commission's Universal Licensing System by the compliance date specified in paragraph (g) of this section.

(g) Paragraphs (e) and (f) of this section may contain information collection and/or recordkeeping requirements. Compliance with paragraphs (e) and (f) will not be required until this paragraph (g) is removed or contains a compliance date, which will not occur until the date specified in a final rule published by the FCC announcing that the Office of Management and Budget has completed review of any information collection requirements associated with paragraphs (e) and (f) of this section or that they have determined such review is not required, which date shall be no earlier than February 28, 2024.

■ 5. Amend § 90.1209 by revising paragraph (d) to read as follows:

§ 90.1209 Policies governing the use of the 4940–4990 MHz band.

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(d) Stations must be placed into operation within twelve (12) months from the date of grant in accordance with § 90.155. Licensees of temporary fixed stations must place at least one such station in operation within twelve months of license grant.

■ 6. Amend § 90.1213 by revising paragraphs (a) introductory text and (b) to read as follows:

§ 90.1213 Band plan.

(a) The following table lists center frequencies for channels in the 4940–4990 MHz band. Channel numbers 1 through 5 and 14 through 18 are 1 MHz bandwidth channels, and channel numbers 6 through 13 are 5 MHz bandwidth channels.

* * * * *

(b) The channels listed in the table in paragraph (a) of this section may be aggregated in any manner up to 50 MHz for wider bandwidth operation. Nonetheless, applicants should request no more bandwidth than necessary for a particular use.

■ 7. Amend § 90.1215 by revising the introductory text and paragraph (a)(1) and adding paragraph (f) to read as follows:

§ 90.1215 Power limits.

Except as provided in paragraph (f) of this section, the transmitting power of stations operating in the 4940–4990 MHz band must not exceed the maximum limits in this section.

(a)(1) For base, mobile, and temporary fixed operations, the maximum conducted output power must not exceed:

TABLE 1 TO PARAGRAPH (a)(1)

Channel bandwidth (MHz)	Low power maximum conducted output power (dBm)	High power maximum conducted output power (dBm)
1	7	20
5	14	27
10	17	30
15	18.8	31.8
20	20	33
30	21.8	34.8
40	23	36
50	24	37

* * * * *

(f) The transmitting power of permanent fixed point-to-point and point-to-multipoint stations operating in the 4940–4990 MHz band must not exceed the maximum limits in this paragraph (f). Moreover, applicants should request no more power than necessary for a particular use.

(1) The maximum equivalent isotropically radiated power (EIRP), as referenced to an isotropic radiator, must not exceed 55 dBW (85 dBm).

(2) For path lengths shorter than 17 kilometers, the EIRP shall not exceed the value derived from the following equation: New EIRP limit = 55 dBW—40*log(17/B) dBW, where B = the actual path length in kilometers.

■ 8. Add § 90.1217 to subpart Y to read as follows:

§ 90.1217 4.9 GHz Band Manager.

The 4.9 GHz Band Manager will have the following three primary responsibilities:

(a) Frequency coordination for public safety applications;

(b) Incentivizing the use of the latest commercially available technologies, including 5G; and

(c) Facilitating non-public safety use of the 4.9 GHz band.

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BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2021–0041; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BE65

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Prostrate Milkweed and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are listing the prostrate milkweed (*Asclepias prostrata*), a plant species from Texas, as an endangered species and designating critical habitat under the Endangered Species Act of 1973, as amended (Act). We are designating approximately 661.0 acres (267.5 hectares) in Starr and Zapata Counties, Texas, as critical habitat for the prostrate milkweed under the Act. This rule adds this species to the List of Endangered and Threatened Plants and extends the Act's protections to the species and its designated critical habitat.

DATES: This rule is effective March 30, 2023.

ADDRESSES: Our February 15, 2022, proposed rule and this final rule are available on the internet at *https://www.regulations.gov.* Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *https://www.regulations.gov at* Docket No. FWS–R2–ES–2021–0041. For the critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are available at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2021–0041.

FOR FURTHER INFORMATION CONTACT: Chuck Ardizzone, Field Supervisor, Texas Coastal Ecological Services Field Office, 17629 El Camino Real Suite 211, Houston, TX 77058; telephone 281–286–8282. 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 prostrate milkweed meets the definition of an endangered species; therefore, we are listing it as such and finalizing a designation of its critical habitat. Both listing a species as an endangered or threatened species and designating critical habitat 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. This rule lists the prostrate milkweed as an endangered species and designates approximately 661.0 acres (267.5 hectares) in Starr and Zapata Counties, Texas, as critical habitat for this 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 competition from introduced invasive grass, habitat loss and degradation from root-plowing and conversion of native vegetation to improved buffelgrass pasture, habitat loss from right-of-way construction and maintenance from energy development and road and utility construction, and habitat loss from border security development and enforcement activities (Factor A), as well as the demographic and genetic consequences of small population sizes (Factor E), are threats to the prostrate milkweed.

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

The critical habitat we are designating in this rule, in eight units comprising 661.0 acres (ac) (267.5 hectares (ha)), constitutes our current best assessment of the areas that meet the definition of critical habitat for prostrate milkweed.

Previous Federal Actions

On February 15, 2022, we published a proposed rule (87 FR 8509) in the **Federal Register** to list prostrate milkweed as an endangered species and

to designate critical habitat for the species under the Act (16 U.S.C. 1531 *et seq.*). Please refer to that proposed rule for a detailed description of previous Federal actions concerning this species.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the prostrate milkweed. 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 peer review of the information contained in the SSA report. As discussed in the proposed rule, we sent the SSA report to six independent peer reviewers and received two responses. The peer reviews can be found at *https://www.regulations.gov.* In preparing the proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which was the foundation for the proposed rule and this final rule. A summary of the peer review comments and our responses can be found in the proposed rule (87 FR 8509; February 15, 2022).

Summary of Changes From the Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public on our February 15, 2022, proposed rule (87 FR 8509). We did not make any substantial changes to this final rule after consideration of the comments we received. We did, however, make the revisions to the critical habitat designation described below based on new information.

In this final rule, we revise critical habitat Unit 2 to reflect recently constructed border wall, which reduces the area meeting the definition of critical habitat in that unit. Specifically, this change results in a decrease of 19.7 ac (8.0 ha) of critical habitat from what we proposed for Unit 2 on February 15, 2022 (87 FR 8509).

In this final rule, we also revise critical habitat Unit 5 to correct a map projection error of the national wildlife refuge tract boundary, which reduces the area of this unit. Specifically, this change results in a decrease of 10.6 ac (4.3 ha) of critical habitat from what we proposed for Unit 5 on February 15, 2022 (87 FR 8509).

Overall, these changes to Units 2 and 5 result in a net decrease of 30.3 ac (12.3 ha) in the critical habitat for prostrate milkweed from what we proposed on February 15, 2022 (87 FR 8509).

We also make minimal nonsubstantive clarifications and editorial corrections in this final rule.

Summary of Comments and Recommendations

In our February 15, 2022, proposed rule (87 FR 8509), we requested that all interested parties submit written comments on the proposal by April 18, 2022. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposed listing determination, proposed designation of critical habitat, and draft economic analysis. Newspaper notices inviting public comment were published in several local newspapers, including *The Monitor* on February 21, 2022. We did not receive any requests for a public hearing. All substantive information provided during the comment period has either been incorporated directly into this final determination or is addressed below.

State Agency Comments

(1) Comment: Texas Parks and Wildlife Department commented that designating critical habitat on private lands where support for the designation is not confirmed could harm relationships with landowners and ultimately impede voluntary conservation efforts for listed species and lead to additional resource protection, management, and partnership challenges.

Our response: We place great value on our partnerships with private landowners. Because important areas for prostrate milkweed conservation can occur on private lands, collaborative relationships with private landowners are key to further recovery. Designation of critical habitat does not affect land ownership, establish any restrictions on use of or access to the designated areas, establish specific land management standards or prescriptions, or prevent access to any land. Further, the Act does not authorize the Service to regulate private actions on private lands, and landowners are not obligated to incur any costs related to the species' conservation or to alter their current land management. Therefore, the listing of prostrate milkweed and designation of critical habitat will not impact private landowners and thus will not impede conservation efforts.

The Service supports voluntary conservation through our Partners for Fish and Wildlife Program and understands concerns for landowner privacy regarding rare plant locations. Where consistent with the discretion provided by the Act, it is beneficial to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation. Voluntary conservation programs may provide technical or financial assistance to the landowner. Private landowners may contact their local Service field office to obtain information about these programs.

(2) Comment: Texas Parks and Wildlife Department also commented that the benefits of excluding private lands from a critical habitat designation may outweigh the benefits of including those lands when the necessary landowner support has not been secured prior to such a designation.

Our response: According to our Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016), we consider six elements when considering whether or not to exclude an area from critical habitat: (1) partnerships and conservation plans; (2) conservation plans permitted under section 10 of the Act; (3) national security and homeland security impacts; (4) Tribal lands; (5) Federal lands; and (6) economic impacts. We give great weight and consideration to the conservation benefits provided through permitted and non-permitted conservation plans, programs, and partnerships. We will generally exclude any area covered by non-permitted conservation where partnerships provide a benefit to the species and its habitat. A generalized concern regarding the potential impact to landowner support is not sufficient grounds for us to be able to undertake an analysis weighing the benefits of exclusion against the benefits of inclusion in considering an area for exclusion. Under the Services' Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 **Federal Register** 7226; February 11, 2016), a proponent of such an exclusion must provide a reasoned rationale for such exclusion, including measures undertaken to conserve species and habitat on the land at issue (such that the benefit of inclusion is reduced). Evidence of a permitted conservation plan or non-permitted conservation agreement and partnership would be

required to demonstrate how the affected landowner(s) would provide a benefit to the species and its habitat. The commenter did not provide sufficient information for us to meaningfully evaluate the benefits of exclusion of private lands. Accordingly, we did not consider any areas for exclusion based on the potential impact to landowner support.

(3) Comment: The Office of the Attorney General of Texas commented that we should not list prostrate milkweed as an endangered species or designate portions of the Texas border as critical habitat under the Act because it would have a significant impact on national security by preventing Texas's efforts to address the border crisis and national security, such as ongoing and future efforts to erect and establish deterrents to illegal border crossings, including, but not limited to, construction of a border barrier.

Our response: The Act requires us to make a determination using the best available scientific and commercial data after conducting a review of the status of the species. For prostrate milkweed, the best available scientific and commercial data indicate that the species is currently in danger of extinction and therefore we are required to list the species as endangered under the Act. For exclusion of an area from critical habitat designation, we follow our Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226; February 11, 2016), which outlines measures we consider when excluding any areas from critical habitat. We reviewed the commenter's request and applied the February 11, 2016, Policy (81 FR 7226). Based on this analysis, we determined that the area should not be excluded from this final rule. Please see Consideration of Impacts under Section 4(b)(2) of the Act, *Exclusions Based on Other Relevant Impacts,* below, for our analysis of the Attorney General of Texas' request for exclusion for lands along the Texas border.

(4) Comment: The Office of the Attorney General of Texas commented that two environmental impact analyses conducted by U.S. Customs and Border Patrol have concluded that construction activity, such as building roads or a border wall, in the counties listed in the February 15, 2022, proposed rule would have minimal or no significant impact on vegetation, including the prostrate milkweed, and, therefore, designating critical habitat is not needed to protect the species from this activity.

Our response: Occupied critical habitat is defined under section 3 of the Act as 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 (PBFs) (I) essential to the conservation of the species and (II) which may require special management considerations or protection (16 U.S.C. 1532(5)(A)(i)). We find that the areas included in this final designation meet the first prong of the Act's definition of critical habitat; therefore, we must include them in the final designation unless the benefits of exclusion outweigh the benefits of inclusion. As discussed above in response to comment (3), we found that the benefits of exclusion did not outweigh the benefits of inclusion. Even if border construction activities will have minimal or no significant impacts to vegetation itself, critical habitat is meant to conserve all parts of the physical and biological habitat that are essential to prostrate milkweed. For a list of the PBFs, please refer to Physical or Biological Features Essential to the Conservation of the Species, below.

Once critical habitat is designated, we will continue to collaborate with DHS and CBP to ensure border security operations can still occur in areas designated as critical habitat for prostrate milkweed. To the best of our ability, we will work with other Federal agencies, including U.S. Customs and Border Patrol, to ensure actions they fund, authorize, or undertake are not likely to destroy or adversely modify critical habitat, including any of the PBFs essential to the conservation of the species. For prostrate milkweed, this includes destruction or adverse modification of soil that is well-drained and sandy overlying strata of sandstone or indurated caliche with a high gypsum concentration. However, designating critical habitat along the border would not impact CBP's ability to engage in border security operations in these areas.

Public Comments

We received numerous comments that prostrate milkweed is an important plant for migratory butterflies and should be protected. The commenters did not provide any new substantial information on prostrate milkweed's status or threats, and thus our critical habitat designation and determination that prostrate milkweed meets the definition of an endangered species under the Act did not change. Below, we provide a summary of the relevant public comments we received.

(5) Comment: One commenter stated we should designate critical habitat in the occupied areas along U.S. Highway 83 and immediately, prior to publishing the final rule, enter into section 7 consultation with Texas Department of Transportation regarding their vegetation removal in highway rights-of-way (ROWs).

Our response: As stated in the proposed rule (87 FR 8509; February 15, 2022), the degree and frequency of soil disturbance along U.S. Highway 83 has caused almost complete replacement of the native plant community with the introduced, highly invasive buffelgrass (*Pennisetum ciliare*). Maintenance operations for the highway, overhead powerlines, and communication cables located in trenches along the ROW will continue indefinitely, and it is likely that additional infrastructure will be installed in the ROW. The prostrate milkweed population in this ROW has declined from about 200 individuals, when it was discovered in 1988, to 3 or fewer individuals during the last 13 years. Further, PBFs 4 and 5 are no longer present along this improved highway ROW, and therefore we are not designating this area as critical habitat for the prostrate milkweed. We are also not including this area as unoccupied critical habitat because it located along a ROW with continuous disturbance that the species cannot withstand, and thus we are reasonably certain that this area will not contribute to the conservation of the species.

(6) Comment: One commenter stated that the Service and Texas Department of Transportation should remove buffelgrass and plant native species.

Our response: Addressing nonnative, invasive species may be valuable in conserving the prostrate milkweed. However, buffelgrass is an extremely difficult plant to control and manage. Efforts to eradicate buffelgrass in highway ROWs are unlikely to succeed because these areas are continuously disturbed for ROW operations and maintenance, making it difficult for native plants to establish and persist, and creating ideal circumstances for buffelgrass to reestablish. Therefore, we are focusing efforts on the conservation of prostrate milkweed in areas that contain the PBFs, including the absence of buffelgrass, where special management is likely to be effective.

(7) Comment: One commenter stated that we should remove PBFs 4 (vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species) and 5 (less than 20 percent cover of buffelgrass) because all occupied areas should be designated as critical habitat. They state that because the species' overall viability requires conservation of all populations

and genetic diversity, each remaining plant can contribute to genetic diversity if managed scientifically. Therefore, the commenter writes that no plants should be sacrificed because their habitat is suffering from adverse modification or undergoing outright destruction.

Our response: The Act does not define occupied critical habitat as all areas with the species present. Rather, the Act defines occupied critical habitat as the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those PBFs (I) essential to the conservation of the species and (II) which may require special management considerations or protection (16 U.S.C. 1532(5)(A)(i)). Occupied areas do not need to include all of the PBFs essential to the conservation of the species but must contain at least one. Using the best available scientific information, we have determined the PBFs that are essential to the conservation of prostrate milkweed (for more information, see Physical or Biological Features Essential to the Conservation of the Species, below). These include vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species, and areas that have less than 20 percent cover of buffelgrass. Special management can also help restore the critical habitat areas that are lacking some of the PBFs. Accordingly, we are focusing our conservation efforts for prostrate milkweed in areas that contain at least one PBF where special management is likely to be effective. Special management considerations may include prescribed burning, grazing, and/or brush thinning; nonnative, invasive grass control; protection from activities that disturb the soil; and propagation and reintroduction of plants in restorable areas. Furthermore, plants in areas that are not designated as critical habitat may still contribute to genetic diversity of the species and will receive any protections due to listing, even if those areas are not designated as critical habitat.

I. Final Listing Determination

Background

Please refer to the SSA report and the February 15, 2022, proposed rule (87 FR 8509) for a full summary of species information. Both are available on our Southwest Region website at *https://www.fws.gov/about/region/southwest* and at *https://www.regulations.gov* under Docket No. FWS–R2–ES–2021–0041.

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 expected response by the species and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as 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 listed 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 prostrate milkweed 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; the full SSA report can be found at Docket FWS–R2–ES–2021–0041 on *https://www.regulations.gov* and at *https://www.fws.gov/office/texas-coastal-ecological-services.*

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

For the prostrate milkweed to maintain viability, its populations or some portion thereof must have sufficient resiliency, redundancy, and representation. Several factors influence the resiliency of prostrate milkweed populations, including abundance and recruitment rate, in addition to elements of the species' habitat that determine whether prostrate milkweed populations can grow. These resiliency factors and habitat elements are discussed in detail in the SSA report and summarized here.

Species Needs

Abundance

Prostrate milkweed abundance is difficult to assess due to its ability to remain dormant for multiple years until the necessary environmental conditions occur. Individual plants may emerge only a few times per decade, and not all plants will emerge at the same time (Price 2005, pers. comm.; Best 2017, pers. comm.). Therefore, we considered populations to be extant if plants have been observed within the past 40 years (Strong 2020, pers. comm.) and with available habitat (*i.e.,* not paved over) or with restorable habitat (*i.e.,* nonnative grass could be removed).

Populations of prostrate milkweed must be large enough to have a high probability of enduring random demographic and environmental variation. For example, species or populations may be considered more vulnerable when the probability of persisting 100 years is less than 90 percent (Mace and Lande 1991, p. 151). This metric of population resilience, called minimum viable population (MVP), refers to the smallest population size that has a high probability of surviving over a specified period. Calculations of MVP require data that are not currently available for prostrate milkweed. As a practical alternative, we estimated the likely MVP range of prostrate milkweed by comparing it to species with similar life-history traits for which MVPs have been calculated (Pavlik 1996, p. 137). This method estimates a highly resilient population if prostrate milkweed has 1,600 or more adult individuals (Service 2020, p. 38).

Determinations of MVP usually consider the effective population size, rather than total number of individuals (Pavlik 1996, entire); 10 genetically identical individuals (for example, clones or ramets) would have an effective population size of one. Because prostrate milkweed is likely self-incompatible and does not appear to form clonal colonies, the effective population size is likely to be nearly the same as the total population size.

Recruitment Rate

A stable or increasing population requires recruitment rates that equal or exceed mortality rates (Service 2020, p. 38). All stages of recruitment, from flowering and seed production to germination and establishment, occur when the soil has available moisture. The porous soils of prostrate milkweed habitat dry quickly after a single heavy thunderstorm. Based on observations of other perennial forbs (broad-leaved herbaceous plants) in this ecosystem, recruitment probably occurs during periods of extended rainfall, meaning multiple rain events over a period of several weeks (Service 2020, p. 38). These events are rare in this semiarid region. Consequently, we expect that successful recruitment may occur only once or a few times per decade. Similarly, most mortality probably occurs during years of extended drought. Hence, both recruitment and mortality would have strong pulses and observed population sizes would vary widely from year to year, leading to potentially spurious interpretations of demographic trends (Service 2020, p. 38).

Populations of prostrate milkweed require habitats that also support healthy populations of large native bees and wasps (Service 2020, p. 38). Native bees in turn require a diversity and abundance of native forb and shrub species that provide pollen and nectar. Tarantula hawks (*Pepsis* spp. and *Hemipepsis* spp.) may also be important pollinators of prostrate milkweed; tarantula hawks require healthy populations of their prey species, tarantulas (Best 2020, pers. comm.).

Prostrate milkweed populations require competition from grasses and forbs to be periodically reduced (Service 2020, p. 38). This requirement, which has been observed in other milkweed species, may be an adaptation to wildfire (Baum and Sharber 2012, pp. 968–971). Although mowing or livestock grazing can also reduce competition, it is likely that prostrate milkweed is adapted to grasslands that were sustained by periodic wildfires (Service 2020, p. 39).

Canopy Cover

Canopy cover refers to shade from trees, shrubs, prickly pear cactuses, or tall (taller than 1 meter) grass. Sufficiently resilient prostrate milkweed populations need an open canopy with little or no herbaceous cover (Service 2020, p. 3). Therefore, the species may occur in areas that mimic historical wildfire or grazing, such as along mowed road ROWs (Service 2020, p. 3).

Ground Cover

Ground cover refers to vegetation growing at the herbaceous layer (shorter than 1 meter tall) that would compete with prostrate milkweed plants for resources. Sufficiently resilient prostrate milkweed populations need an open canopy with little or no herbaceous cover, so there is little competition with other plants (Service 2020, p. 3).

Risk Factors for Prostrate Milkweed

We reviewed the potential risk factors (*i.e.,* threats, stressors) that may affect prostrate milkweed now and in the future. In this rule, we will discuss only those factors in detail that could meaningfully impact the status of the species. Those risks that are not known to have effects on prostrate milkweed populations, such as quarrying/mining, hybridization, pollinator decline, and climate change, are not discussed here but are evaluated in the SSA report. The primary risk factors (*i.e.,* threats) affecting the status of prostrate milkweed are: (1) Competition from introduced invasive grasses (Factor A from the Act); (2) habitat loss from root-plowing and conversion of native vegetation to pasture (Factor A); (3) habitat loss from ROW construction and maintenance from energy development and road and utility construction (Factor A); (4) habitat loss from border security development and enforcement activities (Factor A); and (5) the demographic and genetic consequences of small population sizes and population fragmentation (Factor E).

Competition From Nonnative, Invasive Grasses

Nonnative, invasive grass species displace native plants by competing for water, nutrients, and light, and their dense root systems prevent germination of native plant seeds (Texas Invasives 2019, unpaginated). Buffelgrass (*Pennisetum ciliare*) is a perennial bunchgrass introduced from Africa that is now one of the most abundant introduced grasses in south Texas, and the most prevalent invasive grass within the range of prostrate milkweed. Since the 1950s, Federal and State land management agencies have promoted buffelgrass as a forage grass in south Texas (Smith 2010, p. 113). Buffelgrass is very well-adapted to the hot, semi-arid climate of south Texas due to its drought resistance and ability to aggressively establish in heavily grazed landscapes (Smith 2010, p. 113). Buffelgrass continues to be planted in areas affected by drought and overgrazing to stabilize soils and to increase rangeland productivity. Buffelgrass often creates homogeneous monocultures by out-competing native plants for essential resources (Lyons et al. 2013, p. 8), and it produces phytotoxins in the soil that inhibit the growth of neighboring native plants (Vo 2013, unpaginated). Furthermore, prescribed burning used for brush control promotes buffelgrass forage production in south Texas (Hamilton and Scifres 1982, p. 11).

Most prostrate milkweed plants have been observed where buffelgrass is absent or at low densities (Eason 2019, pers. comm.; Strong 2019, pers. comm.). On national wildlife refuge lands, prostrate milkweed was found in areas where native grass was still dominant, but not where buffelgrass or woody vegetation was present in dense stands (Best 2005, p. 3). The unpaved ROWs on private lands in south Texas for oil and gas wells, wind farms, service roads, pipelines, and powerlines could benefit prostrate milkweed through the periodic mowing of road margins. However, disturbed soils along ROWs are rapidly colonized by buffelgrass.

The Texas Natural Diversity Database (Database) lists invasive species, primarily buffelgrass, as a pervasive threat of extreme severity to prostrate milkweed. The Database defines a pervasive threat as one that affects all or most (71–100 percent) of a species' populations, occurrences, or extent. An extreme level of severity is one that is likely to destroy or eliminate occurrences or habitat or reduce population sizes by 71–100 percent (TXNDD 2016, unpaginated). It is likely that buffelgrass has negatively impacted all Texas populations (TXNDD 2019–2020, entire; Eason 2019, pers. comm.; Kieschnick 2019, pers. comm.). Competition from buffelgrass is the greatest threat to prostrate milkweed.

Root-Plowing and Conversion of Native Grassland and Savanna

Root-plowing is a brush control method that uses powerful tracked vehicles to excavate the roots of woody plants with heavy steel subsoil rippers that dig several feet into the ground. The dead trees and shrubs are then burned, and the root-plowed soils are planted with buffelgrass for livestock grazing. Root-plowing and conversion to buffelgrass pasture is a widely conducted practice in south Texas and northeast Mexico, occurring in much of the potential habitat of prostrate milkweed. Extensive areas of recently root-plowed lands can be identified in aerial photographs. These practices have been and are still subsidized by the United States Department of Agriculture (USDA) Natural Resources Conservation Service and its precursor, the USDA Soil Conservation Service.

Root-plowing temporarily reduces the encroachment of woody plants into the grassland component of former savannas. The conversion of native habitats to improved pastures dominated by buffelgrass or other introduced grasses greatly reduces the abundance and diversity of most native grass and forb species (Woodin et al. 2010, p. 1). Very few, if any, prostrate milkweed plants survive following root-plowing and buffelgrass planting. This is likely due to the excavation and desiccation of most tubers during root-plowing; subsequently, the few remaining individuals decline due to competition from dense buffelgrass cover.

Conversely, prostrate milkweed occurs in well-managed rangelands, provided that the soil was not previously root-plowed or otherwise disturbed (Service 2020, p. 53). Most milkweed species are unpalatable to cattle, and often increase in abundance on grazed lands. Livestock, including cattle, sheep, and horses, graze preferentially on grasses and forbs, including buffelgrass, and on nontoxic herbaceous plants; therefore, livestock grazing may reduce competition with prostrate milkweed from these plants (Service 2020, p. 41). In addition to grazing, livestock may also reduce competition with prostrate milkweed by trampling herbaceous plants (Service 2020, p. 41). Because prostrate milkweed is often observed in the wheel ruts of dirt roads, it appears to be

unusually tolerant of trampling; thus, the effect of livestock trampling is minimal (Service 2020, pp. 41–42). Periodic livestock grazing reduces competition from native and introduced grasses. In South Texas, over-grazed rangelands typically become invaded by woody plants, reducing the habitat suitability for prostrate milkweed. Hence, management practices that promote sustainable grazing of native grasses are beneficial to prostrate milkweed (Service 2020, p. 41).

Road and ROW Construction and Maintenance

Oil and gas exploration and wind energy development are occurring at a rapid pace in Starr and Zapata Counties, Texas. Seismic exploration and the construction of roads and caliche pads for oil and gas wells and wind turbines can destroy plants and their habitats within the construction footprint (Reemts et al. 2014, pp. 123, 125; Leslie 2016, p. 49). Additionally, graded service roads and other permanent structures may indirectly affect the hydrology of surrounding habitats by diverting and channeling water through drainage culverts. Invasive buffelgrass quickly colonizes disturbed roadsides, then invades adjacent habitats. Heavy vehicle traffic during oil and gas well drilling and wind farm construction may increase the frequency of road maintenance, such as grading or widening (Peña 2019, pers. comm.). Grading or blading a caliche road involves scraping the road's surface with a large heavy blade to remove ruts and roadside vegetation. Increased frequency of road maintenance that removes above-ground portions of plants could reduce or eliminate prostrate milkweed flower and fruit production. Conversely, grading or blading of caliche roads conducted during the milkweed's dormant periods may benefit the species by temporarily reducing competition from grasses and forbs (TXNDD 2019, p. 11). TXNDD (2019) ranks road expansion as a pervasive threat (affects all or most (71–100 percent) of a species' populations, occurrences, or extent) of extreme severity to prostrate milkweed.

All or parts of nine prostrate milkweed occurrences are in the margins of improved highway ROWs. All highway ROW populations have declined since they were first observed, likely due to the frequency of soil disturbance and invasive grass competition (Service 2020, p. 40). In addition, from 2010 to 2012, Texas Department of Transportation (TxDOT) widened segments of U.S. Highway 83 that affected at least three known prostrate milkweed sites: Arroyo del Tigre Grande, Mission Mier a Visita, and Arroyo Roma (Strong and Williamson 2015, p. 51; Paradise 2019, pers. comm.). TxDOT has also scheduled additional road widening or construction at five known prostrate milkweed populations: Arroyo del Tigre Grande, Arroyo del Tigre Chiquito, Arroyo de los Mudos, Mission Mier a Visita, and Arroyo Roma (TxDOT 2019, unpaginated). U.S. Customs and Border Protection (CBP) has scheduled road improvements at the prostrate milkweed population site located in the Arroyo Morteros tract of the Lower Rio Grande Valley National Wildlife Refuge (NWR) (Vallejo 2019, pers. comm.).

In contrast, all or parts of three prostrate milkweed occurrences are in the margins of unpaved rural roads. These relatively stable populations have persisted in narrow strips of native vegetation between the gravel or caliche roadbeds and the fence lines of adjacent private properties. The soils in these narrow, naturally vegetated strips have never been excavated, and they have relatively little buffelgrass cover.

The installation of natural gas pipelines and fiber-optic cables has removed prostrate milkweed plants in the Dolores and Arroyo del Tigre Chiquito populations in the past (Damude and Poole 1990, p. 32; Boydston 1993, unpaginated; Campos 1993, unpaginated). In 1995, Southwestern Bell installed a fiber-optic cable in the Highway 83 ROW, 2.6 miles south of the Webb-Zapata County line, which removed at least 100 individuals at the Dolores population (Service 1995, p. 1). In 1993, prior to the fiber-optic cable installation, this population was estimated to have 100 to 200 individuals (TXNDD 2019, unpaginated) and was the largest known population of prostrate milkweed.

In summary, prostrate milkweed faces risks from ROWs and road construction and maintenance associated with oil and gas activities, wind energy development, and utility and pipeline corridor construction.

Border Security Development and Enforcement Activities

All known Texas populations of prostrate milkweed are within 9 miles (14.5 kilometers) of the U.S.-Mexico border. To address border security concerns, additional border barrier construction was proposed in the Rio Grande Valley, including the Arroyo Morteros tract of the Lower Rio Grande Valley NWR. Should border wall construction occur, and depending on the alignment, construction could remove prostrate milkweed plants that occur within the construction footprint. Additionally, CBP plans to improve roads across this tract (Vallejo 2019, pers. comm.) and may also install new drag strips along existing roads. Drag strips are 13- to 16-foot (ft) (4- to 5-meter) -wide swaths cleared of all vegetation and regularly scraped to keep the soil surface loose, to detect recent foot traffic. Due to the high gypsum content, soils in this area are extremely vulnerable to gully erosion. Hence, the unvegetated, continually disturbed drag strips may exacerbate soil erosion and impact a much wider area. The Database ranks drag strip construction within prostrate milkweed populations as a small threat (defined as a threat that affects 1–10 percent of the total population or occurrences or extent) with an extreme level of severity (likely to destroy or eliminate occurrences or habitat, or reduce population by 71–100 percent) (TXNDD 2016, unpaginated). Consequently, the construction of border barriers, roads, and drag strips are potential threats of high magnitude to prostrate milkweed populations, depending on their alignment, design, and proximity to populations and local topography.

Native plant populations are legally protected on NWRs, and, if listed under the Act, these plants have additional legal protections from federally funded or regulated actions. However, a provision of the REAL ID Act of 2005 (Pub. L. 109–13, 119 Stat. 302) gives the Secretary of Homeland Security authority to waive other Federal laws, including the Endangered Species Act, to expedite construction of border barriers. Therefore, border barrier construction on private and public lands is exempt from consultation with the Service under section 7 of the Act. During the previous phase of border barrier construction, beginning in 2007, the Department of Homeland Security (DHS) and the Service coordinated to establish best management practices for the federally listed plants and animals in the project impact area (DHS 2008, entire); nevertheless, these best management practices did not address prostrate milkweed.

Small Population Sizes and Population Fragmentation

Small, isolated populations are more vulnerable to catastrophic losses caused by random fluctuations in recruitment (demographic stochasticity) or variations in rainfall or other environmental factors (environmental stochasticity) (Service 2016, p. 20). Small, reproductively isolated populations are susceptible to the loss of genetic diversity, to genetic drift, and

to inbreeding (Barrett and Kohn 1991, pp. 3–30). Due to the small size and isolation of prostrate milkweed populations, several may already suffer from genetic bottlenecks, genetic drift, inbreeding, and loss of allelic diversity.

In addition to population size, it is likely that population density and connectivity also influence population viability (Service 2020, p. 51). Prostrate milkweed is very likely to be an obligate outcrosser (fertilization between different individuals), as are most other *Asclepias* species, which requires that genetically compatible individuals be clustered within the forage range of the native pollinators for successful reproduction (Service 2020, p. 51). While the specific pollinators of this species have not been revealed, they are likely to be large bees or wasps, and the forage range could be up to several kilometers. If this is the case, sufficiently viable populations of prostrate milkweed could be dispersed at very low densities over relatively large areas, provided that they lie within fairly contiguous habitats that are traversed by pollinating insects. Thus, the small, isolated clusters of prostrate milkweed that have been documented, principally along public roads that slice through large expanses of potential habitat on private lands, may represent only tiny fractions of larger, highly dispersed populations (Service 2020, p. 51).

Based strictly on the available scientific data, the documented populations of prostrate milkweed are all far below the estimated MVP level and may be affected by the demographic and genetic consequences of small population sizes and by fragmentation of populations.

Summary

Our analysis of the past, current, and future influences on the needs of prostrate milkweed for long-term viability revealed several threats that pose a risk to current and future viability: competition from introduced invasive grass (buffelgrass); root-plowing of rangelands; development of new oil and gas wells, wind energy farms, roads, pipelines, and utility corridors; development of new border barriers and drag strips; and the demographic and genetic consequences of small population sizes and population fragmentation. Conversely, well-managed livestock grazing of rangeland is compatible with management of prostrate milkweed habitat and may benefit this species.

Species Condition

The current condition of prostrate milkweed considers the status and risks to its populations. In the SSA report, for each population, we developed and assigned condition categories for two demographic factors and two habitat factors that are important for viability of prostrate milkweed. The condition scores for each factor were then used to estimate the probability of persistence over the next 30 years. We chose 30 years because it is within the range of available climate change model forecasts where we can reasonably foresee the future condition of the species. Populations were rated high, moderate, or low when that probability is greater than 90 percent, between 60 and 90 percent, or between 10 and 60 percent, respectively. Functionally extirpated populations are not expected to persist over 30 years or are already extirpated.

There are 24 populations of prostrate milkweed remaining in Starr and Zapata Counties, Texas, and in Tamaulipas and eastern Nuevo León, Mexico (see table 1, below). The species' range extends more than 200 miles (320 kilometers) from northwest to southeast. In Texas, one population, Dolores, is somewhat isolated in northern Zapata County, with the nearest known population approximately 25 miles (40 kilometers) away. In Mexico, eight known populations are in isolated pockets widely scattered in Tamaulipas and eastern Nuevo León. However, botanists have only surveyed a small proportion of the species' range. Furthermore, the species remains dormant and undetectable except for short periods of time after infrequent, heavy rainfall. Consequently, although the species is certainly rare, its actual abundance is difficult to determine. It is likely that, historically, populations occurred between these areas, connecting the populations in Texas and Mexico. Because they are widely separated, natural gene flow or reestablishment following disturbance is very unlikely between the 24 known populations. Based upon our analysis of current conditions of these 24 extant populations, none are in high condition, 5 are in moderate condition, and 19 are in low condition.

TABLE 1—SUMMARY OF CURRENT CONDITION FOR PROSTRATE MILKWEED

Population name	Current condition
Dolores	Low.
14493	Low.
14491	Low.
Arroyo del Tigre Grande	Moderate.
Arroyo del Tigre Chiquito	Low.
FM 2098	Low.
Falcon	Low.
Los Alvaros	Moderate.
Arroyo Morteros Tract	Moderate.
Los Arrieros Loop	Low.
Arroyo de los Mudos	Low.
Mission Mier a Visita	Low.
San Julián Road	Moderate.
FM 3167	Moderate.
Arroyo Roma	Low.
Arroyo Ramirez Tract	Low.
Rancho La Coma	Low.
Road to Guerrero Viejo	Low.
Carboneras	Low.
Punta de Alambre	Low.
Intersection of 101–180	Low.
Rio El Catán	Low.
Rancho Loreto North	Low.
Rancho Loreto South	Low.

The two demographic factors used to analyze resiliency of prostrate milkweed populations are abundance and recruitment rate. Related to abundance, a highly resilient population of prostrate milkweed has 1,600 or more adult individuals, a moderately resilient population has from 800 to 1,600 mature individuals, and a population with fewer than 800 mature individuals has low resilience (Service 2020, p. 38). Prostrate milkweed populations have high resiliency if the recruitment rate is greater than or equal to 25 percent of individuals producing viable seeds per year. Moderately resilient populations have recruitment rates of between 15 and 24 percent per year, and populations with low resiliency have recruitment rates of less than 15 percent per year (Service 2020, p. 57).

The two habitat factors used to analyze resiliency of prostrate milkweed populations were canopy cover and groundcover. Highly resilient populations have less than 30 percent canopy cover and have all bare ground or are sparsely vegetated with mostly native grass and/or forbs. Moderately resilient populations have between 30 and 60 percent canopy cover and are sparsely vegetated with a mixture of native and nonnative grasses and/or forbs. Minimally resilient populations have between 61 and 100 percent canopy cover and a dense groundcover of native or introduced grasses and forbs and little or no bare ground (Service 2020, p. 57).

Redundancy is low for this species due to low numbers of populations in moderate to high condition for

resiliency, making prostrate milkweed populations vulnerable to extirpations from catastrophic events. Because buffelgrass invasion is prevalent in this area, ecological diversity among the known populations is limited and thus species representation is low. Furthermore, the populations are isolated and widespread across the range, and therefore gene flow among the populations is limited. As a consequence of these current conditions, the viability of the prostrate milkweed now primarily depends on maintaining and restoring the remaining isolated populations and potentially discovering or reintroducing new populations where feasible.

As part of the SSA, we also developed three plausible future scenarios to capture the range of uncertainties regarding future threats and the projected responses by the prostrate milkweed. Our scenarios included a continuing conditions scenario, which incorporated the current risk factors continuing on the same trajectory that they are on now. We also evaluated a conservation scenario and a scenario with increased stressors. Because we determined that the current condition of the prostrate milkweed is consistent with an endangered species (see Determination of Prostrate Milkweed's Status, below), we are not presenting the results of the future scenarios in this rule. Please refer to the SSA report (Service 2020, entire) for the full analysis of future scenarios.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Determination of Prostrate Milkweed'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 endangered species or threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we found that, of the 24 known prostrate milkweed populations remaining, 19 are small, are isolated, and have low resiliency; 5 have moderate resiliency and connection to other populations; and none have high resiliency. Several factors pose threats to prostrate milkweed, including competition from introduced, invasive grass; habitat loss and degradations from root-plowing and conversion of native vegetation to improved buffelgrass pasture; habitat loss from ROW construction and maintenance from energy development and road and utility construction; habitat loss from border security development and enforcement activities (Factor A from the Act); and the demographic and genetic consequences of small population sizes (Factor E).

All the aforementioned threats are currently affecting the known populations of prostrate milkweed. Buffelgrass has already negatively impacted all the Texas populations (TXNDD 2019–2020, entire; Eason 2019, pers. comm.; Kieschnick 2019, pers. comm.) and will continue to do so in the future. Habitat loss and degradation from root-plowing and conversion of native vegetation to improved buffelgrass pasture has also already been occurring for many years (Service 2020, p. 40). Habitat loss from ROW construction and maintenance associated with energy development and road and utility construction has already been observed from oil and gas development occurring in Zapata County. As of November 2019, no wind turbines, oil or gas well pads, pipelines, or energy service roads have been constructed directly within known prostrate milkweed populations. However, some Starr County prostrate milkweed populations are less than 2 kilometers (1.2 miles) from existing wind turbines (Service 2020, pp. 42–43), and a few wind energy farms are expected to be constructed in the future, which could lead to additional habitat loss. Habitat loss from border security development and enforcement activities has occurred in recent years and is expected to continue. Finally, the demographic and genetic consequences of small population sizes are a current threat to the prostrate milkweed. This situation is not expected to change into the future.

In addition to the current threats, redundancy and representation are also limited. There are 24 known populations that are distributed widely across the species' range, and the majority of those populations are currently in low condition. Should a catastrophic event occur, the populations are vulnerable to extirpation because they are small and isolated from each other. The small, reproductively isolated populations are also susceptible to the loss of genetic diversity, genetic drift, and inbreeding due to random fluctuations in recruitment (demographic stochasticity) or variations in rainfall or other environmental factors (environmental stochasticity). Because of the species' overall current resiliency, redundancy, and representation, prostrate milkweed is currently in danger of extinction throughout all of its range. We do not find that the species meets the Act's definition of a threatened species because the species has already shown low levels in current resiliency, redundancy, and representation due to the threats mentioned above. Thus, after assessing the best available information, we determine that prostrate milkweed is in danger of extinction throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have

determined that the prostrate milkweed is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portions of its range. Because the prostrate milkweed 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 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) 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.

Determination of Status

Our review of the best available scientific and commercial information indicates that the prostrate milkweed meets the Act's definition of an endangered species. Therefore, we are listing prostrate milkweed 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 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.

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline and making it available to the public within 30 days of a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (*https://www.fws.gov/program/endangered-species*), or from our Texas Coastal Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Once this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Texas will be eligible for Federal funds to implement management actions that promote the protection or recovery of the prostrate milkweed. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance.*

Please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is 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)(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 any endangered or threatened 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 us.

Federal agency actions within the species' habitat that may require conference, consultation, or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the U.S. Fish and Wildlife Service.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered plants. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.61, make it illegal for any person subject to the jurisdiction of the United States to import or export; remove and reduce to possession from areas under Federal jurisdiction; maliciously damage or destroy on any such area; remove, cut, dig up, or damage or destroy on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law; deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce an endangered plant. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other

Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.62. With regard to endangered plants, a permit may be issued for scientific purposes or for enhancing the propagation or survival of the species. 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 final listing on proposed and ongoing activities within the range of the listed species. Based on the best available information, the following actions are unlikely to result in a violation of section 9, if these activities are carried out in accordance with existing regulations and permit requirements; this list is not comprehensive:

(1) Normal agricultural and silvicultural practices, including herbicide and pesticide use, that are carried out in accordance with any existing regulations, permit and label requirements, and best management practices;

(2) Normal residential landscaping activities on non-Federal lands; and

(3) Recreational use with minimal ground disturbance.

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 handling, removing, trampling, or collecting of prostrate milkweed on Federal land; and

(2) Removing, cutting, digging up, or damaging or destroying prostrate milkweed in knowing violation of any law or regulation of the State of Texas or in the course of any violation of a State criminal trespass law.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Texas Coastal Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Critical Habitat

Background

Although this critical habitat designation was proposed when the regulatory definition of habitat (85 FR 81411; December 16, 2020) and the 4(b)(2) exclusion regulations (85 FR 82376; December 18, 2020) were in place and in effect, those two regulations have been rescinded (87 FR 37757; June 24, 2022 and 87 FR 43433; July 21, 2022) and no longer apply to any designations of critical habitat. Therefore, for this final rule designating critical habitat for the prostrate milkweed, we apply the regulations at 424.19 and the 2016 Joint Policy on 4(b)(2) exclusions (81 FR 7226; February 11, 2016).

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, we designate a species' critical habitat concurrently with listing the species. None of the situations identified at 50 CFR 424.12(a) for when designation of critical habitat would be not prudent or not determinable is present. We therefore are designating critical habitat for prostrate milkweed concurrently with listing it.

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 and biological features (PBFs)

(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 PBFs (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 PBFs 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. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the PBFs that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Geological Substrate and Soils

Prostrate milkweed grows in well-drained sandy soils of the Tamaulipan shrubland region of south Texas and northeast Mexico (Service 2020, pp. 22–26). In Starr and Zapata Counties, Texas, the soils of documented sites overlie Eocene and Oligocene sandstones and clays of the Laredo, Yegua, and Jackson geological formations (Stoeser et al. 2005, unpaginated). In some occupied sites, a stratum of indurated caliche may also be present; in south Texas, caliche refers to soil strata of precipitated calcium carbonate formed during the early Pliocene (Spearing 1998, pp. 258, 398; Baskin and Hulbert, Jr. 2008, p. 93). Soil types of these occupied sites include deep eolian Hebbronville sands, Copita fine sandy loam, Brennan fine sandy loam, eroded Maverick soils, Catarina clay, and Zapata soils (USDA 1972, entire; USDA 2011, entire). Elevated levels of gypsum are present at some sites.

The climate of the Tamaulipan shrubland region is subtropical and semi-arid. Much of the region's precipitation occurs during infrequent periods of heavy rainfall that interrupt prolonged spells of very hot, dry weather. Rainfall readily infiltrates into the well-drained sandy soils of prostrate milkweed habitats, but moisture does not persist long in these soils. Many occupied sites have underlying strata of sandstone; these barriers to root growth limit the establishment of trees and taller shrubs. The growth of many plant species is also limited by high soil gypsum concentrations in some occupied sites. The rapid drying of soil, impenetrable rock strata, and high gypsum are all factors that reduce competition from woody plants, grasses, and other herbaceous plants.

Prostrate milkweed forms tubers underground that are able to persist in a dormant condition for one to several

years. The species responds very quickly to rainfall; the tubers sprout new stems that emerge, flower, and set seed in a matter of weeks, and the plants store carbohydrates, minerals, and water in tubers. Then the above-ground portions die back during hot, dry weather. Prostrate milkweed does not occur in areas of higher rainfall or where moisture persists longer in deeper silty or clayey soils. The species does not persist when occupied sites develop a dense shrub overstory or dense cover of grasses. We conclude that prostrate milkweed is endemic to sites where it escapes competition from other plants through its unique adaptation to ephemeral soil moisture, prolonged drought, and tolerance of high gypsum concentrations.

Therefore, well-drained sandy soil overlying sandstone or indurated caliche strata is an essential physical feature of prostrate milkweed critical habitats. A high soil gypsum concentration contributes to the habitat suitability of some sites by reducing competition and is an essential physical feature.

Ecological Community

Within the Tamaulipan shrubland ecological region, prostrate milkweed inhabits arid subtropical grasslands and shrub savannas. It requires an open canopy, where there is little or no shade from trees and shrubs, and relatively little competition from grasses and herbaceous plants; the estimated combined cover of woody plants, grasses, and herbaceous plants at a site in Zapata County was less than 30 percent (Damude and Poole 1990, p. 16). It is likely that naturally occurring wildfires, in the past, maintained the relatively open structure of these plant communities (Scifres and Hamilton 1993, pp. 8–21). We have observed an increased abundance of other Texas species of *Asclepias,* including antelope horns (*A. asperula*), Emory's milkweed (*A. emoryi*), zizotes milkweed (*A. oenotheroides*), and wand milkweed (*A. viridiflora*), during the first few years after sites have burned; this fire-following effect has been described for green milkweed (*A. viridis*) (Baum and Sharber 2012, entire). Prostrate milkweed, like other milkweeds, may also be stimulated to grow and flower after wildfires have reduced competition.

Most *Asclepias* species require outcrossing for effective fertilization of flowers. All *Asclepias* species have highly specialized pollination mechanisms that require animal pollinators to carry pollen from one individual to another. Although the effective pollinators of prostrate milkweed have not been determined, these are likely to include large bees and wasps. For example, the closely related zizotes milkweed is effectively pollinated by very large wasps called tarantula hawks (*Pepsis* spp. and *Hemipepsis* spp.) (Service 2020, pp. 17, 35–36). Therefore, prostrate milkweed habitats must also support populations of large bees and wasps that, in turn, require abundant, diverse sources of pollen and nectar. Much like milkweeds, many pollen and nectar plants are fire followers that are most abundant in sites that burn periodically, but decline when fires are infrequent.

Buffelgrass is an African grass that is widely planted in south Texas for livestock forage. Buffelgrass is highly invasive, and frequently displaces native grasses and herbaceous plants (Best 2009, pp. 310–311), including prostrate milkweed (Service 2020, pp. 39–40) and the pollen and nectar plants needed to support pollinator populations. The majority of prostrate milkweed plants have been observed in sites where buffelgrass is absent or at low densities (Eason 2019, pers. comm.; Strong 2019, pers. comm.). Prostrate milkweed requires an open canopy with less than 30 percent cover of native and nonnative grasses and herbaceous plants combined (Damude and Poole 1990, p. 16); thus, assuming nonnative buffelgrass is more prevalent, we estimate that 20 percent or less cover of buffelgrass is at a low enough density for prostrate milkweed to survive. Therefore, prostrate milkweed habitats must also have less than 20 percent cover of buffelgrass for prostrate milkweed to have access to sufficient resources such as sunlight.

In summary, the essential biological features of prostrate milkweed critical habitats are: (1) open savannas and grasslands of the Tamaulipan shrubland ecological region; (2) vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species; and (3) less than 20 percent cover of buffelgrass.

Summary of Essential Physical or Biological Features

Additional information can be found in the SSA report (Service 2020, available on *https://www.regulations.gov* under Docket No. FWS–R2–ES–2021–0041). We have determined that the following PBFs are essential to the conservation of prostrate milkweed:

(1) Well-drained sandy soil overlying strata of sandstone or indurated caliche;

(2) High soil gypsum concentration;

(3) Open savannas and grasslands of the Tamaulipan shrubland ecological region;

(4) Vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species; and

(5) Less than 20 percent cover of buffelgrass.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: nonnative, invasive grass; root-plowing and conversion of native vegetation to buffelgrass pasture; ROW construction and maintenance from energy development and road and utility construction; border security development and law enforcement activities; and small population sizes. Management activities that could ameliorate these threats include, but are not limited to: prescribed burning, grazing, and/or brush thinning; nonnative, invasive grass control; protection from activities that disturb the soil; and propagation and reintroduction of plants in restorable areas. There are a variety of ways to manage the land to address the threats facing prostrate milkweed.

In summary, we find that the occupied areas we are designating as critical habitat contain the PBFs that are essential to the conservation of the species and that may require special management considerations or protection. Special management considerations or protection may be required of the Federal action agency to eliminate, or to reduce to negligible levels, the threats affecting the PBFs of each unit.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside

the geographical area occupied by the species to be considered for designation as critical habitat. We are not designating any areas outside the geographical area occupied by the species because we have not identified any unoccupied areas that meet the definition of critical habitat. While prostrate milkweed needs additional populations to reduce the likelihood of extinction in the future, we are not able to identify additional locations that may have a reasonable certainty of contributing to conservation at this time due to limited access to privately owned lands and information regarding lands that would be good candidates for introductions in the species' range. Accordingly, we cannot at this time identify unoccupied locations that are essential to the conservation of the species.

We are designating lands as critical habitat that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and that contain one or more of the PBFs that are essential to support life-history processes of the species. Units are based on one or more of the PBFs being present to support prostrate milkweed's life-history processes. Some units contain all of the identified PBFs and support multiple life-history processes. Some units contain only some of the PBFs necessary to support the prostrate milkweed's particular use of that habitat.

In summary, for areas within the geographic area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following criteria. First, using ArcGIS software, we identified potential habitats in Starr and Zapata Counties that have the essential features of geology and soils described above. The geographic information we obtained about the known populations exists as: (1) vegetation surveys of entire tracts of land; (2) element occurrence (EO) polygons represented in the Texas Natural Diversity Database (Database); or (3) points and lines represented in the Database. We then adapted methods to delineate critical habitats for each type of geographic information.

We delineated all the potential habitats that occur at the Arroyo Ramirez tract and the Arroyo Morteros tract of the Lower Rio Grande Valley NWR as critical habitat (Units 2 and 5). The Lower Rio Grande Valley NWR comprises several disconnected land parcels, rather than one big land area, and these parcels are referred to as ''tracts.'' The two tracts that are included in Units 2 and 5 are isolated areas of NWR land. These NWR tracts are managed for the conservation of native plants and animals, and we have conducted plant surveys and have extensive knowledge of habitat suitability of these tracts.

Similarly, we delineated all the potential habitats that occur at a private ranch (Unit 6) that is managed for wildlife and plant conservation as critical habitat. The landowner has granted access for plant surveys and vegetation studies to researchers from the Texas Parks and Wildlife Department, academic institutions, and the Service. Two of the known populations are represented as polygons in the Database located in the ROWs of unpaved county roads in Starr County. We have no information about the land uses or habitat suitability of areas outside these polygons. We delineated all the potential habitats that occur within these polygons (Units 4 and 7) as critical habitat. Three of the known populations are represented as one or more points or lines in the Database located on privately owned land. We have no information about the land uses or habitat suitability of areas outside the points and lines. Because critical habitats must be areas, not points or lines, we delineated all areas of potential habitat within 50 meters (m) (164 feet (ft)) from these points and lines as critical habitat units; we chose the 50-m distance because the Database also used a 50-m distance for most of these features to account for estimated geographic precision. To complete the delineations of critical habitat areas, we overlaid each critical habitat area described above on Digital Ortho-Quarter Quad aerial photographs to identify and exclude any portions of sites that consist of unvegetated roadbeds that are frequently driven and are maintained by road grading, as well as structures and other developed areas that do not contain the geological and soil substrates and vegetative cover that are essential PBFs.

We did not include in this designation one historical observation that has only approximate location data and cannot be mapped. We also did not include any of the populations reported in the U.S. Highway 83 ROW, all of which have declined since they were first reported. For example, part of EO 3 (Dolores) along U.S. Highway 83 had about 200 individuals in 1988; four surveys conducted from 2009 to 2017 found from 0 to 3 individuals. The degree and frequency of soil disturbance in the ROWs of improved highways has caused almost complete replacement of the native plant community with introduced species, such as buffelgrass. Hence, the essential PBFs are no longer present along this improved highway ROW. For the same reasons, we did not include one site in the road bed of a Starr County park where the species was last observed in 1995.

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for prostrate milkweed. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PBFs in the adjacent critical habitat.

This final critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *https://www.regulations.gov* at Docket No. FWS–R2–ES–2021–0041 and on our internet site at *https://www.fws.gov/office/texas-coastal-ecological-services.*

Final Critical Habitat Designation

We are designating eight units as critical habitat for prostrate milkweed. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for prostrate milkweed. The eight areas we are designating as critical habitat units are all Database EOs: Unit 1 (EO 3), Unit 2 (EO 10), Unit 3 (EO 11), Unit 4 (EO 12), Unit 5 (EO 15), Unit 6 (EO 16), Unit 7 (EO 17), and Unit 8 (EO 22). Table 2 shows the critical habitat units and the approximate area of each unit. All units are occupied.

TABLE 2—CRITICAL HABITAT UNITS FOR PROSTRATE MILKWEED

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)	Occupied?
1 (EO 3)	County Road ROW and Private	10.5 (4.3)	Yes.
2 (EO 10)	Federal (Service)	85.7 (34.7)	Yes.
3 (EO 11)	Private	4.0 (1.6)	Yes.
4 (EO 12)	County Road ROW	4.2 (1.7)	Yes.
5 (EO 15)	Federal (Service)	51.9 (21.0)	Yes.
6 (EO 16)	County Road ROW and Private	484.3 (196.0)	Yes.
7 (EO 17)	County Road ROW and Private	19.4 (7.8)	Yes.
8 (EO 22)	Private	1.0 (0.4)	Yes.
Total		661.0 (267.5)	

Note: Area sizes may not sum due to rounding.

Below, we present brief descriptions of all units and reasons why they meet the definition of critical habitat for prostrate milkweed.

Unit 1: EO 3

Unit 1 consists of six areas, totaling 10.5 acres (ac) (4.3 hectares (ha)), east of U.S. Highway 83 in northwest Zapata County. This unit is on private land and unpaved county road ROWs. The unit is occupied by the species and contains PBFs 1, 3, and 4. Although we have no recent information on threats that affect this unit, we conclude that this unit is affected by invasive, nonnative grass (buffelgrass) and road maintenance operations. Therefore, special management considerations may be required to reduce invasion of nonnative species and impacts from ROW maintenance.

Unit 2: EO 10

Unit 2 consists of 85.7 ac (34.7 ha) in the 699.4-acre Arroyo Ramirez tract of Lower Rio Grande Valley NWR. This unit is in southwestern Starr County adjacent to the Rio Grande on the U.S 2012;Mexico border. The entire unit is on land owned and managed by the Service. The unit is occupied by the species and contains PBFs 1 and 4.

In this final rule, the designated critical habitat in Unit 2 reflects recently constructed border wall, which reduces the area meeting the definition of critical habitat in the unit. Specifically, this change results in a decrease of 19.7 ac (8.0 ha) of critical habitat from what we proposed for Unit 2 on February 15, 2022 (87 FR 8509).

This unit could be directly impacted by border security operations (*i.e.,* drag strips), or indirectly impacted by channeling of runoff along the barrier during heavy rainfall, in addition to invasion of buffelgrass. Therefore, special management considerations may be required to mitigate impacts from border security operations and nonnative grass.

Unit 3: EO 11

Unit 3 consists of three areas, totaling 4.0 ac (1.6 ha), on private land in southwestern Starr County. The unit is occupied by the species and contains PBFs 1, 2, and 4. We have no recent information on threats that affect this unit. Special management considerations may be required.

Unit 4: EO 12

Unit 4 consists of 4.2 ac (1.7 ha) along an unpaved county road ROW in southwestern Starr County. This ROW supports a narrow strip of diverse native vegetation that has likely not been plowed, bulldozed, or graded. The unit is occupied by the species and contains all of the PBFs essential to the conservation of prostrate milkweed. This unit is affected by invasive, nonnative grass (buffelgrass) and maintenance and operation of the county road. Therefore, special management considerations may be required to reduce invasion of nonnative species.

Unit 5: EO 15

Unit 5 consists of 51.9 ac (21.0 ha) in the 90.8-acre Arroyo Morteros tract of the Lower Rio Grande Valley NWR. This unit is in southwestern Starr County adjacent to the Rio Grande on the U.S. Mexico border. The entire unit is on land owned and managed by the Service. The unit is occupied by the species and contains all of the PBFs essential to the conservation of prostrate milkweed.

In this final rule, the designated critical habitat in Unit 5 reflects correction of a map projection error of the NWR tract boundary, which reduces the area of this unit. Specifically, this change results in a decrease of 10.6 ac (4.3 ha) of critical habitat from what we proposed for Unit 5 on February 15, 2022 (87 FR 8509).

This unit could be directly impacted by border barrier construction and security operations (*i.e.,* drag strips), or indirectly impacted by channeling of runoff along the barrier during heavy rainfall, in addition to invasion of buffelgrass. Therefore, special management considerations may be required to mitigate impacts from border security operations and nonnative grass.

Unit 6: EO 16

Unit 6 consists of 484.3 ac (196.0 ha) entirely on the 488.5-acre private Martinez Ranch and along a county road ROW. This unit is in southern Starr County. The owner of the Martinez Ranch is a willing conservation partner in managing the property's native plants and wildlife. The unit is occupied by the species and contains all of the PBFs essential to the conservation of prostrate milkweed. This unit is affected by invasive, nonnative grass (buffelgrass). Therefore, special management considerations may be required to reduce invasion of nonnative species.

Unit 7: EO 17

Unit 7 consists of 19.4 ac (7.8 ha) along both sides of an unpaved county road ROW and adjacent private land in western Starr County. This ROW supports a narrow strip of diverse native vegetation that has likely not been plowed, bulldozed, or graded. The unit is occupied by the species and contains PBFs 1, 3, 4, and 5. This unit is affected by invasive, nonnative grass (buffelgrass) and maintenance and operation of the county road. Therefore, special management considerations may be required to reduce invasion of nonnative species.

Unit 8: EO 22

Unit 8 consists of 1.0 ac (0.4 ha) on private land in central Zapata County.

The unit is occupied by the species and contains PBFs 1, 3, and 4. Although we have no recent information about threats that affect this unit, we estimate that this unit is affected by invasive, nonnative grass (buffelgrass) and development and maintenance of oil and gas wells and utility corridors. Therefore, special management considerations may be required to reduce invasion of nonnative species and impacts from ROW construction and maintenance from energy development and road and utility construction.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action.

In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but Congress also enacted some exceptions in 2018 to the requirement to reinitiate consultation on certain land management plans on the basis of a new species listing or new designation of critical habitat that may be affected by the subject Federal action. See 2018 Consolidated Appropriations Act, Public Law 115–141, Div, O, 132 Stat. 1059 (2018).

Application of the ''Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support PBFs essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that we may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would degrade or destroy native plant communities. Such activities could include, but are not limited to, building roads, clearing land for oil and gas exploration or other purposes, introducing and encouraging the spread of nonnative species (*i.e.,* buffelgrass), and conducting border security operations. However, above-ground cutting or thinning of woody plants and prescribed burning are recommended management practices for conservation of prostrate milkweed and other native grasses and forbs, and would not destroy or adversely modify critical habitats.

(2) Actions that would mechanically disturb the soil structure. Such activities could include, but are not limited to, bulldozing, root-plowing, ripping, excavating, or other mechanical operations that penetrate deep enough into the soil to cut or remove the tubers of prostrate milkweed.

(3) Actions that would increase competition from woody plants or introduced grasses. Such activities could include, but are not limited to, intentional planting of introduced grass species, such as buffelgrass,

bermudagrass (*Cynodon dactylon*), or Old World bluestems (introduced species of *Dichanthium* and *Bothriochloa*).

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. There are no DoD lands with a completed INRMP within the final critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 FR 7226 (February 11, 2016)) (2016 Policy), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled, ''The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act'' (M–37016). We explain each decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable.

The Secretary may exclude any particular area if she determines that the benefits of such exclusion outweigh the benefits of including such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In this final rule, we are not excluding any areas from critical habitat. We describe below the process that we undertook for deciding whether to exclude any areas taking into consideration each category of impacts and our analyses of the relevant impacts.

Exclusions Based on Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, we consider our economic analysis of the critical habitat designation and related factors (IEc 2021, entire). The analysis, dated March 11, 2021, was made available for public review from February 15, 2022, through April 18, 2022 (87 FR 8509). The economic analysis addressed probable economic impacts of critical habitat designation for prostrate milkweed. Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. This final critical habitat designation is 30.3 ac (12.3 ha) less than the proposed critical habitat designation, and therefore we would expect the incremental costs to be the same or slightly less than previously estimated in the economic analysis. Additional information relevant to the probable incremental economic impacts of the critical habitat designation for prostrate milkweed is summarized below and available in the screening analysis for the prostrate milkweed (IEc 2021, entire), available at *https://www.regulations.gov*.

The full description of the findings from the economic analysis are outlined in the proposed rule (87 FR 8509; February 15, 2022). The estimated incremental costs of the total proposed critical habitat designation for prostrate milkweed was found to be less than $37,800 per year. Therefore, with the removal of 30.3 ac (12.3 ha) of critical habitat from this final critical habitat designation to reflect border wall construction in Unit 2 and the correction of the map projection for Unit 5, the annual administrative burden is very unlikely to reach $100 million, which is the threshold for a significant regulatory action under Executive Order (E.O.) 12866.

As discussed above, we considered the economic impacts of the critical habitat designation, and the Secretary is not exercising her discretion to exclude any areas from this designation of critical habitat for the prostrate milkweed based on economic impacts.

Exclusions Based on Impacts on National Security and Homeland Security

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i), because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, we will always consider for exclusion from the designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns. We did not receive any additional information during the public comment period for the proposed critical habitat designation from DoD, DHS, or any other Federal agency regarding impacts of the designation on national security or homeland security that would support excluding any specific areas from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19. No lands within the designation of critical habitat for prostrate milkweed are owned or managed by DoD or DHS.

We received a comment from the Office of the Attorney General of Texas regarding its concerns that including portions of the Texas border as critical habitat would impact national security by preventing Texas's efforts to address the border crisis. We coordinated with CBP in finalizing this rule to ensure appropriate collaboration in our national security and conservation efforts, and they did not request exclusion of the two units of critical habitat located along the border on the

basis of national security or homeland security concerns. As a result, we do not anticipate that there will be an impact on national security or homeland security. Accordingly, we evaluated the Office of the Attorney General of Texas's request for under the basis of other relevant impacts (see *Exclusions Based on Other Relevant Impacts*) below.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area—such as HCPs, SHAs, or CCAAs—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

Attorney General of Texas—Texas Border Lands

We received a comment from the Attorney General of Texas requesting that areas along the U.S.-Mexico border in Texas be excluded from the final critical habitat designation for prostrate milkweed. This request involves Units 2 and 5, which are lands owned and managed by the Service as part of the Lower Rio Grande Valley NWR.

The Attorney General of Texas' rationale for requesting the exclusion was that designating these lands along the U.S.-Mexico border in Texas would prevent Texas' effort to address the border crisis via implementing proven deterrence measures to protect its borders from illegal immigration, such as building a border barrier and engaging in border enforcement activities. In his comment, the Attorney General of Texas acknowledged the value in protecting species native to Texas and general conservation efforts, but stated that designating critical habitat must also account for potential implications to border security, and thus national security. The Attorney General of Texas discussed the increasing trend in the number of encounters with migrants at the border and organized crime, such as human and drug trafficking, and discussed the economic impact to ranchers from fence and gate damage.

Additionally, the Attorney General of Texas commented that recent environmental analyses conducted by CBP determined that border enforcement activities, such as border barrier and road construction, are of minimal or no significance to prostrate milkweed, and thus designation of critical habitat is not needed to protect the species. The Attorney General of Texas writes that these actions by Texas to secure the border would reduce foot traffic by enforcing border security activities, thus actually benefiting surrounding vegetation, including prostrate milkweed. The comment concludes that the border crisis in Texas is resulting in increased costs to the State of Texas. The Attorney General of Texas concludes that designating critical habitat along the U.S.-Mexico border in Texas would prevent the State from implementing proven deterrence measures to protect its border.

Prostrate milkweed occurs in two areas along the U.S.-Mexico border on tracts of land owned by the Lower Rio Grande Valley NWR: Arroyo Ramirez and Arroyo Morteros, Units 2 and 5 of critical habitat, respectively. An 11,086-foot-long border wall was constructed across the western and northern part of the Arroyo Ramirez tract, and the cleared construction area averages about 200 feet wide and is 46.7 acres in area. The Arroyo Morteros tract does not currently have a border wall, but there was a road proposed for border security purposes that has not been constructed, despite the fact that the construction was waived from environmental review.

As stated above, the lands in these two units are owned and managed by the Service. The Lower Rio Grande Valley NWR has many tracts of refuge land along the border. Service staff regularly collaborate with CBP to ensure that border security operations can occur without any impediments. The Real ID Act of 2005 granted authority to the DHS to override other Federal laws, including the Endangered Species Act, for the purpose of border security operations and infrastructure. Therefore, designating critical habitat along the border would not impact CBP's ability to engage in border security operations in these areas. Specifically, the listing and designation of critical habitat for prostrate milkweed will not preclude border wall construction or security operations. It is also unlikely that there will be future restrictions on CBP's border enforcement activities resulting from the ongoing requirements from designating critical habitat. We will continue to collaborate with DHS and CBP to ensure border security operations can still occur in areas designated as critical habitat for prostrate milkweed. The requirement to provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat on the basis of national-security or homeland-security impacts applies to Federal agencies, including DoD and DHS. We contacted CBP in developing this final critical habitat designation but did not receive a response. If such information is provided in the future, we will conduct a discretionary analysis.

Further, our 2016 Policy (81 FR 7226; February 11, 2016) states that the Secretary may undertake a preliminary evaluation of any plans, partnerships, economic considerations, national-security considerations, or other relevant impacts identified after considering the impacts required by the first sentence of the Act's section 4(b)(2). Following the preliminary evaluation, the Secretary may choose to enter into the discretionary 4(b)(2) exclusion analysis for any particular area (81 FR 7226; February 11, 2016). Here, we conducted a preliminary evaluation based on the comments we received from Texas, but, as set forth above, we have not determined that a full discretionary 4(b)(2) analysis is warranted at this time. Accordingly, we are not excluding the area from this final rule due to national security or any other basis.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that

the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and following recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities will be directly regulated by this rulemaking, we certify that this critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule, we reviewed and evaluated all information submitted during the comment period on the February 15, 2022, proposed rule (87 FR 8509) that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that this critical habitat designation will significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate

in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for prostrate milkweed in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. Our takings implications assessment concludes that this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the PBFs of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act will be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this rule identifies the PBFs essential to the conservation of the species. The areas of designated critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

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. In a line of cases starting with *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that no Tribal lands fall within the boundaries of the critical habitat designation for the prostrate milkweed, so no Tribal lands will be affected by the designation.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the Texas Coastal Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rule are the staff members of the U.S. Fish and Wildlife Service's Species Assessment

Team and the Austin and Texas Coastal Ecological Services Field Offices.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.12, amend paragraph (h) by adding an entry for ''*Asclepias prostrata*'' to the List of Endangered and Threatened Plants in alphabetical order under FLOWERING PLANTS to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
FLOWERING PLANTS				
*	*	*	*	*
Asclepias prostrata	Prostrate milkweed	Wherever found	E	87 FR [Insert **Federal Register** page where the document begins], February 28, 2023; 50 CFR 17.96(a).[CH]
*	*	*	*	*

■ 3. In § 17.96, amend paragraph (a) by adding an entry for ''Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed)'' after the entry for ''Family Apiaceae: *Lomatium cookii* (Cook's lomatium, Cook's desert parsley)'', to read as follows:

§ 17.96 Critical habitat—plants.

(a) * * *

Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed)

(1) Critical habitat units are depicted for Starr and Zapata Counties, Texas, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of *Asclepias prostrata* consist of the following components:

(i) Well-drained sandy soil overlying strata of sandstone or indurated caliche;

(ii) High soil gypsum concentration;

(iii) Open savannas and grasslands of the Tamaulipan shrubland ecological region;

(iv) Vegetation composition that includes abundant, diverse pollen and nectar plants and healthy populations of native bee and wasp species; and

(v) Less than 20 percent cover of *Pennisetum ciliare* (buffelgrass).

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on March 30, 2023.

(4) Data layers defining map units were created using Texas Natural Diversity Database (2019–2020) survey data of the documented *Asclepias prostrata* locations in the United States to determine the geological formations and soil types they occupy.

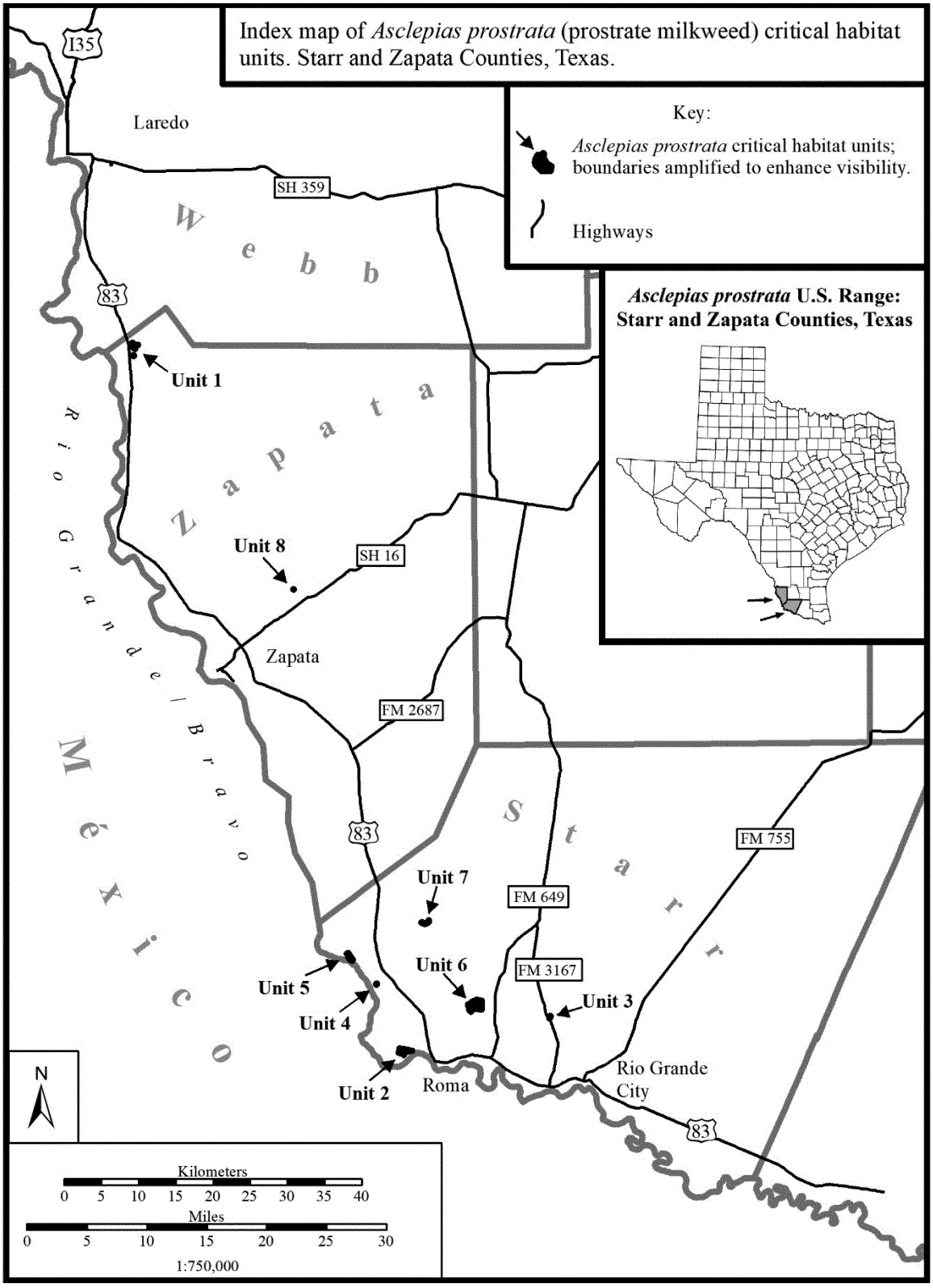
(i) We used the Esri ArcMap software to overlay the geographic coordinates of populations on a digitized map of Texas surface geology and a digitized soil survey map. We then clipped those areas of potential to lands that have documented populations of *Asclepias prostrata.*

(ii) The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *https://www.fws.gov/office/texas-coastal-ecological-services,* at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2021–0041, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

BILLING CODE 4333–15–P

Figure 1 to Family Apocynaceae:
Asclepias prostrata (prostrate milkweed) paragraph (5)

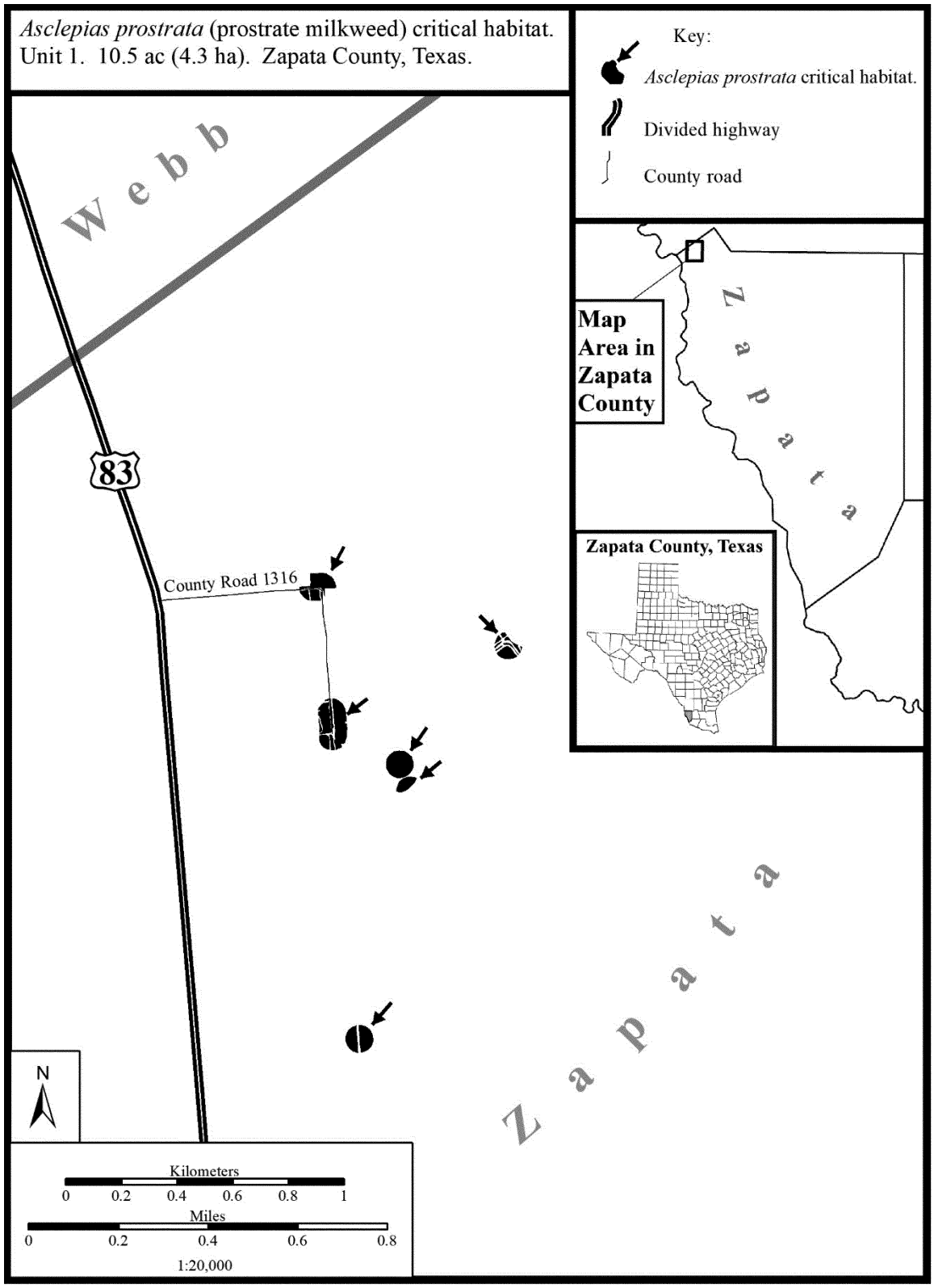


(6) Unit 1: Zapata County, Texas.

(i) Unit 1 consists of 6 areas totaling 10.5 ac (4.3 ha) east of U.S. Highway 83 in northwest Zapata County. This unit is on private land and a county road right-of-way.

(ii) Map of Unit 1 follows:

Figure 2 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (6)(ii)

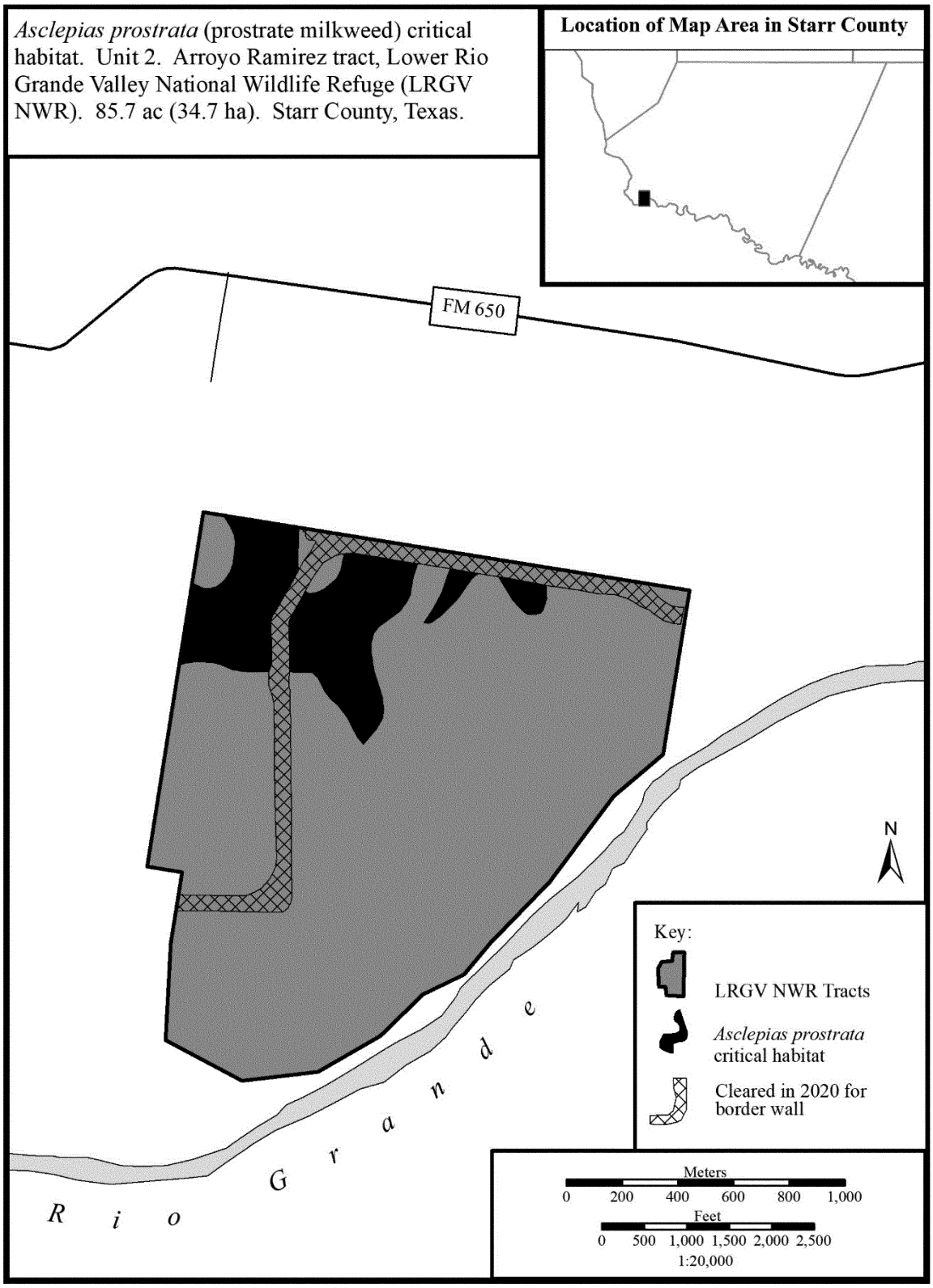


(7) Unit 2: Starr County, Texas.

(i) Unit 2 consists of 85.7 ac (34.7 ha) in the Arroyo Ramirez tract of Lower Rio Grande Valley National Wildlife Refuge. This unit is in southwestern Starr County adjacent to the Rio Grande on the U.S.–Mexico border. The entire unit is on land owned and managed by the Service.

(ii) Map of Unit 2 follows:

Figure 3 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (7)(ii)

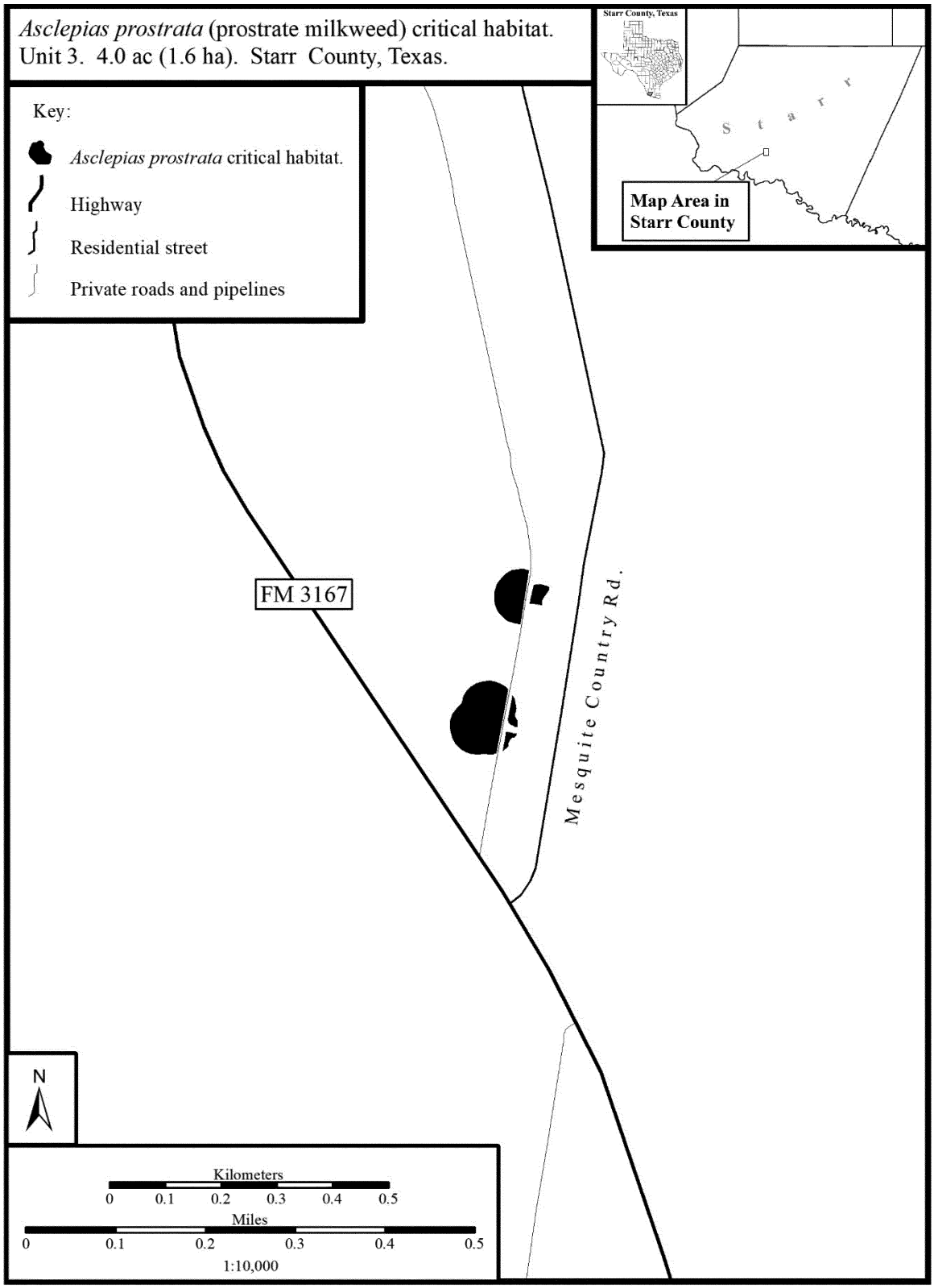


(8) Unit 3: Starr County, Texas.

(i) Unit 3 consists of 4.0 ac (1.6 ha) along both sides of a road right-of-way on private land in southern Starr County.

(ii) Map of Unit 3 follows:

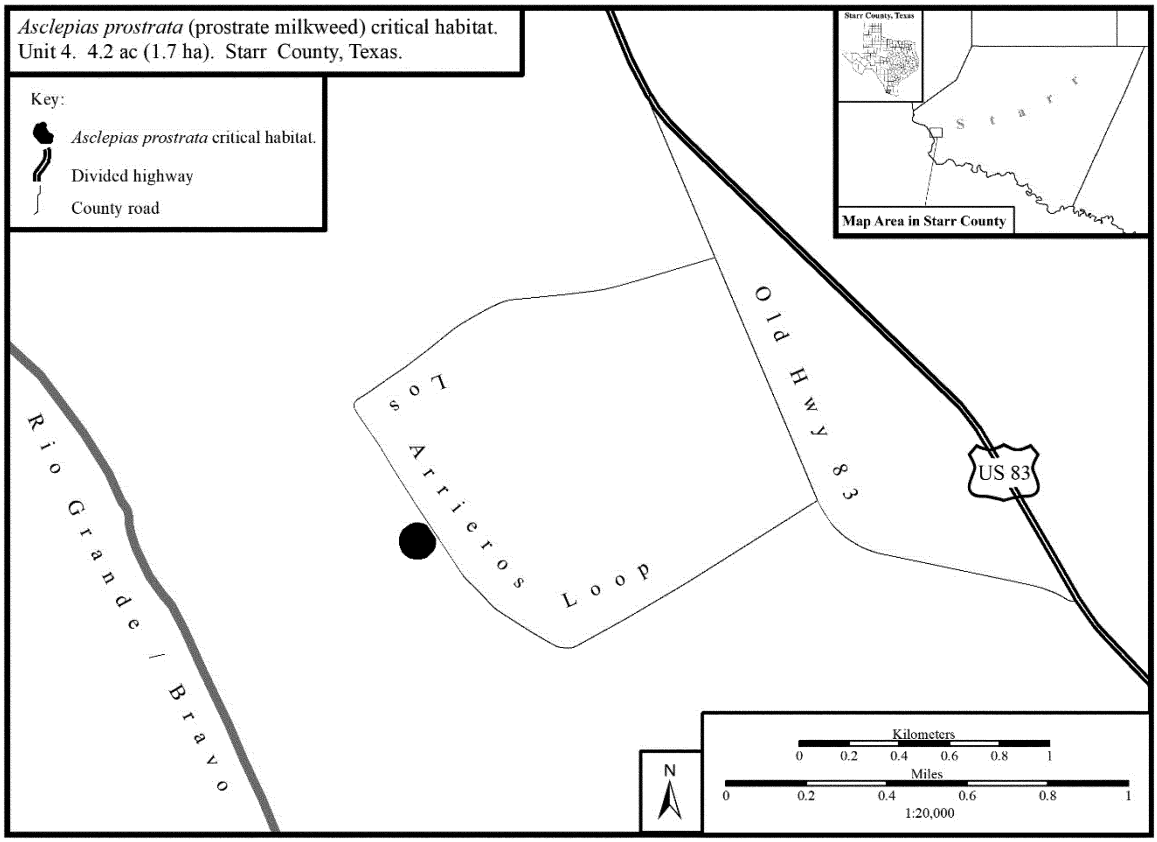
Figure 4 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (8)(ii)



(9) Unit 4: Starr County, Texas.

(i) Unit 4 consists of 4.2 ac (1.7 ha) along the unpaved right-of-way of Los Arrieros Loop, a county road in southwestern Starr County.

(ii) Map of Unit 4 follows:



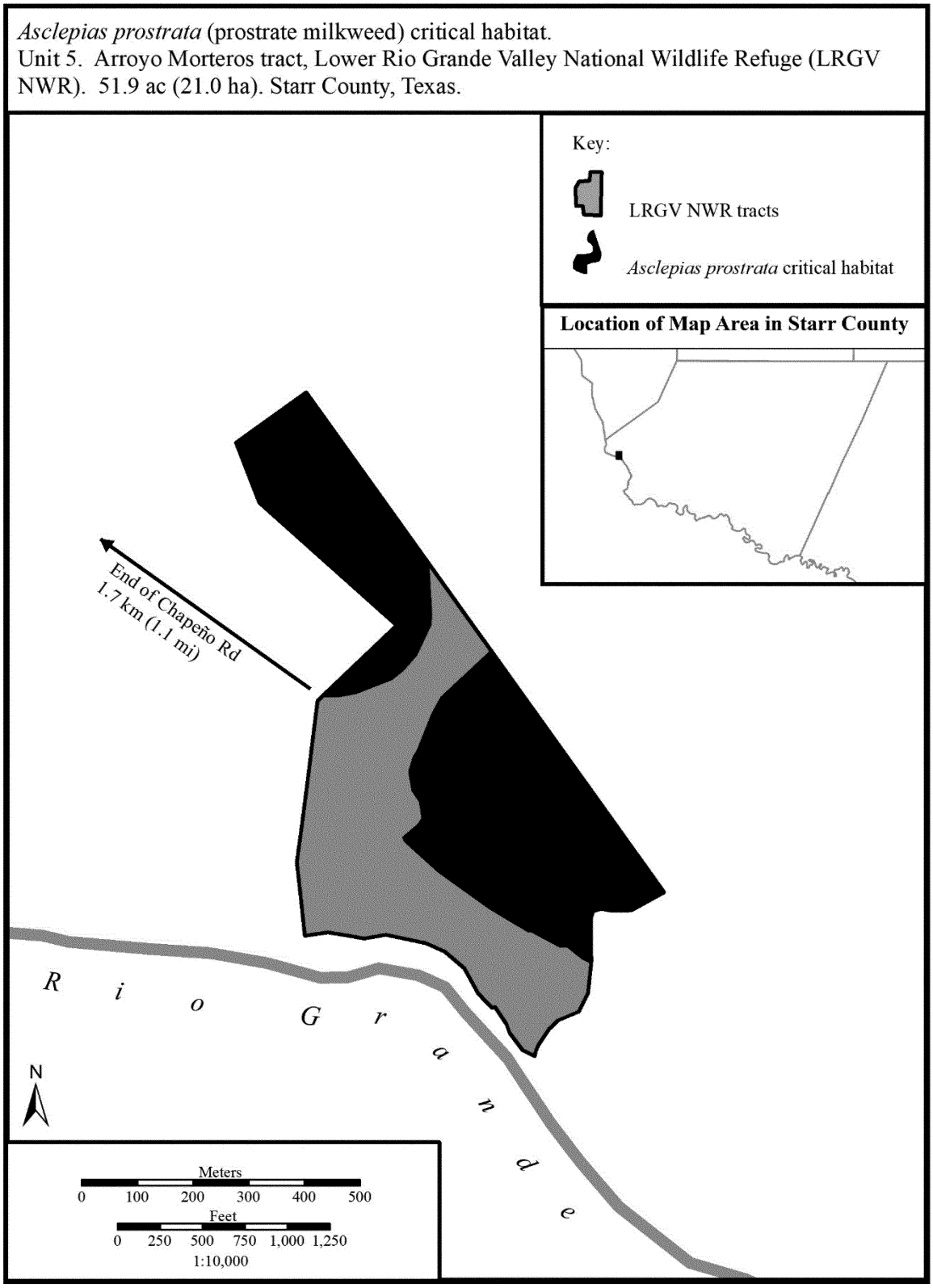
(10) Unit 5: Starr County, Texas.

(i) Unit 5 consists of 51.9 ac (21.0 ha) in the Arroyo Morteros tract of the Lower Rio Grande Valley National Wildlife Refuge. This unit is in western Starr County adjacent to the Rio Grande on the U.S.–Mexico border. The entire unit is on land owned and managed by the Service.

(ii) Map of Unit 5 follows:

Figure 5 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (9)(ii)

Figure 6 to Family Apocynaceae:
Asclepias prostrata (prostrate milkweed) paragraph (10)(ii)



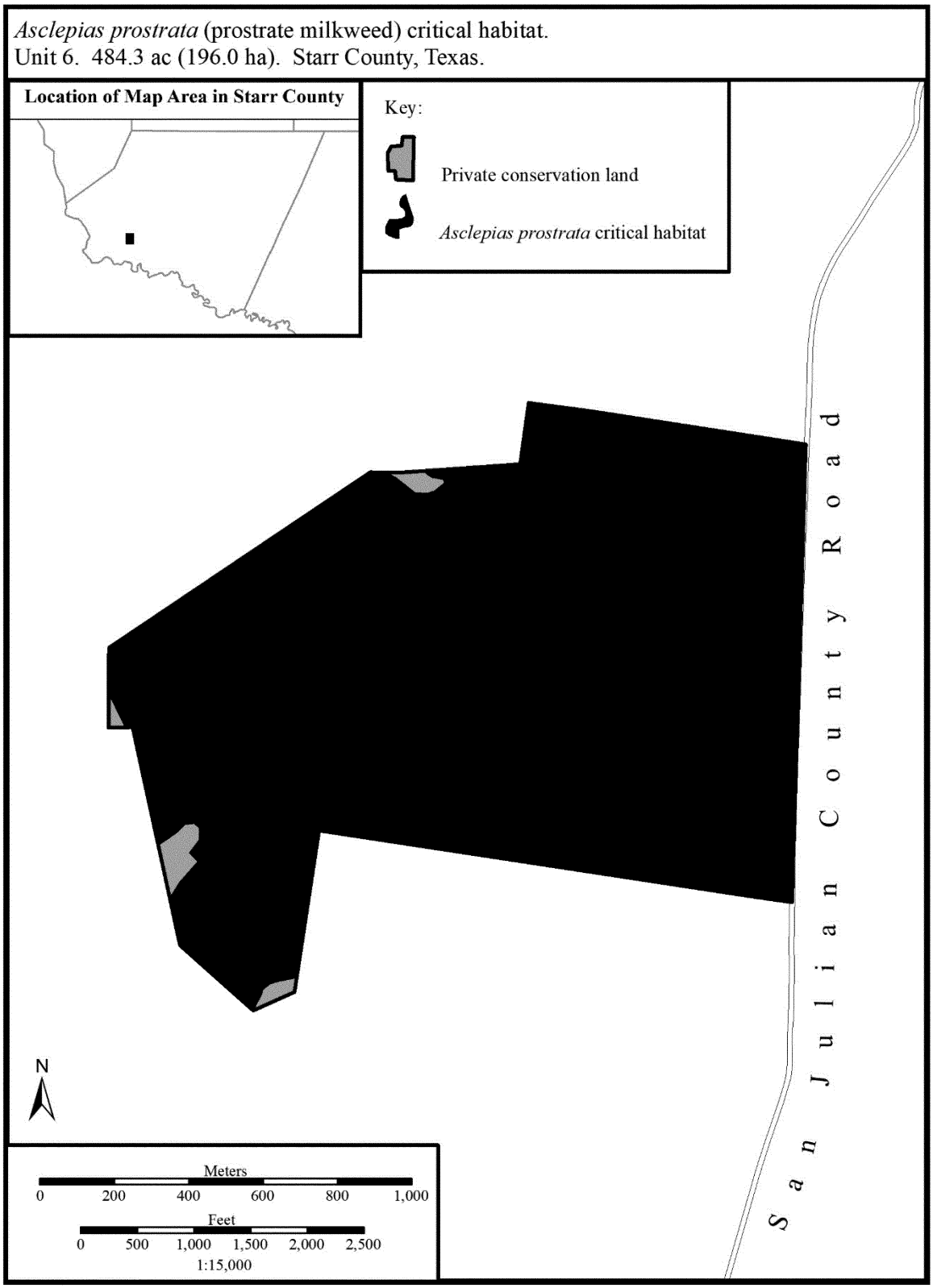
(11) Unit 6: Starr County, Texas.

(i) Unit 6 consists of 484.3 ac (196.0 ha) entirely on privately owned land and the adjacent right-of-way of San

Julian Road. This unit is in western Starr County.

(ii) Map of Unit 6 follows:

Figure 7 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (11)(ii)

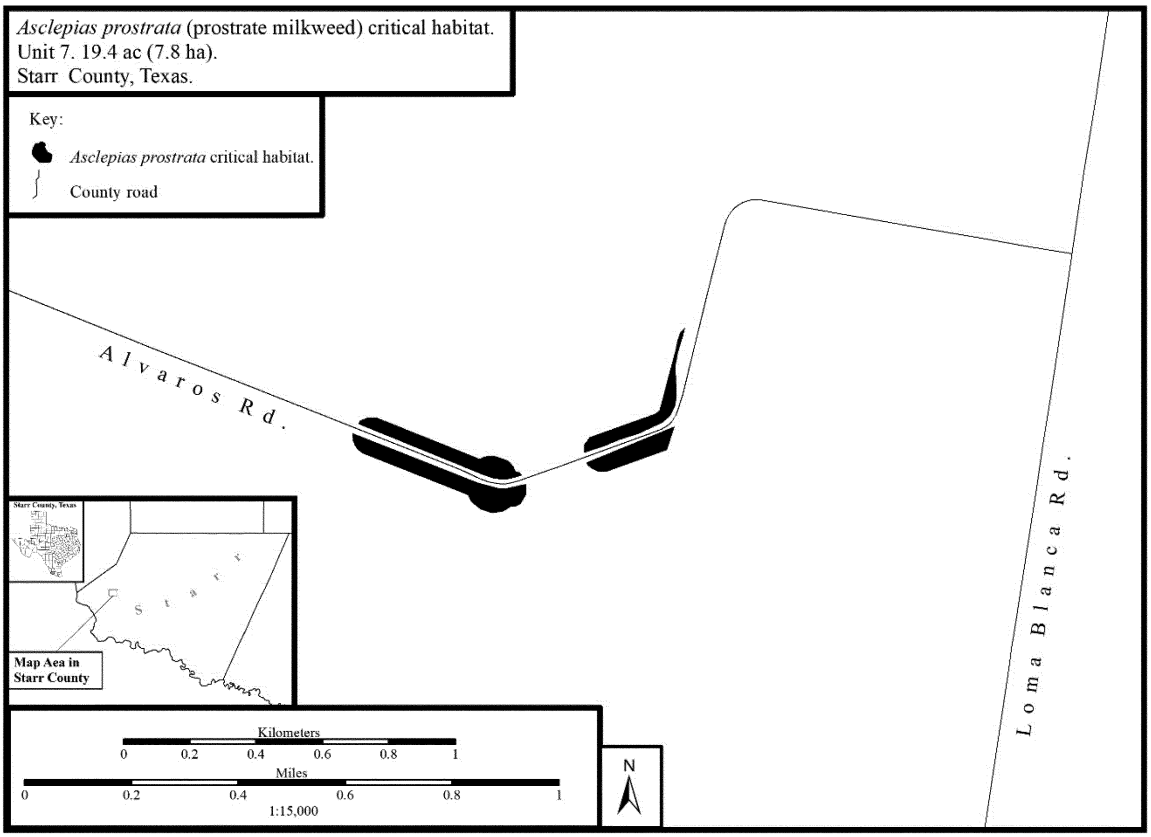


(12) Unit 7: Starr County, Texas.

(i) Unit 7 consists of 19.4 ac (7.8 ha) along both sides of a right-of-way and adjacent private land in western Starr County.

(ii) Map of Unit 7 follows:

Figure 8 to Family Apocynaceae: *Asclepias prostrata* (prostrate milkweed) paragraph (12)(ii)

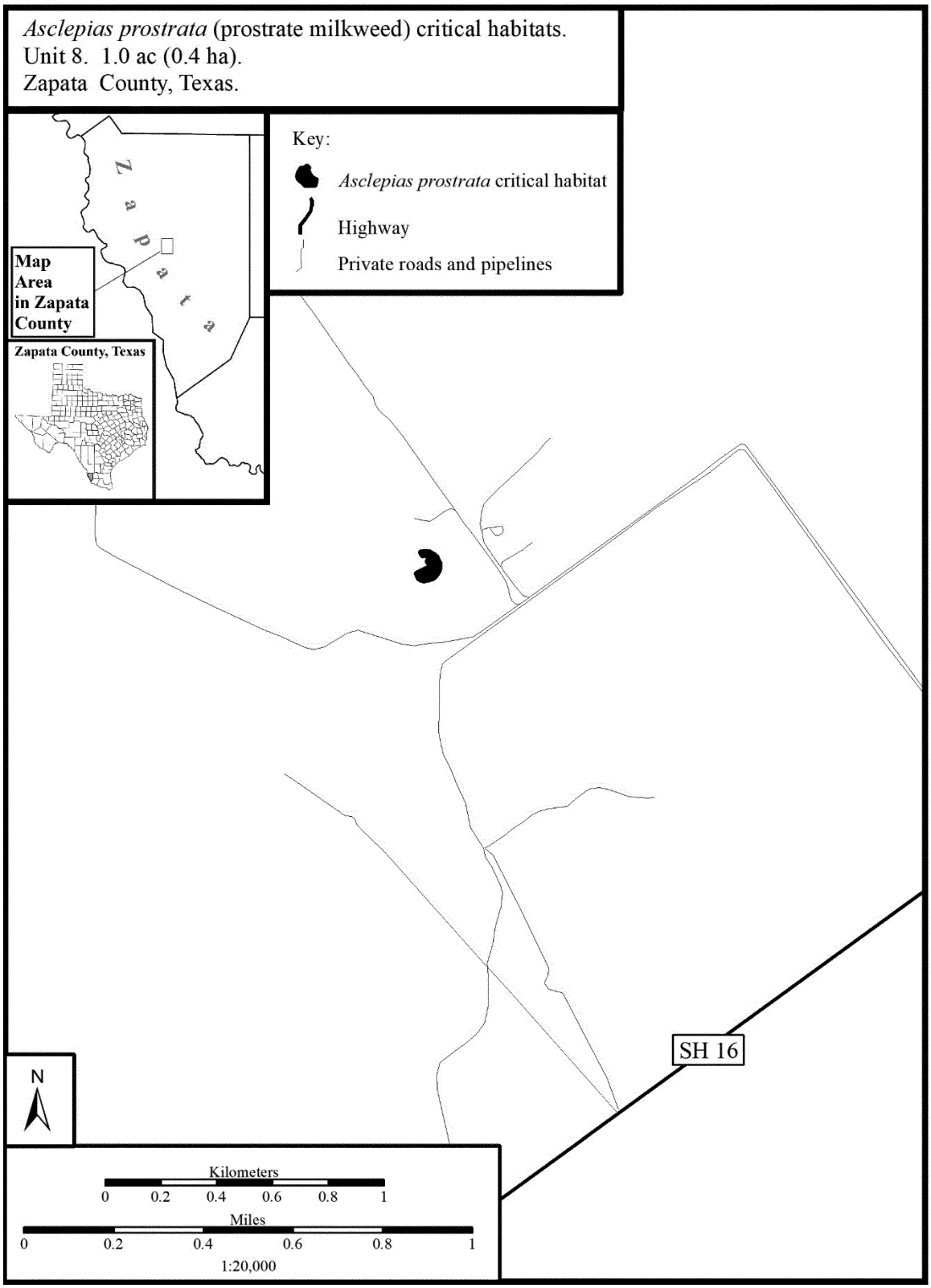


(13) Unit 8: Zapata County, Texas.

(i) Unit 8 consists of 1.0 ac (0.4 ha) on private land in central Zapata County.

(ii) Map of Unit 8 follows:

Figure 9 to Family Apocynaceae:
Asclepias prostrata (prostrate milkweed) paragraph (13)(ii)



* * * * *

Wendi Weber,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–03656 Filed 2–27–23; 8:45 am]

BILLING CODE 4333–15–C

Proposed Rules

Federal Register
Vol. 88, No. 39
Tuesday, February 28, 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.

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[EERE–2014–BT–STD–0005]

RIN 1904–AD15

Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products

Correction

In Proposed Rule Document 2023–00610, appearing on pages 6818–6904 in the issue of Wednesday, February 1, 2023, make the following correction:

On page 6904, in the third column, the table is corrected to read as set forth below:

§ 430.32 Energy and water conservation standards and their compliance dates [Corrected]

* * * * *

Product class	Maximum integrated annual energy consumption (IAEC)
Electric Cooking Tops—Open (Coil) Elements.	199 *kWh/year.*
Electric Cooking Tops—Smooth Elements.	207 *kWh/year.*
Gas Cooking Tops	1,204 *kBtu/year.*

* * * * *

[FR Doc. C1–2023–00610 Filed 2–24–23; 4:15 pm]

BILLING CODE 0099–10–D

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2014–BT–STD–0005]

RIN 1904–AD15

Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products

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

ACTION: Notification of data availability (NODA).

SUMMARY: On February 1, 2023, the U.S. Department of Energy (DOE) published a supplemental notice of proposed rulemaking (SNOPR), in which DOE proposed new and amended energy conservation standards for consumer conventional cooking products. In this NODA, DOE is publishing additional data and information to clarify the analysis for conventional cooking tops. DOE requests comments, data, and information regarding the data.

DATES: The comment period for the SNOPR that published on February 1, 2023 (88 FR 6818), is still in effect. DOE will accept comments, data, and information regarding the SNOPR and this NODA on or before April 3, 2023.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov,* under docket number EERE–2014–BT–STD–0005. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2014–BT–STD–0005, by any of the following methods:

Email: ConventionalCookingProducts2014STD0005@ee.doe.gov. Include the docket number EERE–2014–BT–STD–0005 in the subject line of the message.

Postal Mail: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

Hand Delivery/Courier: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza, SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments and additional information on this process, see section III of this document.

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

The docket web page can be found at *www.regulations.gov/docket/EERE-2014-BT-STD-0005.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section III of this document for information on how to submit comments through *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Dr. Carl Shapiro, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–5649. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Celia Sher, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–6122. Email: *Celia.Sher@hq.doe.gov.*

For further information on how to submit a comment or review other public comments and the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

The Energy Policy and Conservation Act, as amended (EPCA),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B [2] of EPCA

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

established the Energy Conservation Program for Consumer Products Other Than Automobiles. These products include consumer conventional cooking products, the subject of this NODA. (42 U.S.C. 6292(a)(10))

The currently applicable energy conservation standards for consumer conventional cooking products consist of a prescriptive prohibition on constant burning pilots for all gas cooking products (*i.e.,* gas cooking products both with or without an electrical supply cord) manufactured on and after April 9, 2012. These standards are set forth in DOE's regulations at title 10 of the Code of Federal Regulations (CFR) § 430.32(j)(1) and (2).

Consumer conventional cooking products comprise conventional cooking tops and conventional ovens, as defined in 10 CFR 430.2. Representations of energy use or energy efficiency of conventional cooking tops made on or after February 20, 2023, must be based on results generated using the test procedure for conventional cooking products at 10 CFR part 430, subpart B, appendix I1 (appendix I1). There are currently no DOE test procedures for conventional ovens.

On February 1, 2023, DOE published a supplemental notice of proposed rulemaking (February 2023 SNOPR) proposing to establish new and amended standards for consumer conventional cooking products, consisting of maximum integrated annual energy consumption (IAEC) levels, in kilowatt-hours per year (kWh/year) for electric cooking tops and thousand British thermal units per year (kBtu/year) for gas cooking tops. 88 FR 6818 through 6820. Compliance with the new and amended standards would be required 3 years after the publication date of final rule, should DOE finalize the proposed standards. *Id.* The technical support document (TSD) that presented the methodology and results of the SNOPR analysis is available at: *www.regulations.gov/document/EERE-2014-BT-STD-0005-0090.*

DOE held a public meeting on January 31, 2023, to discuss and receive comments on the February 2023 SNOPR (January 2023 public meeting). During the January 2023 public meeting, interested parties raised questions regarding the timing of DOE's cooking top testing, the current market availability of tested models, the existence of temperature-limiting controls on the tested electric open (coil) cooking tops, and the percentage of gas cooking tops currently available on the market that would meet the proposed standards as presented in DOE's analysis, among other questions. Although DOE provided verbal responses to these questions during the public meeting, upon further consideration, DOE believes that additional explanation regarding these topics would better assist interested parties in reviewing the analysis presented in the February 2023 SNOPR. In addition, following the January 2023 public meeting, the Association of Home Appliance Manufacturers (AHAM) submitted a comment [3] requesting that DOE share more complete data regarding the gas and electric cooking top test sample presented in the February 2023 SNOPR.

This NODA provides additional information to clarify the analysis for gas cooking tops. In response to other questions raised during the January 2023 public meeting and in AHAM's request, DOE is also providing further data on the gas and electric cooking top test sample used for the February 2023 SNOPR analysis in an attachment to this NODA, available in the docket for this rulemaking.[4]

In accordance with EPCA, when establishing standards, DOE may not prescribe an amended or new standard if DOE finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of such finding. (42 U.S.C. 6295(o)(4)) To satisfy this requirement, DOE conducts a ''screening analysis'' as part of its rulemaking process, as set forth in DOE's regulations at sections 6(b)(2) through (3) and 7(b) of 10 CFR part 430, subpart C, appendix A (appendix A).[5] One of the criteria of the screening analysis is to eliminate from consideration any design options that would adversely impact product utility or product availability.[6] Therefore, when DOE identifies potential efficiency levels for products (*i.e.,* efficiency levels which DOE may consider as the basis for a new or amended standard), DOE may not consider as design options certain features that may save energy but that might also adversely impact consumer utility.

As with most consumer products, gas cooking tops comprise a wide range of models with varying features and characteristics (*e.g.,* various burner input ratings, sealed versus open burner types, cast iron versus steel grate materials, continuous versus non-continuous grate configurations, *etc.*) Of particular relevance to this NODA, are gas cooking tops with high input rate (HIR) burners (which DOE defined in the February 2023 SNOPR as burners with input rates greater than or equal to 14,000 British thermal units per hour (Btu/h) and continuous cast-iron grates. In the February 2023 SNOPR, DOE did not consider any efficiency levels that could not be achieved by gas cooking tops with HIR burners and continuous cast-iron grates because DOE is aware that some consumers derive utility from these features. 88 FR 6818, 6845. (*See* section II of this document for additional discussion of the consumer utility of these features.) In this NODA, DOE is addressing the questions raised by commenters regarding the percentage of all gas cooking tops currently available on the market that would meet the proposed standards—because this market share was not explicitly stated in the February 2023 SNOPR—by clarifying that DOE has tentatively determined that gas cooking tops without these features, such as gas cooking tops with steel grates, non-continuous grates, and/or burners with input rates less than 14,000 Btu/h—many of which are entry-level models—would also be able to meet the efficiency levels described in the February 2023 SNOPR and therefore would not be impacted by the proposed standard, if finalized. The following

[3] Available at *www.regulations.gov/comment/EERE-2014-BT-STD-0005-0127.*

[4] Available at *www.regulations.gov/docket/EERE-2014-BT-STD-0005/document.*

[5] Section 6(b)(2) specifies that during the pre-NOPR phase of the rulemaking process, DOE will typically develop a list of design options for consideration. Initially, the candidate design options will encompass all those technologies considered to be technologically feasible. Following the development of this initial list of design options, DOE will review each design option based on the factors described in paragraph (6)(b)(3) of appendix A and the policies stated in section 7 of appendix A. The reasons for eliminating or retaining any design option at this stage of the process will be fully documented and published as part of the NOPR and as appropriate for a given rule, in the pre-NOPR documents. The technologically feasible design options that are not eliminated in this screening will be considered further in the engineering analysis described in paragraph (6)(c) of appendix A.

[6] Section 7(b)(3) of appendix A states that if a technology is determined to have significant adverse impact on the utility of the product/equipment to subgroups of consumers, or result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the U.S. at the time, it will not be considered further.

paragraphs describe these clarifications in more detail.

II. Discussion

In determining the maximum technologically feasible efficiency level for gas cooking tops in the February 2023 SNOPR, DOE evaluated the technology options used in gas cooking tops to achieve higher efficiencies to ascertain whether they meet the criteria for consideration as design options for achieving potential standard levels (*i.e.,* ''screening criteria''), as set forth in sections 6(b)(3) and 7(b) of appendix A.[7]

As discussed in section IV.C.1.a.i of the February 2023 SNOPR (88 FR 6818, 6845) and chapter 5 of the SNOPR TSD, for the gas cooking tops product class, DOE recognizes that HIR burners provide unique consumer utility and allow consumers to perform high heat cooking activities, such as searing and stir-frying. DOE is also aware that some consumers derive utility from continuous cast-iron grates, such as the ability to use heavy pans, or to shift cookware between burners without needing to lift them. In the February 2023 SNOPR, DOE screened out any optimized burner and grate designs that could reduce consumer utility associated with these features by only including in its analysis gas cooking tops that include at least one HIR burner and continuous cast-iron grates. 88 FR 6818, 6842. As a result, DOE did not consider any efficiency levels that are not already achieved by models on the current market with HIR burners and continuous cast-iron grates. Rather, DOE defined the efficiency levels for gas cooking tops such that all efficiency levels are achievable with continuous cast-iron grates and at least one HIR burner.

For gas cooking tops, DOE defined three efficiency levels (ELs) in the February 2023 SNOPR as follows:

- Baseline: 1,775 kBtu/year
- EL 1: 1,440 kBtu/year
- EL 2: 1,204 kBtu/year

88 FR 6818, 6844 through 6846.

In the February 2023 SNOPR, DOE tentatively determined all three of these efficiency levels to be achievable by gas cooking tops with continuous cast-iron grates and at least one HIR burner. *Id.* at 88 FR 6845. DOE used this analytical approach to ensure that the utility provided by these features can be maintained for those consumers that value them at each of the considered efficiency levels.

DOE is aware that gas cooking products exist on the market with efficiencies higher than the EL 2 level that DOE defined, but do not include HIR burners or continuous cast-iron grates. DOE's testing included three such gas cooking tops representing a range of manufacturers, brands, and burner/grate designs that do not include both HIR burners and continuous cast-iron grates. DOE believes that these three units are representative of the types of gas cooking tops excluded from the analysis. Table II.1 presents the characteristics of each of these units. Table II.2 presents the test results for each of these units, including the measured active mode annual energy consumption (AEC), annual combined low power mode energy consumption (E_{TLP}), and IAEC. Since these products had been screened out from the analysis, DOE did not present these testing results in the February 2023 SNOPR or the SNOPR TSD, nor included them in the engineering analysis.

TABLE II.1—CHARACTERISTICS OF TESTED GAS COOKING TOPS EXCLUDED FROM THE SNOPR ENGINEERING ANALYSIS

Test unit	Product configuration	Burner input ratings (*Btu/h*)	Burner type	Grate material	Marketed style	Does display include a clock? (y/n)
A	Standalone Cooking Top.	4 × 9,000	Open	Steel	Residential	N.
B	Standalone Cooking Top.	3,900; 2 × 5,900; 9,800; 13,000.	Sealed	Cast iron	Residential	N.
C	Standalone Cooking Top.	5,000; 2 × 9,100; 10,500.	Sealed	Steel	Residential	N.

TABLE II.2—MEASURED ANNUAL ENERGY CONSUMPTION OF TESTED GAS COOKING TOPS EXCLUDED FROM THE SNOPR ENGINEERING ANALYSIS

Test unit	AEC (*kBtu/year*)	E_{TLP} (*kWh/year*)	IAEC (*kBtu/year*)
A	983	0	983
B	951	0	951
C	1041	0	1041

DOE observes that these gas cooking tops all achieved efficiencies significantly higher than (*i.e.,* IAEC values lower than) EL 2, defined for gas cooking tops as 1,204 kBtu/year. From these testing results, DOE estimates that the portion of the market consisting of gas cooking tops without HIR burners and continuous cast-iron grates would all meet EL 2.

DOE presented a table in the SNOPR TSD that included DOE's estimate of the current market share of gas cooking tops that meet each efficiency level under consideration, which reflected the exclusion of higher-efficiency products that DOE had screened out (*i.e.,* excluded products that do not have at least one HIR burner and continuous cast-iron grates). (*See* Table 8.2.43 in chapter 8 of the SNOPR TSD). This table indicates that, among the models not screened out of the analysis, 4 percent currently achieve EL 2. Based on its testing results and model counts of the burner/grate configurations of gas cooking top models currently available on the websites of major U.S. retailers, DOE estimates that the products that were screened out of the engineering analysis represent over 40 percent of the market. Together with the models included in the engineering analysis, DOE estimates that nearly half of the total gas cooking top market currently achieves EL 2 and therefore would not be impacted by the proposed standard, if finalized. The remaining portion of the total market is distributed equally between the baseline and EL 1, as indicated in Table 8.2.43 in chapter 8 of the SNOPR TSD.

DOE requests comment on these estimates for the no-new-standards case efficiency distribution of gas cooking products. In particular, DOE requests comment on its estimate that currently available gas cooking tops representing nearly half of the market would already meet the standards at EL 2 that were

[7] The screening criteria include the following: (1) technological feasibility; (2) practicability to manufacturer, install, and service; (3) impacts on product utility or product availability; (4) adverse impacts on health or safety; and (5) unique-pathway proprietary technologies.

proposed in the February 2023 SNOPR, and therefore would not be impacted by the proposed standard, if finalized. DOE welcomes additional data and information regarding the efficiency of gas and electric cooking tops as measured by appendix I1, particularly gas cooking tops without HIR burners and/or continuous cast-iron grates. DOE additionally requests comment on the use of model-based market percentages to estimate conventional cooking product market share by efficiency level and invites stakeholders to provide shipments-based market share data.

III. Public Participation

DOE will accept comments, data, and information regarding this document, but no later than the date provided in the **DATES** section at the beginning of this document. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via www.regulations.gov. The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

Signing Authority

This document of the Department of Energy was signed on February 16, 2023, by Dr. Geraldine Richmond, Under Secretary for Science and Innovation, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on February 21, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–03864 Filed 2–27–23; 8:45 am]

BILLING CODE 6450–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

[NCUA–2022–0179]

RIN 3133–AF46

Chartering and Field of Membership

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The NCUA Board (Board) is proposing to amend its chartering and field of membership (FOM) rules with respect to the provision of financial services to low- and moderate-income communities and expanding access to safe, fair, and affordable financial services and products generally. The Board is also proposing several changes to the FOM rules to streamline

application requirements and clarify procedures. These proposed amendments result from the agency's experience in addressing FOM issues relating to community charters and service to underserved areas, along with its study of FOM issues in the Board's Advancing Communities through Credit, Education, Stability, and Support (ACCESS) initiative. The Board is also requesting feedback about several aspects of FOM issues for consideration with respect to future policy refinements. Due to the scope and complexity of both the proposed changes and the additional issues presented for feedback, the Board is providing a 90-day comment period. Consistent with the guidance the NCUA provided in Interpretative Ruling and Policy Statement 87–2 (NCUA IRPS 87–2—Developing and Reviewing Government Regulations) the Board is extending the comment period beyond the typical 60 days because it believes it will benefit from an additional opportunity for public input on these issues.

DATES: Comments must be received on or before May 30, 2023.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: https://www.regulations.gov/.* Follow the instructions for submitting comments for Docket Number NCUA–2022–0179.
- *NCUA website: https://www.ncua.gov/regulation-supervision/rulemakings-proposals-comment.* Follow the instructions for submitting comments.
- *USPS/Hand Delivery/Courier:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at *https://www.regulations.gov,* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. If you are unable to access public comments on the internet, you may contact the NCUA for alternative access by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: *Office of Credit Union Resources and Expansion (CURE):* Rita Woods, Division Director (703) 518–1157; Susan Ryan, Division Director (703–664–3957); Leilani Stamper, Program Officer (703) 664–3839; Sheila Snock, Program Officer (703) 664–3106; or Paul Dibble, Program Officer (703) 664–3164 at 1775 Duke Street, Alexandria, VA 22314. *Office of General Counsel:* Robert Leonard, Compliance Officer; Ian Marenna, Associate General Counsel; Marvin Shaw and Ariel Pereira, Senior Staff Attorneys, Office of General Counsel, at the above address or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background

A. Overview of Proposed Rule

The proposed rule would make nine changes to the Chartering and Field of Membership Manual (the Manual) to enhance consumer access to financial services, while reducing duplicative or unnecessary paperwork and administrative requirements.[1] The Board's goal in proposing these changes is to eliminate unnecessary burdens while enhancing the agency's focus on the core principles of credit union membership. The proposed changes cover underserved areas, community-based FOMs, and some more broadly applicable FOM provisions.

The proposed rule would make four changes on underserved areas that multiple common bond federal credit unions (FCUs) may seek to add to their FOMs. The changes would streamline existing application requirements and clarify the role of data and criteria that other federal agencies provide relating to underserved areas.

The proposed rule would also simplify application requirements for community-based FCUs by eliminating the need to submit redundant or less useful information and providing a standard form for business and marketing plans. The proposed rule would eliminate the business and marketing plan requirement for certain federally insured, state-chartered credit unions that seek to convert to a federal charter while serving the same community FOM. The proposed rule would also expand the community-based FOM affinities—relationships between a person and the geographic community—to recognize the growth of telecommuting and remote work for companies headquartered in a community and to better capture the ongoing bond between individuals within a field of membership and their immediate family members following the death of a member.[2]

Finally, the Board is proposing a technical clarification and correction on the process for the NCUA to review and approve the character and fitness of a prospective FCU's management and officials.

The following sections include a legal overview and then a detailed discussion of the proposed regulatory changes.

B. Legal Authority and Overview

In adopting the Credit Union Membership Access Act of 1998 (CUMAA), which amended the Federal Credit Union Act, Congress reiterated its longstanding support for credit unions, emphasizing their ''specific mission of meeting the credit and savings needs of consumers, especially persons of modest means.'' [3] In Section 2 of CUMAA, Congress set forth the following findings:

(1) The American credit union movement began as a cooperative effort to serve the productive and provident credit needs of individuals of modest means.

(2) Credit unions continue to fulfill this public purpose, and current members and membership groups should not face divestiture from the financial services institutions of their choice as a result of recent court action.

(3) To promote thrift and credit extension, a meaningful affinity and bond among members, manifested by a commonality of routine interaction, shared and related work experiences, interests, or activities, or the maintenance of an otherwise well understood sense of cohesion or identity is essential to fulfillment of credit unions' public mission.

(4) Credit unions, unlike many other participants in the financial services market, are exempt from Federal and most State taxes because they are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors and because they have the specific mission of meeting the credit and savings needs of consumers, especially persons of modest means.

(5) Improved credit union safety and soundness provisions will enhance the public benefit that citizens receive from these cooperative financial service institutions.

The congressional findings are bolstered by specific provisions of CUMAA. For instance, Title II of that law addresses ''credit union membership,'' including the express

[1] The Board has codified the Manual in 12 CFR 701, Appendix B.

[2] The Manual's glossary currently defines ''immediate family member'' as ''A spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.''

[3] Public Law 105–218, 112 Stat. 912 (Aug. 7, 1998).

provision in section 109 for the Board to establish regulations to encourage the chartering of community and multiple common bond FCUs. This section includes provisions encouraging formation of FCUs to provide financial services to underserved communities and people of modest means. Section 109's provisions allowed multiple common bond credit unions to expand service opportunities to underserved communities. Title II of CUMAA mandates that the Board protect the National Credit Union Share Insurance Fund (NCUSIF) by issuing stricter safety-and-soundness provisions, including enhanced accounting standards in section 201. Title III of CUMAA includes capitalization and net worth requirements to ''resolve the problems of the insured credit unions at the least possible long-term loss to the [NCUSIF].'' Title III also sets forth specific mandates, including issuing regulations for prompt corrective action; capitalization requirements, including the submission of net worth restoration plans; earnings retention requirements, and prior written approval requirements for credit unions that are not adequately capitalized; certification of NCUSIF equity ratios; increased share insurance premiums; and periodic evaluation of access to liquidity. Title IV of CUMAA includes assurances for independent decision-making in connection with certain charter conversions.

As CUMAA indicates, Congress directed the Board to consider multiple responsibilities, including encouraging access to financial services for people of modest means, encouraging competition among providers of financial services, and protecting taxpayers by enhancing the safety and soundness of the credit union system and protecting the NCUSIF.

Under the FCU Act, seven or more individuals may charter an FCU by presenting a proposed charter (referred to in the FCU Act as the ''organization certificate'') to the Board.[4] These individuals, referred to as ''subscribers,'' must state the number of shares subscribed by each and describe the FCU's proposed FOM.[5] An FOM consists of those persons and entities eligible for membership based on an FCU's type of charter. Before granting an FCU charter, the Board must complete an appropriate investigation and determine the character and fitness of the subscribers, the economic advisability of establishing the FCU, and the conformity of the proposed charter with the FCU Act.[6]

The FCU Act provides a choice among several charter types: a single group sharing a single occupational or associational common bond;[7] a multiple common bond consisting of groups that each have a distinct occupational or associational common bond among members of the group;[8] and a community consisting of ''persons or organizations within a well-defined local community, neighborhood, or rural district.''[9]

C. Regulatory Overview

The Manual, incorporated as Appendix B to Part 701 of the NCUA regulations,[10] implements the chartering and FOM requirements that the FCU Act establishes for FCUs. The Manual provides that the NCUA will grant a charter if the FOM requirements are met, the subscribers are of good character and fit to represent the proposed FCU, and the establishment of the FCU is economically advisable.[11] In addition, ''[i]n unusual circumstances . . . [the] NCUA may examine other factors, such as other federal law or public policy, in deciding if a charter should be approved.''[12]

Congress expressly delegated to the Board substantial authority in the FCU Act to define what constitutes each type of community charter, namely a well-defined local community, neighborhood, or rural district.[13] This authority assists the NCUA in ''making any determination'' regarding a community FCU,[14] and permits the Board to establish applicable criteria for any such determination.[15] To qualify as a well-defined local community, neighborhood, or rural district, the Board requires the proposed area to have ''specific geographic boundaries,'' such as those of ''a city, township, county (single or multiple portions of a county) or a political equivalent, school districts, or a clearly identifiable neighborhood.''[16] The boundaries themselves may consist of political borders, streets, rivers, railroad tracks, or other static geographical features.[17]

The Board has periodically amended the Manual to further the statutory goals set forth by Congress.[18] The Board's goals in revising and modernizing the Manual are as follows: (1) increasing access for underserved communities; (2) providing objective and easily administered criteria to potential applicants; (3) providing regulatory relief while balancing safety-and-soundness concerns; and (4) enhancing efficiency.

More recently, the Board has launched the Advancing Communities through Credit, Education, Stability and Support (ACCESS) initiative to increase the agency's focus on enabling credit unions to serve underserved, unserved, or disadvantaged communities.[19] A key tenet of this coordinated, multi-disciplinary initiative is that expanding access to safe, fair, and affordable credit allows more Americans to build wealth, achieve financial prosperity, and create strong and vibrant communities.

Based on these considerations, the Board has actively explored ways to enhance access to financial services for low- and moderate-income communities. The NCUA 2021 Annual

[4] 12 U.S.C. 1753.

[5] 12 U.S.C. 1753(3), (5).

[6] 12 U.S.C. 1754.

[7] 12 U.S.C. 1759(b)(1).

[8] *Id.* 1759(b)(2)(A).

[9] *Id.* 1759(b)(3).

[10] Appendix B to 12 CFR part 701. The Manual addresses all aspects of chartering FCUs. In that respect, it is similar to the regulations of the Office of the Comptroller of the Currency applicable to the chartering of national banks or federal savings associations. 12 CFR part 5.

[11] Manual, Chapter 1, Section I.

[12] *Id.*

[13] The Board notes that under the agency's interpretation of this phrase, the term ''local'' applies solely to a well-defined local community; it does not apply to a rural district. *See* 81 FR 88412, 88417 (Dec. 7, 2016) (The Board explained that the that the proposal to expand the rural district option in 2016 was an unreasonable interpretation of the terms ''rural'' and ''local'' rely on a pair of misconceptions, described as follows: (1) that ''local'' as used in section 1759(b) and (g) modifies ''rural district,'' when in fact it does not, and (2) that a ''local'' area and a ''rural'' area necessarily share similar characteristics, which they inherently do not. In any case, a rural district by its very nature typically covers an area that is too large to be considered ''local.''). The Manual applies the ''well-defined'' modifier to communities (including neighborhoods through references to this option in the discussion of community charters) and rural districts. *See* 12 CFR part 701, app. B., ch. 2, sec. V.A.2 (referring to the boundaries of a ''well-defined rural district'').

[14] *Id.* 1759(g)(1)(A).

[15] *Id.* 1759(g)(1)(B). The D.C. Circuit Court of Appeals cited this express delegation in an August 2019 decision. *Am. Bankers Ass'n* v. *Nat'l Credit Union Admin.,* 934 F.3d 649, 663 (D.C. Cir. 2019).

[16] Manual, Chapter 2, Section V.A.2.

[17] Manual, Chapter 2, Section V.A.5.

[18] 73 FR 73301 (Dec. 2, 2008). The Board updated and clarified the process of approving credit union service to ''underserved areas.'' First, the rule clarified the procedure for establishing that an ''underserved area'' qualifies as a well-defined local community, as that rule required. Second, it made explicit the process for applying the economic distress criteria that determine whether an area combining multiple geographic units is sufficiently ''distressed'' to qualify as ''underserved.'' Third, it updated the documentation and clarified the scope requirements for demonstrating that a proposed area has ''significant unmet needs'' for loans and financial services. Fourth, the rule used data provided by NCUA on the location of depository institution facilities to determine whether an area is ''underserved by other depository institutions'' according to the presence of their facilities within the area.

[19] *See* ACCESS, *https://www.ncua.gov/support-services/access.*

Report, a February 2022 study by the Government Accountability Office (GAO), and a June 2022 report by the Federal Financial Institutions Examination Council (FFIEC) address the need for federal financial regulators and financial institutions to expand access to unserved and underserved communities.[20]

These communities often comprise what have been called ''banking or financial services deserts,'' and can be found in both urban and rural areas. Such deserts often are home to communities high concentrations of minorities, including those comprised of significant populations of African Americans, Hispanic Americans, Native Americans, and Asian Americans. Facilitating additional opportunities to add underserved areas would allow FCUs to fill voids where no or few other local options are available. The proposed rule changes may help FCUs willing to reach out to the underserved and low- to moderate-income individuals and seek a broader membership base.

In addition to changes to enhance access for low- and moderate-income communities, the proposal includes potential improvements to the Manual to simplify requirements and procedures based on agency experience. Simplifying such requirements will facilitate more consumers having access to safe, fair, affordable, and reliable financial services at a federally insured credit union.

The Board has carefully considered the legal requirements underlying the proposed rule and believes that the changes are consistent with the FCU Act while reducing unnecessary requirements. The proposed rule offers several changes to reduce burden by simplifying the requirements for underserved area additions, conversions from federally insured, state-chartered credit unions (FISCUs) to FCUs, and community charter actions.

The rule would also correct multiple unintended consequences of prior rules. One proposed change corrects a provision that may prevent credit unions from expanding into underserved rural areas. Specifically, the change would eliminate a limitation in which a rural district, if an underserved area, must be in, or adjacent to, the state in which the FCU has its headquarters. Another change corrects a reference to a regulation addressing approval of credit union officials that does not apply in the chartering process.

II. Summary of Proposed Changes and Request for Comments

A. Underserved Area Additions

In 1998, Congress enacted CUMAA, as discussed previously in this preamble, which amended the FCU Act to authorize the Board to allow multiple common bond FCUs to serve members residing in ''underserved areas,'' provided the FCU establishes and maintains a facility there.[21] The Act currently permits only multiple common bond FCUs to add underserved areas to their FOM beyond the common bond requirements specified in the FCU Act. This option is an exception to the FCU Act's general requirement that an FCU limit its membership to one of the three options in the FCU Act (single common bond, multiple common bond, or community).[22]

The FCU Act defines an ''underserved area'' as (1) a ''local community, neighborhood, or rural district'' that (2) meets the definition of an ''investment area'' under section 103(16) of the Community Development Banking and Financial Institutions Act of 1994 (CDFI Act) and (3) is ''underserved by other depository institutions'' based on data of the NCUA Board and the federal banking agencies.[23]

CDFI Investment Area Definition

As noted, the first criterion for an ''underserved area'' established by CUMAA is that the area meets the CDFI Act's definition of an ''investment area.'' The CDFI Act defines an ''investment area'' as a geographic area that, unless it is presently designated an Empowerment Zone or Enterprise Community, ''meets the objective criteria of economic distress developed by the [CDFI] Fund'' and ''has significant unmet needs for loans or equity investments.'' [24] [25] By regulation, the CDFI Fund adopted a definition of investment area that established criteria of economic distress and implemented the significant unmet needs criterion.[26] The regulation also dictates that ''[a]n Investment Area shall meet specific geographic and other criteria'' prescribed in the CDFI Fund's investment area definition.[27] Further, the regulation gives the CDFI Fund sole discretion to determine whether these criteria are fulfilled.[28]

Under the CDFI Fund's distress criteria, a proposed investment area's location within or outside a designated Metropolitan Area (a Metro or Non-Metro area, respectively) determines the geographic unit(s) into which the area must be translated in order to apply the economic distress criteria.[29] For a Metro area, the permissible geographic units are limited to a census tract or an American Indian or Alaskan Native area.[30] For a Non-Metro area, the permissible geographic units are limited to a county (or equivalent area); minor civil division that is a unit of a local government; incorporated place; census tract; or an American Indian or Alaskan Native area.[31]

The CDFI Fund's regulation designates as distressed a proposed area that meets the applicable economic distress criteria as reported by the most recent decennial U.S. Census.[32] How the distress criteria apply in each case depends on which geographic units are permitted (based on the area's designation as Metro or Non-Metro) and whether the area consists of a single geographic unit or multiple contiguous units. A proposed Metro area consisting of a single census tract, for example, must meet the distress criterion for either unemployment, poverty, or median family income.[33] A proposed Non-Metro area consisting of a single county, for example, must meet the distress criterion for either unemployment, poverty, median family income or, if the area is a county, population loss or migration loss.[34]

A proposed area consisting of multiple contiguous geographic units (such as adjoining census tracts in a Metro area or adjoining counties in a Non-Metro area) may combine distressed and non-distressed units. But the area must satisfy a population threshold requiring the distressed units—those that ''together meet one of the [applicable distress] criteria''—to

[20] The 2021 NCUA Annual Report is available at the link: *2021 NCUA Annual Report (pages 21–23).*The GAO report is available at the link: *GAO–22–104468, Accessible Version, BANKING SERVICES: Regulators Have Taken Actions to Increase Access, but Measurement of Actions' Effectiveness Could Be Improved (February 2022).* The report by the FFIEC is available at this link: *https://www.ffiec.gov/press/pr061622.htm.*

[21] 12 U.S.C. 1759(c)(2).

[22] 12 U.S.C. 1759(b) (''Membership Field''), 1759(c)(2) (''Exception for Underserved Areas'').

[23] 12 U.S.C. 4702(16).

[24] The Board notes that as a practical matter these programs are relatively inactive in that the U.S. Department of Housing and Urban Development (HUD) has not approved new Empowerment Zones or Enterprise Communities. These terms are defined in 26 U.S.C. 1391, as referenced in 12 U.S.C. 4702(16), which defines ''investment area'' for purposes of 12 U.S.C. 1759.

[25] 12 U.S.C. 4702(13).

[26] 12 CFR 1805.201(b)(3).

[27] 12 CFR 1805.201(b)(3)(i).

[28] 12 CFR 1805.201(a).

[29] 12 CFR 1805.201(b)(3)(ii)(B), (C).

[30] 12 CFR 1805.201(b)(3)(ii)(B).

[31] *Id.*

[32] 12 CFR 1805.201(b)(3)(ii)(D).

[33] *Id.* § 1805.201(b)(3)(ii)(D)(1), (3).

[34] *Id.* § 1805.201(b)(3)(ii)(D)(1), (3), (4), (5).

represent at least 85 percent of the area's total population.[35]

Finally, to qualify as an investment area, the proposed area must also ''have significant unmet needs for loans or equity investments.'' [36] The CDFI Fund regulation deems this criterion fulfilled when ''a narrative analysis provided by the entity demonstrates a pattern of unmet needs'' within the proposed area.[37]

Incorporation of Underserved Area Authorities Into the Manual

After Congress enacted CUMAA in 1998, the Board revised the Manual to implement the new authority to allow service to underserved areas.[38] The NCUA's regulations define eligible areas (well-defined local communities, neighborhoods, or rural districts) and how to test whether an area is underserved by other depository institutions. The investment area element draws from the CDFI Act, which the FCU Act cites for this element. The Board has sought to maintain consistency in the Manual with the CDFI Fund's economic distress criteria.[39] Anticipating periodic changes to the economic distress criteria, the Board included in the Manual a reference to revise or add additional criteria that the CDFI Fund might adopt in the future.[40] Interested readers may also refer to the Board's preamble to Interpretive Ruling and Policy Statement 2008–2, which contains additional information on underserved areas.[41]

Proposed Amendments to the Manual for Underserved Areas

As noted in the preceding discussion, a multiple common bond FCU that seeks to add an underserved area to its FOM as an investment area must satisfy the CDFI Fund's economic distress criteria, among other requirements.[42] The current Manual essentially reiterates the economic distress criteria that the CDFI Fund adopted or had in place in 2008 and requires FCUs seeking to add underserved areas to satisfy these requirements. Despite the acknowledgment of the potential for the CDFI Fund to change the criteria over time, the NCUA has received numerous inquiries about perceived conflicts between the Manual and the CDFI Fund's current regulations and policies. A 2021 NCUA Legal Opinion Letter details some of these issues, including the use of decennial census data and the types of geographic units that may constitute an underserved area.[43]

Based on this dynamic environment and on feedback the NCUA has received from stakeholders, the Board is proposing four changes to the requirements that apply to multiple common bond FCUs that seek to serve underserved areas. The proposed changes would accomplish the following:

(1) clarify the Board's intent to provide flexibility to multiple common bond FCUs serving underserved areas based on rural districts;

(2) clarify how the NCUA applies the CDFI Fund's economic distress criteria, as the FCU Act requires;

(3) eliminate census block groups as a geographic unit for composing underserved areas, in adherence to a regulatory change that the CDFI Fund has adopted; and

(4) simplify and reduce the burden for FCUs on the required statement of unmet needs that must accompany a request to serve an underserved area.

1. Underserved Areas Based on Rural Districts

On October 27, 2016, the Board approved a final rule to Appendix B to Part 701 of NCUA's regulations to change the definition of a rural district, which is one subcategory of options for a community charter. These changes increased the population limit to one million persons. The final rule also added a restriction so that an area's boundaries would not exceed the outer boundaries of the states that are immediately contiguous to the state in which the credit union maintains its headquarters (that is, not to exceed the outer perimeter of the layer of states immediately surrounding the headquarters state).

The intent behind the headquarters restriction for a rural district's boundaries for community-chartered credit unions was to prevent areas from becoming overly broad, while at the same time affording FCUs the opportunity to achieve sufficient scale so that serving a sparsely populated area is economically viable. However, the change made by the final rule also applies to underserved areas, thus unintentionally curtailing the options available to multiple common bond credit unions interested in adding to their FOMs underserved areas consisting of rural districts. The change also created an inconsistency between eligibility to add underserved areas consisting of rural districts versus underserved areas consisting of communities or neighborhoods, which did not include a geographic restriction in relation to an FCU's headquarters.

The NCUA's objective to allow underserved area additions ''without regard to location'' [44] reflects the FCU Act's less restrictive language in this area. Also, the addition of an undeserved area without regard to location provides multiple common bond FCUs with the opportunity to increase access to financial services for those in underserved areas, particularly those of low- to-moderate income. Thus, the headquarters restriction was intended to apply only to community charter FCUs consisting of rural districts and not to underserved areas consisting of rural districts. The proposed rule removes this headquarters restriction for underserved areas.

Despite this proposed adjustment, the Board believes a number of inherent constraints will continue to prevent the addition of underserved rural districts from becoming overly broad. The underserved rural district must continue to meet all the requirements for economic distress to qualify as an investment area. This benchmark becomes more challenging as a contiguous area becomes larger and more affluent geographic units come in proximity with distressed geographic units. The FCU's business and marketing plan must also demonstrate an ability and intent to serve the entire area, which can be difficult for unduly large areas. The Board invites comments as to whether it should consider any additional requirements for an underserved area based on a rural district. For example, in finalizing the proposed rule, should the Board impose a new requirement that an underserved area based on a rural district not have boundaries exceeding the states immediately contiguous to the state in the geographic center of the underserved area, in addition to other limitations that presently apply?

[35] *Id.* § 1805.201(b)(3)(ii)(C)(2).

[36] 12 U.S.C. 4702(16)(A)(ii).

[37] *https://www.ecfr.gov/current/title-12/section-1805.201.*

[38] 63 FR 71998 (Dec. 30, 1998).

[39] The CDFI Fund applies its economic distress criteria in its financial and technical assistance opportunities, which enhance funding recipients' ability to provide financial products, financial services, and development services in their target markets. *See* 12 CFR 1805.101; *see also* CDFI Fund, About Us, at *https://www.cdfifund.gov/about#:~:text=Mission,investors%2C%20and%20financial%20service%20providers.*

[40] 67 FR 20013, 20017 (Apr. 24, 2002).

[41] 73 FR 73392 (Dec. 2, 2008).

[42] The economic distress criteria do not apply to underserved areas that qualify as Empowerment Zones or Enterprise Communities. 12 U.S.C. 4702(16)(B).

[43] NCUA Legal Opinion Letter, Chartering and Field of Membership Manual (July 9, 2021), available at *https://www.ncua.gov/regulation-supervision/legal-opinions/2021/chartering-and-field-membership-manual.*

[44] Manual, Chapter 3, Section III.A.

Depending on the feedback it receives from commenters, the Board may modify this provision in the final rule to incorporate such a requirement.

2. Application of CDFI Economic Distress Criteria

The Manual discusses the data an FCU and the NCUA will use to decide whether an area meets the investment area criteria for a proposed underserved area expansion. The Manual currently requires the use of the most recent decennial U.S. census data. This proposal would eliminate the term ''decennial'' and revise the applicable sections in Chapter 3, Section III.B.2 and Section III.B.2.a., to clarify that the census dataset should be consistent with the practices of the U.S. Department of the Treasury in overseeing the CDFI Fund.

Both the Manual and the CDFI regulation use the phrase ''decennial census'' when defining the term ''investment area.'' In a legal opinion letter dated July 9, 2021,[45] the NCUA communicated that for practical and legal reasons the agency has discontinued the use of decennial data and is currently using the U.S. Census Bureau's American Community Survey (ACS) data. The use of ACS data allows for a more current assessment of economic distress for geographic units under consideration. Further, the CDFI Fund now uses ACS data in place of decennial data for most of its programs.

The ACS functionally replaced the data the U.S. Census Bureau derived, up until the 2000 decennial census, from the long form distributed to a representative sample of citizens. Continuing to use decennial long form data from 2000 or before, or its functional equivalent ACS data designed to resemble the 2010 census as if derived from the long form, would result in relying on data that is more than 10 years old. Conversely, data from more recent ACS sampling would result in using the most contemporary census data, which according to CDFI Fund staff has effectively replaced the decennial data.[46]

Further, continuing use of the stale decennial data would raise logistical issues because the CDFI Fund has decided to replace decennial data with the ACS. Most importantly, the CDFI Fund's staff has advised the NCUA that not only is the CDFI Fund solely relying on the ACS (except in certain geographic areas in which it is not available), but it views the ACS as functionally equivalent to the previous decennial data. CDFI Fund staff confirmed that the Fund changed its definition of decennial, explaining that in 2006 Congress directed the Census Bureau to replace the decennial census long form data with the 5-year ACS data. The first 5-year ACS data was released in 2010 (the 2006–2010 ACS), thereby replacing the decennial long form data which was last collected in the 2000 decennial census.

With the release of the 2010 decennial census tracts and the first full 5-year ACS data, the CDFI Fund adopted the 5-year ACS as the successor to the decennial census long form data. Thus, the CDFI Fund has determined that the statutory reference in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 to ''decennial census data'' has been functionally replaced by the Census Bureau with the 5-year ACS that provides the socioeconomic data used for determining program eligibility, such as investment areas.[47]

The Board believes it can best address these developments by amending the Manual to cross-reference the CDFI Fund's economic distress criteria, as the CDFI Fund may amend them from time to time. This change would clarify that the NCUA defers to the CDFI Fund on these criteria, which is appropriate under the FCU Act because the CDFI Fund's economic distress criteria determine which areas are investment areas that can count as underserved areas. The Manual would no longer replicate these criteria, which the Board believes will reduce confusion and inconsistencies as these criteria may change over time. The Board notes that it would continue to make final determinations on underserved area applications, including whether an FCU meets the economic distress criteria. The proposed change would simply clarify that, by statute, an investment area must meet the CDFI Fund's economic distress criteria. The change would also better align the Manual with the reference resources the CDFI Fund makes available on its website.

The Board invites comments on this change and specifically on whether the Board should consider including a summary of the current CDFI Fund criteria in the Manual, despite the increased opportunity for inconsistencies, for reference along with a statement that FCUs must follow the CDFI Fund's criteria. The Board is interested in input on whether this approach would provide clearer information to FCUs on the NCUA's position on the CDFI Fund's criteria. Depending on the feedback it receives from commenters, the Board may include such a statement in the final rule regulatory text solely for the sake of clarity.

3. Technical Update To Eliminate Census Block Group as a Permissible Geographic Unit

The Manual outlines acceptable geographic units, which includes census block groups, by a proposed underserved area's location for the purpose of meeting the definition of an investment area.[48] The Manual also indicates that the proposed area must meet the CDFI definition of investment area.[49]

The CDFI Fund deleted references to block groups in its regulatory definition of geographic units that may constitute an investment area in an interim final rule it issued in 2015.[50] Specifically, in defining geographic units, the CDFI Fund ceased including the term ''census block groups.'' For regulatory consistency, the Board believes it is not appropriate to include a census block group as a geographic unit. The Board notes that the CDFI Act does not expressly state that geographic units for an investment area must be as defined by the CDFI Fund; however, these units are tied closely to the CDFI Fund's economic distress criteria and supplementary guidance and maps that the CDFI Fund issues. The Board, therefore, finds it can best implement the investment area provisions by following suit with the CDFI Fund's elimination of the census block group geographic unit.

The Board believes that the proposed change will adequately address this development by replacing outdated quotations and paraphrases of the CDFI Fund's criteria with a direct reference to the criteria, as the CDFI Fund may change them from time to time.

4. Statement of Unmet Needs

The Board is proposing changes to the current requirements on statements of unmet needs after assessing the agency's extensive experience in processing underserved area requests. The CDFI Act, as referenced in the FCU Act, requires an investment area to have

[45] *https://www.ncua.gov/regulation-supervision/legal-opinions/2021/chartering-and-field-membership-manual Interpretative Letter to Samuel Brownell, CU Collaborate.*

[46] The following link provides a high level overview of how the Census Bureau introduced the ACS process to replace the long form: *https://www.census.gov/programs-surveys/decennial-census/about/census-acs.html.*

[47] Public Law 103–328.

[48] Manual, Chapter 3, Section III.B.2.a—Economic Distress Criteria.

[49] Manual, Chapter 3, Section III.B.2—Investment Area.

[50] 80 FR 52379 (Aug. 31, 2015).

''significant unmet needs for loans or equity investments.'' [51] This element is separate from the economic distress criteria and the FCU Act requirement for the area to be underserved by other depository institutions. Currently, FCUs seeking to add an underserved area must submit a one-page narrative outlining that the proposed service area has significant unmet needs for credit union services (SUN statement). The SUN statement must include support in the form of objective reasons and/or accompanying documentation derived from an identified, authoritative source. The Manual further indicates that third-party documentation is most compelling.

While successful applicants generally have no difficulty in meeting the SUN statement requirements, the NCUA has found that in some instances FCUs view the requirement to submit a one-page document discussing characteristics of the investment areas as burdensome, especially when the NCUA can get this information from other sources. As detailed in this subsection, the Board is proposing to remove the length requirement and third-party data or support references that neither the FCU Act nor the CDFI Fund's criteria require.

As discussed previously, for an area to qualify as underserved, CUMAA requires the Board to determine that the area is (1) a local community, neighborhood, or rural district which (2) qualifies as an investment area as defined in the CDFI Act and (3) is underserved by other depository institutions.[52] By incorporating the CDFI Act's definition of an investment area, CUMAA's underserved area authority also incorporated the regulations implementing that definition. The CDFI Act defines an investment area as a geographic area that, unless it is presently designated an Empowerment Zone or Enterprise Community, meets the objective criteria of economic distress developed by the CDFI Fund and has significant unmet needs for loans or equity investments.[53] By regulation, the CDFI Fund adopted a definition of investment area that established criteria of economic distress and implemented the significant unmet needs criterion.[54]

The Board emphasizes that while the statute provides that an investment area must meet the ''objective criteria of economic distress developed by the [CDFI] Fund,'' it does not include the same requirement for the significant unmet needs element of the definition. Instead, the statute states only that an investment area must have ''significant unmet needs for loans and equity investments.'' Thus, while the CDFI Fund's regulations and policies on this element are significant, the Board believes it is not required to have identical requirements if a different approach would meet the statutory standard. As explained in detail in the rest of this subsection, the Board believes a less prescriptive approach would continue to meet the statutory standard and would not conflict with the CDFI Fund's standards.

In a 2008 Interpretive Ruling and Policy Statement (IRPS) that amended the NCUA's chartering rules (titled IRPS 08–2), the Board updated and clarified the process of approving FCU service to an underserved area. In part, the IRPS updated the documentation and clarified the scope requirements for demonstrating that a proposed area has significant unmet needs for loans and financial services. It also provided a methodology to determine if an area is underserved by other depository institutions. The IRPS codified the current SUN statement requirement that the Board now proposes to change.

During the comment period for the Board's 2008 proposed rulemaking that resulted in issuance of IRPS 08–2, the NCUA received 14 comments addressing the proposal to require a narrative statement on significant unmet needs.[55] Nearly all commenters said the narrative statement was redundant of the CDFI Fund's distress criteria, contending that, by definition, a distressed area must have significant unmet needs for loans and financial services. They believed the requirement would be a costly, burdensome duplication of effort. The information to establish significant unmet needs, the commenters further maintained, is too difficult to find, too subjective to quantify, too difficult to organize by census tracts, and too difficult to document.

As noted in the preamble to the 2008 proposed IRPS, the CDFI Fund at that time accepted a one-page narrative statement describing the significant unmet capital or financial services needs within a proposed area.[56] IRPS 08–2 noted that the analysis must be supported by relevant, objective reasons or statistical data. The IRPS further noted there are no definitive standards of evaluation and SUN statements are evaluated on a case-by-case basis.

In the preamble to IRPS 08–2, the NCUA concluded that it could not interpret the distress criterion or the SUN criterion as redundant of each other because the CDFI Act sets forth both criteria independently in defining an investment area. To ensure a sound record, IRPS 08–2 required a one-page SUN statement in the business plan. The rule required the business plan to explain how the credit union planned to fulfill the unmet needs for loans and credit union services it identified in its statement.

The Board has reconsidered this issue and believes the SUN statement requirement, in its current form, duplicates other elements of the application and imposes undue burden without adding material value. The Board bases this conclusion on two separate findings, each of which is sufficient on its own to support the proposed changes.

First, the CDFI Fund does not require a one-page narrative and does not require third-party data or support. Thus, the Board sees no continuing need to require the one-page narrative. Second, the CDFI Fund considers the lack of financial institution branches in an investment area as part of the SUN criterion. The Board believes that its concentration of facilities test, which measures whether an area is underserved by other depository institutions, directly addresses this point and in most cases would support a finding of significant unmet needs in an investment area.

The Board notes that it would still require the application to cover significant unmet needs, which is consistent with the statement in IRPS 08–2 that the underserved and significant unmet needs criteria are separate by law and not redundant. And, in some cases, an area could theoretically meet the concentration of facilities test but not have significant unmet needs. The proposed rule change will not detract from this principle and will instead merely reduce paperwork requirements because a less prescriptive approach may still enable FCUs to meet these separate statutory criteria.

Effect of Proposed Change on CDFI Certification Requirements

To determine whether the proposed changes may have unintended consequences for CDFI certification, NCUA staff inquired into the CDFI Fund's standards for certifying institutions as CDFIs. The Manual's current requirement that the business plan identify the credit and depository

[51] 12 U.S.C. 4702(13).

[52] 12 U.S.C. 1759(c)(2)(A).

[53] 12 U.S.C. 4702(16).

[54] 12 CFR 1805.201(b)(3)(ii) (2008).

[55] 73 FR 34365 (Aug. 18, 2008).

[56] *Id.,* at 34369, citing to the ''CDFI Certification Application'' (June 2007) at 11.

needs of the community and detail how the credit union plans to serve those needs can support a pattern of significant unmet needs for one or more authorized credit union services.[57] Therefore, the existing credit and depository needs standard is a reasonable measure of significant unmet needs, provided it addresses authorized credit union services.

The CDFI certification application requires the applicant to provide a narrative description of the unmet capital or financial services needs within each identified investment area but does not specify the length of the narrative. Moreover, the CDFI Fund's regulations do not require a separate section in the application for the SUN statement. On this basis alone, the Board believes that FCUs can demonstrate significant unmet needs without a strict one-page requirement.

Further, the CDFI certification application (referred to as the AMIS [58] Submission Guide, updated as of November 2018) requires simply that the applicant ''provide [a] narrative description(s) of the significant unmet capital or financial service needs within each identified Investment Area.'' The application requires no specific length and does not call for third-party data or support. Considering the CDFI Fund's requirements for this criterion, the Board finds it reasonable to eliminate the length requirement for the SUN statement as well as the third-party support reference.

The NCUA's separate concentration of facilities test for underserved areas, which the Board adopted in IRPS 08–2, substantially satisfies the CDFI Fund's standard when provided in a narrative analysis. This test is the NCUA's methodology, as outlined in the Manual, to determine whether an area is underserved by other insured depository institutions.[59] The requirement that an area be underserved by other insured depository institutions is unique to the FCU Act; the CDFI Act's investment area definition does not include this element.

The NCUA's test provides statistical data to support the proposition that an area is underserved by other depository institutions, namely that the area has fewer depository institution facilities as compared to a non-distressed area, which sets a benchmark level of adequate service. As the CDFI Fund's supplemental guidance shows, the CDFI Fund allows data showing a lack of financial institution branches in an investment area to help meet its significant unmet needs requirement. For this reason, the NCUA's separate requirement and test assure the agency that an area passing the test would be likely to meet the significant unmet needs standard.

The NCUA's experience in applying the test supports this conclusion. The NCUA has found that once an area meets the economic distress criteria and is underserved by other depository institutions, the area also has significant unmet needs. As a result, requiring FCUs to identify the significant unmet needs in the level of detail that the Manual currently requires often leads to redundant and time-consuming data gathering that does not add material value.

For each of these independent reasons, the Board proposes to amend the SUN statement requirement to eliminate any length requirement and the reference to third-party support and instead require a statement about the area's credit or depository needs and how the applicant will meet the needs. As amended, this provision would still require the business plan to address significant unmet needs. The Board believes that this change would reduce burden on applicants while still requiring compliance with the statutory standards. The provision would also continue to allow the applicant to decide which of the following needs to address in the statement: loans, share draft accounts, savings accounts, check cashing, money orders, certified checks, automated teller machines (ATMs), deposit taking, safe deposit box services, and similar services. The Board is not proposing any changes to the list of services.

B. Community Charter Conversions and Expansions

This proposed rule would make three changes to reduce the regulatory burden for community charter applications or conversions.[60] Specifically, the proposed rule would (1) establish a simplified business and marketing plan for community charter applications, (2) provide a standardized, fillable application for community charter conversion or expansion requests, and (3) eliminate the requirement for FISCUs converting to a federal community charter to submit a business and marketing plan under certain conditions.

The FCU Act and the Manual require the NCUA to consider the economic advisability of chartering a new FCU and expanding an existing FOM.[61] The business and marketing plan requirement in the Manual achieves this by allowing the NCUA to consider whether a new FCU has realistic assumptions that support its viability and plan to serve its entire FOM. For expansion, the business and marketing plans help the NCUA test an FCU's capacity to serve the new group or geographic area. The Board continues to acknowledge the importance of these plans in promoting economic advisability and service to the entire FOM that an FCU seeks to serve.

After studying the existing requirements and considering its substantial experience in processing and reviewing various applications, the Board is proposing targeted relief in this area. These changes would not undermine the important goals that the plans serve and would instead reduce or eliminate paperwork requirements while sharpening the agency's focus on the substantive merits of each application.

Simplified Business and Marketing Plan

In implementing the economic advisability requirement of the FCU Act, the Manual requires the credit union to submit a business plan containing specified elements, which currently apply to new FCU charters and existing FCUs requesting a community charter conversion or expansion.[62]

Chapter 2, Section V.A.4, of the Manual defines the business plan requirements specific to community charter actions. The current requirements are:

- Provide pro forma financial statements for a minimum of 24 months after the proposed conversion;
- Provide anticipated financial impact on the credit union, including the need for additional employees and fixed assets, and the associated costs;
- Provide a description of the current and proposed office/branch structure, including a general description of the location(s); parking availability, public transportation availability, drive-through service, lobby capacity, or any other service feature illustrating community access;
- Provide a marketing plan addressing how the community will be served for the 24-month period after the

[57] IRPS 06–1, 71 FR at 36667 (June 22, 2006).

[58] AMIS is an acronym standing for Awards Management Information System.

[59] Manual, Chapter 3, Section III.B.3.

[60] For the proposed changes discussed in this section, references to community credit unions include those federal credit unions serving a well-defined local community, neighborhood, or rural district meeting the requirements specified by the NCUA Board.

[61] 12 U.S.C. 1754; Manual, Chapter 1, Section IV.

[62] Manual, Chapter 2, Section V.A 4.

proposed conversion to a community charter, including detailing how the credit union will implement its business plan; the unique needs of the various demographic groups in the proposed community; how the credit union will market to each group, particularly underserved groups; which community-based organizations the credit union will target in its outreach efforts; the credit union's marketing budget projections dedicating greater resources to reaching new members; and the credit union's timetable for implementation, not just a calendar of events;

- Provide details, terms, and conditions of the credit union's financial products, programs, and services to be provided to the entire community; and
- Provide maps showing the current and proposed service facilities, ATMs, political boundaries, major roads, and other pertinent information.

The Manual also provides for a streamlined business and marketing plan for existing community charters applying to add bordering areas.[63] Existing community credit unions adding bordering areas may continue to use the streamlined business and marketing plan, as the proposed rule leaves this option intact. With respect to all other community charter requests, the specific proposed modifications to the existing plan requirements are discussed in the following paragraphs.

As noted, credit unions are currently required to provide a description of the current and proposed office/branch structure, including a general description of the location(s), parking availability, public transportation availability, drive-through service, lobby capacity, or any other service feature illustrating community access. Under the proposed rule, the credit union would be required to provide branch details to include how many service facilities are in the area, whether the credit union participates in shared branching, number of ATMs (owned and shared), any new branches planned, use of electronic delivery channels, and how the credit union will sign up low- and moderate-income individuals. By eliminating the need for providing granular details about the branch structure, the NCUA hopes to encourage applicants to spend more time determining how to best meet the evolving needs of their members and considering innovative service delivery channels like virtual banking.

The following is an example of a marketing budget that credit unions could use for a 24-month period. Under the proposed rule, a credit union may include all the various marketing media to set marketing expectations and demonstrate their intent to reach new members in the proposed community. The NCUA emphasizes that credit unions would not be required to use the marketing media set forth in the example.

Example Marketing Budget

MARKETING BUDGET

Category	Year-end actual	Projected year 1	Projected year 2
Social Media	$xx,xxx	$xx,xxx	$xx,xxx
Geofencing	xx,xxx	xx,xxx	xx,xxx
Special Program for New Branch	xx,xxx	xx,xxx	xx,xxx
Direct Mail Campaign	xx,xxx	xx xxx	xx,xxx
Television	xx,xxx	xx,xxx	xx,xxx
Radio	xx,xxx	xx,xxx	xx,xxx
Total	xx,xxx	xx,xxx	xx,xxx

The proposed rule would also remove the requirement that a credit union provide ''details, terms, and conditions of the credit union's financial products, programs, and services to be provided to the entire community'' and instead include a question on whether the credit union is full service, and if so, what unique or particularly interesting products or services it offers.[64] The NCUA believes there is no need to list every product or service because the regulation defines full service, and the agency wants credit unions to be able to focus their application on products tailored to the needs of their FOM, especially low-to-moderate income members. In addition, in most cases products and services are listed on the credit union's website.

Standardized Fillable Application for Community Charter Requests

The NCUA receives several requests each year for an application form for a community conversion or expansion request. The agency addressed this need in part by providing templates for business and marketing plans through NCUA Letters to FCUs 11–FCU–03 and 21–FCU–01.[65] However, because there is no NCUA form in the Manual for applicants to request community charter actions, credit unions' submissions can be voluminous and may not meet regulatory requirements. The proposed rule would require the use of a fillable, standardized application for all community charter actions. The standardized application should better focus credit unions on critical requirements and ensure uniform NCUA reviews across applications. The use of the standardized application form should reduce the number of follow-up requests from the NCUA for additional information. The proposed form is available for review within the *Regulations.gov* docket for this notice of proposed rulemaking.

The proposed changes will not hinder the NCUA's ability to assess a credit union's economic advisability and service to low-income members. Although the proposed changes adjust the current process to require less information in total, they better target the most useful information, thereby enhancing the efficiency and effectiveness of NCUA reviews.

The Board welcomes comments on all aspects of these proposed changes and specifically requests comment on whether the new fillable application

[63] Manual, Chapter 2, Section V.B 1.

[64] The Manual defines full service as ''providing, at a minimum, savings accounts, share draft accounts, mortgages, home-equity loans, automobile loans, money orders, wire transfers, interactive website, home banking, bill payment, and mobile banking.''

[65] *https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/community-charter-conversions-and-expansions* and *https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/community-charter-conversions-and-expansions-0.*

should be mandatory. The Board's intention is to reduce burden on applicants and the agency by making the process simpler without sacrificing the quality of the information and analysis. The Board is interested in whether a free-form narrative option is preferrable and may consider making the form optional, depending on the feedback from commenters. The Board also requests comment on whether it should codify the new form in the Manual. The advantage of codifying it is making it more readily accessible, but the disadvantage is that even minor changes may require a new notice-and-comment rulemaking to avoid confusion.[66] The Board may decide not to codify the form or label the form as being subject to modification by CURE from time to time in the final rule, depending on the feedback it receives from commenters.

Requirements for Community-Based State-Chartered Credit Union Converting to an FCU

FISCUs converting to a federal community charter are currently also subject to the business and marketing plan requirements discussed in the preceding section of this preamble.[67] The proposed rule eliminates this requirement for FISCUs converting to a federal community charter if they will continue to serve the same community. The economic advisability of granting a community charter in a conversion to a federal credit union is more readily determinable because the applicant applying to convert is an existing insured credit union whose management and operations the NCUA has examined or supervised and that has an established history of serving the community.

The Manual defines the business and marketing plan requirements for a community credit union. The business and marketing plan must demonstrate the credit union's ''ability and commitment to serve the entire community for which it seeks NCUA approval.'' [68] The Board did not propose changes to the charter conversion requirements in the 2016 FOM rulemakings on community charters. The Board acknowledges that it relies on sound business and marketing plans to ensure that expanded community chartering options are reasonable and viable.[69]

In addition, the Manual implements the statutory requirements governing the conversion of a state charter to a federal charter.[70] In general, conversions ''are treated the same as any initial application for a federal charter.'' [71] However, ''[s]ince the applicant in a conversion is an ongoing credit union, the economic advisability of granting a charter is more readily determinable than in the case of an initial charter applicant.'' [72]

The Manual also requires that, ''[i]f the converting credit union is a community charter and the new federal charter is community-based, it must meet the community field of membership requirements set forth in Chapter 2, Section V, of this manual.'' [73] Among other requirements, this section notes how the NCUA will not approve an application for a community charter consisting of all or a portion of a combined statistical area or a core-based statistical area unless the applicant demonstrates in its business and marketing plan the credit union will (1) serve a community that is contiguous and (2) provide financial services to low- and moderate-income and underserved people. The NCUA must also ensure the credit union has not selected its service area to exclude low- and moderate-income and underserved people or to engage in illegal discrimination.[74]

The proposed rule would amend the Manual's business and marketing plan requirement for FISCUs that already serve the community applying to become a federal community charter. In place of the plan, the NCUA would only require a FISCU to submit a statement addressing the following three topics:

1. Does the existing community consist of a portion of a Core Based Statistical area or Combined Statistical Area? If so, please explain the credit union's basis for selecting its service area.

2. Describe products and services you offer or plan to offer to low- and moderate-income and underserved members.

3. How will you market to the low- and moderate-income, and underserved (economically distressed) people, and those with unique needs, in the community?

The Board believes that the proposed removal of the business and marketing plan requirement for FISCU conversions will not hinder the NCUA's ability to assess the applicant's economic advisability and its capacity to provide services to low- and moderate-income members. This would be accomplished through the NCUA's review of the FISCU's Financial Performance Report, review of examination reports, including reports related to compliance with consumer financial protection and fair lending statutes and regulations. The proposed changes will reduce the time involved for both the credit union and NCUA staff.[75]

A FISCU converting to an FCU community charter would not be subject to the NCUA's 3-year business and marketing plan review.[76] The NCUA believes it is able to review for non-discrimination through other means, such as the FISCU's track record, state examination results, including results related to any fair lending reviews, and other information available to the agency.

This proposed change would not apply to single or multiple common bond FISCUs converting to an FCU community charter. These credit unions would have to submit a business and marketing plan. This change would also not apply to non-federally insured credit unions. As stated previously, the NCUA has an opportunity to conduct ongoing reviews of FISCUs that provide insight into the credit union's management and operations. Because

[66] Some changes may meet the Administrative Procedure Act's good cause exception to the general requirement for an agency to provide the public prior notice and an opportunity for comment before adopting a rule. *See* 5 U.S.C. 553. For example, non-substantive changes may meet the ''unnecessary'' prong of the good cause standard. *See, e.g., Mack Trucks, Inc.* v. *E.P.A.,* 682 F.3d 87, 94 (D.C. Cir. 2012) (''This prong of the good cause inquiry is 'confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.'') (citation and quotation mark omitted).

[67] Manual, Chapter 2, Section V.A.4.

[68] Manual, Chapter 2, Section V.A.2.

[69] *See* 81 FR 88412, at 88413 (Dec. 7, 2016) providing that ''What critics of repealing the 'core area' service requirement overlook is that NCUA has in place a supervisory process to assess management's efforts to offer service to the entire community an FCU seeks to serve. NCUA holds credit union management accountable for the results of an annual evaluation that encompasses a community FCU's implementation of its business and marketing plans, extending for three [3] years after the credit union either is chartered, converts, or expands. Experience confirms that the agency's evaluations are a more effective means of ensuring that the low-income and underserved populations are fairly served compared to the rest of the community, in contrast to a requirement forcing a credit union to serve the 'core area' of the portion of a CBSA that comprises its community.'' *See also* 81 FR 88412, at 8814 (''As with any community an FCU seeks to serve, a Combined Statistical Area would be subject to NCUA's practice of periodically reviewing the FCU's implementation of its business and marketing plans to assess its capability of, and success in, serving its original or previously expanded community.'').

[70] 12 U.S.C. 1771(b); Manual, Chapter 4, Section II.

[71] Manual, Chapter 4, Section II.A.

[72] *Id.*

[73] *Id.*

[74] Manual, Chapter 2, Section V.A.8.

[75] During the period of 2011–2021, the NCUA approved 19 FISCUs converting to federal community charters. The NCUA estimates approximately 40 hours of paperwork burden for each charter conversion.

[76] Manual, Chapter 2, Section V.A.4.

the NCUA does not have the same opportunity with non-federally insured credit unions, the Board believes that the basis for this change is not applicable. The Board specifically invites comments on whether to treat any conversions of non-federally insured credit unions differently in this respect. After reviewing any input from commenters on this issue, the Board may consider expanding this flexibility to non-federally insured credit unions in finalizing the proposed rule.

C. Groups Sharing a Common Bond With Community Areas

The Board is also proposing a targeted addition to the affinity groups eligible for membership in community FCUs.[77] The Manual defines an affinity as a relationship on which a community charter is based. The affinity concept, which the FCU Act does not set forth or restrict, complements the community FOM. The community FOM tells a prospective member which geographic area is relevant—a well-defined local community, neighborhood, or rural district. The affinities tell them which relationships to that area are enough to make a bond suitable for membership.

The Manual currently defines four types of affinity groups eligible for membership in FCUs serving communities or rural districts, namely persons who live in, worship in, attend school in, or work in the community or rural district.[78]

While the current regulatory structure is generally effective, it imposes limits on credit unions serving, or desiring to serve, a community which has employers with staff located outside the community boundaries. This limitation potentially discourages credit unions from pursuing a federal community charter if they have an existing working relationship with the employees of an employer headquartered within its operational area, but would, upon converting, lose the ability to serve the employer's staff working from another location.

The Board is also concerned the current affinities permitted for community credit unions do not satisfactorily address changing trends in the workplace. Most significantly, the concept of employment location has changed over time, particularly in the post-COVID–19 world which increased the trend for telecommuting and decentralized workplaces. Advances in technology have significantly changed how employees conduct work and communicate with one another, and there is less of a need for persons working for the same entity to share a common work location. Although the concept of where people work is changing, especially through the increase in the number of persons working from remote locations, we also believe individuals in another locale who are employed by a company headquartered in the community still maintain important ties to their company's headquarters.

Since March 2020, the collective efforts of companies to adapt to the COVID–19 pandemic offer even more pronounced evidence of how a staff member's physical location has become less important in maintaining an employment affinity that enables an employer to accomplish its mission. Subsequent to the pandemic, employers may generally be more likely to structure operations to accommodate more geographically dispersed workforces. As a result, the current constraints affecting FCUs serving well-defined local communities, neighborhoods, or rural districts could have a more adverse impact as employees in many workplaces now work at home in remote locations which are not in a commutable distance from the company's physical location.

As of June 30, 2022, there were 1,009 community chartered FCUs with $253.7 billion in assets that provide service to over 17 million members. The overwhelming majority of existing community charters began as single or multiple common bond credit unions, and many had to sacrifice the ability to serve persons working for employers in the community if those employees resided outside the community. This change will permit these FCUs to maintain or expand their membership base, promote financial inclusion, and expand access to credit union services to more individuals.

To address this limitation, the Board proposes adding a fifth affinity to include a paid employee for a legal entity headquartered in the community, neighborhood, or rural district. The Board believes this rule change will help FCUs adapt to serve everyone with ties to a community by providing employees access to a community credit union with which they have a bond through their employer, even if they do not physically work in the well-defined local community or rural district.

The addition of the ''paid employee for a legal entity headquartered in the well-defined local community, neighborhood or rural district'' also has safety-and-soundness benefits to FCUs. It will allow community FCUs to reduce their risk to localized economic downturns and disasters. In addition, it will help address the reality that more employers are moving to a business model in which more staff members can work in remote locations.

D. Eligibility of Immediate Family Members of Decedents

The Board is also proposing an update to the groups of persons who may join an FCU based on a common bond with its members or the FCU. Many of these provisions, including those on spouses of persons who died while within the field of membership, volunteers, and pensioners, were in the NCUA's chartering regulations and policies before CUMAA and reflected the agency's judgment on which relationships show a common bond that supports extending membership eligibility.[79] The proposed update would modestly expand an existing option to reflect changes in society and alleviate logistical hurdles to funds transfer and succession for FCU members.

Under the current options available for FCUs to enroll secondary members, immediate family or household members of decedents are not eligible for membership unless the person was a spouse of a person who died while within the field of membership of the credit union. As a result of the survivors not retaining membership eligibility, the Board has learned FCUs may lose the funds the decedents held in the credit union to another financial institution, along with any goodwill associated with a longstanding relationship the credit union had with the decedent.

Immediate family or household members who are not surviving spouses may not have joined a federal credit union when the decedent was still living due to an oversight, lack of awareness regarding eligibility, or a perceived lack of need in cases where the decedent handled the finances of the family or household. Also, in the case of accounts established in joint tenancy, a survivor may have mistakenly believed he or she already is a member.

The Board proposes amending the Manual to address these concerns and minimize the potential for future confusion, especially when a consumer is undergoing a period of bereavement. The amendment will update the definition of secondary members for

[77] For this section, references to community credit unions include those federal credit unions serving a well-defined local community, neighborhood, or rural district meeting the requirements specified by the NCUA Board.

[78] Manual, Chapter 2, Section V.A.1.

[79] *See* 44 FR 43737, 43739 (July 26, 1979) (proposed rule on chartering that discussed the common bond that certain persons have with the basic group that an FCU serves).

each common bond type to include every member of a decedent's immediate family or household for a 6-month period following the decedent's passing.

In developing the proposed rule change, the Board patterned the agency's approach after the principles the NCUA already recognizes in its share insurance regulation, which allows a grace period of 6 months for survivors of a decedent to restructure accounts to maintain coverage after a member passes away. This provision allows survivors to act as if the decedent were still living for the purposes of maintaining an insured coverage relationship with the credit union when possible.[80]

If the NCUA followed the same principle relative to general membership enrollment, it would allow a similar grace period after a member or individual who is within the field of membership passes away for survivors to exercise a right that existed while the member or potential member was still living. In addition to being consistent with language on insurance coverage, it would avoid a situation that allows eligibility for survivors in perpetuity even if they themselves are not otherwise within the field of membership. Allowing eligibility in perpetuity could create problems verifying eligibility and stretches the assertion that an individual is eligible based on his or her relationship to the decedent, which may have ended many years prior. While the Board believes the proposed rule offers a fair approach to handling a sensitive issue, it welcomes comments as to whether an alternative timeframe is appropriate.

The Board, while welcoming comments on any aspect of this proposed rule change, specifically requests comment on a potential variation on the proposal which would allow immediate family members, other than a surviving spouse, to join the FCU after a person's death only if the decedent was a member of the credit union, as opposed to being just a potential member, at the time of death. This option would preserve the right of a surviving spouse of a member or potential member to remain eligible for credit union membership as permitted under the current regulatory framework. It would, however, only allow eligibility for other members of the immediate family or household for 6 months if their ties were with an actual, not potential, member who passed away. The Board requests comments to better understand the membership succession needs of FCUs and consumers when faced with the loss of a member of the immediate family or household.

E. Updated References for Review of Prospective Management and Officials

This proposed rule makes a technical clarification and correction to the Manual provision regarding the agency's evaluation and disapproval of directors and other management officials for applicants for NCUSIF coverage. The goal of the change is to reduce confusion for applicants and provide a clearer explanation of which authorities govern this review process.

Section 201(c) of the FCU Act requires the NCUA to ensure that the management of applicants for insurance are of good ''general character and fitness.'' [81] Chapter 1, Section IV.B., of the Manual implements this statutory requirement. Separately, section 104 of the FCU Act states ''an investigation shall be made for the purpose of determining . . . the general character and fitness of subscribers'' to the FCU organization certificate in the Board's approval of a new FCU charter.[82] An FCU's subscribers—the individuals who seek to charter a new FCU—often apply to serve as officials of the prospective FCU.

The present wording of the Manual incorrectly cites to the NCUA regulation in § 701.14, which does not pertain to sections 104 or 201(c) of the FCU Act. The regulation implements section 212 of the FCU Act, which provides separate statutory authority for disapproval of directors and management officials of certain federally insured credit unions.[83] The regulation only applies in cases of federally insured credit unions in troubled condition or newly chartered credit unions (defined in § 701.14(c)(1)(ii) as those chartered for less than 2 years).[84] These requirements, including time limitations for application review and approval, do not apply to credit unions that are applying for an FCU charter or insurance of member of accounts. The Manual and § 701.14 apply similar standards to prospective directors and management officials, but under the FCU Act and the NCUA's regulations, these procedures are distinct.

The proposed rule removes the reference to § 701.14 in Chapter 1, Section IV.B., of the Manual to clarify that the NCUA relies on the authority of section 201(c) of the FCU Act in disapproving a director or other management official of an applicant for NCUSIF coverage, as well as section 104 on the character and fitness of FCU subscribers. The proposed change does not alter the NCUA's current procedures for such disapprovals. By proposing this change, the Board intends solely to ensure the accuracy and clarity of the Manual.

III. Questions for Commenters on Possible Future Actions

The Board is also interested in seeking input from commenters to inform future policies or rulemaking outside the scope of this proposed rule. In addition to the specific requests for comment included with the discussion of proposed changes elsewhere in this preamble, the Board welcomes comments on the following topics, which the Board may address in future actions but not in connection with this proposed rule or any final rule based on the proposed rule.

Application of ''well-defined'' to underserved areas. Currently, the Manual applies the ''well-defined'' requirement to communities, neighborhoods, and rural districts that an applicant seeks to serve as an underserved area.[85] But, the FCU Act does not apply this term in the provision on underserved areas. The statute requires that these areas may include persons or organizations within a ''local community, neighborhood, or rural district.'' If the Board revisits the current requirement, how would commenters recommend the Board describe the required boundaries for a qualifying area? Currently, the ''well-defined'' requirement is defined as having specific geographic boundaries. How would commenters recommend that the Board distinguish a well-defined area from one that may not need to be well-defined? Should the Board consider amending the ''well-defined'' definition to provide a clear basis to distinguish such areas?

Concentration of facilities. Currently, the Manual provides three options for an applicant to establish that a proposed underserved area is underserved by other depository institutions, as the FCU Act requires.[86] First, the Manual provides for a specific calculation based on the non-distressed tracts within an area. This is the test the NCUA runs to see whether an area qualifies. Second, the Manual provides that an

[80] 12 CFR 745.2(e) provides that a member's death will not affect the member's share insurance coverage for 6 months following death, unless someone restructures the deceased member's account(s) before 6 months are up.

[81] 12 U.S.C. 1781(c).

[82] 12 U.S.C. 1754.

[83] 12 U.S.C. 1790a.

[84] 12 CFR 701.14(a).

[85] Manual, Chapter 3, Section III.B.1.

[86] 12 U.S.C. 1759(c)(2)(A)(ii); 12 CFR 701, Manual, Chapter 3, Section III.B.3.

underserved county, as designated by the Consumer Financial Protection Bureau, will qualify as underserved for purposes of this test. Third, the Manual provides that an area may qualify based on a credit union's own ''metric'' if the credit union's measure is based on data from the NCUA or other federal banking agencies. Do commenters believe these options, including the current flexibility for an applicant to provide its own data and analysis, provide sufficient latitude to establish that an area is underserved? What additional measures or metrics do commenters recommend, and could they fit within the third option described in this paragraph? Alternatively, should the Board consider adopting an additional option based on a national benchmark of depository institution facilities? What sources do commenters recommend the Board consider in studying this issue?

Neighborhoods as a chartering option. Currently, the Manual does not include a detailed description and set of specific criteria to define a permissible charter based on a neighborhood, as 12 U.S.C. 1759(b) allows. In the agency's experience, communities (and likely rural districts) typically subsume neighborhoods. The proposed rule contains some minor elaboration and suggested clarifications on neighborhoods but is not proposing any substantive changes. Should the Board consider proposing or otherwise developing guidance or requirements for neighborhood-based charters? Do commenters believe that some neighborhoods may extend beyond or not be co-extensive with a community or rural district in some instances? Would development of this option assist FCUs in expanding access to financial services?

IV. Regulatory Procedures

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemaking in which an agency creates a new or amends existing information collection requirements.[87] For purposes of the PRA, an information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a valid Office of Management and Budget (OMB) control number. The current information collection requirements for the Chartering and Field of Membership Manual are approved under OMB control number 3133–0015.

The proposed rule would introduce a simplified application for community-based FCUs by eliminating duplicative and unused reporting and providing a standard format for business and marketing plans. The NCUA estimates that 50 percent of the respondents of the current application will use the new simplified version for an estimated reduction of 560 burden hours.

The proposed rule would also eliminate the one-page narrative and third-party data from FCUs seeking to add an underserved area. The elimination of this reporting requirement is estimated to reduce the burden by 2 hours per response to complete the application for a total reduction of 42 burden hours.

A FISCU converting to a federal community charter is currently subject to the business and marketing plan requirements. The proposed rule would eliminate this requirement for FISCUs when converting to a federal community charter if they already serve the same community. It is estimated that one FISCU would fall in this category. A reduction of 2 burden hours would be due to the elimination of this reporting requirement.

A program change attributed with this proposed rulemaking is estimated to reduce the overall burden hours by 604.

OMB Control Number: 3133–0015.

Title of information collection: Chartering and Field of Membership Manual, 12 CFR 701.1, App. B to Part 701.

Estimated number respondents: 8,245.

Estimated number of responses per respondent: 1.

Estimated total annual responses: 8,245.

Estimated total annual burden hours per response: 0.53.

Estimated total annual burden hours: 15,619.

The NCUA invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and cost of operation, maintenance, and purchase of services to provide information.

All comments are a matter of public record. Interested persons are invited to submit written comments to (1) *www.reginfo.gov/public/do/PRAMain* (find this particular information collection by selecting the agency under ''Currently under Review'') or to (2) National Credit Union Administration, 1775 Duke Street, Suite 6032, Alexandria, Virginia 22314; or email at *PRAComments@ncua.gov.*

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. This proposed rule only applies to FCUs and 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. Although the rule, in part, streamlines some of the requirements for converting from a FISCU to an FCU, the NCUA's experience generally indicates the application process itself has not been a determinative factor in an existing credit union's choice of jurisdictional authority. Accordingly, the NCUA believes that the effect of this change on the states would be limited. The NCUA has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

The Board has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.[88] Although the provision on extending membership eligibility to surviving family members may affect members and their families by extending access to financial services, the Board does not believe that the change would affect family well-being as described in factors included in the legislation, which include the effect of the action on the stability and safety of the family; on parental authority and rights in the education, supervision, and

[87] 44 U.S.C. 3507(d); 5 CFR part 1320.

[88] Public Law 105–277, 112 Stat. 2681 (1998).

nurture of their children; on the ability of families support their functions or substitutes governmental activity for these functions; and on increases or decreases to disposable income. The Board's proposed change would potentially affect where family members access funds after a members' death, but the proposal would not affect access to the funds themselves.

List of Subjects in 12 CFR Part 701

Credit Unions.

By the NCUA Board on February 16, 2023.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons stated in the preamble, the NCUA Board proposes to amend 12 CFR part 701, as follows:

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

■ 1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.;* 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. In appendix B to part 701:
■ a. Amend chapter 1 by revising section IV.B;
■ b. Amend chapter 2 by:
■ i. Revising sections II.H, III.H, IV.J, and V.A.1;
■ ii. Redesignating section V.A as section V.A.4 and revising it; and
■ iii. Revising section V.G;
■ c. Amend chapter 3 by:
■ i. Adding a new sentence at the end of section III.B.1;
■ ii. Revising section III.B.2;
■ iii. Removing section III.B.2a; and
■ iv. Redesignating section III.B.2.b as section III.B.2.a and revising it;
■ d. Amend chapter 4 by revising section II.B; and
■ e. Amend Appendix 1 Glossary by revising the definition of ''Affinity''.

The revisions and addition read as follows:

Appendix B to Part 701—Chartering and Field of Membership Manual

Chapter 1—Federal Credit Union Chartering

* * * * *

IV—Economic Advisability

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IV.B—Character and Fitness Analysis

Section 104 of the Federal Credit Union Act, 12 U.S.C. 1754, requires NCUA to ensure that the subscribers are of good ''general character and fitness.'' Section 201(c) of the Federal Credit Union Act, 12 U.S.C. 1781(c), requires NCUA to consider the ''general character and fitness'' of management in reviewing an application by a credit union for insurance of member accounts. Prospective officials and employees, including those who elect to serve on a voluntary basis, will be the subject of credit and background investigations. In many cases, a federal credit union's subscribers—the individuals who seek to charter a new credit union—simultaneously apply to serve as officials of the proposed charter. The investigation report must demonstrate each applicant's ability to effectively handle financial matters. Employees and officials should also be competent, experienced, honest, and of good character. Factors that may lead to disapproval of a prospective official or employee include criminal convictions, indictments, and acts of fraud and dishonesty. Further, factors such as serious or unresolved past due credit obligations and bankruptcies disclosed during credit checks may disqualify an individual.

NCUA also needs reasonable assurance that the management team will have the requisite skills—particularly in leadership and accounting—and the commitment to dedicate the time and effort needed to make the proposed federal credit union a success.

Section 201 of the Federal Credit Union Act, 12 U.S.C. 1781(c), sets forth the criteria for evaluation of the general character and fitness of the management of a credit union that applies to the NCUA Board for federal share insurance of member accounts. The Federal Credit Union Act, 12 U.S.C. 1754, requires an appropriate investigation be made into the general character and fitness of the subscribers to the organization certificate before the organization certificate may be approved. If the application of a prospective official or employee to serve is not acceptable to the Office of Credit Union Resources and Expansion Director, the group can propose an alternate to act in that individual's place. If the charter applicant feels it is essential that the disqualified individual be retained, the individual may appeal the Office of Credit Union Resources and Expansion Director's decision to the NCUA Board. If an appeal is pursued, action on the application may be delayed. If the appeal is denied by the NCUA Board, an acceptable new applicant must be provided before the charter can be approved.

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Chapter 2—Field of Membership Requirements for Federal Credit Unions

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II—Occupational Common Bond

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II.H—Other Persons Eligible for Credit Union Membership

A number of persons, by virtue of their close relationship to a common bond group, may be included, at the charter applicant's option, in the field of membership. These include the following:

- Employees of this credit union;
- Persons retired as pensioners or annuitants from the above employment;
- Volunteers;
- Members of the immediate family or household, including those of a member or person eligible for membership who died no longer than 6 months prior to the date of the application for credit union membership;
- Honorably discharged veterans who served in any of the Armed Services of the United States listed in this charter;
- Organizations of such persons; and
- Corporate or other legal entities in this charter.

Immediate family is defined as spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

Household is defined as persons living in the same residence maintaining a single economic unit. Membership eligibility is extended only to individuals who are members of an ''immediate family or household'' of a credit union member. It is not necessary for the primary member to join the credit union in order for the immediate family or household member of the primary member to join, provided the immediate family or household clause is included in the field of membership. However, it is necessary for the immediate family member or household member to first join in order for that person's immediate family member or household member to join the credit union. A credit union can adopt a more restrictive definition of immediate family or household.

Volunteers, by virtue of their close relationship with a sponsor group, may be included. Examples include volunteers working at a hospital or school.

Under the Federal Credit Union Act, once a person becomes a member of the credit union, such person may remain a member of the credit union until the person chooses to withdraw or is expelled from the membership of the credit union. This is commonly referred to as ''once a member, always a member.'' The ''once a member, always a member'' provision does not prevent a credit union from restricting services to members who are no longer within the field of membership.

III—Associational Common Bond

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III.H—Other Persons Eligible for Credit Union Membership

A number of persons by virtue of their close relationship to a common bond group may be included, at the charter applicant's option, in the field of membership. These include the following:

- Employees of this credit union;
- Volunteers;
- Members of the immediate family or household, including those of a member or person eligible for membership who died no longer than 6 months prior to the date of the application for credit union membership;
- Honorably discharged veterans who served in any of the Armed Services of the United States in this charter;
- Organizations of such persons; and
- Corporate or other legal entities in this charter.

Immediate family is defined as spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

Household is defined as persons living in the same residence maintaining a single economic unit.

Membership eligibility is extended only to individuals who are members of an ''immediate family or household'' of a credit union member. It is not necessary for the primary member to join the credit union in order for the immediate family or household member of the primary member to join, provided the immediate family or household clause is included in the field of membership. However, it is necessary for the immediate family member or household member to first join in order for that person's immediate family member or household member to join the credit union. A credit union can adopt a more restrictive definition of immediate family or household.

Volunteers, by virtue of their close relationship with a sponsor group, may be included. One example is volunteers working at a church.

Under the Federal Credit Union Act, once a person becomes a member of the credit union, such person may remain a member of the credit union until the person chooses to withdraw or is expelled from the membership of the credit union. This is commonly referred to as ''once a member, always a member.'' The ''once a member, always a member'' provision does not prevent a credit union from restricting services to members who are no longer within the field of membership.

IV—Multiple Occupational/Associational Common Bonds

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IV.J—Other Persons Eligible for Credit Union Membership

A number of persons, by virtue of their close relationship to a common bond group, may be included, at the charter applicant's option, in the field of membership. These include the following:

- Employees of this credit union;
- Persons retired as pensioners or annuitants from the above employment;
- Volunteers;
- Members of the immediate family or household, including those of a member or person eligible for membership who died no longer than 6 months prior to the date of the application for credit union membership;
- Honorably discharged veterans who served in any of the Armed Services of the United States in this charter;
- Organizations of such persons; and
- Corporate or other legal entities in this charter.

Immediate family is defined as spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

Household is defined as persons living in the same residence maintaining a single economic unit.

Membership eligibility is extended only to individuals who are members of an ''immediate family or household'' of a credit union member. It is not necessary for the primary member to join the credit union in order for the immediate family or household member of the primary member to join, provided the immediate family or household clause is included in the field of membership. However, it is necessary for the immediate family member or household member to first join in order for that person's immediate family member or household member to join the credit union. A credit union can adopt a more restrictive definition of immediate family or household.

Volunteers, by virtue of their close relationship with a sponsor group, may be included. Examples include volunteers working at a hospital or church.

Under the Federal Credit Union Act, once a person becomes a member of the credit union, such person may remain a member of the credit union until the person chooses to withdraw or is expelled from the membership of the credit union. This is commonly referred to as ''once a member, always a member.'' The ''once a member, always a member'' provision does not prevent a credit union from restricting services to members who are no longer within the field of membership

V—Community Charter Requirements

V.A.1—General

There are two types of community charters. One is based on a single, geographically well-defined local community or neighborhood; the other is a rural district. More than one credit union may serve the same community.

NCUA recognizes five types of affinity on which both a community charter, including a well-defined local community or neighborhood, and a rural district can be based on persons who live in, worship in, attend school in, work in, or are a paid employee for a legal entity headquartered in the community or rural district. Businesses and other legal entities within the community boundaries or rural district may also qualify for membership.

NCUA has established the following requirements for community charters:

- The geographic area's boundaries must be clearly defined; and
- The area is a well-defined local community or a rural district.

* * * * *

V.A.4.—Business Plan Requirements for a Community Credit Union

For the purpose of this section, references to community credit unions include those federal credit unions serving a well-defined local community, neighborhood, or rural district meeting the requirements specified by the NCUA Board. A community credit union is frequently more susceptible to competition from other local financial institutions and generally does not have substantial support from any single sponsoring company or association. As a result, a community credit union will often encounter financial and operational factors that differ from an occupational or associational charter. Its diverse membership may require special marketing programs targeted to different segments of the community. For example, the lack of payroll deduction creates special challenges in the development and promotion of savings programs and in the collection of loans. Accordingly, to support an application for a community charter, an applicant federal credit union must submit a business plan incorporating the following data in the form prescribed by the NCUA:

- Pro forma financial statements for a minimum of 24 months after the proposed conversion, including the underlying assumptions and rationale for projected member, share, loan, and asset growth;
- Anticipated financial impact on the credit union, including the need for additional employees and fixed assets, and the associated costs;
- A description of the number and location of service facilities in the community, whether the credit union participates in shared branching, the number of ATMs owned or shared by the credit union in the community, any new branches the credit union plans to establish in the community, the credit union's use of electronic delivery channels, and how the credit union will provide services to low- and moderate-income individuals;
- A marketing plan, including a budget, addressing how the community will be served for the 24-month period after the proposed conversion to a community charter, including detailing: How the credit union will implement its business plan; the unique needs of the various demographic groups in the proposed community; how the credit union will market to each group, particularly underserved groups; and the credit union's timetable for implementation, not just a calendar of events; and
- Maps showing the current and proposed service facilities, ATMs, political boundaries, major roads, and other pertinent information.

An existing federal credit union may apply to convert to a community charter. Groups currently in the credit union's field of membership, but outside the new community credit union's boundaries, may not be included in the new community charter. Therefore, the credit union must notify groups that will be removed from the field of membership as a result of the conversion. Members of record can continue to be served.

Before approval of an application to convert to a community credit union, NCUA must be satisfied that the credit union will be viable and capable of providing services to its members.

Community credit unions will be expected to regularly review and to follow, to the fullest extent economically possible, the marketing and business plans submitted with their applications. Additionally, NCUA will follow up with an FCU every year for 3 years after the FCU has been granted a new or expanded community charter, and at any other intervals NCUA believes appropriate, to determine if the FCU is satisfying the terms of its marketing and business plans.

An FCU failing to satisfy those terms will be subject to supervisory action. As part of this review process, the regional office or Office of National Examinations and Supervision Director will report to the NCUA Board instances where an FCU is failing to

satisfy the terms of its marketing and business plan and indicate what supervisory actions the region or ONES intends to take.

* * * * *

V.G—Other Persons With a Relationship to the Community

A number of persons who have a close relationship to the community may be included, at the charter applicant's option, in the field of membership. These include the following:

- Employees of this credit union;
- Volunteers in the community;
- Members of the immediate family or household, including those of a member or person eligible for membership who died no longer than 6 months prior to the date of the application for credit union membership; and
- Organizations of such persons

Immediate family is defined as spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

Household is defined as persons living in the same residence maintaining a single economic unit. Membership eligibility is extended only to individuals who are members of an ''immediate family or household'' of a credit union member. It is not necessary for the primary member to join the credit union in order for the immediate family or household member of the primary member to join, provided the immediate family or household clause is included in the field of membership. However, it is necessary for the immediate family member or household member to first join in order for that person's immediate family member or household member to join the credit union. A credit union can adopt a more restrictive definition of immediate family or household.

Under the Federal Credit Union Act, once a person becomes a member of the credit union, such person may remain a member of the credit union until the person chooses to withdraw or is expelled from the membership of the credit union. This is commonly referred to as ''once a member, always a member.'' The ''once a member, always a member'' provision does not prevent a credit union from restricting services to members who are no longer within the field of membership.

Chapter 3—Low-Income Credit Unions and Credit Unions Serving Underserved Areas

* * * * *

III—Service to Underserved Communities

III.B.1—Local Community

* * * For areas qualifying as a rural district under this section III, the boundaries are not limited to the outer boundaries of the states that are *immediately contiguous* to the state in which the credit union maintains its headquarters.

II.B.2—Investment Area

To be approved as an ''underserved area,'' the proposed area must meet the CDFI definition of an ''investment area,'' as developed pursuant to The Community Development Banking and Financial Institutions Act of 1994, as amended from time to time.

III.B.2.a—Proposed Area's ''Significant Unmet Needs''

A proposed area that is ''distressed'' also must display ''significant unmet needs'' for loans or for one or more of the financial services credit unions are authorized to offer. To meet this criterion, the credit union must include within its Business Plan a narrative description, entitled ''Significant Unmet Needs for Credit Union Services'' (''SUN statement''), that identifies the credit and depository needs of the community and details how the credit union plans to serve those needs. The credit union may choose which among the following ''credit and depository needs'' to address in the SUN statement: loans, share draft accounts, savings accounts, check cashing, money orders, certified checks, automated teller machines, deposit taking, safe deposit box services, and similar services.

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Chapter 4—Charter Conversions

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II—Conversion of a State Credit Union to a Federal Credit Union

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II.B—Submission of Conversion Proposal to NCUA

The following documents must be submitted with the conversion proposal:

- Conversion of State Charter to Federal Charter (NCUA 4000);
- Organization Certificate (NCUA 4008). Only Part (3) and the signature/notary section should be completed and, where applicable, signed by the credit union officials.
- Report of Officials and Agreement to Serve (NCUA 4012);
- The Application to Convert from State Credit Union to Federal Credit Union (NCUA 4401);
- The Application and Agreements for Insurance of Accounts (NCUA 9500);
- Certification of Resolution (NCUA 9501);
- Written evidence regarding whether the state regulator is in agreement with the conversion proposal; and
- Business plan, including the most current financial report and delinquent loan schedule. A state-chartered community credit union converting to a federal charter is not required to submit a business plan or a marketing plan if the credit union will serve the same community or a portion thereof that it served as a state charter. However, if the state credit union is a community credit union consisting of all or part of a CSA or a CBSA, the state credit union must submit written evidence of its compliance with the requirements of Chapter 2, Section V.A.8. Further, if the state credit union proposes to amend its field of membership, the Office of Credit Union Resources and Expansion Director may, after taking into account the significance of the proposed amendment, require the applicant to submit a business plan addressing specific issues (see Chapter 2, Section II.C.2).

If the state charter is applying to become a federal community charter, it must also comply with the documentation requirements included in Chapter 2, Section V.A.2 of this Manual.

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APPENDIX 1 GLOSSARY

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Affinity—A relationship upon which a community charter is based. Acceptable affinities include living, working, worshiping, attending school, or being a paid employee of a legal entity headquartered in a well-defined local community, neighborhood, or rural district.

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[FR Doc. 2023–03684 Filed 2–27–23; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[USCG–2023–0112]

RIN 1625–AA00

Safety Zone; Back River, Hampton, VA; Air Show

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a safety zone for certain waters in the vicinity of the northwest branch of the Back River. This action is necessary to provide for the safety of life on these navigable waters near Langley Air Force Base, Hampton, VA, during an annual airshow. This proposed rulemaking would prohibit persons and vessels from entry in the safety zone unless authorized by the Captain of the Port Virginia or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before March 30, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0112 using the Federal Decision-Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email LCDR Ashley Holm, Chief Waterways Management Division U.S. Coast Guard; 757–617–7986, *Ashley.E.Holm@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

On January 26, 2023, the Joint Base Langley-Eustis Fire Dispatch notified the Coast Guard that the 2023 Air Power Over Hampton Roads Air Show will be occurring Friday, May 5, 2023, to Sunday, May 7, 2023, from 10:00 a.m. to 4 p.m. each day and annually on the third or fourth Friday through Sunday in April or the first or second Friday through Sunday in May thereafter. The air show includes an aerial performance area over a portion of the Back River, where high powered jet aircrafts will perform aerobatic maneuvers. The Captain of the Port Virginia (COTP) has determined that due to the hazards associated with the air show, a safety zone is needed to ensure the safety of vessels on the navigable water. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The COTP is proposing to establish a safety zone annually on the third or fourth Friday through Sunday in April or the first or second Friday through Sunday in May from 10:00 a.m. to 4 p.m. daily to protect the public from potential hazards associated with an air show which is expected to occur annually. The safety zone would cover all navigable waters from the shoreline of the Back River contained within the following points: 37°05′34.32″ N, 076°20′47.13″ W; 37°5′38.05″ N, 076°20′36.49″ W; 37°5′30.53″ N, 076°20′31.86″ W. The duration of the safety zone is intended to ensure the safety of vessels on these navigable waters. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. Vessel traffic would be able to safely transit around this safety zone which would impact a small designated area of the Back River. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has 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. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect 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. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which

guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone lasting 6 hours, each day of the event, that would prohibit entry within a small portion of the Back River. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0112 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the proposed rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons stated in the preamble, the Coast Guard proposes to amend 33 CFR part 165, as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.517 to read as follows:

§ 165.517 Safety Zone; Back River, Hampton, VA; Air Show

(a) *Location.* The following area is a safety zone: all navigable waters from the shoreline of the Back River contained within the following points: 37°5′34.32″ N, 076°20′47.13″ W; 37°5′38.05″ N, 076°20′36.49″ W; 37°5′30.53″ N, 076°20′31.86″ W.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Virginia (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF–FM Channel 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced annually on the third or fourth Friday through Sunday in April or the first or second Friday through Sunday in May from 10 a.m. to 4 p.m. each day during the event.

Dated: February 10, 2023.

J.A. Stockwell,

Captain, U.S. Coast Guard, Captain of the Port Virginia.

[FR Doc. 2023–03999 Filed 2–27–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1788–P]

RIN 0938–AV17

Medicare Program; Medicare Disproportionate Share Hospital (DSH) Payments: Counting Certain Days Associated With Section 1115 Demonstrations in the Medicaid Fraction

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise our regulations on the counting of days associated with individuals eligible for certain benefits provided by section 1115 demonstrations in the Medicaid fraction of a hospital's disproportionate patient percentage.

DATES: To be assured consideration, comments must be received at one of the addresses provided below by May 1, 2023.

ADDRESSES: In commenting, please refer to file code CMS–1788–P.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation

to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1788–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1788–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Donald Thompson or Michele Hudson, *DAC@cms.hhs.gov,* (410) 786–4487.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that website to view public comments. CMS will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. CMS continues to encourage individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

I. Background

Section 1886(d)(5)(F) of the Social Security Act (the Act) provides for additional Medicare inpatient prospective payment system (IPPS) payments to subsection (d) hospitals [1] that serve a significantly disproportionate number of low-income patients. These payments are known as the Medicare disproportionate share hospital (DSH) adjustment, and the statute specifies two methods by which a hospital may qualify for the DSH payment adjustment.

- Under the first method, hospitals that are located in an urban area and have 100 or more beds may receive a DSH payment adjustment if the hospital can demonstrate that, during its cost reporting period, more than 30 percent of its net inpatient care revenues are derived from State and local government payments for care furnished to patients with low incomes. This method is commonly referred to as the ''Pickle method.''
- The second method for qualifying for the DSH payment adjustment, which is the most common method, is based on a complex statutory formula under which the DSH payment adjustment is based on the hospital's geographic designation, the number of beds in the hospital, and the level of the hospital's disproportionate patient percentage (DPP). A hospital's DPP is the sum of two fractions: the ''Medicare fraction'' and the ''Medicaid fraction.'' The Medicare fraction (also known as the ''SSI fraction'' or ''SSI ratio'') is computed by dividing the number of the hospital's inpatient days that are furnished to patients who were entitled to both Medicare Part A and Supplemental Security Income (SSI) benefits by the hospital's total number of patient days furnished to patients entitled to benefits under Medicare Part A. The Medicaid fraction is computed by dividing the hospital's number of inpatient days furnished to patients who, for such days, were eligible for Medicaid but were not entitled to benefits under Medicare Part A, by the hospital's total number of inpatient days in the same period.

Because the DSH payment adjustment is part of the IPPS, the statutory references to ''days'' in section 1886(d)(5)(F) of the Act have been interpreted to apply only to hospital acute care inpatient days. Regulations located at 42 CFR 412.106 govern the Medicare DSH payment adjustment and specify how the DPP is calculated as well as how beds and patient days are counted in determining the Medicare DSH payment adjustment. Under § 412.106(a)(1)(i), the number of beds for the Medicare DSH payment adjustment is determined in accordance with bed counting rules for the Indirect Medical Education (IME) adjustment under § 412.105(b). Section 1115(a) of the Act gives the Secretary the authority to approve a demonstration requested by a State which, ''in the judgment of the Secretary, is likely to assist in promoting the objectives of [Medicaid.]'' In approving a section 1115 demonstration, the Secretary may waive compliance with any Medicaid State plan requirement under section 1902 of the Act to the extent and for the period he finds necessary to enable the State to carry out such project. The costs of such project that would not otherwise be included as Medicaid expenditures eligible for Federal matching under section 1903 of the Act may, to the extent and for the period prescribed by the Secretary, be regarded as such federally matchable expenditures.

States use section 1115(a) demonstrations to test changes to their Medicaid programs that generally cannot be made using other Medicaid authorities, including to provide health insurance to groups that generally could not or have not been made ''eligible for medical assistance under a State plan approved under title XIX'' (Medicaid benefits). These groups, commonly referred to as expansion populations or expansion waiver groups, are specific, finite groups of people defined in the demonstration approval letter and special terms and conditions for each demonstration. (We note in the discussion that follows, we use the term ''demonstration'' rather than ''project'' and/or ''waiver'' and the term ''groups'' instead of ''populations,'' as this terminology is generally more consistent with the implementation of the provisions of section 1115 of the Act. Therefore, we refer in what follows to groups extended health insurance through a demonstration as ''demonstration expansion groups.'')

II. Provisions of the Proposed Regulation

A. History of 42 CFR 412.106(b)(4) and the Deficit Reduction Act of 2005

Prior to 2000, some States had chosen to only cover Medicaid populations under their State plans when State plan coverage was mandatory under the statute, and they did not provide State plan coverage for populations for whom the statute made State plan coverage optional. Instead, coverage for these optional State plan coverage groups (as well as groups not eligible for even optional coverage) could be provided through demonstrations approved under section 1115 of the Act. We referred to these demonstration groups that could have been covered under optional State plan coverage as ''hypothetical'' groups—consisting of patients that could have been but were not covered under a State plan, but that received the same or very similar package of insurance benefits under a demonstration as did individuals eligible for those benefits under the State plan. Many other States, however,

[1] Defined in section 1886(d)(1)(B) of the Act.

still elected to cover optional State plan coverage groups under their Medicaid State plans instead of through a demonstration. In order to avoid disadvantaging hospitals in States that covered such optional State plan coverage groups under a demonstration, CMS developed a policy of counting hypothetical group patients covered under a demonstration in the numerator of the Medicaid fraction of the Medicare DSH calculation (hereinafter, the DPP Medicaid fraction numerator) as if those patients were eligible for Medicaid.

Such demonstrations could also include individuals who could not have been covered under a State plan, such as childless adults for whom, at the time, State plan coverage was not mandatory under the statute, nor was optional State plan coverage available. We refer to these groups as ''expansion'' groups. Prior to 2000, CMS did not include expansion groups in the DPP Medicaid fraction numerator, even if they received the same package of hospital insurance benefits under a demonstration as hypothetical groups and those eligible under the State plan.

On January 20, 2000, we issued an interim final rule with comment period (65 FR 3136) (hereinafter, January 2000 interim final rule), followed by a final rule issued on August 1, 2000 (65 FR 47086 through 47087), that changed the Secretary's policy on how to treat the patient days of expansion groups that received Medicaid-like benefits under a section 1115 demonstration in calculating the Medicare DSH adjustment. The policy adopted in the January 2000 interim final rule (65 FR 3136) permitted hospitals to include in the DPP Medicaid fraction numerator all patient days of groups made eligible for title XIX matching payments through a section 1115 demonstration, whether or not those individuals were, or could be made, eligible for Medicaid under a State plan (assuming they were not also entitled to benefits under Medicare Part A). Speaking literally, neither expansion groups nor hypothetical groups were in fact ''eligible for medical assistance under a State plan''—meaning neither group was eligible for Medicaid benefits. But, in CMS' view, certain section 1115 demonstrations introduced an ambiguity into the DSH statute that justified including both hypothetical and expansion groups in the DPP Medicaid fraction numerator. Specifically, CMS thought it appropriate to count the days of these demonstration groups because the demonstrations provided them the same or very similar benefits as the benefits provided to Medicaid beneficiaries under the State plan. As we explained in that rule (65 FR 3137), allowing hospitals to include patient days for section 1115 demonstration expansion groups in the DPP Medicaid fraction numerator is fully consistent with the Congressional goals of the Medicare DSH payment adjustment to recognize the higher costs to hospitals of treating low-income individuals covered under Medicaid. This policy was effective for discharges occurring on or after January 20, 2000.

In the FY 2004 IPPS final rule (68 FR 45420 and 45421), we further revised our regulations to limit the types of section 1115 demonstrations for which patient days could be counted in the DPP Medicaid fraction numerator. We explained that in allowing hospitals to include patient days of section 1115 demonstration expansion groups, our intention was to include patient days of those groups who under a demonstration receive benefits, including inpatient hospital benefits, that are similar to the benefits provided to Medicaid beneficiaries under a State plan. However, we had become aware that certain section 1115 demonstrations provided some expansion groups with benefit packages so limited that the benefits were unlike the relatively expansive health insurance (including insurance for inpatient hospital services) provided to beneficiaries under a Medicaid State plan. We explained that these limited section 1115 demonstrations extend benefits only for specific services and do not include similarly expansive benefits.

In the FY 2004 IPPS final rule we specifically discussed family planning benefits offered through a section 1115 demonstration as an example of the kind of demonstration days that should not be counted in the DPP Medicaid fraction numerator because the benefits granted to the expansion group are too limited, and therefore, unlike the package of benefits received as Medicaid benefits under a State plan. Our intention in discussing family planning benefits under a section 1115 demonstration was not to single out family planning benefits, but instead to provide a concrete example of how the changes being made in the FY 2004 IPPS final rule would refine the Secretary's policy (set forth in the January 2000 interim final rule (65 FR 3136)). This refinement was to allow only the days of those demonstration expansion groups who are provided benefits, and specifically inpatient hospital benefits, equivalent to the health care insurance that Medicaid beneficiaries receive under a State plan, to be included in the DPP Medicaid fraction numerator. Moreover, this example was intended to illustrate the kind of benefits offered through a section 1115 demonstration that are so limited that the patients receiving them should not be considered eligible for Medicaid for purposes of the DSH calculation.

Because of the limited nature of the Medicaid benefits provided to expansion groups under some demonstrations, as compared to the benefits provided to the Medicaid population under a State plan, we determined it was appropriate to exclude the patient days of patients provided limited benefits under a section 1115 demonstration from the determination of Medicaid days for purposes of the DSH calculation. Therefore, in the FY 2004 IPPS final rule (68 FR 45420 and 45421), we revised the language of § 412.106(b)(4)(i) to provide that for purposes of determining the DPP Medicaid fraction numerator, a patient is deemed eligible for Medicaid on a given day only if the patient is eligible for inpatient hospital services under an approved State Medicaid plan or under a section 1115 demonstration. Thus, under our current regulations, hospitals are allowed to count patient days in the DPP Medicaid fraction numerator only if they are days of patients made eligible for inpatient hospital services under either a State Medicaid plan or a section 1115 demonstration, and who are not also entitled to benefits under Medicare Part A.

In 2005, the United States Court of Appeals for the Ninth Circuit held that demonstration expansion groups receive care ''under the State plan'' and that, accordingly, our pre-2000 practice of excluding them from the DPP Medicaid fraction numerator was contrary to the plain language of the Act. Subsequently, the United States District Court for the District of Columbia reached the same conclusion, reasoning that if our policy after 2000 of counting the days of demonstration expansion groups was correct, then patients in demonstration expansion groups were necessarily ''eligible for medical assistance under a State plan'' (that is, eligible for Medicaid), and the Act had always required including their days in the Medicaid fraction.

Shortly after these court decisions, in early 2006, Congress enacted the Deficit Reduction Act of 2005 (the DRA) (Pub. L. 109–171, February 8, 2006). Section 5002 of the DRA amended section 1886(d)(5)(F)(vi) of the Act to clarify the Secretary's discretion to regard as eligible for Medicaid those not so eligible and to include in or exclude from the DPP Medicaid fraction numerator demonstration days of

patients regarded as eligible for Medicaid. First, by distinguishing between ''patients *who . . . were eligible* for medical assistance under a State plan approved under subchapter XIX'' (that is, Medicaid) and ''*patients not so eligible* but who are regarded as such because they receive benefits under a demonstration project,'' section 5002(a) of the DRA clarified that groups that receive benefits through a section 1115 demonstration are not ''eligible for medical assistance under a State plan approved under title XIX.'' This provision effectively overruled the earlier court decisions that held that expansion groups were made eligible for Medicaid under a State plan. Second, the DRA stated ''the Secretary may, to the extent and for the period the Secretary determines appropriate, include patient days of patients not so eligible but who are regarded as such because they receive benefits under a demonstration project approved under title XI.'' Thus, the statute provides the Secretary the discretion to determine ''the extent'' to which patients ''not so eligible'' for Medicaid benefits ''may'' be ''regarded as'' eligible ''because they receive benefits under a demonstration project approved under title XI.'' Third, this same language provides the Secretary with further authority to determine the days of which patients regarded as being eligible for Medicaid to include in the DPP Medicaid fraction numerator and for how long.

Having provided the Secretary with the discretion to decide whether and to what extent to include patients who receive benefits under a demonstration project, Congress expressly ratified in section 5002(b) of the DRA our prior and then-current policies on counting demonstration days in the Medicaid fraction. As stated before, our pre-2000 policy was not to include in the DPP Medicaid fraction numerator days of section 1115 demonstration expansion groups unless those patients could have been made eligible for Medicaid under a State plan. We changed that policy in 2000 to include in the DPP Medicaid fraction numerator all patient days of demonstration expansion groups made eligible for matching payments under title XIX, regardless of whether they could have been made eligible for Medicaid under a State plan. And for FY 2004, before the DRA was enacted, CMS had further refined this policy and included in the DPP Medicaid fraction numerator the days of only a small subset of demonstration expansion group patients regarded as eligible for Medicaid: those that were eligible to receive inpatient hospital insurance benefits under the terms of a section 1115 demonstration. By ratifying the Secretary's pre-2000 policy, the January 2000 interim final rule, and the FY 2004 IPPS final rule, the DRA further established that the Secretary had always had the discretion to determine which demonstration expansion group patients to regard as eligible for Medicaid and whether or not to include any of them in the DPP Medicaid fraction numerator.

Because at the time the DRA was passed the language of § 412.106(b)(4) already addressed the treatment of section 1115 days to exclude some expansion populations that received limited health insurance benefits through the demonstration, we did not believe it was necessary to update our regulations after the DRA explicitly granted us the discretion to include or exclude section 1115 days from the Medicaid fraction of the DSH calculation. We believed instead the language of § 412.106(b)(4) reflected our view that only those eligible to receive inpatient hospital insurance benefits under a demonstration project could be ''regarded as'' ''eligible for medical assistance'' under Medicaid. Thus, considering this history and the text of the DRA, we understand the Secretary to have broad discretion to decide (1) whether and the extent to which to ''regard as'' eligible for Medicaid because they receive benefits under a demonstration those patients ''not so eligible'' under the State plan, and (2) of such patients regarded as Medicaid eligible, the days of which types of these patients to count in the DPP Medicaid fraction numerator and for what period of time to do so.

We do not believe that either the statute or the DRA permit or require the Secretary to count in the DPP Medicaid fraction numerator days of just any patient who is in any way related to a section 1115 demonstration. Rather, section 1886(d)(5)(F)(vi) of the Act limits including days of expansion group patients to those who may be ''regarded as'' ''eligible for medical assistance under a State plan approved under title XIX.''

B. Uncompensated/Undercompensated Care Funding Pools Authorized Through Section 1115 Demonstrations

CMS's overall policy for including section 1115 demonstration days in the DPP Medicaid fraction numerator rested on the presumption that the demonstration provided a package of health insurance benefits that were essentially the same as what a State provided to its Medicaid population. More recently, however, section 1115 demonstrations have been used to authorize funding a limited and narrowly circumscribed set of payments to hospitals. For example, some section 1115 demonstrations include funding for uncompensated/undercompensated care pools that help to offset hospitals' costs for treating uninsured and underinsured individuals. These pools do not extend health insurance to such individuals nor are they similar to the package of health insurance benefits provided to participants in a State's Medicaid program under the State plan. Rather, such funding pools ''promote the objectives of Medicaid'' as required under section 1115 of the Act, but they do so by providing funds directly to hospitals, rather than providing health insurance to patients. These pools help hospitals that treat the uninsured and underinsured stay financially viable so they can treat Medicaid patients.

By providing hospitals payment based on their uncompensated care costs, the pools directly benefit those providers, and, in turn, albeit less directly, the patients they serve. Unlike demonstrations that expand the group of people who receive health insurance beyond those groups eligible under the State plan and unlike Medicaid itself, however, uncompensated/undercompensated care pools do not provide inpatient health insurance to patients or, like insurance, make payments on behalf of specific, covered individuals.[2] In these ways, payments from these pools serve essentially the same function as Medicaid DSH payments under sections 1902(a)(13)(A)(iv) and 1923 of the Act, which are also title XIX payments to hospitals meant to subsidize the cost of treating the uninsured, underinsured, and low-income patients and that promote the hospitals' financial viability and ability to continue treating Medicaid patients. Notably, as numerous Federal courts across the country have universally held, the patients whose care costs are indirectly offset by such *Medicaid DSH* payments are not ''eligible for medical assistance'' under the *Medicare DSH* statute and are not included in the DPP Medicaid fraction numerator. See, for example, *Adena Regional Medical Center* v. *Leavitt*, 527 F.3d 176 (D.C. Cir. 2008); *Owensboro Health, Inc.* v. *HHS,* 832 F.3d 615 (6th Cir. 2016).

We also note that demonstrations can simultaneously authorize different programs within a single demonstration,

[2] For more information on this distinction, as upheld by courts, we refer readers to *Adena Regional Medical Center* v. *Leavitt,* 527 F.3d 176 (D.C. Cir. 2008), and *Owensboro Health, Inc.* v. *HHS,* 832 F.3d 615 (6th Cir. 2016).

thereby creating a group of people the Secretary regards as Medicaid eligible because they receive health insurance through the demonstration, while also creating a separate category of payments that do not provide health insurance to individuals, such as uncompensated/undercompensated care pools for providers.

C. Recent Court Decisions and Rulemaking Proposals on the Treatment of 1115 Days in the Medicare DSH Payment Adjustment Calculation

Several hospitals challenged our policy of excluding uncompensated/undercompensated care days and premium assistance days from the DPP Medicaid fraction numerator, which the courts have recently decided in a series of cases.[3] These decisions held that the current language of the regulation at § 412.106(b)(4) requires CMS to count in the DPP Medicaid fraction numerator patient days for which hospitals have received payment from an uncompensated/undercompensated care pool authorized by a section 1115 demonstration, as well as days of patients who received premium assistance under a section 1115 demonstration. Interpreting this regulatory language, that was adopted before the DRA was enacted, two courts concluded that if a hospital received payment for a patient's otherwise uncompensated inpatient hospital treatment, that patient is ''eligible for inpatient hospital services'' within the meaning of the current regulation, and therefore, his patient day must be included in the DPP Medicaid fraction. Likewise, a court concluded that patients who receive premium assistance to pay for private insurance that covers inpatient hospital services are ''eligible for inpatient hospital services'' within the meaning of the current regulation, and those patient days must be counted.

As discussed previously, it was never our intent when we adopted the current language of the regulation to include in the DPP Medicaid fraction numerator days of patients that benefitted so indirectly from a demonstration. In the FY 2022 IPPS/LTCH PPS proposed rule (86 FR 25459) (hereinafter, the FY 2022 proposed rule), we stated that we continued to believe, as we have consistently believed since at least 2000, that it is not appropriate to include patient days associated with funding pools and premium assistance authorized by section 1115 demonstrations in the DPP Medicaid fraction numerator because the benefits provided patients under such demonstrations are not similar to Medicaid benefits provided beneficiaries under a State plan and may offset costs that hospitals incur when treating uninsured and underinsured individuals. In the FY 2022 proposed rule, we proposed to revise our regulations to more clearly state that in order for an inpatient day to be counted in the DPP Medicaid fraction numerator, the section 1115 demonstration must provide inpatient hospital insurance benefits directly to the individual whose day is being considered for inclusion. We specifically discussed that, under the proposed change, days of patients who receive premium assistance through a section 1115 demonstration and the days of patients for which hospitals receive payments from an uncompensated/undercompensated care pool created by a section 1115 demonstration would not be included in the DPP Medicaid fraction numerator. Because neither premium assistance nor uncompensated/undercompensated care pools are inpatient hospital insurance benefits directly provided to individuals, nor are they comparable to the breadth of benefits available under a Medicaid State plan, we stated that individuals associated with such assistance and pools should not be ''regarded as'' ''eligible for medical assistance under a State plan.''

Commenters generally disagreed with our proposal, arguing that both premium assistance programs and uncompensated/undercompensated care pools are used to provide individuals with inpatient hospital services, either by reimbursing hospitals for the same services as the Medicaid program in the case of uncompensated/undercompensated care pools or by allowing individuals to purchase insurance with benefits similar to Medicaid benefits offered under a State plan in the case of premium assistance. Thus, they argued, those types of days should be included in the DPP Medicaid fraction numerator. Following review of these comments, in the final rule with comment period that appeared in the December 27, 2021 **Federal Register**, which finalized certain provisions of the FY 2022 proposed rule related to Medicare graduate medical education payments for teaching and Medicare organ acquisition payment, we stated that after further consideration of the issue we had determined not to move forward with our proposal and planned to revisit the issue of section 1115 demonstration days in future rulemaking (86 FR 73418).

After considering the comments we received in response to the FY 2022 proposed rule, in the FY 2023 IPPS/LTCH PPS proposed rule (87 FR 28398) (hereinafter, the FY 2023 proposed rule), we proposed to revise our regulation to explicitly reflect our interpretation of the language ''regarded as'' ''eligible for medical assistance under a State plan approved under title XIX'' in section 1886(d)(5)(F)(vi) of the Act to mean patients who (1) receive health insurance authorized by a section 1115 demonstration or (2) patients who pay for all or substantially all of the cost of health insurance with premium assistance authorized by a section 1115 demonstration, where State expenditures to provide the health insurance or premium assistance may be matched with funds from title XIX. Moreover, of the groups we regarded as Medicaid eligible, we proposed to use our discretion under the Act to include in the DPP Medicaid fraction numerator only (1) the days of those patients who obtained health insurance directly or with premium assistance that provides essential health benefits (EHB) as set forth in 42 CFR part 440, subpart C, for an Alternative Benefit Plan (ABP), and (2) for patients obtaining premium assistance, only the days of those patients for which the premium assistance is equal to or greater than 90 percent of the cost of the health insurance, provided in either case that the patient is not also entitled to Medicare Part A. (87 FR 28398 through 28402).

In the FY 2023 IPPS/LTCH PPS final rule (87 FR 49051), we noted that the agency received numerous, detailed comments on our proposal. We indicated that due to the number and nature of the comments that we received, and after further consideration of the issue, we had determined not to move forward with the FY 2023 proposal. We stated that we expected to revisit the treatment of section 1115 demonstration days for purposes of the DSH adjustment in future rulemaking (87 FR 49051).

D. Current Proposal To Amend 42 CFR 412.106(b)(4)

Consistent with our interpretation of the Medicare DSH statute over more than 2 decades and the history of our policy on counting section 1115 demonstration days in the DPP Medicaid fraction numerator set forth in our regulations, considering the series of adverse cases interpreting the current regulation, and in light of what we

[3] *Bethesda Health, Inc.* v. *Azar,* 980 F.3d 121 (D.C. Cir. 2020); *Forrest General Hospital* v. *Azar,* 926 F.3d 221 (5th Cir. 2019); *HealthAlliance Hospitals, Inc.* v. *Azar,* 346 F. Supp. 3d 43 (D.D.C. 2018).

proposed in the FY 2022 and FY 2023 proposed rules and our consideration of the comments we received thereon, we are again proposing to amend the regulation at § 412.106(b)(4). In order for days associated with section 1115 demonstrations to be counted in the DPP Medicaid fraction numerator, the statute requires those days to be of patients who can be ''regarded as'' eligible for Medicaid. Accordingly, and consistent with the proposed approach set forth in the FY 2023 proposed rule and with our longstanding interpretation of the statute and as amended by the DRA, and with the current language of § 412.106(b)(4), we are proposing to modify our regulations to explicitly state our long-held view that only patients who receive health insurance through a section 1115 demonstration where State expenditures to provide the insurance may be matched with funds from title XIX can be ''regarded as'' eligible for Medicaid.

Similar to our statements in the FY 2023 proposed rule, in further considering the comments regarding the treatment of the days of patients provided premium assistance through a section 1115 demonstration to buy health insurance, we are again proposing that such patients can also be regarded as eligible for Medicaid under section 1886(d)(5)(F)(vi) of the Act. Therefore, we propose for purposes of the Medicare DSH calculation in section 1886(d)(5)(F)(vi) of the Act to ''regard as'' ''eligible for medical assistance under a State plan approved under title XIX'' patients who (1) receive health insurance authorized by a section 1115 demonstration or (2) buy health insurance with premium assistance provided to them under a section 1115 demonstration, where State expenditures to provide the health insurance or premium assistance is matched with funds from title XIX. Furthermore, of these expansion groups we are proposing to regard as eligible for Medicaid, we propose to include in the DPP Medicaid fraction numerator only the days of those patients who receive from the demonstration (1) health insurance that covers inpatient hospital services or (2) premium assistance that covers 100 percent of the premium cost to the patient, which the patient uses to buy health insurance that covers inpatient hospital services, provided in either case that the patient is not also entitled to Medicare Part A. Finally, we propose stating specifically that patients whose inpatient hospital costs are paid for with funds from an uncompensated/undercompensated care pool authorized by a section 1115 demonstration are not patients ''regarded as'' eligible for Medicaid, and the days of such patients may not be included in the DPP Medicaid fraction numerator.

As discussed previously, we continue to believe it is not appropriate to include in the DPP Medicaid fraction numerator days of all patients who may benefit in some way from a section 1115 demonstration. First, we do not believe the statute permits everyone receiving a benefit from a section 1115 demonstration to be ''regarded as'' ''eligible for medical assistance under a State plan approved under title XIX'' merely because they receive a limited benefit. Second, even if the statute were so to permit, as discussed herein, the Secretary believes the DRA provides him with discretion to determine which patients ''not so eligible'' for Medicaid under a State plan may be ''regarded as'' eligible. Thus, the Secretary proposes to regard as Medicaid eligible only those patients who receive as ''benefits'' from a demonstration health insurance or premium assistance to buy health insurance, because—at root—''medical assistance under a State plan approved under title XIX'' provides Medicaid beneficiaries with health insurance, not simply medical care. Third, the DRA also gives the Secretary the authority to decide which days of patients ''regarded as'' Medicaid eligible to include in the DPP Medicaid fraction numerator. Using this discretion, we propose to include only the days of those patients who receive from a demonstration (1) health insurance that covers inpatient hospital services or (2) premium assistance that covers 100 percent of the premium cost to the patient, which the patient uses to buy health insurance that covers inpatient hospital services, provided in either case that the patient is not also entitled to Medicare Part A.

We note this is a change from the proposal included in the FY 2023 proposed rule, which would have required that the insurance provide EHB and the premium assistance cover at least 90 percent of the cost of the insurance. The feedback we received on that proposal from interested parties included concerns regarding, among other issues, the burden associated with verifying whether a particular insurance program in which an individual was enrolled provided EHB, how to determine whether a particular premium assistance program covered at least 90 percent of the cost of the insurance, and the difficulty in receiving accurate information on those issues in a timely manner. In light of this feedback, this proposal maintains the policy established in the regulations at least as far back as FY 2004 that days associated with individuals who obtain health insurance from a demonstration that covers inpatient hospital services be included in the DPP Medicaid fraction numerator. We do not believe that it would be unduly difficult for providers to verify that a particular insurance program includes inpatient benefits. (We refer readers to section III. of this proposed rule for more information on the burden estimate associated with this proposal.)

For those individuals who buy health insurance covering inpatient hospital services using premium assistance received from a demonstration, we are now proposing that the premium assistance cover 100 percent of the individual's cost of the premium. Indeed, it may be difficult to distinguish between patients who, on the one hand, receive through a demonstration health insurance for inpatient hospital services or 100 percent premium assistance to purchase health insurance and patients who, on the other hand, are eligible for medical assistance under the State plan: all patients receive health insurance paid for with title XIX funds, and all may be enrolled in a Medicaid managed care plan. We also do not believe that it will be difficult for providers to verify that a particular demonstration covers 100 percent of the premium cost to the patient, as it is our understanding that all premium assistance demonstrations currently meet that standard. In other words, as a practical matter, if a hospital is able to document that a patient is in a demonstration that explicitly provides premium assistance, then that documentation would also document that a patient is in a demonstration that covers 100 percent of the individual's costs of the premium. We also believe our proposed standard of 100 percent of the premium cost to the beneficiary is appropriate because it encapsulates all current demonstrations as a practical matter. If in the future there is a demonstration that explicitly provides premium assistance that does not cover 100 percent of the individual's costs for the premium, we may revisit this issue in future rulemaking.

As we have consistently stated, individuals eligible for medical assistance under title XIX are eligible for, among other things, specific benefits related to the provision of inpatient hospital services (in the form of inpatient hospital insurance). Because funding pool payments to hospitals authorized by a section 1115 demonstration do not provide health insurance to any patient, nor do the payments inure to any specific individual, uninsured patients whose costs are subsidized by uncompensated/

undercompensated care pool payments to hospitals do not receive benefits to the extent that or in a manner similar to the full equivalent of ''medical assistance'' available to those eligible under a Medicaid State plan. Uninsured or underinsured individuals, whether or not they benefit from uncompensated/undercompensated care pool payments to hospitals, do not have health insurance provided by the Medicaid program. Thus, we continue to believe that patients whose costs are associated with uncompensated/undercompensated care pools may not be ''regarded as'' Medicaid-eligible, and we are proposing to use the Secretary's discretion to not regard them as such. Even if they could be so regarded and irrespective of whether the Secretary has the discretion not to regard them as such, the Secretary also is proposing to use his authority to not include the days of such patients in the DPP Medicaid fraction numerator: Such patients have not obtained insurance under the demonstration, and including all uninsured patients associated with uncompensated/undercompensated care pools could distort the Medicaid proxy in the Medicare DSH calculation that is used to determine the low-income, non-senior population a hospital serves.[4] An uninsured patient who does not pay their hospital bill (thereby creating uncompensated care for the hospital) is not necessarily a low-income patient.

Accordingly, in this proposed rule, we are proposing to revise our regulations at § 412.106(b)(4) to explicitly reflect our interpretation of the language ''regarded as'' ''eligible for medical assistance under a State plan approved under title XIX'' ''because they receive benefits under a demonstration project approved under title XI'' in section 1886(d)(5)(F)(vi) of the Act to mean patients provided health insurance benefits by a section 1115 demonstration. Specifically, we are proposing to regard as Medicaid eligible for purposes of the Medicare DSH payment adjustment patients (1) who receive health insurance through a section 1115 demonstration itself or (2) who purchase health insurance with the use of premium assistance provided by a section 1115 demonstration, where State expenditures to provide the insurance or premium assistance is matchable with funds from title XIX. In addition, even if the statute would permit a broader reading, the Secretary is exercising his discretion under section 1886(d)(5)(F)(vi) of the Act to ''regard as'' Medicaid eligible only those patients. Furthermore, whether or not the Secretary has discretion to determine who is ''regarded as'' Medicaid eligible, we propose to use the authority provided the Secretary to limit the days of those section 1115 demonstration group patients included in the DPP Medicaid fraction numerator to only those of individuals who receive from the demonstration (1) health insurance that covers inpatient hospital services or (2) premium assistance that covers 100 percent of the premium cost to the patient, which the patient uses to buy health insurance that covers inpatient hospital services, provided in either case that the patient is not also entitled to Medicare Part A. Finally, we are proposing to explicitly exclude from the DPP Medicaid fraction numerator the days of patients with uncompensated care costs for which a hospital is paid from a funding pool authorized by a section 1115 demonstration project.

E. Responses to Relevant Comments to Recent Prior Proposed Rules

Many commenters on the FY 2022 and FY 2023 proposed rules asserted that the statute requires CMS to ''regard as'' Medicaid eligible patients with uncompensated care costs for which a hospital is paid from a demonstration funding pool and to count those patients' days in the DPP Medicaid fraction numerator. These commenters draw support for these conclusions by asserting that uninsured patients ''effectively'' receive insurance from an uncompensated/undercompensated care pool, and thus, cannot be reasonably distinguished from patients who receive insurance from the Medicaid program. They also stated that the inpatient benefits uninsured patients receive are the same inpatient benefits that Medicaid beneficiaries receive because the inpatient care they receive is the same.

We continue to disagree with the commenters' factual predicates and the legal conclusions that the statute requires a patient receiving any benefit from a section 1115 demonstration to be ''regarded as'' a patient eligible for medical assistance under a State plan authorized by title XIX and that all days of such patients must be counted in the DPP Medicaid fraction numerator.

First, we disagree with the proposition that uninsured patients whose costs may be partially paid to hospitals by uncompensated/undercompensated care pools effectively have insurance, and therefore, are indistinguishable from Medicaid beneficiaries and expansion group patients whose days the Secretary includes in the DPP Medicaid fraction numerator. Uninsured patients, unlike Medicaid patients or expansion group patients, do not have health insurance. It is quite clear insurance that includes coverage for inpatient hospital services is beneficial in ways that uncompensated/undercompensated care pools are not or could not possibly be to individual patients.[5] Medicaid and other forms of health insurance are not merely mechanisms of payment to providers for costs of patient care: Health insurance provides a reasonable expectation on the part of the insurance holder that they can seek treatment without the risk of financial ruin. Hospitals may bill uninsured patients for the full cost of their care and refer their medical debts to collection agencies when they are unable to pay, even if some of their medical treatment costs may be paid to the provider by an uncompensated/undercompensated care pool. Thus, it remains the case that uninsured patients may avoid treatment for fear of being unable to pay for it. For example, if two patients receive identical care from a hospital that accepts government-funded insurance, but one of them has insurance as a Medicaid beneficiary or receives insurance through a section 1115 demonstration and therefore is financially protected, while the other patient is uninsured and spends years struggling to pay their hospital bill—even if the hospital receives partial payment from a demonstration-authorized uncompensated/undercompensated care pool for that patient's treatment—the two patients have not received the same benefit from the government or one that could reasonably be ''regarded as'' comparable. This distinction between insured and uninsured patients is meaningful in this context, and we believe it is a sound basis on which to distinguish the treatment of patient days in the DSH calculation of uninsured patients who may in some way benefit from a section 1115 demonstration-authorized uncompensated/undercompensated care pool and the days of patients provided health insurance as a Medicaid beneficiary

[4] See, *Becerra* v. *Empire Health Foundation,* 142 S. Ct. 2354, 2358 (2022) (the Medicaid fraction counts the low-income, non-senior population).

[5] See Health Insurance Coverage and Health—What the Recent Evidence Tells Us (*https://www.nejm.org/doi/pdf/10.1056/nejmsb1706645*); Economic and Employment Effects of Medicaid Expansion Under ARP | Commonwealth Fund (*https://www.commonwealthfund.org/publications/issue-briefs/2021/may/economic-employment-effects-medicaid-expansion-under-arp*). To be clear, we mention these studies only in support of our assertion that having health insurance is fundamentally different than not having insurance.

under a State plan or through a demonstration.

Second, we also disagree with commenters who have stated that uninsured patients whose costs may be paid to hospitals by an uncompensated/undercompensated care pool receive the same benefits as patients eligible for Medicaid because the inpatient hospital care is likely the same for both groups. As stated above, within the meaning of section 1886(d)(5)(F)(vi) of the Act, the ''benefits'' provided to the individual by Medicaid and other forms of insurance a patient receives is the promise of a payment made on behalf of a specific patient to a provider of care for providing the care, not the care itself the hospital provides. Also, the provision of inpatient hospital services and payment for such services are two distinct issues, and simply because a hospital treats a patient presenting a need for medical care does not indicate anything about whether or how the hospital may be paid for providing that care. Thus, the similarity of care a patient receives is irrelevant to the question of whether the ''benefits'' provided ''because'' of a demonstration may be ''regarded as'' something akin to ''medical assistance under a State plan approved under title XIX.''

Therefore, we continue to disagree, as we have explained both here and in previous rulemakings, that the statute allows us to regard uninsured patients as eligible for Medicaid, just because they in some way benefit from an uncompensated/undercompensated care pool authorized by a demonstration. We understand the statute to provide that we may only include patients who are regarded as being eligible for Medicaid, such as the expansion groups at issue in the Portland Adventist and Cookeville cases [6] who received from the demonstrations health insurance benefits that were like the ''medical assistance'' received by patients ''under a State plan.'' The Medicaid program can—and does (through Medicaid DSH payments)—subsidize the treatment of low-income, uninsured patients without making those individuals eligible for ''medical assistance,'' as that phrase is used in the statute. See, for example, *Adena Regional Medical Center* v. *Leavitt,* 527 F.3d 176 (D.C. Cir. 2008); *Owensboro Health, Inc.* v. *HHS,* 832 F.3d 615 (6th Cir. 2016). Therefore, we disagree that patients whose costs may be partially offset by an uncompensated/undercompensated care fund receive ''medical assistance'' as that phrase is used in the Medicare DSH provision at section 1886(d)(5)(F)(vi) of the Act.

As we explained in the FY 2023 proposed rule (87 FR 28108 and 28400) and reiterate again above, we believe that the statutory phrase ''regarded as such'' refers to patients who are regarded as eligible for medical assistance under a State plan approved under title XIX, and therefore, should be understood to refer to patients who get insurance coverage paid for with Medicaid funds, just as if they were actually Medicaid-eligible. In other words, they are people who are treated by the Medicaid program as if they are eligible for Medicaid because of a demonstration approved under title XI, not merely because they are people who might receive from a demonstration a benefit that is not health insurance (such as treatment at a hospital).

While it is true that a few courts have interpreted the regulation that we are proposing to replace to require including in the DPP Medicaid fraction numerator days associated with uncompensated/undercompensated care because they read the regulation to treat such days as those of patients regarded as eligible for Medicaid, we disagree with those holdings. As noted previously, the current regulation was drafted prior to the enactment of section 5002 of the DRA, and therefore, does not directly interpret the language the DRA added to the Medicare statute. Section 5002(b) of the DRA ratified CMS' pre-2000 policy of not including expansion groups, like those in Portland Adventist and Cookeville, in the DPP Medicaid fraction numerator. The DRA also ratified CMS' January 2000 policy, which reversed the pre-2000 policy and included all expansion group days; and it similarly ratified CMS's FY 2004 policy that limited the type of expansion days included in the DPP Medicaid fraction numerator. Therefore, it cannot be that section 5002 of the DRA requires that *all* days of patients that receive any benefit from a demonstration must be included in the DPP Medicaid fraction numerator, as some commenters have suggested. Rather, the DRA provides the Secretary with discretion to determine whether populations that receive benefits under a section 1115 demonstration should be ''regarded as'' eligible for Medicaid, and likewise provides the Secretary further discretion to determine ''the extent'' to which the days of those groups may be included in the DPP Medicaid fraction numerator.

For all of the reasons discussed herein and previously, to the extent commenters read the Forrest General case (*Forrest General Hospital* v. *Azar*, 926 F.3d 221 (5th Cir. 2019)) as interpreting section 1886(d)(5)(F)(vi) of the Act to require that any patient who benefits from a demonstration is regarded as eligible for Medicaid and required to be included in the Medicaid fraction, we respectfully disagree with that reading. Rather, the better reading of Forrest General is that the court determined that any patient who is ''regarded as'' eligible for medical assistance under the regulation (which the court found uninsured patients to be under the current regulation) must be included in the Medicaid fraction. We also disagree with this conclusion, for the reasons already stated. Nevertheless, we are proposing the changes in this rule to clarify whom the Secretary regards as eligible for Medicaid because of benefits provided by a section 1115 demonstration, and which of those patient days the Secretary proposes to include in the DPP Medicaid fraction numerator.

In light of our prior rulemakings on this subject, and Congress' intervention in enacting section 5002 of the DRA, we believe the Secretary has, and has always had, the discretion to regard as eligible for Medicaid—or not—populations provided benefits through a demonstration, and to include or exclude those regarded as eligible, as he deems appropriate. First, the statute clearly uses discretionary language. It specifies that ''the Secretary may, to the extent and for the period the Secretary determines appropriate, include patient days of patients not so eligible but who are regarded as such because they receive benefits under a demonstration project approved under title XI.'' As the Supreme Court recently explained, ''may'' is quintessentially discretionary language. The Supreme Court has repeatedly emphasized that the use of ''may'' in a statute is intended to confer discretion rather than establish a requirement.[7] ''The use of the word 'may' . . . thus makes clear that . . . the Secretary 'has the authority, but not the duty.' '' *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001). So while the DSH statute specifies the Secretary must count the days of patients ''eligible for medical assistance under a State plan approved under title XIX'' in the DPP Medicaid fraction numerator, the DRA provides that the Secretary may count the days of

[6] *Portland Adventist Med. Ctr.* v. *Thompson,* 399 F.3d 1091, 1096 (9th Cir. 2005); *Cookeville Reg'l Med. Ctr.* v. *Thompson,* 2005 U.S. Dist. LEXIS 33351, *18 (D.D.C. Oct. 28, 2005).

[7] See *Opati* v. *Republic of Sudan*, 140 S. Ct. 1601, 1609 (2020) (The Court has ''repeatedly observed'' that ''the word 'may' clearly connotes discretion.''). See also, for example, *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 139 S. Ct. 361, 371 (2018); *Jama* v. *Immigration and Customs Enforcement*, 543 U.S. 335, 346 (2005).

those ''not so eligible'' (that is, patients not eligible for Medicaid).

The additional clause ''to the extent and for the period the Secretary determines appropriate'' provides even more evidence that Congress sought to give the Secretary the authority to determine which ''patient days of patients not so eligible [for Medicaid] but who are regarded as such'' to count in the DPP Medicaid fraction numerator. In other words, the statute expressly contemplates that the Secretary may include the days of patients who are not actually eligible for medical assistance under a State plan approved under title XIX (eligible for Medicaid), but who are treated for all intents and purposes as if they were eligible for such ''medical assistance.'' But the Secretary is not commanded that he must count such patients. Accordingly, we disagree with commenters who stated that the statute requires we count in the DPP Medicaid fraction numerator all patients who benefit from a demonstration. Rather, the statute authorizes the Secretary to determine, as ''the Secretary determines [is] appropriate,'' whether patients are regarded as being eligible for Medicaid and, if so, ''the extent'' to which to include their days in the Medicaid fraction.

Furthermore, even if uninsured patients are regarded as eligible for Medicaid, we propose not including them in the DPP Medicaid fraction numerator for policy reasons. The DPP is intended to be a proxy calculation for the percentage of low income patients a hospital treats. Congress has defined the proxy to count in the Medicare fraction the days of patients entitled to Medicare Part A and SSI; the days of patients not entitled to Medicare but eligible for Medicaid are counted in the Medicaid fraction. Thus, not every low income patient is necessarily counted in the DPP proxy. If we counted all uninsured patients who could be said to have benefited from an uncompensated/undercompensated care pool (whether low income patients or not, because one need not be low-income to be uninsured and leave a hospital bill unpaid), we could potentially include in the DPP proxy not just all low-income patients in States with uncompensated/undercompensated care pools but also patients who are not low-income but who do not have insurance and did not pay their hospital bill. This would be a significant distortion from how Congress intended the DSH calculation to work, where the DPP is a proxy for the percentage of low-income patients hospitals serve based on patients covered by Medicare or Medicaid. We note that in contrast to an individual who could afford, but elects not to buy insurance, and lets bills go unpaid, an individual who receives insurance coverage under a section 1115 demonstration by definition must meet low income standards. By using our discretion to include in the DPP Medicaid fraction numerator only the days of those demonstration patients for which the demonstration provides health insurance that covers inpatient hospital care and the premium assistance that accounts for 100 percent of the premium cost to the patient, we believe we are hewing to Congress' intent to count some, but not necessarily all, low-income patients in the proxy.

Section 5002(b) of the DRA's ratification of the Secretary's prior policy and regulations on including or excluding demonstration group patient days from the DPP Medicaid numerator further supports our proposal here to exclude days of uninsured patients. By ratifying the Secretary's prior regulation that explicitly stated that our intent was to include in the fraction only the days of those that most looked like Medicaid-eligible patients, the limits we are proposing here to exclude days of uninsured patients whose costs are subsidized by uncompensated/undercompensated care pool funding fully align with Congress's amendment of the statute.

Also, counting all low-income patients in States with uncompensated/undercompensated care pools could drastically and unfairly increase DSH payments to hospitals located in States with broad uncompensated/undercompensated care pools in comparison to hospitals in States without uncompensated/undercompensated care pools, even though the cost burden on hospitals of treating low-income, uninsured patients might be higher in States without uncompensated/undercompensated care pools, precisely because they do not have uncompensated/undercompensated care pools. The purpose ''of the DSH provisions is not to pay hospitals the most money possible; it is instead to compensate hospitals for serving a disproportionate share of low-income patients.'' [8] We do not believe that purpose would be furthered by counting uninsured patients associated with uncompensated/undercompensated care pool funding as if they were patients eligible for Medicaid.

Thus, while we continue to believe that the statute does not permit patients who might indirectly benefit from uncompensated/undercompensated care pool funding to be ''regarded as'' eligible for Medicaid, if the statute permits us to regard such patients as eligible for medical assistance under title XIX, the statute also provides the Secretary with the discretion to determine whether to do so. We are electing to exercise the Secretary's discretion not to regard patients that may indirectly benefit from uncompensated/undercompensated funding pools as eligible for Medicaid. In any event, the statute also plainly provides the Secretary with the authority to determine whether to include patient days of patients regarded as eligible for Medicaid in the DPP Medicaid fraction numerator ''to the extent and for the period'' that the Secretary deems appropriate. Thus, we are also exercising the Secretary's discretion not to include in the DPP Medicaid fraction numerator patient days of patients associated with uncompensated/undercompensated care pool payments.

In summary, we are proposing to revise our regulations at § 412.106(b)(4) to explicitly reflect our interpretation of the language ''regarded as'' ''eligible for medical assistance under a State plan approved under title XIX'' ''because they receive benefits under a demonstration project approved under title XI'' in section 1886(d)(5)(F)(vi) of the Act to mean patients (1) who receive health insurance through a section 1115 demonstration itself or (2) who purchase health insurance with the use of premium assistance provided by a section 1115 demonstration, where State expenditures to provide the insurance or premium assistance may be matched with funds from title XIX. Alternatively, we are exercising the discretion the statute provides the Secretary to propose limiting to those two groups the patients the Secretary ''regard[s] as'' ''eligible for medical assistance under a State plan'' ''because they receive benefits under a demonstration.'' Moreover, using the Secretary's authority to determine the days of which demonstration groups ''regarded as'' Medicaid eligible to include in the DPP Medicaid fraction numerator, we propose that only the days of those patients who receive from the demonstration (1) health insurance that covers inpatient hospital services or (2) premium assistance that covers 100 percent of the premium cost to the patient, which the patient uses to buy health insurance that covers inpatient hospital services, are to be included, provided in either case that the patient is not also entitled to Medicare Part A.

[8] *Becerra* v. *Empire Health Found.*, 142 S. Ct. 2354, 2367 (2022) (emphasis added).

Finally, we are exercising the Secretary's discretion to not regard as Medicaid eligible patients whose costs are paid to hospitals from uncompensated/undercompensated care pool funds authorized by a section 1115 demonstration; and we are similarly exercising the Secretary's authority to exclude the days of such patients from being counted in the DPP Medicaid fraction numerator, even if those patients could be ''regarded as'' ''eligible for medical assistance under a State plan authorized by title XIX.'' Thus, we are also proposing to explicitly exclude from counting in the DPP Medicaid fraction numerator any days of patients for which hospitals are paid from demonstration-authorized uncompensated/undercompensated care pools.

In developing the proposal above, we considered counting the days of patients in the DPP Medicaid fraction numerator whose inpatient hospital costs are paid for with funds from an uncompensated/undercompensated care pool authorized by a section 1115 demonstration. However, after consideration, as discussed in greater detail above, because of the Secretary's interpretation of the statute and electing to exercise his discretion for policy reasons, we are not proposing to include counting patients whose inpatient hospital costs are paid for with funds from an uncompensated/undercompensated care pool authorized by a section 1115 demonstration in the DPP Medicaid fraction numerator. We invite public comments with regard to our statutory interpretation and our election to exercise the Secretary's authority discussed above, as well as our proposal not to count in the DPP Medicaid fraction numerator days of patients whose inpatient hospital costs are paid to hospitals from uncompensated/undercompensated care pool funds authorized by a section 1115 demonstration.

Finally, we propose that our revised regulation would be effective for discharges occurring on or after October 1, 2023. As has been our practice for more than two decades, we have made our periodic revisions to the counting of certain section 1115 patient days in the Medicare DSH calculation effective based on patient discharge dates. Doing so again here treats all providers similarly and does not impact providers differently depending on their cost reporting periods.

III. Collection of Information Requirements

A. Statutory Requirement for Solicitation of Comments

Under the Paperwork Reduction Act (PRA) of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In this proposed rule, we are soliciting public comment on the following information collection requirement (ICR).

B. ICR Relating To Counting Certain Days Associated With Section 1115 Demonstrations in the Medicaid Fraction

In the preamble of this proposed rule, we are proposing to revise the criteria for a hospital to count section 1115 demonstration inpatient days for which the patient is regarded as being eligible for Medicaid in the numerator of the Medicaid fraction: for the patient days of individuals who obtain benefits from a section 1115 demonstration, the demonstration must provide those patients with insurance that includes coverage of inpatient hospital services, or the insurance the patient purchased with premium assistance provided by the demonstration must include coverage of inpatient hospital service; and that for days of patients who have bought health insurance that provides inpatient hospital benefits using premium assistance obtained through a section 1115 demonstration, that assistance must be equal to 100 percent of the premium cost to the patient. We estimate 310 hospitals will be affected by this requirement, which is the total number of Medicare-certified subsection (d) hospitals in the seven States (Arkansas, Massachusetts, Oklahoma, Rhode Island, Tennessee, Utah, and Vermont) that currently operate approved premium assistance section 1115 demonstrations. The estimated total burden is $18,350,169 a year (1,736,883 inquiries a year × 0.25 hours per inquiry × (wages of $21.13/hour × 2 (fringe benefits)) = $18,350,169/year).

The number of inquiries is calculated by subtracting the total CY 2019 Medicare discharges from total CY 2019 discharges for all payers for all subsection (d) hospitals in each State with a currently approved premium assistance section 1115 demonstration. We used annualized discharges for both Medicare and all payer discharge figures rather than actual discharges, as some hospitals' cost reports do not provide data for an entire calendar year. To determine whether a patient's premiums for inpatient hospital services insurance are paid for by subsidies provided by a section 1115 demonstration, we believe hospitals would need to conduct inquiries for all patients with non-Medicare insurance for purposes of reporting on the Medicare cost report.[9] The estimated difference between all payer annualized discharges and annualized Medicare discharges was 1,736,883 in CY 2019.

We estimate that hospitals will use their existing communication methods that are in place to verify insurance information when collecting the information under this ICR. We estimate that verifying section 1115 demonstration waiver premium assistance status for private insurance for an individual will take 15 minutes. We believe that information clerks will be making these inquiries. Based on the most recent Bureau of Labor Statistics Occupational Employment Statistics data (May 2021) for Category 43–4199,[10] Information and Record Clerks, All Other, the mean hourly wage for an Information and Record Clerk is $21.13. We have added 100 percent for fringe and overhead benefits, which calculates to $42.26 per hour. We estimate the total annual cost is $18,350,159 (1,736,883 inquiries × 0.25 hours per inquiry × $42.26 per hour).

To obtain copies of a supporting statement and any related forms for the proposed collection summarized in this rulemaking document, please access the CMS PRA website by copying and pasting the following web address into your web browser and search the CMS–Form–2552–1: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

If you wish to comment on this information collection with respect to reporting, recordkeeping, or third-party

[9] CMS–Form–2552–10 OMB No. 0938–0050.

[10] *https://www.bls.gov/oes/current/oes_nat.htm.*

disclosure requirements, please submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule.

Comments must be received by May 1, 2023.

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Analysis

A. Statement of Need

This proposed rule is necessary to make payment policy changes governing the treatment of certain days associated with section 1115 demonstrations in the DPP Medicaid fraction numerator for the purposes of determining Medicare DSH payments to subsection (d) hospitals under section 1886(d)(5)(F) of the Act. Specifically, we are proposing to revise our regulations to reflect explicitly our interpretation of the language ''patients . . . regarded as'' ''eligible for medical assistance under a State plan approved under title XIX'' ''because they receive benefits under a demonstration project approved under title XI'' in section 1886(d)(5)(F)(vi) of the Act to mean patients who receive health insurance through a section 1115 demonstration itself or who purchase insurance with the use of premium assistance provided by a section 1115 demonstration, where State expenditures to provide the insurance or premium assistance may be matched with funds from title XIX. Alternatively, the Secretary proposes to use his discretion under the statute to limit to these two groups those he regards as Medicaid eligible for the purpose of being counted in the DPP Medicaid fraction numerator. Moreover, of the groups ''regarded as'' Medicaid eligible, we propose that only the days of those patients who receive from the demonstration (1) health insurance that covers inpatient hospital services or (2) premium assistance that covers 100 percent of the premium cost to the patient, which the patient uses to buy health insurance that covers inpatient hospital services, be included, provided in either case that the patient is not also entitled to Medicare Part A. We are also proposing to revise our regulations to explicitly exclude days of patients for which hospitals are paid from uncompensated/undercompensated care pools authorized by section 1115 demonstrations for the cost of such patients' inpatient hospital services.

The primary objective of the IPPS is to create incentives for hospitals to operate efficiently and minimize unnecessary costs, while at the same time ensuring that payments are sufficient to adequately compensate hospitals for their legitimate costs in delivering necessary care to Medicare beneficiaries. In addition, we share national goals of preserving the Medicare Hospital Insurance Trust Fund.

We believe that the changes proposed in this rulemaking are needed to further each of these goals, while maintaining the financial viability of the hospital industry and ensuring access to high quality health care for Medicare beneficiaries. We expect that these proposed changes would ensure that the outcomes of the IPPS are reasonable and provide equitable payments, while avoiding or minimizing unintended adverse consequences.

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96 354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with significant regulatory action/s and/or with economically significant effects ($100 million or more in any 1 year). Based on our estimates, OMB's Office of Information and Regulatory Affairs has determined that this rulemaking is ''economically significant'' as measured by the $100 million threshold. Accordingly, we have prepared a Regulatory Impact Analysis that to the best of our ability presents the costs and benefits of the rulemaking. Therefore, OMB has reviewed this proposed regulation, and the Department has provided the following assessment of its impact.

C. Detailed Economic Analysis

1. Benefits

- Incentives for hospitals to operate efficiently and minimize unnecessary costs will be created, while at the same time ensuring that payments are sufficient to adequately compensate hospitals for their legitimate costs in delivering necessary care to Medicare beneficiaries;
- The Medicare Hospital Insurance Trust Fund will be preserved; and
- The financial viability of the hospital industry and access to high quality health care for Medicare beneficiaries will be maintained.

At this time, we are not able to quantify these benefits.

2. Costs

Reporting and recordkeeping costs incurred by the hospitals are presented in the Paperwork Reduction Act analysis, above. The costs of reviewing these regulations are discussed below.

3. Transfers

In section II. of this proposed rule, we discuss our proposed policies related to counting certain days associated with section 1115 demonstrations in the Medicaid fraction. Specifically, we are proposing to revise our regulations to explicitly reflect our interpretation of the language ''patients . . . regarded as'' ''eligible for medical assistance under a State plan approved under title XIX'' ''because they receive benefits under a demonstration project approved under

title XI'' in section 1886(d)(5)(F)(vi) of the Act to mean patients who receive health insurance authorized by a section 1115 demonstration or patients who pay for health insurance with premium assistance authorized by a section 1115 demonstration, where State expenditures to provide the health insurance or premium assistance may be matched with funds from title XIX. Alternatively, we are proposing to use the statutory discretion provided the Secretary to regard as eligible for Medicaid only these same groups of patients. Moreover, irrespective of which individuals are ''regarded as'' Medicaid eligible, the Secretary is exercising his discretion to include in the DPP Medicaid fraction numerator only the days of those patients who receive from the demonstration (1) health insurance that covers inpatient hospital services or (2) premium assistance that covers 100 percent of the premium cost to the patient, which the patient uses to buy health insurance that covers inpatient hospital services, provided in either case that the patient is not also entitled to Medicare Part A.

Seven States have section 1115 waivers that explicitly include premium assistance (we believe premium assistance in these States is 100 percent of the premium cost to the patients): Arkansas, Massachusetts, Oklahoma, Rhode Island, Tennessee, Utah, and Vermont. Hospitals in States that have section 1115 demonstration programs that explicitly include premium assistance (at 100 percent of the premium cost to the patient) would be allowed to continue to include these days in the numerator of the Medicaid fraction, provided the patient is not also entitled to Medicare Part A. Therefore, there would be no change to how these hospitals report Medicaid days and no impact on their Medicaid fraction as a result of our proposed revisions to the regulations regarding the counting of patient days associated with these section 1115 demonstrations.

For States that have section 1115 demonstrations that include uncompensated/undercompensated care pools, the patients whose care is subsidized by these section 1115 demonstration funding pools would not be ''regarded as'' ''eligible for medical assistance under a State plan approved under title XIX'' in section 1886(d)(5)(F)(vi) of the Act because the demonstration does not provide them with health insurance benefits. Even if they could be regarded as Medicaid eligible, the Secretary is proposing to use his authority to exclude the days of those patients from being counted in the DPP Medicaid fraction. Therefore, hospitals in the following six States would no longer be eligible to report days of patients for which they received payments from uncompensated/undercompensated care pools authorized by the States' section 1115 demonstration for use in the DPP Medicaid fraction numerator: Florida, Kansas, Massachusetts, New Mexico, Tennessee, and Texas.

To estimate the impact of the proposal to exclude uncompensated/undercompensated care pool days, we would need to know the number of these section 1115 demonstration days per hospital for the hospitals potentially impacted. We do not currently possess such data because the Medicare cost report does not include lines for section 1115 demonstration days separately from other types of days. Therefore, the number of demonstration-authorized uncompensated/undercompensated care pool days per hospital and the net overall savings of this proposal are especially challenging to estimate.

However, in light of public comments received in prior rulemakings recommending that we utilize plaintiff data in some manner to help inform this issue, we examined the unaudited figures claimed by plaintiffs in the most recent of the series of court cases on this issue, namely Bethesda Health, Inc. v. Azar, 980 F.3d 121 (D.C. Cir. 2020), as currently reflected in the System for Tracking Audit and Reimbursement (STAR or the STAR system) as of the time of this rulemaking. Of the Bethesda Health plaintiff data in the STAR system that listed reported section 1115 demonstration-approved uncompensated/undercompensated care pool days for purposes of effectuating the decision in that case, we utilized the reported unaudited amounts in controversy claimed by the plaintiffs for the more recent of their cost reports ending in FY 2016 or FY 2017. We then utilized the number of beds (2,490) reported in the March 2022 Provider Specific File to determine the average unaudited amount in controversy per bed ($2,477) for these plaintiffs. Based on the data as shown in Table 1, the average unaudited amount in controversy per bed for these plaintiffs is $2,477 (= $6,167,193/2,490). We note that there are *Bethesda Health* plaintiffs that do not have section 1115 demonstration program days listed in STAR, and one plaintiff that has section 1115 demonstration program days listed in STAR, but the most recent cost report with this data ends in FY 2012; therefore, these plaintiffs are not listed in Table 1.

TABLE 1—AVERAGE UNAUDITED AMOUNT IN CONTROVERSY PER BED (A/B)

Unaudited amount in controversy by plaintiff (A)	Beds (B)	Average unaudited amount in controversy per bed (A/B)
$2,174,897	382	
1,342,081	512	
253,404	210	
1,301,024	717	
505,899	310	
318,984	181	
270,905	178	
Total 6,167,193	Total 2,490	$2,477

In Table 2, we used the number of beds in DSH eligible hospitals in the six States with section 1115 demonstration programs that include uncompensated/undercompensated care pools to extrapolate the average unaudited amount in controversy per bed for the plaintiffs in Table 1 to all DSH eligible hospitals in those States. The resulting extrapolated unaudited amount in controversy is $348,749,215 (= 140,795 × $2,477).

TABLE 2—EXTRAPOLATED UNAUDITED AMOUNT IN CONTROVERSY

State	DSH hospital beds (A)	Unaudited average amount in controversy per bed from Table 1 (B)	Extrapolated unaudited amount in controversy (A × B)
Florida	50,352		
Kansas	5,881		
Massachusetts	13,099		

TABLE 2—EXTRAPOLATED UNAUDITED AMOUNT IN CONTROVERSY—Continued

State	DSH hospital beds (A)	Unaudited average amount in controversy per bed from Table 1 (B)	Extrapolated unaudited amount in controversy (A × B)
New Mexico	3,405	.....	.....
Tennessee	15,718	.....	.....
Texas	52,340	.....	.....
Total	140,795	$2,477	$348,749,215

Note, we caution against considering the extrapolated unaudited amount in controversy to be the estimated Trust Fund savings that would result from our proposal. For the reasons described earlier, the savings from our proposal are highly uncertain. The savings may be higher or lower than the extrapolated amount. However, we are providing the above transfer calculations in response to the public comments received on prior rulemaking on this issue, requesting that we utilize plaintiff data in some manner to help inform this issue.

D. Regulatory Review Cost Estimation

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this proposed rule, we should estimate the cost associated with regulatory review. Due to the uncertainty involved with accurately quantifying the number of entities that will review the rule, we assume that the total number of IPPS hospitals, the majority of which are DSH eligible, will be the number of reviewers of this proposed rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this rule. It is possible that not all IPPS hospitals will review this rule (such as those hospitals that consistently are not eligible for DSH payments), while certain hospital associations and other interested parties will likely review this rule. For these reasons, we believe that the total number of IPPS hospitals (3,150) would be a fair estimate of the number of reviewers of this rule. We welcome any comments on the approach in estimating the number of entities that will review this proposed rule.

Using the wage information from the BLS for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this rule is $115.22 per hour, including overhead and fringe benefits *https://www.bls.gov/oes/current/oes_nat.htm*. Assuming an average reading speed, we estimate that it would take approximately 1.5 hours for the staff to review this proposed rule. For each entity that reviews the rule, the estimated cost is $172.83 (1.5 hours × $115.22). Therefore, we estimate that the total cost of reviewing this regulation is $544,414.50 ($172.83 × 3,150 reviewers).

E. Alternatives Considered

This proposed rule would revise our regulations on counting days associated with individuals eligible for certain section 1115 demonstration programs in as hospital's DPP Medicaid fraction numerator. It also provides descriptions of the statutory provisions that are addressed, identifies the proposed policy, and presents rationales for our decisions and, where relevant, alternatives that were considered.

As discussed in section II. of this proposed rule, in the past we have received comments regarding the inclusion in the DPP Medicaid fraction numerator of the days of patients for which hospitals receive payments from an uncompensated/undercompensated care pool created by a section 1115 demonstration. We considered these comments for purposes of this rule. As we discussed in greater detail in section II. of this proposed rule, because uncompensated/undercompensated care pools are not inpatient hospital insurance benefits directly provided to individuals, nor are they comparable to the breadth of benefits available under a Medicaid State plan, we stated that the individuals whose costs may be subsidized by such pools should not be ''regarded as'' ''eligible for medical assistance under a State plan'' ''because they receive benefits under a demonstration project approved under title XI.'' Thus, while we continue to believe that the statute does not permit patients who might indirectly benefit from uncompensated/undercompensated care pool funding to be ''regarded as'' eligible for Medicaid, if the statute permits us to regard such patients as eligible for medical assistance under title XIX, the statute also provides the Secretary with ample discretion to determine whether to do so. As stated above, we are electing to exercise the Secretary's discretion not to regard patients that may indirectly benefit from uncompensated/undercompensated funding pools as so eligible. For a complete discussion, see section II. of this proposed rule.

F. Accounting Statement and Table

As required by OMB Circular A–4 (available at *https://obamawhitehouse.archives.gov/omb/circulars_a-004_a-4/* and *https://georgewbush-whitehouse.archives.gov/omb/circulars/a004/a-4.html*), we are required to prepare an accounting statement showing the classification of the expenditures associated with the provisions of this proposed rule as they relate to acute care hospitals. As discussed above, to estimate the impact of the proposal to exclude uncompensated/undercompensated care pool days from the DPP Medicaid fraction numerator, we would need to know the number of these days per hospital for the hospitals potentially impacted. We do not currently possess such data because the Medicare cost report does not include lines for section 1115 demonstration days separately from other types of days. Therefore, the number of demonstration-authorized uncompensated/undercompensated care pool days per hospital and the net overall savings of this proposal are highly uncertain. However, for purposes of the accounting statement in Table 3, we have included the extrapolated unaudited amount in controversy (from Table 2) as the net cost to IPPS Medicare Providers associated with the policy proposed in this proposed rule.

TABLE 3—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES FOR COUNTING CERTAIN DAYS ASSOCIATED WITH SECTION 1115 DEMONSTRATIONS IN THE MEDICAID FRACTION FOR MEDICARE DISPROPORTIONATE SHARE HOSPITAL (DSH) PAYMENT

Category	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate (%)	Period covered
Annualized monetized transfers to the Federal government from IPPS Medicare Providers	$349	$262	$436	2022	7	2022–2023
Annualized Monetized ($million/year)	0.54	0.41	0.68	2022	7	2022
Regulatory Review Costs	0.54	0.41	0.68	2022	3	2022

G. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small entities if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that almost all hospitals are small entities as that term is used in the RFA. The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business (having revenues of less than $8.0 million to $41.5 million in any 1 year). (For details on the latest standards for health care providers, we refer readers to page 32 of the Table of Small Business Size Standards for Sector 62, Health Care and Social Assistance found on the SBA website at *http://www.sba.gov/content/small-business-size-standards*.)

Medicare Administrative contractors (MACs) are not considered to be small entities because they do not meet the SBA definition of a small business.

HHS's practice in interpreting the RFA is to consider effects economically ''significant'' if greater than 5 percent of providers reach a threshold of 3 to 5 percent or more of total revenue or total costs. We do not believe that the requirements in this proposed rule would reach this threshold. Specifically, based on data from the FY 2023 final rule, we estimate that DSH payments are approximately 2.8 percent of all payments under the IPPS for FY 2023. Therefore, the Secretary has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a proposed rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, with the exception of hospitals located in certain New England counties, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

H. Unfunded Mandates Reform Act (UMRA)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending by State, local, and tribal governments in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2023, that threshold is approximately $177 million. This proposed rule does not mandate any requirements for State, local, or tribal governments, or for the private sector.

I. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule would not have a substantial direct effect on State or local governments, preempt States, or otherwise have a Federalism implication.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on January 10, 2023.

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ 1. The authority citation for part 412 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 2. Amend § 412.106 by
■ a. Revising paragraphs (b)(4) introductory text, (i), and (ii);
■ b. Redesignating paragraphs (b)(4)(iii) and (iv) as paragraphs (b)(4)(iv) and (v), respectively; and
■ c. Adding new paragraph (b)(4)(iii).

The revisions and addition read as follows:

§ 412.106 Special treatment: Hospitals that serve a disproportionate share of low-income patients.

* * * * *

(b) * * *

(4) *Second computation.* The fiscal intermediary determines, for the same cost reporting period used for the first computation, the number of the hospital's patient days of service for patients (A) who were not entitled to Medicare Part A, and (B) who were either eligible for Medicaid on such days as described in paragraph (b)(4)(i) of this section or who were regarded as eligible for Medicaid on such days and the Secretary has determined to include those days in this computation as described in paragraph (b)(4)(ii)(A) or (B) of this section. The fiscal intermediary then divides that number by the total number of patient days in the same period. For purposes of this second computation, the following requirements apply:

(i) For purposes of this computation, a patient is eligible for Medicaid on a given day if the patient is eligible on that day for inpatient hospital services under a State Medicaid plan approved under title XIX of the Act, regardless of whether particular items or services were covered or paid for on that day under the State plan.

(ii) For purposes of this computation, a patient is regarded as eligible for Medicaid on a given day if (I) the patient receives health insurance

authorized by a demonstration approved by the Secretary under section 1115(a)(2) of the Act for that day, where the cost of such health insurance may be counted as expenditures under section 1903 of the Act, or (II) the patient has health insurance for that day purchased using premium assistance received through a demonstration approved by the Secretary under section 1115(a)(2) of the Act, where the cost of the premium assistance may be counted as expenditures under section 1903 of the Act, and in either case regardless of whether particular items or services were covered or paid for on that day by the health insurance. Of these patients regarded as eligible for Medicaid on a given day, only the days of patients meeting the following criteria on that day may be counted in this second computation:

(A) Patients who are provided by a demonstration authorized under section 1115(a)(2) of the Act health insurance that covers inpatient hospital services; or

(B) Patients who purchase health insurance that covers inpatient hospital services using premium assistance provided by a demonstration authorized under section 1115(a)(2) of the Act and the premium assistance accounts for 100 percent of the premium cost to the patient.

(iii) Patients whose health care costs, including inpatient hospital services costs, for a given day are claimed for payment by a provider from an uncompensated, undercompensated, or other type of funding pool authorized under section 1115(a) of the Act to fund providers' uncompensated care costs are not regarded as eligible for Medicaid for purposes of paragraph (b)(4)(ii) of this section on that day and the days of such patients may not be included in this second computation.

* * * * *

Dated: February 17, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023–03770 Filed 2–24–23; 4:15 pm]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WP Docket No. 07–100; FCC 23–3; FR ID 126041]

Improving Public Safety Communications in the 4.9 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (FCC) seeks comment on the details of implementing a new leasing model for the 4.9 GHz (4940–4990 MHz) band to achieve its goals of allowing robust locally controlled public safety operations while ensuring consistent, nationwide rules that promote overall spectral efficiency, foster innovation, and drive down equipment costs.

DATES: Interested parties may file comments on or before March 30, 2023; and reply comments on or before May 1, 2023.

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

You may submit comments, identified by WP Docket No. 07–100, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
  - Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy* .

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

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Jon Markman of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418–7090 or *Jonathan.Markman@fcc.gov* or Brian Marenco of the Public Safety and Homeland Security Bureau at (202) 418–0838 or *Brian.Marenco@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of Commission's Ninth Further Notice in WP Docket No. 07–100; FCC 23–3, adopted and released on January 18, 2023. The full text of this document is available for public inspection online at *https://docs.fcc.gov/public/attachments/FCC-23-3A1.pdf.*

1. In this Ninth Further Notice, the Commission seeks comment on a range of questions related to the implementation of its new Band Manager model for the 4.9 GHz band adopted in the Seventh Report and Order. This model will preserve the essentially public safety nature of the band while decreasing access costs and expanding use to a variety of primary public safety and secondary non-public safety operations.

2. First, it seeks comment on the Band Manager's efforts in coordinating public safety operations, in particular mitigating harmful interference and modernizing operations. Next, it seeks comment on the Band Manager's role in facilitating leasing to non-public safety users; how to enable such leasing, how to manage the revenues that arise from it, and how to ensure preemption rights for public safety operations. It also seeks comment on the implementation of our committee-based selection process for the Band Manager, which mirrors the approach the Commission has taken for selecting clearinghouses and transition coordinators in a number of other bands. Finally, it seeks comment on oversight of the Band Manager and on other issues related to the implementation of the Band Manager model.

3. In particular, the Commission in this Ninth Further Notice builds off the record before it and seeks comment on specific criteria for protecting public safety licensees operating in the band from what it terms ''harmful

interference at 4.9 GHz.'' It seeks comment on what role the Band Manager should play, as part of its frequency coordination duties, in mediating or deciding disputes if parties disagree about existing or proposed operations. It also seeks further comment on whether the Band Manager should be able to engage with any broadband network providers (public safety and/or commercial) to pursue opportunities for integrating operations in the 4.9 GHz band with broadband networks used by public safety in other spectrum bands and how best to incorporate the latest commercially available technologies, including 5G, into the 4.9 GHz band.

4. Furthermore, the Commission in this Ninth Further Notice seeks input on two possible means of enabling Band Manager-coordinated non-public safety leasing, as well as general considerations for creating an effective leased access model for the band, in particular, the need to ensure non-discriminatory treatment of potential lessees. Under either model, the Commission seeks to ensure that all potentially affected licensees are given the opportunity to consent to the leasing arrangements. It also proposes that the Band Manager be funded, at least partially, by leasing revenues, which will enable the Band Manager to be fully independent and equipped to engage in the kind of complex spectrum analysis needed to enable this leasing model. The Commission also seeks comment on how its rules should treat compensation to licensees, either directly from non-public safety operators or from the Band Manager.

5. The Commission in this Ninth Further Notice also seeks comment on how to ensure preemption rights for public safety licensees over non-public safety users in emergency circumstances. It also seeks comment on the nature of a selection committee for the Band Manager and tentatively concludes that the selection committee should include representatives from the public safety community.

6. The Commission also seeks comment in this Ninth Further Notice on the role it should play in overseeing the Band Manager's decisions, on how to address future licensing of the band, and on whether the new Band Manager framework presents new opportunities for unmanned aircraft systems (UAS) in the band.

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

Procedural Matters

Paperwork Reduction Act

8. This Ninth Further Notice may contain new or modified information collection(s) subject to the Paperwork Reduction Act of 1995. If the Commission adopts any new or modified information collection requirements, they will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

Regulatory Flexibility Act

9. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning potential rule and policy changes contained in the Ninth Further Notice. The IRFA is contained in Appendix D of the Ninth Further Notice.

Initial Regulatory Flexibility Analysis

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

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

11. Having decided in the Seventh Report and Order that a nationwide Band Manager for the 4.9 GHz band is the best option for moving forward on a comprehensive nationwide, coordinated approach to the band, in the Ninth Further Notice the Commission seeks comment on the tentative conclusions, proposals and inquiries we put forth addressing the rights and responsibilities of the nationwide Band Manager regarding public safety and non-public safety operations, selection of the Band Manager, Commission oversight of the Band Manager and other considerations involving licensing and use of the band. More specifically, we seek comment in the Ninth Further Notice on an interference criteria for the Band Manager to apply as part of its frequency coordination duties. We also seek comment on the Band Manager mediating disputes, evaluating potential integration of the 4.9 GHz band with broadband networks used by public safety in other frequency bands, and facilitating the leasing of unused spectrum rights to non-public safety entities which includes two possible leasing models that could be implemented. We further seek comment on our proposals regarding the applicable rules for leasing arrangements, the required consents for non-public safety use of the band, funding of the Band Manager primarily by leasing revenues, allowing the Band Manager to charge licensees and applicants reasonable rates for its coordination services and the eligibility criteria to be used by the selection committee in its evaluation process for Band Manager applicants.

12. Finally, we seek comment on ensuring preemption rights for public safety licensees over non-public safety users, qualifications for any entity seeking the Band Manager position, a selection committee to select the Band Manager, the role of the Commission in overseeing the Band Manager as well as the contents of annual reports from the Band Manager, on future public safety

licensing of the band and on aeronautical mobile use of the band.

13. In seeking comment on these issues, we believe the Commission can implement a nationwide framework for the 4.9 GHz band which ensures public safety operations continue to be prioritized while opening the band to additional users which will facilitate increased use of the band, encourage a more robust market for equipment and greater innovation, and at the same time protect public safety users from harmful interference.

B. Legal Basis

14. The proposed action is authorized pursuant to sections 1, 4(i), 4(j), 4(o), 301, 303(b), 303(g), 303(r), 316, 332, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 154(o), 301, 303(b), 303(g), 303(r), 316, 332, and 403.

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

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

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

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

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

19. *Private Land Mobile Radio Licensees.* Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. Companies of all sizes operating in all U.S. business categories use these radios. Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications, is the closest industry with an SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates licensees in this industry can be considered small.

20. Based on Commission data as of December 14, 2021, there are approximately 387,370 active PLMR licenses. Active PLMR licenses include 3,577 licenses in the 4.9 GHz band; 19,011 licenses in the 800 MHz band; and 2,716 licenses in the 900 MHz band. Since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard. Nevertheless, the Commission believes that a substantial number of PLMR licensees are small entities.

21. Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA small business size standard for this industry classifies businesses having 1,250 employees or less as small. U.S. Census Bureau data for 2017 show that there were 656 firms in this industry that operated for the entire year. Of this number, 624 firms had fewer than 250 employees. Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

22. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 797 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 715 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

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

23. The Ninth Further Notice may impose new or additional reporting or recordkeeping and/or other compliance obligations on small entities, if adopted. Based on Commission proposals in the Ninth Further Notice, small and other entities are likely to be subject to the requirement that all lease arrangements between public safety and non-public safety entities in the 4.9 GHz band comply with our secondary markets rules, if our proposal is adopted. Small and other entities are also likely to be subject to compliance with our proposed requirement that all relevant public safety licensees must to consent to non-public safety operator use, if adopted.

24. We also seek comment on what role, if any, public safety licensees should have in reviewing and approving lease agreements being negotiated by the Band Manager. In particular, we seek comment on the benefits and costs of different models of licensee involvement in the leasing process. Further, we seek comment whether the Commission should permit the Band Manager to limit the categories of entities eligible for leased access, or whether such limitations would be contrary to the Commission's goals of ensuring fair access and efficient use of spectrum. The resolution of each of these matters may result in additional compliance obligations for small and other entities operating in the 4.9 GHz band.

25. In assessing the cost of compliance for small entities, at this time the Commission is not in a position to determine whether, if adopted, the proposals and matters upon which we seek comment will require small entities to hire professionals to comply and cannot quantify the cost of compliance with any of the potential rule changes that may be adopted. We expect the information we received in comments including where requested, cost and benefit analyses, to help the Commission identify and evaluate relevant compliance matters for small entities, including compliance costs and other burdens that may result from the proposals and inquiries we make in the Ninth Further Notice.

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

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

27. Parties in the proceeding uniformly supported the goal of protecting current and future public safety licensees from interference but differ on how to define interference and which interference protection approach is most appropriate. Therefore, rather than imposing a standard on its own which could adversely impact small entities, in the Ninth Further Notice the Commission seeks further comment on specific criteria for protecting public safety licensees operating in the band from interference. Based on comments, we considered and seek comment on these alternative approaches, the threshold degradation approach of TIA–10, a propagation modeling approach used by part 90 frequency coordination for TDMA systems operating in the VHF band or contour overlap analysis as the basis for determining interference to public safety licensees operating in the 4.9 GHz band. In each case, we seek comment on whether the interference protection criteria would strike the right balance between allowing robust use of the band while protecting critical public safety communications. Further, in the Ninth Further Notice we invite the submission of other approaches and proposals with cost and benefit analyses to establish protection for public safety licensees operating in the 4.9 GHz band.

28. In the Ninth Further Notice, we also seek comment on ways to enable the Band Manager to facilitate the leasing of unused spectrum rights to non-public safety entities. We propose that all relevant public safety licensees would be required to consent to this arrangement but considered and seek comment on alternatives such as whether we should have exceptions to this general requirement and allow leasing in the absence of a given licensee's consent, for example after a period of non-responsiveness or if the licensee has conditioned its consent in a manner which violates our rules on compensation. Or whether we should have an exception for lack of consent if, we require certain licensees whose license area does not overlap with the lease area to consent.

29. To safeguard small and other entities from discriminatory treatment, we seek comment in the Ninth Further Notice on what rules should be imposed on the Band Manager to ensure it administers leasing in a non-discriminatory manner. Our inquiry for non-discriminatory leasing rules explores specific lessees as well as the types of lessees and the nature of the operations they will conduct with the 4.9 GHz band. Finally, while we propose that the Band Manager fund itself from leasing revenue, to minimize the impact for small and other entities we considered and seek comment on whether there are any requirements we should put in place as to those fees, whether we should limit the fees charged by the Band Manager to public safety licensees and applicants, whether there are other funding sources for the Band Manager that our rules should contemplate, and how to approach revenues exceeding the Band Manager's costs for its services.

30. The Commission is hopeful that the comments it receives will specifically address matters impacting small entities and include data and analyses relating to these matters. Further, while the Commission believes the rules that are eventually adopted in this proceeding should benefit small entities, whether public safety licensees seeking interference protection in the band or non-public safety entities seeking access to valuable spectrum, the Commission expects to more fully consider the economic impact and alternatives for small entities following the review of comments filed in response to the Ninth Further Notice. The Commission's evaluation of this information will shape the final alternatives it considers, the final conclusions it reaches, and any final actions it ultimately takes in this proceeding to minimize any significant economic impact that may occur on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

31. None.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–02611 Filed 2–27–23; 8:45 am]

BILLING CODE 6712–01–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 532 and 552

[GSAR Case 2022–G513; Docket No. GSA–GSAR–2023–0008; Sequence No. 1]

RIN 3090–AK55

General Services Administration Acquisition Regulation; Updating Payments Clause

AGENCY: Office of Acquisition Policy, General Services Administration (GSA).

ACTION: Proposed rule.

SUMMARY: GSA is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to remove clause 552.232–1 *Payments*. This clause requires the Government to pay a contractor without submission of an invoice or voucher for non-commercial fixed price contracts for supplies or services.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before May 1, 2023 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to GSAR Case 2022–G513 to: *https://www.regulations.gov* via the Federal eRulemaking portal by searching for ''GSAR Case 2022–G513''. Select the link ''Comment Now'' that corresponds with GSAR Case 2022–G513. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''GSAR Case 2022–G513'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite GSAR Case 2022–G513, in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Taylor McDaniels at 817–253–7858 or *gsarpolicy@gsa.gov*. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *gsaregsec@gsa.gov*. Please cite GSAR Case 2022–G513.

SUPPLEMENTARY INFORMATION:

I. Background

The General Services Administration (GSA) conducts routine reviews of its acquisition regulations to identify outdated content and to ensure there is no unnecessary duplication of or conflict with the Federal Acquisition Regulation (FAR), pursuant to FAR 1.304. Through one of these reviews in Fiscal Year (FY) 2022, GSA identified that General Services Administration Acquisition Regulation (GSAR) clause 552.232–1 *Payments* conflicts with FAR clause 52.232–1 *Payments* and should be removed. As this GSAR clause is over 10 years old, GSA does not have any historical information that explains why the GSAR clause was initially created. This rule seeks to rectify the issue.

II. Discussion and Analysis

GSA is proposing to amend the GSAR to remove GSAR Clause 552.232–1 *Payments* and any corresponding references to the clause.

First, this rule proposes to remove and reserve the GSAR clause 552.232–1 *Payments* because GSA has determined the existing FAR clause 52.232–1 *Payments* is sufficient, and it is no longer in the best interests of GSA to deviate from the FAR. The GSAR clause requires, in certain transactions, the Government to pay a contractor without submission of a proper invoice for non-commercial fixed price contracts for supplies or services; whereas the FAR currently requires that the Government pay a contractor only after receipt of the contractor's proper invoice or voucher. GSA has found that the GSAR clause is no longer necessary and is unaware of any situation in which this clause is used for any payments being processed.

Next, this rule proposes to remove the prescription for GSAR clause 552.232–1 at GSAR 532.111 and make conforming changes to subsequent text to improve consistency and readability of the GSAR.

Finally, this rule proposes to revise the prescription for GSAR clause 552.323–5: ''As prescribed in 532.111(b), insert the following clause.'' Because of the change discussed above, there is no part (b) of GSAR 532.111, so (b) should be removed from this statement.

III. Expected Impact of the Rule

This rule proposes to remove one conflicting GSAR clause regarding payments for non-commercial fixed price contracts for supplies or services. GSA believes the exception to invoicing in the GSAR clause is not currently followed, and applicable contractors are already following the invoice requirements of the FAR clause. However, we have conducted the analysis below demonstrating that the expected impact of this rule is not significant.

With this change, contractors with non-commercial, fixed-price, contracts for supplies or services will now have to submit proper invoices in order to receive payments in accordance with FAR 52.232–1 *Payments*. Information generated from the System for Award Management (SAM.gov) for FY 2022 reflects approximately 142,120 GSA contracts were awarded for non-commercial fixed price contracts for supplies or services across approximately 735 separate contractors.

Consistent with the methodology and analysis for the FAR clause information collection [1], the affected contracts on average are estimated to have 6 invoices per contract per year, for a total of 852,720 total responses. Each response is estimated to require 0.25 hours, for a total of 213,180 hours of total burden. Applying a GS–12 pay rate, the total cost is estimated to be $12,517,930 [2], or approximately $17,031 per contractor which is not significant.

IV. Executive Orders 12866 and 13563

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

V. Regulatory Flexibility Act

GSA does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601,

[1] Office of Management and Budget Control Number 9000–0073, *Certain Federal Acquisition Regulation Part 32 Requirements*.

[2] The hourly rate for GS–12 is $58.72 ($43.10 as a GS–12/step 5 salary OPM 2023 pay scale Rest of US, with a 36.25% fringe factor pursuant to OMB memorandum M–08–13).

et seq., because this rule merely reverts back to the existing FAR clause for payments. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603. The analysis is summarized as follows:

The objective of the rule is to amend the GSAR to revise sections of GSAR Part 532, Contract Financing, and Part 552, Solicitation Provisions and Contract Clauses, to remove an unnecessary payments clause and any corresponding references to the clause.

Title 40 of the United States Code (U.S.C.) Section 121 authorizes GSA to issue regulations, including the GSAR, to control the relationship between GSA and contractors.

The rule applies to large and small business entities, which are awarded contracts that are fixed price, non-commercial, supplies or services. Information generated from the System for Award Management (*SAM.gov*), formerly known as the Federal Procurement Data System (FPDS), for Fiscal Year (FY) 2022 has been used as the basis for estimating the number of contractors that have been awarded such contracts. A total of 17,520 government-wide contracts were awarded in the targeted PSCs for FY 2022. Of these contract awards, only 14 percent were small business entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small business entities.

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

There are no known alternatives to this rule which would accomplish the stated objectives. This rule does not initiate or impose any new administrative or performance requirements on small business contractors because the policies are already being followed.

The Regulatory Secretariat Division will be submitting a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. GSA invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

GSA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (GSAR Case 2022–G513) in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the GSAR do not impose additional information collection requirements to the paperwork burden previously approved for FAR clause 52.232–1 *Payments,* under the Office of Management and Budget Control Number 9000–0073, Certain Federal Acquisition Regulation Part 32 Requirements.

List of Subjects in 48 CFR Parts 532 and 552

Government procurement.

Jeffrey A. Koses

Senior Procurement Executive, Office of Acquisition Policy, Office of Government-wide Policy, General Services Administration.

Therefore, GSA proposes to amend 48 CFR parts 532 and 552 as set forth below:

■ 1. The authority citation for 48 CFR parts 532 and 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 532—CONTRACT FINANCING

■ 2. Revise section 532.111 to read as follows:

532.111 Contract Clauses for non-commercial purchases.

Construction contracts. Insert the clause at 552.232–5, Payments under Fixed-Price Construction Contracts, in solicitations and contracts when a fixed-price construction contract is contemplated.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

552.232–1 [Removed and Reserved]

■ 3. Remove and reserve section 552.232–1.

552.232–5 [Amended]

■ 4. Amend section 552.232–5 by removing from the introductory text ''552.111(b)'' and adding ''532.111'' in its place.

[FR Doc. 2023–03913 Filed 2–27–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 230217–0045]

RIN 0648–BL84

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Red Snapper Harvest Levels

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement management measures described in a framework action under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP), as prepared by the Gulf of Mexico (Gulf) Fishery Management Council (Council). If implemented, this proposed rule would revise the commercial and recreational annual catch limits (ACLs) and annual catch targets (ACTs) for red snapper in the Gulf exclusive economic zone (EEZ). The purpose of this proposed rule is to increase the Gulf red snapper ACLs and ACTs consistent with best scientific information available, and to continue to achieve optimum yield (OY) for the stock.

DATES: Written comments must be received on or before March 30, 2023.

ADDRESSES: You may submit comments on the proposed rule, identified by ''NOAA–NMFS–2022–0123'' by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter ''NOAA–NMFS–2022–0123'', in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Dan Luers, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of the framework action, which includes an environmental assessment, regulatory impact review, and a Regulatory Flexibility Act (RFA) analysis, may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/modification-catch-limits-gulf-mexico-red-snapper.*

FOR FURTHER INFORMATION CONTACT: Dan Luers, Southeast Regional Office,

NMFS, telephone: 727–824–5305, email: *daniel.luers@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Gulf reef fish fishery, which includes red snapper, is managed under the FMP. The FMP was prepared by the Council and is implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Steven Act).

Unless otherwise noted, all weights in this proposed rule are in round weight.

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and to achieve, on a continuing basis, the OY from federally managed fish stocks to ensure that fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems.

Red snapper in the Gulf EEZ is harvested by both the commercial and recreational sectors. The stock ACL for red snapper is equal to the acceptable biological catch (ABC) recommended by the Council's Scientific and Statistical Committee (SSC), and each sector has its own ACL and associated management measures. The stock ACL is allocated 51 percent to the commercial sector and 49 percent to the recreational sector. In 2015, Amendment 40 to the FMP (80 FR 22422, April 22, 2015) divided the recreational ACL (quota) between the Federal charter vessel/headboat (for-hire) component (42.3 percent) and the private angling component (57.7 percent).

In 2020, NMFS implemented state management of red snapper for the private angling component as specified in Amendments 50 A–F to the FMP (85 FR 6819, February 6, 2020). Through these amendments, each Gulf state was allocated a portion of the red snapper private angling component ACL and was delegated the authority to set the private angling fishing season, bag limit, and size limit. However, each Gulf state was managing the harvest by its private anglers using estimates from its own state data collection program, which, except for Texas, was not directly comparable to the state's ACL. To address this issue, the Council, Gulf states, and NMFS worked to develop and implement calibration ratios that adjusted each state's private angling component ACL so that it could be directly compared to the landings estimates produced by that state's data collection program. (87 FR 74014, December 2, 2022).

In 2016, Congress awarded funding to researchers in an effort to independently estimate the population size of red snapper in the Gulf. Commonly known as the ''Great Red Snapper Count'' (GRSC), this project's primary goal was to provide a snapshot estimate of abundance and distribution of age 2 and older red snapper on artificial, natural, and uncharacterized bottom habitat across the northern Gulf through 2019.

The results of the GRSC and catch projections produced by the NMFS Southeast Fisheries Science Center (SEFSC) using the GRSC estimates of red snapper abundance were made available to the Council's SSC in 2021. The SSC expressed some concerns about using the GRSC findings to recommend catch levels. Specifically, the SSC noted the uncertainty associated with the GRSC biomass estimate, questions about the productivity of the red snapper stock that are raised by the GRSC findings (that the productivity of the stock appears to be lower than previously assumed), and the declining trend observed in the longstanding NMFS Bottom Longline (BLL) survey. Based on these concerns, and until additional information could be presented related to the SSC's questions about some aspects of the GRSC, the SSC determined that it was not appropriate to use the GRSC-based projections to recommend a new ABC, which constrains the total allowable catch that may be specified by the Council. Instead, the SSC used the GRSC-based projections to recommend a new OFL of 25,600,000 lb (11,611,965 kg) but used projections generated using information from the NMFS BLL survey to recommend a new ABC of 14,400,000 lb (6,531,730 kg). The Council adopted these recommendations and specified new commercial and recreational catch limits using the established allocations. These new catch limits were effective on January 1, 2023 (87 FR 74014, December 2, 2022).

At its March 2022 meeting, the Council's SSC reviewed new catch level projections based on an SEFSC analysis that used updated GRSC abundance data for Florida and included an independent study that provided an estimate of red snapper abundance for Louisiana. A detailed explanation of the information reviewed by the SSC is available in the framework action. In summary, the SSC determined that the SEFSC projections informed by the GRSC abundance data for Texas, Alabama, Mississippi, the updated abundance data for Florida, and new abundance data for Louisiana are based on the best scientific information available and should be used for new OFL and ABC recommendations. Therefore, the SSC recommended a new OFL of 18,910,000 lb (8,577,432 kg) and a new ABC of 16,310,000 lb (7,398,092 kg), which is reduced from the OFL based on 30 percent probability of overfishing. The SSC recommended a decrease in the OFL because the total estimate of red snapper (over the age of 2) abundance was reduced from 118 million fish to 85.6 million fish. The SSC recommended an increase in the ABC because the decrease in the scientific uncertainty in the new abundance estimates allowed for a smaller buffer between the OFL and ABC.

Consistent with the Council's practice of setting the red snapper stock ACL equal to the ABC, the SSC's recommendation would result in the red snapper stock ACL increasing from 15,400,000 lb (7,000,000 kg) to 16,310,000 lb (7,400,000 kg). The Council approved the framework action to revise the red snapper harvest limits at its August 2022 meeting.

Management Measures Contained in This Proposed Rule

The framework action and this proposed rule would revise the red snapper OFL and ABC as recommended by the Council's SSC and increase the red snapper commercial and recreational ACLs and ACTs.

The commercial ACL (commercial quota) would increase from 7,854,000 lb (3,562,514 kg) to 8,318,100 lb (3,773,026 kg), and the recreational ACL (recreational quota) would increase from 7,546,000 lb (3,422,808 kg) to 7,991,900 lb (3,625,065 kg). This proposed rule would also increase the Federal for-hire component ACL from 3,191,958 lb (1,447,848 kg) to 3,380,574 lb (1,533,403 kg) and increase the Federal for-hire component ACT from 2,904,682 lb (1,317,542 kg) to 3,076,322 lb (1,395,396 kg). In addition, this proposed rule would increase the private angling component ACL from 4,354,042 lb (1,974,960 kg) to 4,611,326 lb (2,091,662 kg) and increase the private angling component ACT from 3,483,234 lb (1,579,968 kg) to 3,689,061 lb (1,673,330 kg).

This proposed rule would increase the state specific private angling component ACLs for each of the Gulf states. Each state's ACL listed below is consistent with the allocation established in Amendment 50A and the state specific calibration ratio implemented in January 2023. Alabama's private angling component ACL would increase from 558,200 lb

(253,195 kg) to 591,185 lb (268,157 kg). Florida's private angling component ACL would increase from 2,069,053 lb (938,507 kg) to 2,191,315 lb (993,964 kg). Louisiana's private angling component ACL would increase from 882,443 lb (400,269 kg) to 934,587 lb (423,922 kg). Mississippi's private angling component ACL would increase from 59,354 lb (26,923 kg) to 62,862 lb (28,514 kg). Finally, Texas's private angling component ACL would increase from 270,386 lb (122,645 kg) to 286,363 lb (129,892 kg).

Measure Contained in This Proposed Rule Not in the Framework Action

In addition to modifying the Gulf red snapper harvest level as specified in the framework action, this proposed rule would revise language related to the red snapper Federal for-hire component quota (50 CFR 622.39(a)(2)(i)(B)) and the red snapper Federal for-hire component ACT (50 CFR 622.41(q)(2)(iii)(B)). Since 2015, when the recreational ACL (quota) was allocated between the Federal for-hire and private angling components, these provisions have specified that the Federal for-hire quota and ACT apply ''to vessels that have been issued a valid Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year.'' (84 FR 24832 May 1, 2015). This language was intended to prohibit persons with vessels issued Federal for-hire permits from transferring those permits off the vessels and then fishing for red snapper under the private-angling component catch limits during the same fishing year. To clarify this prohibition, NMFS added the following language in the final rule implementing Amendments 50A–F (85 FR 6819, February 6, 2020): ''A person aboard a vessel that has been issued a charter vessel/headboat permit for Gulf reef fish any time during the fishing year may not harvest or possess red snapper in or from the Gulf EEZ when the Federal charter vessel/headboat component is closed.'' However, in that final rule, NMFS mistakenly referred to ''the Gulf EEZ,'' which is inconsistent with the 2015 language because it improperly suggests that persons aboard these vessels could harvest red snapper from state waters when the for-hire component is closed and, thus, allow the type of activity that the prior sentence was intended to prohibit. This proposed rule would remove ''EEZ'' from that sentence in both 50 CFR 622.39(a)(2)(i)(B) and 50 CFR 622.41(q)(2)(iii)(B) to reflect that the harvest limitation applies to the entire Gulf (Federal and state waters).

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the framework action, the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination follows. NMFS notes that this analysis has been updated since the final rule implementing the red snapper calibration and harvest level framework actions published on December 2, 2022, and which is effective on January 1, 2023 (87 FR 74014, December 2, 2022). The revised red snapper catch limits contained in that final rule will now serve as the no action alternative (status quo) in the updated factual basis included for this proposed rule. The conclusions of the analysis have not changed.

A description of this proposed rule, why it is being considered, and the objectives of this proposed rule are contained in the preamble of this proposed rule. The Magnuson-Stevens Act provides the statutory basis for this proposed rule.

This proposed rule would apply to all federally-permitted commercial vessels, federally-permitted charter vessels and headboats (for-hire vessels), and recreational anglers that fish for or harvest red snapper in Federal waters of the Gulf. It would also apply to red snapper individual fishing quota (IFQ) shareholders within the commercial sector. It would not directly apply to federally-permitted dealers. Any change in the supply of red snapper available for purchase by dealers as a result of this proposed rule, and associated economic effects, would be an indirect effect of the proposed rule and would therefore fall outside the scope of the RFA. Although this rulemaking would apply to for-hire vessels, it would not be expected to have any direct effects on these entities. For-hire vessels sell fishing services to recreational anglers. The proposed changes to the red snapper management measures would not directly alter the services sold by these vessels. Any change in demand for these fishing services, and associated economic effects, as a result of this proposed rule would be a consequence of behavioral change by anglers, secondary to any direct effect on anglers and, therefore, an indirect effect of this proposed rule. Because the effects on for-hire vessels would be indirect, they fall outside the scope of the RFA. Furthermore, for-hire captains and crew are not permitted to retain red snapper under the recreational bag limit, so only recreational anglers would be directly affected by the proposed changes to the red snapper recreational ACLs and ACTs. The RFA does not consider recreational anglers to be small entities, so they are outside the scope of this analysis (5 U.S.C. 603). Small entities include small businesses, small organizations, and small governmental jurisdictions (5 U.S.C. 601(6) and 601(3)–(5)). Recreational anglers are not businesses, organizations, or governmental jurisdictions. In summary, only the impacts on commercial vessels and IFQ shareholders will be discussed.

As of July 8, 2021, there were 825 limited access valid or renewable commercial Gulf reef fish permits. In order to commercially harvest red snapper, a vessel permit must also be linked to an IFQ account and possess sufficient allocation for this species. IFQ accounts can be opened and valid permits can be linked to IFQ accounts at any time during the year. Eligible vessels can receive red snapper allocation from other IFQ participants. On average from 2016 through 2020, there were 637 IFQ accounts that held red snapper allocation and 355 that held red snapper shares. During the same period, there were 438 federally permitted commercial vessels, on average each year, with reported landings of red snapper in the Gulf. Their average annual vessel-level gross revenue from all species for 2016 through 2020 was approximately $146,000 (2021 dollars) and red snapper accounted for approximately half of this revenue. For commercial vessels that harvested Gulf red snapper, NMFS estimates that economic profits are approximately 34 percent of annual gross revenue, on average. The maximum annual revenue from all species reported by a single one of the commercial vessels that landed Gulf red snapper from 2016 through 2020 was approximately $3.3 million (2021 dollars).

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is

commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. All of the commercial fishing businesses directly regulated by this proposed rule are believed to be small entities based on the NMFS size standard. No other small entities that would be directly affected by this proposed rule have been identified.

This proposed rule would modify the red snapper OFL, ABC, ACLs, and recreational ACTs for 2022 and subsequent years based on the OFL and ABC recommendations of the Gulf Council's SSC. As stated previously, this updated analysis utilizes the revised red snapper catch limits from the final rule that published on December 2, 2022 (87 FR 74014) as the no action alternative (status quo), which differs from those that were in place at the time final action was taken by the Council on the framework action. Under this proposed rule, the commercial ACL (quota) would increase by 464,100 lb (210,512 kg), which if harvested in full, would correspond to an estimated increase in annual ex-vessel revenue of approximately $2.28 million (2021 dollars). Divided by the average number of commercial vessels with reported landings of red snapper from 2016 through 2020, this would be an increase of approximately $5,205 (2021 dollars) in gross revenue and $1,770 in profits per vessel (4 percent of average annual gross revenue and profits). In addition to the expected increase in ex-vessel revenue, the proposed increase in the commercial red snapper quota would be expected to result in an annual increase in IFQ allocation value of approximately $1.55 million (2021 dollars). Finally, total red snapper IFQ share value would be expected to increase by approximately $16.15 million (2021 dollars). These estimates rely on average ex-vessel, IFQ allocation, and IFQ share price estimates from 2016 through 2020. Actual future prices could increase or decrease relative to this average because of market forces. NMFS expects that any negative price effects induced by this proposed rule, should they occur, would be outweighed by the benefits of the increased quota.

An additional item that is contained in the proposed rule that is not included in the framework action, are revisions to 50 CFR 622.41(q)(2)(iii)(B) and 50 CFR 622.39(a)(2)(i)(B), to remove the term ''EEZ'' from the following language, ''A person aboard a vessel that has been issued a charter vessel/headboat permit for Gulf reef fish any time during the fishing year may not harvest or possess red snapper in or from the Gulf EEZ when the Federal charter vessel/headboat component is closed.'' The term ''EEZ'' was inadvertently included in this language in the final rule implementing Amendments 50 A–F (85 FR 6819, February 6, 2020) and is inconsistent with the original language in those provisions that specify that Federal for-hire catch limits apply to vessels that have been issued the Federal for-hire permit at any time during the fishing year. This is an administrative change and is not expected to have any direct economic effects on any small entities. As such, this component of the proposed rule is outside the scope of the RFA.

In summary, the information provided above supports a determination that this proposed rule would not have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this proposed rule.

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 622

Annual catch limits, Fisheries, Fishing, Gulf, Red snapper, Reef fish, Quota.

Dated: February 17, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 622 as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.23, revise paragraph (a)(1)(ii) to read as follows:

§ 622.23 State management of the red snapper recreational sector private angling component in the Gulf EEZ.

(a) * * *

(1) * * *

(ii) *State private angling component ACLs.* All ACLs specified below are in round weight and are consistent with monitoring under the respective state's reporting system. Equivalent ACLs, consistent with monitoring under the Federal reporting system, are provided, as applicable. If a state's delegation is suspended, as described in paragraph (a)(1) of this section, the Federal equivalent ACL, or for the Texas regional management area the ACL in paragraph (a)(1)(ii)(E) of this section, applies in the EEZ off that state.

(A) *Alabama regional management area*—591,185 lb (268,157 kg); Federal equivalent—1,212,687 lb (550,066 kg).

(B) *Florida regional management area*—2,191,315 lb (993,964 kg); Federal equivalent—2,066,889 lb (937,525 kg).

(C) *Louisiana regional management area*—934,587 lb (423,922 kg); Federal equivalent—881,686 lb (399,926 kg).

(D) *Mississippi regional management area*—62,862 lb (28,514 kg); Federal equivalent—163,702 lb (74,254 kg).

(E) *Texas regional management area*—286,363 lb (129,892 kg).

* * * * *

■ 3. In § 622.39, revise paragraphs (a)(1)(i) and (a)(2)(i) to read as follows:

§ 622.39 Quotas.

* * * * *

(a) * * *

(1) * * *

(i) Commercial quota for red snapper—8,318,100 lb (3,773,027 kg), round weight.

* * * * *

(2) * * *

(i) *Recreational quota for red snapper*—

(A) *Total recreational.* The total recreational quota is 7,991,900 lb (3,625,065 kg), round weight.

(B) *Federal charter vessel/headboat component quota.* The Federal charter vessel/headboat component quota applies to vessels that have been issued a valid Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. A person aboard a vessel that has been issued a charter vessel/headboat permit for Gulf reef fish any time during the fishing year may not harvest or possess red snapper in or from the Gulf when the Federal charter vessel/headboat component is closed. The Federal charter vessel/headboat component quota is 3,380,574 lb (1,533,403 kg), round weight.

(C) *Private angling component quota.* The private angling component quota

applies to vessels that fish under the bag limit and have not been issued a Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. The private angling component quota is 4,611,326 lb (2,091,662 kg), round weight.

* * * * *

■ 4. In § 622.41, revise the paragraph (q)(2)(iii)(B) and the last sentence in (q)(2)(iii)(C) to read as follows:

§ 622.41 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(q) * * *

(2) * * *

(iii) * * *

(B) *Federal charter vessel/headboat component ACT.* The Federal charter vessel/headboat component ACT applies to vessels that have been issued a valid Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. A person aboard a vessel that has been issued a charter vessel/headboat permit for Gulf reef fish any time during the fishing year may not harvest or possess red snapper in or from the Gulf when the Federal charter vessel/headboat component is closed. The component ACT is 3,076,322 lb (1,395,396 kg), round weight.

(C) * * * The component ACT is 3,689,061 lb (1,673,330 kg), round weight.

[FR Doc. 2023–03834 Filed 2–27–23; 8:45 am]

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Notices

Federal Register
Vol. 88, No. 39
Tuesday, February 28, 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

Submission for OMB Review; Comment Request

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Comments are requested regarding: (1) 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) the accuracy of the agency's estimate of burden 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 those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding these information collections are best assured of having their full effect if received by March 30, 2023. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: NASS Data Security Requirements for Accessing Confidential Data.

OMB Control Number: 0535–NEW.

Summary of Collection: Title III of the Foundations for Evidence-Based Policymaking Act of 2018 (hereafter referred to as the Evidence Act) mandates that OMB establish a Standard Application Process (SAP) for requesting access to certain confidential data assets. Specifically, the Evidence Act requires OMB to establish a common application process through which agencies, the Congressional Budget Office, State, local, and Tribal governments, researchers, and other individuals, as appropriate, may apply for access to confidential data assets collected, accessed, or acquired by a statistical agency or unit. This new process will be implemented while maintaining stringent controls to protect confidentiality and privacy, as required by law.

Need and Use of the Information: Data collected, accessed, or acquired by statistical agencies and units is vital for developing evidence on conditions, characteristics, and behaviors of the public and on the operations and outcomes of public programs and policies. Access to confidential data on businesses, households, and individuals from federal statistical agencies and units enables agencies, the Congressional Budget Office, State, local, and Tribal governments, researchers, and other individuals to contribute evidence-based information to research and policy questions on economic, social, and environmental issues of national, regional, and local importance. This evidence can benefit the stakeholders in the programs, the broader public, as well as policymakers and program managers at the local, State, Tribal, and National levels.

Description of Respondents: Individuals or Households.

Number of Respondents: 200.

Frequency of Responses: Reporting; Annually.

Total Burden Hours: 484.

Levi S. Harrell,
Departmental Information Collection Clearance Officer.

[FR Doc. 2023–04075 Filed 2–27–23; 8:45 am]
BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2023–0006]

Notice of Request To Renew an Approved Information Collection: Voluntary Destruction of Imported Meat, Poultry, and Egg Products

AGENCY: Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, FSIS is announcing its intention to request renewal of the approved information collection regarding the voluntary destruction of imported meat, poultry, and egg products. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2023.

DATES: Submit comments on or before May 1, 2023.

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

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

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2023–0006. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202) 205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Title: Voluntary Destruction of Imported Meat, Poultry, and Egg Products.

OMB Number: 0583–0182.

Expiration Date of Approval: June 30, 2023.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18 and 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, and properly labeled and packaged.

Imported meat, poultry, and egg products that do not comply with U.S. requirements are not allowed to enter U.S. commerce and are identified as ''U.S. Refused Entry'' product. Inspection Program Personnel (IPP) are required to verify that U.S. refused entry product is stored and segregated from other product at an official import inspection establishment until final disposition occurs, or permission to move the shipment is granted by a FSIS Office of Field Operations (OFO) District Office (DO).

The regulations at 9 CFR 327.13, 381.202, 557.13, and 590.945 provide different options for the disposition of U.S. Refused entry product, including: (1) Exportation (return) of the product to the originating country or to a third country, if permitted; (2) destruction of the product for human food purposes; (3) denaturing the product so it cannot be used for human food; (4) conversion of the product to animal food if permitted and approved by the Food and Drug Administration (FDA), and that permission is communicated to the FSIS DO; and (5) rectification if the reason for refusal has been corrected.

FSIS is requesting renewal of the information collection to document the Importer/Broker/Agent decision to voluntarily destroy product for human food purposes. This information collection is applicable only to destruction witnessed by FSIS IPP. FSIS IPP uses the information during the observation of the product destruction to verify that the product being destroyed is the same product that was refused entry and that the product is controlled by the import establishment until destruction is completed.

The Importer/Broker/Agent completes FSIS Form 9840–4, Voluntary Destruction of Imported Meat (Including Siluriformes), Poultry, and Egg Product, for product that will be destroyed under FSIS supervision. The form is maintained in the FSIS case file. IPP also enter information into the Public Health Information System (PHIS), based on the information provided on the form.

FSIS has made the following estimates based upon an information collection assessment:

Estimate of Burden: FSIS estimates that it will take respondents an average of 5 minutes per response.

Respondents: Importers/Brokers/Agents.

Estimated Total Number of Respondents: 151.

Estimated Annual Number of Responses per Respondent: 1,416.

Estimated Total Annual Burden on Respondents: 17,818 hours. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 205–0495.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of FSIS' functions, including whether the information will have practical utility; (b) the accuracy of FSIS' estimate of the burden of the proposed collection of information, including the validity of the method 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, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than

English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; the USDA TARGET Center at (202) 720–2600 (voice and TTY); or the Federal Relay Service at (800) 877–8339.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, *USDA Program Discrimination Complaint Form,* which can be obtained online at *https://www.ocio.usda.gov/document/ad-3027,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

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Paul Kiecker,

Administrator.

[FR Doc. 2023–04087 Filed 2–27–23; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2023–0002]

Notice of Request To Renew an Approved Information Collection: Sanitation SOPs and Pathogen Reduction/HACCP

AGENCY: Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, FSIS is announcing its intention to request renewal of the approved information collection regarding Sanitation Standard Operating Procedures (Sanitation SOPs) and pathogen testing and Hazard Analysis and Critical Control Point (HACCP) Systems requirements. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2023.

DATES: Submit comments on or before May 1, 2023.

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

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

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2023–0002. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202) 205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Title: Sanitation SOPs and Pathogen Reduction/HACCP.

OMB Number: 0583–0103.

Expiration Date of Approval: June 30, 2023.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53) as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, and properly labeled and packaged.

FSIS is announcing its intention to request renewal of the approved information collection regarding Sanitation Standard Operating Procedures (Sanitation SOPs), pathogen reduction, and Hazard Analysis and Critical Control Point (HACCP) systems requirements. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2023.

FSIS regulations require that establishments: develop, implement, and revise, as needed, written Sanitation SOPs (9 CFR part 416); (2) conduct regular microbial testing to verify the adequacy of process controls for the prevention and removal of fecal contamination and associated bacteria (9 CFR 9 CFR 310.18, 310.25(a), or 381.65 (f) and (g)); and (3) develop and implement a system of preventive controls designed to improve the safety of their products, known as HACCP, and maintain necessary records to support the system (9 CFR part 417).

Establishments may have programs that are prerequisite to HACCP that are designed to provide the basic environmental and operating conditions necessary for the production of safe, wholesome food. Because of its prerequisite programs, an establishment may decide that a food safety hazard is not reasonably likely to occur in its operations. The establishment would need to document this determination in its hazard analysis and include the procedures it employs to ensure that the program is working and that the hazard is not likely to occur (9 CFR 417.5(a)(1)).

FSIS has made the estimates below based upon an information collection assessment related to documentation requirements discussed above.

Estimate of Burden: FSIS estimates that it will take respondents an average of 1,157 hours each year to comply with the information request associated with this collection.

Respondents: Meat and poultry establishments.

Estimated Number of Respondents: 6,087.

Estimated Total Annual Burden on Respondents: 7,045,303 hours. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and

Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of FSIS' functions, including whether the information will have practical utility; (b) the accuracy of FSIS' estimate of the burden of the proposed collection of information, including the validity of the method 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, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; the USDA TARGET Center at (202) 720–2600 (voice and TTY); or the Federal Relay Service at (800) 877–8339.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, *USDA Program Discrimination Complaint Form,* which can be obtained online at *https://www.ocio.usda.gov/document/ad-3027,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

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Paul Kiecker,

Administrator.

[FR Doc. 2023–04084 Filed 2–27–23; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2023–0004]

Notice of Request To Renew an Approved Information Collection: Advanced Meat Recovery

AGENCY: Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, FSIS is announcing its intention to request renewal of the approved information collection regarding the regulatory requirements associated with the production of meat from advanced meat recovery systems. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2023.

DATES: Submit comments on or before May 1, 2023.

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

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

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2023–0004. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202) 205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Title: Advanced Meat Recovery.

OMB Number: 0583–0130.

Expiration Date of Approval: June 30, 2023.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18 and 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*). This statute mandates that FSIS protect the public by verifying that meat products are safe, wholesome, and properly labeled and packaged.

FSIS is announcing its intention to request renewal of the approved information collection regarding the regulatory requirements associated with the production of meat from advanced meat recovery systems. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2023.

The regulations at 9 CFR 318.24 state that meat, as defined in 9 CFR 301.2, may be derived by mechanically separating skeletal muscle tissue from the bones of livestock, other than skulls or vertebral column bones of cattle 30 months of age and older as provided in 9 CFR 310.22, using advances in mechanical meat/bone separation machinery (*i.e.,* AMR systems) that, recover meat (1) without significant incorporation of bone solids or bone marrow as measured by the presence of calcium and iron in excess of the requirements in this section, and (2) without the presence of any brain, trigeminal ganglia, spinal cord, or dorsal root ganglia. As a prerequisite to labeling or using AMR product, establishments are to develop, implement, and maintain written procedures that ensure that the establishment's production process is in control, which includes testing for calcium, iron, spinal cord, and dorsal root ganglia, documenting testing protocols, handling product in a manner that does not cause product to be misbranded or adulterated, and maintaining records on a daily basis sufficient to document the implementation and verification of its production process.

FSIS has made the following estimates based upon an information collection assessment related to the written procedures described above:

Estimate of Burden: FSIS estimates that it will take respondents an average of a half hour per response.

Respondents: Official establishments that produce meat from AMR systems.

Estimated Number of Respondents: 47.

Estimated Number of Annual Responses per Respondent: 900.

Estimated Total Annual Burden on Respondents: 21,159 hours. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 205–0495.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of FSIS' functions, including whether the information will have practical utility; (b) the accuracy of FSIS' estimate of the burden of the proposed collection of information, including the validity of the method 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, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; the USDA TARGET Center at (202) 720–2600 (voice and TTY); or the Federal Relay Service at (800) 877–8339.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, *USDA Program Discrimination Complaint Form,* which can be obtained online at *https://www.ocio.usda.gov/document/ad-3027,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant

Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

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Paul Kiecker,

Administrator.

[FR Doc. 2023–04085 Filed 2–27–23; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2023–0005]

Notice of Request To Renew an Approved Information Collection: Nutrition Labeling of Major Cuts of Single-Ingredient Raw Meat or Poultry Products and Ground or Chopped Meat and Poultry Products

AGENCY: Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, FSIS is announcing its intention to request renewal of the approved information collection regarding nutrition labeling of the major cuts of single-ingredient raw meat or poultry products and ground or chopped meat and poultry products. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2023.

DATES: Submit comments on or before May 1, 2023.

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

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

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2023–0005. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202) 205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Title: Nutrition Labeling of Major Cuts of Single-Ingredient Raw Meat or Poultry Products and Ground or Chopped Meat and Poultry Products.

OMB Number: 0583–0148.

Expiration Date of Approval: June 30, 2023.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18 and 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, and properly labeled and packaged.

FSIS is announcing its intention to request renewal of the approved information collection regarding nutrition labeling of the major cuts of single-ingredient raw meat or poultry products and ground or chopped meat and poultry products. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2023.

FSIS requires nutrition labeling of the major cuts of single-ingredient, raw meat and poultry products, unless an exemption applies. Major cuts are defined in the regulations and include such products as Beef Chuck Blade Roast, Beef Brisket, Chicken Breast, Turkey Thigh (see 9 CFR 317.344 and 381.444). For these products, the nutrition labeling may be on the package or at point of purchase. FSIS also requires nutrition labels on all ground or chopped meat and poultry products, with or without added seasonings, unless an exemption applies. Further, the nutrition labeling requirements for all ground or chopped meat and poultry products are consistent with the nutrition labeling requirements for multi-ingredient and heat processed products (see 9 CFR 381.400(a), 317.300(a), 317.301(a), and 381.401(a)).

FSIS has made the following estimates based upon an information collection assessment:

Estimate of Burden: FSIS estimates that it will take respondents an average of a half hour per response.

Respondents: Official establishments, grocery stores and warehouses.

Estimated No. of Respondents: 76,439.

Estimated No. of Annual Responses per Respondent: 1.77.

Estimated Total Annual Burden on Respondents: 67,861 hours. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 205–0495.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of FSIS' functions, including whether the information will have practical utility; (b) the accuracy of FSIS' estimate of the burden of the proposed collection of information, including the validity of the method 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, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS

web page located at: *https://www.fsis.usda.gov/federal-register.*

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USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; the USDA TARGET Center at (202) 720–2600 (voice and TTY); or the Federal Relay Service at (800) 877–8339.

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(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

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Paul Kiecker,

Administrator.

[FR Doc. 2023–04086 Filed 2–27–23; 8:45 am]

BILLING CODE 3410–DM–P

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Senior Executive Service; Performance Review Board

AGENCY: U.S. Chemical Safety and Hazard Investigation Board (CSB).

ACTION: Notice of appointment of members to the Senior Executive Service Performance Review Board.

SUMMARY: This notice announces the membership of the Chemical Safety and Hazard Investigation Review Board (CSB) Senior Executive Service (SES) Performance Review Board (PRB).

DATES: These appointments are effective on the date of publication of this notice to March 2024.

FOR FURTHER INFORMATION CONTACT: Selena Simmons-Ferguson, HR Director, CSB, 1750 Pennsylvania Ave. NW, Suite 910, (202) 510–3054.

SUPPLEMENTARY INFORMATION: 5 U.S.C. 4314(c)(1) requires each agency to establish, in accordance with regulations with regulations prescribed by the Office of Personnel Management, a performance review board (PRB). The PRB reviews the initial performance ratings of members of the Senior Executive Service (SES) and makes recommendations for final annual performance ratings for senior executives. In addition, the PRB will review and recommend executive performance bonuses and pay increases.

Publication of the PRB membership is required by 5 U.S.C. 4314(c)(4). Because the CSB is a small independent Federal agency, in addition to a member from the CSB, the agency is drawing additional career appointed SES members for its PRB from other Federal agencies. The members of the CSB's PRB have committed to serving a one-year term.

The PRB shall consist of at least three members, and more than half of the members shall consist of career appointees when reviewing the performance of a career appointed SES. The following persons comprise the CSB Senior Executive Service PRB:

Dr. Sylvia Johnson, Board Member, U.S. Chemical Safety and Hazard Investigation Board; Rachel A. Wallace, Deputy General Counsel and Chief Operating Officer, Office of Science and Technology Policy, Executive Office of the President; and Jerold Gidner, Director, Bureau of Trust Funds Administration, U.S. Department of Interior.

Dated: February 22, 2023.

Tamara Qureshi,

Assistant General Counsel, Chemical Safety and Hazard Investigation Board.

[FR Doc. 2023–04034 Filed 2–27–23; 8:45 am]

BILLING CODE 6350–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Virginia Advisory Committee; Cancellation

AGENCY: Commission on Civil Rights.

ACTION: Notice; cancellation of virtual business meeting.

SUMMARY: The Commission on Civil Rights published a notice in the **Federal Register** concerning a virtual business meeting of the Virginia Advisory Committee. The meeting scheduled for Tuesday, February 28, 2023, at 12:00 p.m. (ET) is cancelled. The notice is in the **Federal Register** of Monday, February 13, 2023, in FR Doc. 2023–02998 in the first and second columns of page 9226.

FOR FURTHER INFORMATION CONTACT: Sarah Villanueva, *svillanueva@usccr.gov,* 202–769–2843.

Dated: February 23, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–04091 Filed 2–27–23; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Tennessee Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that a meeting of the Tennessee Advisory Committee to the Commission will convene by Zoom on Thursday, March 16, 2023, at 12:00 p.m. (CT). The purpose of the meeting is to hear testimony on the Committee's project on voting rights and conduct a business meeting.

DATES: The meeting will take place on Thursday, March 16, 2023, at 12:00 p.m. (CST).

ADDRESSES:

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1617427556?pwd=SHkrTW5YcXBVRWpHNDZWV0lCTGpCZz09.

Telephone (Audio Only): Dial (833) 568–8864 USA Toll Free; Access Code: 161 742 7556.

FOR FURTHER INFORMATION CONTACT: Victoria Moreno at *vmoreno@usccr.gov* or by phone at 434–515–0204.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the Zoom link above. If joining only via phone, callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the call-in number found through registering at the web link provided above for the meeting. Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the respective meeting. Written comments may be emailed to Victoria Moreno at *vmoreno@usccr.gov.* All written comments received will be available to the public.

Persons who desire additional information may contact the Regional Programs Unit at (202) 809–9618. Records and documents discussed during the meeting will be available for public viewing as they become available at the *www.facadatabase.gov.* Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Regional Programs Unit at the above phone number or email address.

Agenda: Thursday, March 16, 2023, at 12:00 p.m. (CT)

1. Welcome & Roll Call
2. Chair's Comments
3. Panelist Testimony
4. Committee Business
5. Next Steps
6. Public Comment
7. Adjourn

Dated: February 22, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–04004 Filed 2–27–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Utah Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Utah Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold its inaugural business meeting via Zoom at 11:00 a.m. MT on Tuesday, March 7, 2023.

DATES: The meeting will take place on Tuesday, March 7, 2023, from 11 a.m.–12 p.m. MT.

ADDRESSES:

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1619194238.

Telephone (Audio Only): Dial (833) 435–1820 USA Toll Free; Meeting ID: 161 919 4238.

FOR FURTHER INFORMATION CONTACT: David Barreras, DFO, at *dbarreras@usccr.gov* or (202) 656–8937.

SUPPLEMENTARY INFORMATION: Committee meetings are available to the public through the videoconference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Closed captions will be provided for individuals who are deaf, deafblind, or hard of hearing. To request additional accommodations, please email *dbarreras@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Liliana Schiller at *lschiller@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (202) 809–9618.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Utah Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at the above phone number.

Agenda

I. Welcome & Roll Call
II. Introductions
III. Designated Federal Officer—Overview
IV. Public Comment
V. Next Steps
VI. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given fewer than 15 calendar days prior to the meeting because of the exceptional circumstances of final preparations for the upcoming scheduled Committee meeting.

Dated: February 22, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–04019 Filed 2–27–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Qingshan Li, Room 201 NO106 Lane 24, Chengshan Rd., Pudong District, Shanghai, China 200126; Order Denying Export Privileges

On June 12, 2020, in the U.S. District Court for the Southern District of California, Qingshan Li (''Li'') was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C.

2778) (''AECA''). Specifically, Li was convicted of knowingly and willfully attempting to export from the United States to China, a Harris Falcon III AN/PRC 152A Radio, which is designated as a defense article on the United States Munitions List, without the required licenses or written authorization from the State Department. As a result of his conviction, the Court sentenced Li to 36 months of confinement, three years of supervised release and $100 assessment. Li was also placed on U.S. Department of State's debarred list.

Pursuant to Section 1760(e) of the Export Control Reform Act (''ECRA''), the export privileges of any person who has been convicted of certain offenses, including, but not limited to, Section 38 of the AECA, may be denied for a period of up to ten (10) years from the date of his/her conviction. *See* 50 U.S.C. 4819(e). In addition, any Bureau of Industry and Security (''BIS'') licenses or other authorizations issued under ECRA, in which the person had an interest at the time of the conviction, may be revoked. *Id.*

BIS received notice of Li's conviction for violating Section 38 of the AECA. BIS provided notice and opportunity for Li to make a written submission to BIS, as provided in Section 766.25 of the Export Administration Regulations (''EAR'' or the ''Regulations''). 15 CFR 766.25.[2] BIS has not received a written submission from Li.

Based upon my review of the record and consultations with BIS's Office of Exporter Services, including its Director, and the facts available to BIS, I have decided to deny Li's export privileges under the Regulations for a period of 10 years from the date of Li's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which Li had an interest at the time of his conviction.[3]

Accordingly, it is hereby *ordered*:

First, from the date of this Order until June 12, 2030, Qingshan Li, with a last known address of Room 201 NO106 Lane 24, Chengshan Rd., Pudong District, Shanghai, China 200126, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not directly or indirectly participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, pursuant to Section 1760(e) of ECRA (50 U.S.C. 4819(e)) and Sections 766.23 and 766.25 of the Regulations, any other person, firm, corporation, or business organization related to Li by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with part 756 of the Regulations, Li may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Li and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until June 12, 2030.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–03985 Filed 2–27–23; 8:45 am]

BILLING CODE 3510–DT–P

[2] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2022).

[3] The Director, Office of Export Enforcement, is the authorizing official for issuance of denial orders, pursuant to amendments to the Regulations (85 FR 73411, November 18, 2020).

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Transportation and Related Equipment Technical Advisory Committee; Notice of Open Meeting

The Transportation and Related Equipment Technical Advisory Committee will meet on March 15, 2023, 11:30 a.m., Eastern Standard Time, via teleconference. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to transportation and related equipment or technology.

Agenda

Public Session

1. Welcome and Introductions.
2. Status reports by working group chairs.
3. Public comments and Proposals.

To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than March 8, 2023.

To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to

Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via email.

For more information, contact Ms. Springer via email.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2023–04105 Filed 2–27–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–124, C–570–125]

Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders—Dual-Piston Engines

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that imports of dual-piston engines with a single, common combustion chamber, of the type designed by FNA Group, Inc. (FNA), produced in, and exported from the People's Republic of China (China), constitute later-developed merchandise that is circumventing the antidumping duty (AD) and countervailing duty (CVD) orders on certain vertical shaft engines between 99cc and up to 225cc, and parts thereof (small vertical engines), from China. Commerce is also applying this affirmative circumvention finding on a country-wide basis.

DATES: Applicable February 28, 2023.

FOR FURTHER INFORMATION CONTACT: Paul Gill, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5673.

SUPPLEMENTARY INFORMATION:

Background

On September 29, 2022, Commerce published the *Preliminary Determination* of the circumvention inquiry of the AD and CVD orders on small vertical engines from China [1] with respect to imports of dual-piston engines with a single, common combustion chamber, of the type designed by FNA, produced in, and exported from China.[2] We invited parties to comment on the *Preliminary Determination.* For a complete description of the events that followed the *Preliminary Determination, see* the Issues and Decision Memorandum.[3]

Scope of the Orders

The merchandise subject to the *Orders* is small vertical engines from China. For a complete description of the scope of the *Orders, see* the Issues and Decision Memorandum.

Merchandise Subject to the Circumvention Inquiry

This circumvention inquiry covers dual-piston engines with a single, common combustion chamber, of the type designed by FNA, produced in, and exported from China, that otherwise meet the scope of the *Orders.* The dual-piston engines subject to this circumvention inquiry have a common combustion chamber shared by two cylinders that contain pistons working in unison.[4]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of the issues raised is attached in the appendix to this notice. The Issues and Decision Memorandum is a public document and is filed electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Affirmative Final Determination of Circumvention

Consistent with the *Preliminary Determination,*[5] Commerce continues to determine that imports of dual-piston engines with a single, common combustion chamber, of the type designed by FNA, produced in, and exported from China, constitute later-developed merchandise that is circumventing the *Orders,* pursuant to section 781(d) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.226(k). Commerce also continues to apply this affirmative circumvention finding on a country-wide basis.

Liquidation of Entries

In the *Preliminary Determination,* Commerce stated it would instruct U.S. Customs and Border Protection (CBP) to suspend liquidation of, and collect cash deposits on, imports of dual-piston engines with a single, common combustion chamber, of the type designed by FNA, produced in, and exported from China, that were entered, or withdrawn from warehouse, for consumption on or after April 25, 2022 (*i.e.,* the date of the initiation of this inquiry).[6] On October 26, 2022, Commerce rescinded the administrative review of the AD order for the period July 23, 2020, through April 30, 2022.[7] Accordingly, the administrative review covering entries that would have been suspended had they entered from April 25, 2022, through April 30, 2022, has been rescinded.

For any unliquidated entries of dual-piston engines with a single, common combustion chamber, of the type designed by FNA, produced in, and exported from China, that entered as non-AD/CVD type entries (*e.g.,* type 01) that were shipped and/or entered, or withdrawn from warehouse, for consumption in the United States after April 25, 2022, importers should file a Post Summary Correction with CBP, in accordance with CBP's regulations regarding the conversion of such entries from non-AD/CVD case numbers to AD/CVD type entries (*e.g.,* type 01 to type 03). For such shipments, the Post Summary Corrections should be completed as soon as practicable, but no later than 45 days after the publication of this notice in the **Federal Register**. Importers should report those AD/CVD type entries of merchandise under the AD/CVD case numbers of the *Orders* on small vertical engines from China (*i.e.,*

[1] *See Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof from the People's Republic of China: Antidumping and Countervailing Duty Orders,* 86 FR 23675 (May 4, 2021) (*Orders*).

[2] *See Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping and Countervailing Duty Orders-Dual-Piston Engines; Rescission in Part,* 87 FR 59059 (September 29, 2022) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[3] *See* Memorandum, ''Certain Vertical Shaft Engines Between 99cc and 225cc from the People's Republic of China: Issues and Decision Memorandum for Circumvention Inquiry—Dual-Piston Engines,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See* Petitioner's Letter, ''Request for Anti-Circumvention Inquiry Pursuant to Section 781(c) and/or Section 781(d) of the Tariff Act of 1930,'' dated March 4, 2022, at 2–3.

[5] *See Preliminary Determination* PDM.

[6] *Id.,* 87 FR at 59060.

[7] *See Rescission of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 64764 (October 26, 2022).

A–570–124, C–570–125) or appropriate third-country case numbers (*i.e.,* A–201–996, C–201–997). The importer must pay case deposits on those entries consistent with the regulations governing post summary corrections that require the payment of additional duties.

Commerce intends to instruct CBP to assess ADs and/or CVDs on all appropriate entries of dual-piston engines with a single, common combustion chamber, of the type designed by FNA, produced in, and exported from China, during the periods of review noted above at rates equal to the applicable cash deposit of estimated ADs or CVDs in effect at the time of entry, or withdrawal of merchandise from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue assessment instructions no earlier than 35 days after the publication of this notice in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Continuation of Suspension of Liquidation

In accordance with 19 CFR 351.225(l)(3), Commerce will direct CBP to continue to suspend liquidation of dual-piston engines with a single, common combustion chamber, of the type designed by FNA, produced in, and exported from China, that are entered, or withdrawn from warehouse, for consumption on or after April 25, 2022 (*i.e.,* the date of the initiation of this inquiry).[8] Pursuant to 19 CFR 351.225(l)(3), Commerce will also instruct CBP to require cash deposits of estimated duties equal to the AD and CVD rates in effect for small vertical engines for each unliquidated entry of dual-piston engines with a single, common combustion chamber, of the type designed by FNA, produced in, and exported from China, that are entered, or withdrawn from warehouse, for consumption on or after April 25, 2022. The suspension of liquidation and cash deposit instructions will remain in effect until further notice.

Administrative Protective Order

This notice serves as the only reminder to all parties subject to the administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of the APO is a sanctionable violation.

Notification to Interested Parties

This determination is published in accordance with section 781(d) of the Act and 19 CFR 351.226(g)(2) and (k).

Dated: February 21, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2023–04046 Filed 2–27–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–835]

Furfuryl Alcohol From the People's Republic of China: Continuation of Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on furfuryl alcohol from the People's Republic of China (China) would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing this notice of continuation of the AD order on furfuryl alcohol from China.

DATES: Applicable February 28, 2023

FOR FURTHER INFORMATION CONTACT: Matthew Palmer, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1678.

SUPPLEMENTARY INFORMATION:

Background

On June 21, 1995, Commerce published the AD order on furfuryl alcohol from China.[1] On July 1, 2022, Commerce published the notice of initiation of the fifth sunset review of the *Order,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2]

As a result of its expedited review, on November 2, 2022, Commerce determined that revocation of the AD order on furfuryl alcohol from China would be likely to lead to a continuation or recurrence of dumping, and, therefore, notified the ITC of the magnitude of the margins likely to prevail should the *Order* be revoked.[3] On February 15, 2023, the ITC published its determination, pursuant to section 751(c) of the Act, that revocation of the existing AD order on furfuryl alcohol from China would be likely to lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[4]

Scope of the Order

The merchandise covered by this *Order* is furfuryl alcohol ($C_4H_3OCH_2OH$). Furfuryl alcohol is a primary alcohol, and is colorless or pale yellow in appearance. It is used in the manufacture of resins and as a wetting agent and solvent for coating resins, nitrocellulose, cellulose acetate, and other soluble dyes. The product subject to this *Order* is classifiable under subheading 2932.13.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope is dispositive.

Continuation of the Order

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would be likely to lead to a continuation or recurrence of dumping, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, Commerce hereby orders the

[8] *Id.*

[1] *See Notice of Antidumping Duty Order: Furfuryl Alcohol from the People's Republic of China (PRC),* 60 FR 32302 (June 21, 1995) (*Order*).

[2] *See Initiation of Five-Year* (*Sunset*) *Reviews,* 87 FR 39459 (July 1, 2022).

[3] *See Furfuryl Alcohol from the People's Republic of China: Final Results of Expedited Fifth Sunset Review of Antidumping Duty Order,* 87 FR 66127 (November 2, 2022).

[4] *See Furfuryl Alcohol from the People's Republic of China,* Inv. No. 731–TA–703 (Fifth Review), USITC Publication 5407 (February 2023).

continuation of the AD order on furfuryl alcohol from China. U.S. Customs and Border Protection will continue to collect cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the *Order* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, Commerce intends to initiate the next five-year review of the *Order* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely notification of return/destruction or conversion to judicial protective order is hereby requested. Failure to comply is a violation of the APO which may be subject to sanctions.

Notification to Interested Parties

This five-year (sunset) review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: February 21, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–04045 Filed 2–27–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC799]

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold its 147th Scientific and Statistical Committee (SSC) and its 194th Council meeting to take actions on fishery management issues in the Western Pacific Region. The Council will also hold meetings of the following advisory groups and standing committees: Joint Meeting of the American Samoa Advisory Panel (AP), Hawaii AP, and Fishing Industry Advisory Committee (FIAC); Guam Regional Ecosystem Advisory Committee (REAC); Commonwealth of the Northern Mariana Islands (CNMI) REAC; Mariana Archipelago AP; and Executive and Budget Standing Committee (SC) meeting.

DATES: The meetings will be held between March 14 and March 31, 2023. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The 147th SSC meeting will be held in a hybrid format with in-person and remote participation (Webex) options available for the SSC members, and public attendance limited to web conference via Webex. In-person attendance for the SSC members will be hosted at the Council office, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813.

The Joint Meeting of the American Samoa AP, Hawaii AP and FIAC will be held by web conference via Webex.

The Guam REAC, CNMI REAC, Mariana Archipelago AP, and the 194th Council Meeting will be held as a hybrid meeting for Council members and public, with remote participation option available via Webex. The Executive and Budget SC will be held as an in-person meeting for Council members and public. The in-person portion of the Guam REAC meeting will be held at the Governor's Main Conference Room, 513 West Marine Corps Drive, Ricardo J. Bordallo Complex, Hagatna, GU 96910. The in-person portion of the CNMI REAC, Mariana Archipelago AP, and Executive and Budget SC will be held at the Crowne Plaza, Coral Tree Ave., Saipan, MP 96950. The first two days of the 194th Council meeting and the CNMI Fishers Forum will be held at the Crowne Plaza, Saipan, MP, and the last two days of the Council meeting will be held at the Hilton Guam Resort and Spa, 202 Hilton Road, Tumon Bay, GU 96913. The Guam Fishers Forum will be held at the Guam Museum, 193 Chalan Santo Papa Juan Pablo Dos, Hagatna, GU 96910.

Specific information on joining the meeting, connecting to the web conference and providing oral public comments will be posted on the Council website at *www.wpcouncil.org.* For assistance with the web conference connection, contact the Council office at (808) 522–8220.

Council address: Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; phone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: The 147th SSC meeting will be held between 9 a.m. and 5 p.m. Hawaii Standard Time (HST) on March 14, 2023, 10:30 a.m. and 5 p.m. on March 15, 2023, and 9 a.m. and 5 p.m. on March 16, 2023. The Joint Meeting of the American Samoa AP, Hawaii AP and FIAC will be held between 5 p.m. and 7 p.m. HST on March 16, 2023. The Guam REAC meeting will be held between 8:30 a.m. and 4 p.m. Chamorro Standard Time (ChST) on March 23, 2023. The CNMI REAC meeting will be held between 10 a.m. and 4 p.m. ChST on March 24, 2023. The Mariana Archipelago AP meeting will be held between 10 a.m. and 4 p.m. ChST on March 25, 2023. The Executive and Budget SC meeting will be held between 10:00 a.m. and 12 p.m. ChST on March 26, 2023. The portion of the Executive and Budget SC from 11:30 a.m. to 12 p.m. will be closed to the public for employment matters in accordance with section 302(i)(3) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The first two days of the 194th Council Meeting will be held between 9 a.m. and 5 p.m. ChST on March 27–28, 2023. The CNMI Fishers Forum will be held between 6 p.m. and 9 p.m. ChST on March 27, 2023. The first Public Comment on Non-Agenda Items will be held between 4 p.m. and 4:30 p.m. ChST on March 28, 2023. The last two days of the 194th Council Meeting will be held between 9 a.m. and 5 p.m. ChST on March 30–31, 2023. The second Public Comment on Non-Agenda Items will be held between 4:30 p.m. and 5 p.m. ChST on March 30, 2023. The Guam Fishers Forum will be held between 6 p.m. and 9 p.m. ChST on March 30, 2023.

Please note that the evolving public health situation regarding COVID–19 may affect the conduct of the March Council and its associated meetings. At the time this notice was submitted for publication, the Council anticipated convening the Standing Committee meeting as an in-person meeting only, and the Council meeting as an in-person meeting with a web conference attendance option. If public participation options will be modified, the Council will post notice on its website at *www.wpcouncil.org* by, to the extent practicable, 5 calendar days before each meeting.

Agenda items noted as ''Final Action'' refer to actions that may result in Council transmittal of a proposed fishery management plan, proposed plan amendment, or proposed regulations to the U.S. Secretary of Commerce, under Sections 304 or 305 of the MSA. In addition to the agenda items listed here, the Council and its advisory bodies will hear recommendations from Council advisors. An opportunity to submit public comment will be provided throughout the agendas. The order in which agenda items are addressed may change and will be announced in advance at the Council meeting. The meetings will run as late as necessary to complete scheduled business.

Background documents for the 194th Council meeting will be available at *www.wpcouncil.org.* Written public comments on final action items at the 194th Council meeting should be received at the Council office by 5 p.m. HST, Thursday, March 23, 2023, and should be sent to Kitty M. Simonds, Executive Director; Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813, phone: (808) 522–8220 or fax: (808) 522–8226; or email: *info@wpcouncil.org.* Written public comments on all other agenda items may be submitted for the record by email throughout the duration of the meeting. Instructions for providing oral public comments during the meeting will be posted on the Council website. This meeting will be recorded (audio only) for the purposes of generating the minutes of the meeting.

Agenda for the 147th SSC Meeting

Tuesday, March 14, 2023, 9 a.m. to 5 p.m. HST

1. Introductions
2. Approval of Draft Agenda and Assignment of Rapporteurs
3. Status of the 146th SSC Meeting Recommendations
4. Pacific Islands Fisheries Science Center Director Report
5. Island Fisheries
   - A. Western Pacific Bottomfish Fisheries
     1. American Samoa Bottomfish Management Unit Species (BMUS) Stock Assessment and Western Pacific Stock Assessment Review Update
     2. Guam Bottomfish Data Workshops
   - B. Establishing Status Determination Criteria for Kona Crab Fisheries (Action Item)
   - C. Gold Coral Management (Action Item)
   - D. Northwestern Hawaiian Islands (NWHI) Fishing Cost Recovery Analysis (Action Item)
   - E. Public Comment
   - F. SSC Discussion and Recommendations
6. Protected Species
   - A. Ecosystem-based Fishery Management (EBFM) Turtle Model Workshop Report
   - B. Hawaii Deep-set and American Samoa Longline Fishery Draft Biological Opinions (BiOps)
     1. Updated Assessment of Population-level Impacts of Leatherback Turtle Interactions in the Hawaii Deep-set Longline Fishery
     2. Review of the Draft BiOps
   - C. A Potential New Assessment Approach for Hawaii Pelagic False Killer Whales
   - D. Review of Potential Measures for the False Killer Whale Take Reduction Plan Modifications
   - E. Draft Recovery Plan for Oceanic Whitetip Sharks
   - F. Public Comment
   - G. SSC Discussion and Recommendations

Wednesday, March 15, 2023, 10:30 a.m. to 5 p.m. HST

7. Pelagic and International Fisheries
   - A. 2022 Longline Fishery Reports
     1. Hawaii Longline Fishery Report
     2. American Samoa Longline Fishery Report
   - B. International Billfish Biological Sampling Research Update
   - C. Multi-Year Territorial Bigeye Tuna Catch and Allocation Specifications (Action Item)
   - D. Bayesian Meta-synthesis of Shark Bycatch Mortality to Support Evidence-informed Hazard Mitigation Policy
   - E. Area-based Management Issues
     1. Limited Conservation Efficacy of Large-Scale Marine Protected Areas for Pacific Skipjack and Bigeye Tunas
     2. Council Coordination Committee Area-Based Management Subcommittee Manuscript
     3. Updated Analyses of Papahānaumokuākea Marine National Monument Expansion Spillover
   - F. Updating the Council's Pelagic Fisheries Research Plan
   - G. Western & Central Pacific Fisheries Commission (WCPFC) Tropical Tuna Scientific Requests
   - H. Public Comment
   - I. SSC Discussion and Recommendations

Thursday, March 16, 2023, 9 a.m. to 5 p.m. HST

8. Other Business
   - A. June 2023 SSC Meetings Dates
9. Summary of SSC Recommendations to the Council

Agenda for the Joint Meeting of the American Samoa AP, Hawaii AP and FIAC

Thursday, March 16, 2023, 5 p.m. to 7 p.m. HST

1. Welcome and Introductions
2. Review of Draft American Samoa Longline and Hawaii Longline Fishery BiOps
   - A. Draft BiOp Overview
   - B. Advisory Group Review of the Draft BiOps
3. Review of Potential Measures for the False Killer Whale Take Reduction Plan Modifications
4. Public Comment
5. Discussion and Recommendations
6. Other Business

Agenda for the Guam REAC Meeting

Thursday, March 23, 2023, 8:30 a.m. to 4 p.m. ChST

1. Welcome and Introductions
2. About the Guam REAC
3. Current Fishery Ecosystem Issues
   - a. Introduction and Overview of Endangered Species Act (ESA) Critical Habitat
   - b. Status of Guam Fisheries Stocks
   - c. Overview of Data Collection System and Efforts
4. Territorial Issues
   - a. Marine Conservation Plan 2023–2026
   - b. Developing Fishery Management Plans
5. Federal Issues
   - a. Military Issues
     - i. The Use of Open Burn on Guam
     - ii. Explosive Ordinance/Blasting Pit Permit at Tarague Basin and Sea Turtle Nesting Mitigation
     - iii. Planned Military Exercises at Whiskey 517 and Working with the Fishing Community for Safe Passage
   - b. Review of the Sikes Act Agreement
   - c. Status of Guam National Wildlife Refuge and US Marine Corps Firing Range
6. Updates on the NOAA Fisheries Equity and Environmental Justice (EEJ) Strategy
7. Public Comments
8. Discussion and Recommendations
9. Other Business

Agenda for the CNMI REAC Meeting

Friday, March 24, 2023, 10 a.m. to 4 p.m. ChST

1. Welcome and Introductions
2. About the CNMI REAC
3. Current Fishery Ecosystem Issues

a. Introduction and Overview of ESA Critical Habitat
b. EEJ CNMI Report
c. Pelagic Fisheries
i. Status of overfished stocks in Western Pacific
ii. Explanation of WCPFC tuna quota discussion
d. Status of CNMI Fisheries Stocks
e. Overview of Data Collection System and Efforts
f. CNMI Fishery Management Plan Development
4. Marianas Conservation Issues
a. Proposed Mariana National Marine Sanctuary
i. Status of Mariana Trench Sanctuary Nomination
ii. Discussion on Sanctuary Status and Future
b. Area-based Management Update
i. Executive Order 14008 (Biden 30x30)
ii. Micronesia Challenge
5. Public Comment
6. Discussion and Recommendations
7. Other Business

Agenda for the Mariana Archipelago AP Meeting

Saturday, March 25, 2023, 10 a.m. to 4 p.m. ChST

1. Welcome and Introductions
2. Setting the Direction for the Marianas AP
3. Marianas Projects and Activities 2023 (AP Plans)
A. CNMI
B. Guam
4. Feedback from the Fleet
A. First Quarter Fishermen Observations in the Marianas
B. Marianas Archipelago Fishery Issues and Priorities
5. Council Issues
A. Options for a Multi-Year Bigeye Tuna Catch and Allocation Limits
B. Guam and CNMI Marine Conservation Plan Review
6. Marianas Fishery Issues and Activities
A. Bottomfish Fisheries
i. BMUS Revision Update
ii. Guam Data Workshop Outcomes and Next Steps
iii. Discussion on Bottomfish
B. Pelagic Fisheries
i. Exploratory Longline Fishing in the CNMI
ii. Council Pelagic Fisheries Research Priorities
iii. Discussion on Pelagic Fisheries
7. Updates on the NOAA Fisheries EEJ Strategy
8. Other Business
9. Public Comment
10. Discussion and Recommendations

Agenda for the Executive and Budget Standing Committee

Sunday, March 26, 2023, 10 a.m. to 12 p.m. ChST (11:30 a.m. to 12 p.m. Closed)

1. Financial Reports
2. Administrative Reports
3. Council Program Plan Report
4. Council Family Changes
5. Meetings and Workshops
6. Other Issues
7. Public Comment
8. Discussion and Recommendations
9. Closed session on Employment Matters—pursuant to MSA section 302(i)(3)

Agenda for the 194th Council Meeting

Monday, March 27, 2023, 9 a.m. to 5 p.m. ChST

1. Welcome and Introductions
2. Opening Protocol
3. Opening Remarks
4. Approval of the 194th CM Agenda
5. Approval of the 193rd CM Meeting Minutes
6. Executive Director's Report
7. Agency Reports
A. National Marine Fisheries Service
1. Pacific Islands Regional Office
2. Pacific Islands Fisheries Science Center
B. NOAA Office of General Counsel Pacific Islands Section
C. Enforcement
1. U.S. Coast Guard
2. NOAA Office of Law Enforcement
3. NOAA Office of General Counsel Enforcement Section
D. U.S. State Department
E. U.S. Fish and Wildlife Service
F. Public Comment
G. Council Discussion and Action
8. Mariana Archipelago—CNMI
A. Department of Land and Natural Resources/Division of Fish and Wildlife Report
B. Arongol Falú
C. Review of CNMI Marine Conservation Plan (Action Item)
D. Options for Exploratory Longline Fishing in CNMI
E. Advisory Group Report and Recommendations
1. Advisory Panel
2. Fishing Industry Advisory Committee
3. Regional Ecosystem Advisory Committee
4. Scientific & Statistical Committee
F. Public Comment
G. Council Discussion and Action
9. Protected Species
A. EBFM Turtle Model Workshop Report
B. Review of the Hawaii Deep-set and American Samoa Longline Fishery Draft BiOps
1. Draft BiOp Overview
2. Advisory Group Review of Draft BiOps

Monday, March 27, 2023, 6 p.m. to 9 p.m. ChST

Fishers Forum: All About Bottomfish in the Mariana Islands

Tuesday, March 28, 2023, 9 a.m. to 5 p.m. ChST

9. Protected Species (continued)
C. ESA and Marine Mammal Protection Act Updates
1. Overview of ESA critical habitat designations
2. Coral and green turtle critical habitat rulemaking update
3. Draft Recovery Plan for oceanic whitetip shark
D. Review of Potential Measures for the False Killer Whale Take Reduction Plan Modifications
E. Advisory Group Report and Recommendations
1. Advisory Panel
2. Fishing Industry Advisory Committee
3. Regional Ecosystem Advisory Committee
4. Scientific & Statistical Committee
F. Public Comment
G. Council Discussion and Action
10. Hawai'i Archipelago & Pacific Remote Island Areas (PRIA)
A. Moku Pepa
B. DLNR/DAR Report (Legislation, Enforcement)
C. NWHI Fishing Regulations—Native Hawaiian Subsistence Permit and Cost Recovery (Final Action)
D. Main Hawaiian Islands Kona Crab Status Determination Criteria (Initial Action)
E. Gold Coral Management (Final Action)
F. Review of PRIA Marine Conservation Plan (Action Item)
G. Advisory Group Report and Recommendations
1. Archipelagic Plan Team
2. Advisory Panel
3. Fishing Industry Advisory Committee
4. Scientific & Statistical Committee
H. Public Comment
I. Council Discussion and Action

Tuesday, March 28, 2023, 4 p.m. to 4:30 p.m. ChST

Public Comment on Non-Agenda Items

Thursday, March 30, 2023, 9 a.m. to 5 p.m. ChST

11. Welcome and Introductions
A. Opening Protocol
B. Opening Remarks
12. Mariana Archipelago—Guam

A. Isla Informe
B. DoA/DAWR
C. Review of Guam Marine Conservation Plan (Action Item)
D. Report of the Guam Bottomfish Data Workshop
E. Advisory Group Report and Recommendations
1. Advisory Panel
2. Fishing Industry Advisory Committee
3. Regional Ecosystem Advisory Committee
4. Scientific & Statistical Committee
F. Public Comment
G. Council Discussion and Action
13. Pelagic & International Fisheries
A. 2022 Longline Reports 2022
1. Hawaii Longline Fishery
2. American Samoa Longline Fishery
B. Multi-Year Territorial Bigeye Tuna Catch & Allocation Specifications (Initial Action)
C. International Fisheries Issues
1. Western and Central Pacific Ocean Longline Management Workshop
D. Advisory Group Report and Recommendations
1. Advisory Panel
2. Fishing Industry Advisory Committee
3. Regional Ecosystem Advisory Committees
4. Scientific & Statistical Committee
E. Public Comment
F. Council Discussion and Action
14. Program Planning and Research
A. National Legislative Report
B. Territorial BMUS Revision Status Update
C. Updates on the NOAA Fisheries EEJ Strategy
D. Regional Communications & Outreach Report
E. Council Program Planning Report
F. Regional Coordination Meeting Reports
1. Council-Pacific Islands Regional Office
2. Council-Pacific Islands Fisheries Science Center
3. Council-State of Hawaii
G. Advisory Group Report and Recommendations
1. Advisory Panel
2. Fishing Industry Advisory Committee
3. Regional Ecosystem Advisory Committees
4. Archipelagic Plan Team
5. Scientific & Statistical Committee
H. Public Comment
I. Council Discussion and Action

Thursday, March 30, 2023, 4:30 p.m. to 5 p.m. ChST

Public Comment on Non-Agenda Items

Thursday, March 30, 2023, 6 p.m. to 9 p.m. ChST

Fishers Forum: All About Bottomfish in the Mariana Islands

Friday, March 31, 2023, 9 a.m. to 5 p.m. ChST

15. American Samoa Archipelago
A. Motu Lipoti
B. Department of Marine and Wildlife Resources Report
C. Update on American Samoa Bottomfish Stock Assessment and Review
D. Advisory Group Report and Recommendation
1. Advisory Panel
2. Fishing Industry Advisory Committee
3. Scientific & Statistical Committee
E. Public Comment
F. Council Discussion and Action
16. Administrative Matters
A. Financial Reports
B. Administrative Reports
C. Council Family Changes
D. Meetings and Workshops
E. Executive and Budget Standing Committee Report
F. Public Comment
G. Council Discussion and Action
17. Other Business

Non-emergency issues not contained in this agenda may come before the Council for discussion and formal Council action during its 194th meeting. However, Council action on regulatory issues will be restricted to those issues specifically listed in this document and any regulatory issue arising after publication of this document that requires emergency action under section 305(c) of the MSA, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

These meetings are accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: February 23, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–04090 Filed 2–27–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC803]

Caribbean Fishery Management Council; Public Meeting

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

ACTION: Notice of a public hybrid meeting.

SUMMARY: The Caribbean Fishery Management Council's (Council) Outreach and Education Advisory Panel (OEAP) will hold a public hybrid meeting to address the items contained in the tentative agenda included in the **SUPPLEMENTARY INFORMATION**.

DATES: The OEAP public hybrid meeting will be held on March 22, 2023, from 9:30 a.m. to 5 p.m. AST.

ADDRESSES: You may join the OEAP public virtual meeting (via Zoom) from a computer, tablet or smartphone by entering the following address:

Join Zoom Meeting
https://us02web.zoom.us/j/84039986774?pwd=SUhDc1hXeFloQWF3ajVtL2ZHRGN3Zz09
Meeting ID: 840 3998 6774
Passcode: 179728
One tap mobile
+17879667727,, 84039986774#,,,, *179728# Puerto Rico
+19399450244,, 84039986774#,,,, *179728# Puerto Rico
Dial by your location
+1 787 966 7727 Puerto Rico
+1 939 945 0244 Puerto Rico
+1 787 945 1488 Puerto Rico
+1 309 205 3325 U.S.
+1 312 626 6799 U.S. (Chicago)
+1 346 248 7799 U.S. (Houston)
+1 360 209 5623 U.S.
+1 386 347 5053 U.S.
+1 507 473 4847 U.S.
+1 564 217 2000 U.S.
+1 646 931 3860 U.S.
+1 669 444 9171 U.S.
+1 669 900 6833 U.S. (San Jose)
+1 689 278 1000 U.S.
+1 719 359 4580 U.S.
+1 929 205 6099 U.S. (New York)
+1 253 205 0468 U.S.
+1 253 215 8782 U.S. (Tacoma)
+1 301 715 8592 U.S. (Washington DC)
+1 305 224 1968 U.S.
Meeting ID: 840 3998 6774
Passcode: 179728
Find your local number: https://us02web.zoom.us/u/kbLZjE6tAP

FOR FURTHER INFORMATION CONTACT: Miguel Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 398–3717.

SUPPLEMENTARY INFORMATION: The following items included in the tentative agenda will be discussed:

9:30 a.m.

—Call to Order

—Adoption of Agenda

9:45 a.m.–10:15 a.m.

—OEAP Chairperson's Report
—Updates:
  —Meetings and Webinars Attended: NOAA Caribbean, MREP, EBFM NOAA webinar, Descending devices outreach webinar, CFMC Meeting
  —Calendar 2024
  —Recipe Book
  —Illustrated Booklet on Climate Change and U.S. Caribbean Fisheries
  —MREP update
  —DAP Workshop in St. Thomas/St. John, U.S.V.I. on IBFMP

10:15 a.m.–10:20 a.m.

—Short Break

10:20 a.m.–11 a.m.

—Update on Status of the Fishery Ecosystem Plan (FEP)—Liajay Rivera
—Outreach Materials on MPAs in Puerto Rico—Vilmarie Román
—UPR Sea Grant Activities on Consumption of Underutilized Species—Jannette Ramos

11 a.m.–12 p.m.

—Update of the Island-Based Fishery Management Plans
—Fact Sheets on IBFMP

12 p.m.–1 p.m.

—Lunch

1 p.m.–5 p.m.

—OEAP Recommendation of Outreach Strategies on IBFMPs for Puerto Rico, St. Thomas/St. John, and St. Croix, U.S.V.I.
—Liaisons Recommendations
—Liaisons Reports:
  —Wilson Santiago—Puerto Rico
  —Nicole Greaux/St. Thomas, U.S.V.I.
  —Mavel Maldonado/St. Croix, U.S.V.I.
—CFMC Facebook, Instagram and YouTube Communications with Stakeholders
—Other Business

The order of business may be adjusted as necessary to accommodate the completion of agenda items. The meeting will begin on March 22, 2023, at 9:30 a.m., and will end on March 22, 2023, at 5 p.m. AST. Other than the start time, interested parties should be aware that discussions may start earlier or later than indicated, at the discretion of the Chair. In addition, the meeting may be completed prior to the date established in this notice.

Special Accommodations

For any additional information on this public virtual meeting, please contact Diana Martino, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico, 00918–1903, telephone: (787) 226–8849.

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

Dated: February 23, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–04089 Filed 2–27–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC797]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Fisheries Research

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

ACTION: Notice; receipt of application for Letter of Authorization; request for comments and information.

SUMMARY: NMFS' Office of Protected Resources (OPR) has received a request from the NMFS Northwest Fisheries Science Center (NWFSC) for authorization to take small numbers of marine mammals incidental to conducting fisheries research, over the course of 5 years from the date of issuance. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), OPR is announcing receipt of the NWFSC's request for the development and implementation of regulations governing the incidental taking of marine mammals. OPR invites the public to provide information, suggestions, and comments on the NWFSC's application and request.

DATES: Comments and information must be received no later than March 30, 2023.

ADDRESSES: Comments on the applications should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Laws@noaa.gov*.

Instructions: OPR is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities*. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements

pertaining to the mitigation, monitoring and reporting of the takings are set forth.

Summary of Request

On August 3, 2022, we received an application from NWFSC requesting authorization for take of marine mammals incidental to fisheries research conducted by NWFSC. The requested regulations would be valid for 5 years, from August 29, 2023, through August 28, 2028. The NWFSC plans to NWFSC plans to continue fisheries and ecosystem research in three defined research areas including the California Current Research Area, the Puget Sound Research Area, and the Lower Columbia River Research Area, defined as the estuarine and tidally influenced waters of the lower Columbia River below the Bonneville Dam. It is possible that marine mammals may interact with fishing gear (*e.g.,* trawl nets, longlines) used in NWFSC's research, resulting in injury, serious injury, or mortality. Because the specified activities have the potential to take marine mammals present within these action areas, NWFSC requests authorization to take multiple species of marine mammal that may occur in these areas.

The requested regulations would be the second incidental take regulations issued to NWFSC, following regulations in place from 2018–2023. NWFSC has complied with all requirements of the previously issued Letters of Authorization and has not exceeded the authorized take numbers. Monitoring reports submitted by NWFSC are available online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-fisheries-nwfsc-fisheries-and-ecosystem-research*.

Specified Activities

The Federal Government has a responsibility to conserve and protect living marine resources in U.S. Federal waters and has also entered into a number of international agreements and treaties related to the management of living marine resources in international waters outside the United States. NOAA has the primary responsibility for managing marine finfish and shellfish species and their habitats, with that responsibility delegated within NOAA to NMFS.

In order to direct and coordinate the collection of scientific information needed to make informed management decisions, Congress created six Regional Fisheries Science Centers, each a distinct organizational entity and the scientific focal point within NMFS for region-based Federal fisheries-related research. This research is aimed at monitoring fish stock recruitment, abundance, survival and biological rates, geographic distribution of species and stocks, ecosystem process changes, and marine ecological research. The NWFSC is the research arm of NMFS in the Northwest Region. The NWFSC conducts research and provides scientific advice to manage fisheries and conserve protected species in three aforementioned geographic research areas. The NWFSC provides scientific information to support the Pacific Fishery Management Council and numerous other domestic and international fisheries management organizations.

The NWFSC collects a wide array of information necessary to evaluate the status of exploited fishery resources and the marine environment. NWFSC scientists conduct fishery-independent research onboard NOAA-owned and operated vessels or on chartered vessels. A few surveys are conducted onboard commercial fishing vessels, but the NWFSC designs and executes the studies and funds vessel time. The gear types used fall into several categories: pelagic trawl gear used at various levels in the water column, pelagic longlines with multiple hooks, seine nets, and other gear. Of research gear used by NWFSC, only pelagic trawl, hook and line gear (including longline gears), and seine nets are likely to interact with marine mammals.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning the NWFSC's request (see **ADDRESSES**). NMFS will consider all information, suggestions, and comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals by the NWFSC, if appropriate.

Dated: February 23, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–04103 Filed 2–27–23; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Request for Nominations for the Global Market Structure Subcommittee, Digital Asset Markets Subcommittee, and Technical Issues Subcommittee Under the Global Markets Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is requesting nominations for membership on the Global Market Structure Subcommittee, the Digital Asset Markets Subcommittee, and/or the Technical Issues Subcommittee (together, Subcommittees) under the Global Markets Advisory Committee (GMAC). The GMAC is a discretionary advisory committee established by the Commission in accordance with the Federal Advisory Committee Act.

DATES: The deadline for the submission of nominations is March 14, 2023.

ADDRESSES: Nominations should be emailed to *GMAC_Submissions@cftc.gov* or sent by hand delivery or courier to Gates S. Hurand, GMAC Designated Federal Officer and Chief Counsel to Commissioner Caroline D. Pham, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581. Please use the title ''GMAC Global Market Structure Subcommittee,'' ''GMAC Digital Asset Markets Subcommittee,'' and/or ''the GMAC Technical Issues Subcommittee,'' as appropriate, for any nominations you submit.

FOR FURTHER INFORMATION CONTACT: Gates S. Hurand, GMAC Designated Federal Officer and Chief Counsel to Commissioner Caroline D. Pham at (202) 418–5000 or email: *GMAC_submissions@cftc.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the proposed Subcommittees would be to provide report(s) and/or recommendations to the GMAC that will identify and examine key issues that affect the integrity and competitiveness of U.S. markets and U.S. firms engaged in global business, including the regulatory challenges of a global marketplace that reflects the increasing interconnectedness of markets and the multinational nature of business, including for derivatives markets; and to assess and inform international standards through engagement with international policymakers and authorities in other jurisdictions, with a focus on global market structure, digital asset markets, and technical issues, respectively. The GMAC, in turn, would consider and discuss the report(s) and/or recommendations of each Subcommittee. Topics and issues the Subcommittees may consider include, but are not limited to, the following:

- *Global Market Structure Subcommittee.* Identifying and assessing key issues and policy proposals with an impact on global

markets, including global market structure and access to markets.

• *Digital Asset Markets Subcommittee.* Identifying and assessing key issues and policy proposals with respect to digital asset markets, including digital finance and tokenization of assets, non-financial activities and Web3, and blockchain technology.

• *Technical Issues Subcommittee.* Identifying and assessing key issues and policy proposals with respect to technical requirements that apply to global markets, including financial market infrastructures, market participants, end-users, and service providers.

Each of the Subcommittees will provide its report(s) and/or recommendations directly to the GMAC and will not provide report(s) and/or recommendations directly to the Commission. No Subcommittee has the authority to make decisions on behalf of the GMAC, and no determination of fact or policy will be made by any of the Subcommittees on behalf of the Commission.

The members of each of the Subcommittees will generally serve as representatives and provide advice reflecting the views of stakeholder organizations and entities throughout the derivatives and financial markets. Each of the Subcommittees may also include special government employees and regular government employees when doing so furthers its purpose. It is anticipated that each of the Subcommittees will hold at least three in-person or telephonic meetings per year. Members of each of the Subcommittees serve at the pleasure of the Commission, and will be appointed to serve two-year terms. Members of each of the Subcommittees do not receive compensation or honoraria for their services, and they are not reimbursed for travel and per diem expenses.

Members of each of the Subcommittees will include individuals who are members of the GMAC and/or other individuals. For individuals who are not serving on the GMAC currently, the Commission seeks nominations of individuals from a wide range of perspectives, including from industry, academia, the government, and public interest groups. To advise the GMAC effectively, members of each Subcommittee must have a high level of expertise and experience with the subject matter of the Subcommittee. To the extent practicable, the Commission will strive to select members reflecting wide ethnic, racial, gender, and age representation.

The Commission invites the submission of nominations for membership in each of the Subcommittees. Each nomination submission should include the proposed member's name, title, organization affiliation and address, email address and telephone number, as well as information that supports the individual's qualifications to serve on the relevant Subcommittee. The submission should also include the name, email address and telephone number of the person nominating the proposed Subcommittee member. Self-nominations are acceptable.

Submission of a nomination is not a guarantee of selection as a member of a subcommittee. As noted in the GMAC's Membership Balance Plan, the Commission seeks to ensure that the membership of a Subcommittee is balanced relative to the particular issues addressed by the Subcommittee in question. The Commission may identify members for the Subcommittees based on a variety of methods. Such methods may include public requests for nominations for membership; recommendations from existing advisory committee members; consultations with knowledgeable persons outside the CFTC (industry, consumer groups, other state or federal government agencies, academia, etc.); requests to be represented received from individuals and organizations; and Commissioners' and CFTC staff's professional knowledge of those experienced in the global markets.

The office of the Commissioner primarily responsible for the GMAC and the Subcommittees plays a primary, but not exclusive, role in this process and makes recommendations regarding membership to the Commission. The Commission, by vote, authorizes members to serve on each of the GMAC Subcommittees.

(Authority: 5 U.S.C. 1001 *et seq.*)

Dated: February 23, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023–04048 Filed 2–27–23; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0018]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Finance and Accounting Services (DFAS) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by May 1, 2023.

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

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

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

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Suite 03F09–09, Alexandria, VA 22350–3100, Angela Duncan, 571–372–7574.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Application for Former Spouse Payments from Retired Pay, DD Form 2293; OMB Number 0730–0008.

Needs and Uses: The information collection requirement is necessary to provide DFAS with the basic data needed to process court orders for division of military retired pay as property or order alimony and child support payment from that retired pay per title 10 U.S.C. 1408.

Affected Public: Individuals or households.

Annual Burden Hours: 12,500.

Number of Respondents: 25,000.

Responses per Respondent: 1.

Annual Responses: 25,000.

Average Burden per Response: 30 minutes.

Frequency: On occasion.

The respondents to this information collection are spouses or former spouses (herein referred to as applicant) of military members who access the form through the DoD forms website. The applicant submits through U.S. Mail Service or by fax a DD Form 2293, ''Application for Former Spouse Payments from Retired Pay,'' to DFAS and a copy of a court order that requires the division of a member's military retired pay, or orders the member to make monthly payment of either child support or alimony. The information from the DD Form 2293 is used by DFAS to process the applicant's request as authorized under title 10 U.S.C. 1408.

The information is required to properly identify the former spouse applicant and identify the service member, whose retired pay is to be deducted, by name, address and social security number. The DD Form 2293 was devised to standardize applications for payment under the Act. Information on the form is also used to determine the applicant's current status and contains the statutory required certifications the applicant/former spouse must make when applying for payments.

After the application is reviewed for sufficiency, the application and the military member are advised whether the application will be honored or rejected, any further documentation needed, and if applicable, notifies when payments to the former spouse will be implemented by mail. The mail templates used to notify applicant if application is being honored or rejected will be submitted as part of the collection package.

Dated: February 23, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–04100 Filed 2–27–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0017]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Finance and Accounting Services (DFAS), announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by May 1, 2023.

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

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

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

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Suite 03F09–09, Alexandria, VA 22350–3100, Angela Duncan, 571–372–7574.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Child Annuitant's School Certification; DD Form 2788; OMB Control Number 0730–0001.

Needs and Uses: Child annuitants, between the ages of 18 and 22 years of age, must provide evidence of intent to continue study or training at a recognized educational institution. The certificate is required for the school semester or other period in which the school year is divided. Without this certification, funds cannot be released to annuitant/payee.

Affected Public: Individuals or households.

Annual Burden Hours: 3,600.

Number of Respondents: 7,200.

Responses per Respondent: 1.

Annual Responses: 7,200.

Average Burden per Response: 30 Minutes.

Frequency: Each semester or other period in which the school year is divided.

The Child Annuitant's School Certification (DD Form 2788) is generated by the Defense Retired and Annuitant System (DRAS). DRAS identifies the child annuitant prior to their 18th birthday and sends initial mailing. Annuity Pay System downloads child annuitant information into DRAS when retiree is deceased. After the initial mailing, the child annuitant (18 and over) or payee receives the form and flex letter annually. Each semester or other period in which the school year is divided, thereafter, the respondent is required to complete and return via mail, fax or email to the DFAS as indicated on the form/letter. The child will certify as to his or her intent for future enrollment. DFAS reviews the completed form/letter and uses the information to determine eligibility and release funds. Respondents are annuitants between the age of 18 and 22 and payees for the children under age 18.

Dated: February 23, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–04096 Filed 2–27–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2022–OS–0110]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 30, 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: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Department of Defense Survivor Family Member Survey; OMB Control Number 0704–DDSS.

Type of Request: Existing collection in use without an OMB control number.

Number of Respondents: 540.

Responses per Respondent: 1.

Annual Responses: 540.

Average Burden per Response: 30 minutes.

Annual Burden Hours: 270.

Needs and Uses: The National Defense Authorization Act of 2006 (Pub. L. 109–163) requires data to be collected on the quality of casualty assistance provided to next of kin of military decedents. Beginning in early 2010, the DoD began inviting all primary next of kin to participate in a survey that is designed to measure the effectiveness of its casualty assistance program and the degree of satisfaction of those family members provided such assistance. In 2019, DoD began surveying secondary next of kin, which accounts for the increase in parent and guardian participation. Family responses are held confidentially and will not be reported individually, unless specifically requested by the respondent, but rather are combined with the responses of other survey participants. The aggregate findings from the survey are reported to senior leadership along with recommendations on how we might better serve those who are receiving assistance.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

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

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: February 22, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–04038 Filed 2–27–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0016]

Proposed Collection; Comment Request

AGENCY: Defense Acquisition University, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Acquisition University announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by May 1, 2023.

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

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

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

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Suite 03F09–09, Alexandria, VA 22350–3100, Angela Duncan, 571–372–7574.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Defense Acquisition University, Data Services Management; OMB Control Number 0704–0591.

Needs and Uses: The Data Services Management provides administrative and academic capabilities and functions related to student registrations, account requests, courses attempted and completed, and graduation notifications to DoD training systems.

Affected Public: Individuals or households.

Annual Burden Hours: 208.

Number of Respondents: 2,500.

Responses per Respondent: 1.

Annual Responses: 2,500.

Average Burden per Response: 5 minutes.

Frequency: On occasion.

Respondents are university applicants, DoD Acquisition Workforce students (contractor personnel sponsored by a DoD Program Management Office), and instructors who voluntarily provide personal information to take courses administered by DAU or access DAU training, knowledge-sharing, collaboration systems, and course offerings. Failure to provide required information results in the individual being denied access to these services and tools. All respondents are providing data which is used to support the academic functions, including: attendance, grades, statistical analysis, tracking, and reporting for Defense Acquisition Workforce Improvement Act (DAWIA) Certification purposes. These functions are necessary to support Acquisition Workforce Certifications; graduation data will be shared with the Services and Corporate Partners of DoD-sponsored students.

Dated: February 23, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–04065 Filed 2–27–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0015]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Finance and Accounting Services (DFAS) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by May 1, 2023.

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

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

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

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Suite 03F09–09, Alexandria, VA 22350–3100, Angela Duncan, 571–372–7574.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Custodianship Certification to Support Claims on Behalf of Minor Children of Deceased Members of the Armed Forces; DD Form 2790; OMB Control Number 0730–0010.

Needs and Uses: Per DoD Financial Management Regulation, 7000.14–R, Volume 7B, Chapter 46, paragraph 460103A(1), an annuity for a minor child is paid to the legal guardian, or, if there is no legal guardian, to the natural parent who has care, custody, and control of the child as the custodian, or to a representative payee of the child. An annuity may be paid directly to the child when the child is considered to be of majority age under the law in the state of residence. The child then is considered an adult for annuity purposes and a custodian or legal fiduciary is not required.

Affected Public: Individuals or households.

Annual Burden Hours: 50.

Number of Respondents: 300.

Responses per Respondent: 1.

Annual Responses: 300.

Average Burden per Response: 10 minutes.

Frequency: On occasion.

DD Form 2790 is used by DFAS to determine the authorized payee for deceased retiree SBP payments. In order to pay the annuity to the correct person on behalf of a child under the age of majority, the form is mailed upon notification of death of retiree and completed by the custodian (legal guardian, natural parent, or representative payee of child) of the dependent child(ren), certifying their eligibility. The form can then be mailed or faxed back upon completion. If the form, with the completed certification is not received, the annuity payments are suspended.

If the form is received and not filled out fully, an information request memorandum is sent back to the respondent, along with the originally submitted form, and asked to complete required data on the form and return to DFAS.

Dated: February 23, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–04054 Filed 2–27–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2022–OS–0141]

Submission for OMB Review; Comment Request

AGENCY: Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 30, 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: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: DLA Culture/Climate Survey; OMB Control Number 0704–0575.

Type of Request: Revision.

Number of Respondents: 903.

Responses per Respondent: 1.

Annual Responses: 903.

Average Burden per Response: 45 minutes.

Annual Burden Hours: 677.

Needs and Uses: The information collection requirement is necessary to obtain and record the perceptions of DLA employees regarding the organizational culture and climate. The DLA Culture/Climate Survey standardizes how organizational culture/climate is measured across the DLA enterprise, focuses leadership attention on culture/climate, and drives actions to improve the overall culture/climate and DLA organizational performance.

Affected Public: Individuals or households.

Frequency: Biennially.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

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

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: February 22, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–04035 Filed 2–27–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2023–HQ–0009]

Proposed Collection; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Marine Corps Training and Education Command (TECOM) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by May 1, 2023.

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

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

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

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to United States Marine Corps Training and Education Command, 2007 Elliot Road, Quantico, VA 22134–5010; ATTN: Mr. Larry Smith II, or call 888–435–8762.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: MarineNet Registration; OMB Control Number 0712–MNET.

Needs and Uses: The Marine Corps Training and Education Command (TECOM) is tasked by the Commandant of the Marine Corps to provide individual entry-level training, professional military education (PME) and continuous professional development. TECOM operates MarineNet, a web-based e-learning portal, to assist in the delivery of required training and PME. A collection of pertinent information (*i.e.,* name, Social Security Number, email address) is necessary for administrative access control to confirm the identity and verify the eligibility of individuals seeking access to the training content on the MarineNet portal. Eligible respondents include active-duty military, reservists, dependents, retirees, Department of Defense (DoD) civilians and contractors seeking initial access to MarineNet for mandatory annual training, PME, and e-learning resources.

Affected Public: Individuals or households.

Annual Burden Hours: 37.83.

Number of Respondents: 454.

Responses per Respondent: 1.

Annual Responses: 454.

Average Burden per Response: 5 minutes.

Frequency: On occasion.

Dated: February 23, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–04094 Filed 2–27–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2022–SCC–0153]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; State Education Agency, Local Educational Agency, and School Data Collection and Reporting Under ESEA, Title I, Part A

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 March 30, 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 Melissa Siry, (202) 260–0926.

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: State Education Agency, Local Educational Agency, and School Data Collection and Reporting under ESEA, Title I, Part A.

OMB Control Number: 1810–0581.

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

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 17,022.

Total Estimated Number of Annual Burden Hours: 293,152.

Abstract: Title I, Part A (Title I) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act of 2015 (ESSA), contains several provisions that require State educational agencies (SEAs), local educational agencies (LEAs), and schools to collect and disseminate information. Thus, SEAs, LEAs, and schools collect and disseminate the information to carry out these reporting requirements. The collected information facilitates compliance with statutory requirements and to provides information to school communities (including parents), LEAs, SEAs and the U.S. Department of Education (the Department) regarding activities required under Title I of the ESEA. The Paperwork Reduction Act (PRA) covers these activities. However, the present information collection authorization is due to expire. Therefore, the Department requests an extension of the currently approved information collection (1810–0581).

Dated: February 23, 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. 2023–04047 Filed 2–27–23; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Meetings

AGENCY: U.S. Election Assistance Commission.

ACTION: Sunshine Act notice; notice of public meeting agenda.

SUMMARY: Public Meeting: U.S. Election Assistance Commission.

DATES: Wednesday, March 15, 2023, 1:00 p.m.–2:30 p.m. EST.

ADDRESSES: The Election Assistance Commission hearing room at 633 3rd St. NW, Washington, DC 20001. The meeting is open to the public and will be livestreamed on the U.S. Election Assistance Commission YouTube Channel: *https://www.youtube.com/channel/UCpN6i0g2rlF4ITWhwvBwwZw.*

FOR FURTHER INFORMATION CONTACT: Kristen Muthig, Telephone: (202) 897–9285, Email: *kmuthig@eac.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: In accordance with the Government in the Sunshine Act (Sunshine Act), Public Law 94–409, as amended (5 U.S.C. 552b), the U.S. Election Assistance Commission (EAC) will hold a public meeting focusing on list maintenance.

Agenda: The U.S. Election Assistance Commission (EAC) will host a public meeting to discuss how different jurisdictions conduct list maintenance of voter registration rolls, the challenges they face, and best practices on this topic.

The agenda includes a panel discussion with election officials and subject matter experts on this topic. Panelists will give remarks and respond to questions from the EAC Commissioners.

Also included in this event will be a review of a new EAC resource for election officials on list maintenance best practices.

The full agenda will be posted in advance on the EAC website: *https://www.eac.gov.*

Background: The Help America Vote Act of 2002 (HAVA) charged the EAC to serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of federal elections. The EAC's Clearinghouse Division is made up of former election officials and subject matter experts who work with EAC staff to provide materials that address the needs of election officials.

Status: This meeting will be open to the public.

Camden Kelliher,

Associate Counsel, U.S. Election Assistance Commission.

[FR Doc. 2023–04198 Filed 2–24–23; 4:15 pm]

BILLING CODE P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER18–1182–005.

Applicants: System Energy Resources, Inc.

Description: Compliance filing: SERI Compliance (ER18–1182 and EL23–11) to be effective 12/31/9998.

Filed Date: 2/21/23.

Accession Number: 20230221–5339.

Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER21–1502–000; ER21–1503–000.

Applicants: Maverick Solar 7, LLC, Maverick Solar 6, LLC.

Description: Notice of Non-Material Change in Status of Maverick Solar 6, LLC, et al.

Filed Date: 2/21/23.

Accession Number: 20230221–5338.

Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–491–001.

Applicants: Power Authority of the State of New York, New York Independent System Operator, Inc.

Description: Compliance filing: Power Authority of the State of New York submits tariff filing per 35: NYPA compliance filing re: FERC January 23, 2023 order on formula rate revisions to be effective 1/24/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5106.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–842–001.

Applicants: Big Plain Solar, LLC.

Description: Tariff Amendment: Supplement to Petition for Market-Based Rate Authorization to be effective 1/14/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5141.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–843–001.

Applicants: Oak Trail Solar, LLC.

Description: Tariff Amendment: Supplement to Petition for Market-Based Rate Authorization to be effective 1/14/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5143.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–1142–001.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Amending ISA, Service Agreement No. 6802; Queue No. AE2–214 in ER23–1142–000 to be effective 1/20/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5157.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–1152–000.

Applicants: New England Power Company.

Description: § 205(d) Rate Filing: 2023–02–21 Filing of SGIA with Great River Hydro and Request for CEII Treatment to be effective 1/30/2023.

Filed Date: 2/21/23.

Accession Number: 20230221–5327.

Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1155–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 5633; Queue No. AC2–088/AD1–136 to be effective 4/24/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5013.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–1156–000.

Applicants: Mid-Atlantic Interstate Transmission, LLC,PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Mid-Atlantic Interstate Transmission, LLC submits tariff filing per 35.13(a)(2)(iii: MAIT submits one Engineering and Construction Agreement, SA No. 6626 to be effective 4/24/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5028.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–1157–000.

Applicants: American Transmission Systems, Incorporated, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: American Transmission Systems, Incorporated submits tariff filing per 35.13(a)(2)(iii: ATSI submits two Engineering and Construction Agreements, SA Nos. 6629 and 6632 to be effective 4/24/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5032.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–1158–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original NSA, SA No. 6788; Queue No. AC2–136 to be effective 1/26/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5034.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–1159–000.

Applicants: Constellation Mystic Power, LLC.

Description: Constellation Mystic Power, LLC submits Limited Waiver Request of Certain Deadlines Requirements as listed in Sections I.B.3, II.2.A, II.2.C, II.4.A, and II.4.B in the Protocols.

Filed Date: 2/17/23.

Accession Number: 20230217–5238.

Comment Date: 5 p.m. ET 2/27/23.

Docket Numbers: ER23–1160–000.

Applicants: Upper Missouri G. & T. Electric Cooperative, Inc.

Description: § 205(d) Rate Filing: Revised Rate Scheduel FERC No. 8 (Roughrider) to be effective 4/1/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5073.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–1161–000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: CCSF missed Unmetered Points (WDT SA 275) to be effective 4/24/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5123.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–1162–000.

Applicants: Public Service Company of Colorado.

Description: § 205(d) Rate Filing: 2023–02–22 CSU Midway SS SISA & FAC 736–PSCo to be effective 2/23/2023.

Filed Date: 2/22/23.

Accession Number: 20230222–5128.

Comment Date: 5 p.m. ET 3/15/23.

Docket Numbers: ER23–1163–000.

Applicants: Public Service Company of Colorado.

Description: Tariff Amendment: PacifiCorp Motion to Withdraw NOC in ER23–533–000 to be effective 10/31/2022.

Filed Date: 2/22/23.

Accession Number: 20230222–5161.

Comment Date: 5 p.m. ET 3/15/23.

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 22, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–04111 Filed 2–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–447–000.

Applicants: Spire STL Pipeline LLC.

Description: § 4(d) Rate Filing: Spire STL Pipeline LLC Contact Update Filing to be effective 3/23/2023.

Filed Date: 2/21/23.

Accession Number: 20230221–5127.

Comment Date: 5 p.m. ET 3/6/23.

Docket Numbers: RP23–448–000.

Applicants: Southern Natural Gas Company, L.L.C.

Description: § 4(d) Rate Filing: SNG Fuel Retention Rates—Summer 2023 to be effective 4/1/2023.

Filed Date: 2/21/23.
Accession Number: 20230221–5135.
Comment Date: 5 p.m. ET 3/6/23.

Docket Numbers: RP23–449–000.
Applicants: Elba Express Company, L.L.C.
Description: § 4(d) Rate Filing: EEC Fuel Tracker Filing—2023 to be effective 4/1/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5179.
Comment Date: 5 p.m. ET 3/6/23.

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.

Filings in Existing Proceedings

Docket Numbers: RP19–1523–011.
Applicants: Panhandle Eastern Pipe Line Company, LP.
Description: Compliance filing: Compliance Filing to Update Rate Schedule IT to be effective 3/1/2020.
Filed Date: 2/17/23.
Accession Number: 20230217–5027.
Comment Date: 5 p.m. ET 3/1/23.

Docket Numbers: RP23–92–001.
Applicants: Guardian Pipeline, L.L.C.
Description: Compliance filing: Compliance Filing to Implement RP22–725–000 Settlement Rates to be effective 4/1/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5198.
Comment Date: 5 p.m. ET 3/6/23.

Docket Numbers: RP23–434–001.
Applicants: Midwestern Gas Transmission Company.
Description: Tariff Amendment: Supplement to Housekeeping Update to be effective 3/24/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5171.
Comment Date: 5 p.m. ET 3/6/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

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 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–04022 Filed 2–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–6672–006]

Fisfis, David T.; Notice of Filing

Take notice that on January 23, 2023, David T. Fisfis submitted for filing, revised application for authority to hold interlocking positions, pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d (b) and part 45.8 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR part 45.8.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://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.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern Time on March 3, 2023.

Dated: February 21, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–04006 Filed 2–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2000–089]

New York Power Authority; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amended Shoreline Stabilization Plan—Article 401.

b. *Project No:* 2000–089.

c. *Date Filed:* April 19, 2022.

d. *Applicant:* New York Power Authority.

e. *Name of Project:* St. Lawrence—FDR Hydroelectric Project.

f. *Location:* The project is located on the St Lawrence River, near the cities of Cornwall and Massena, in St. Lawrence County, New York. The project does not occupy Federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Robert Knowlton, 123 Main Street, White Plains, New York, (914) 681–6426, *robert.knowlton@nypa.gov.*

i. *FERC Contact:* Margaret Noonan, (202) 502–8971, *Margaret.Noonan@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* 30 days from the date of notice issuance.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at

http://www.ferc.gov/docs-filing/efiling.asp. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–2000–089. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The applicant proposes to amend their 2004 Shoreline Stabilization Plan (Original Plan) such that, in part, Whitehouse Bay (site 12) becomes the final stabilization site. No further work will be performed on the sites identified in the Original Plan, and the licensee will have met its obligations under the Shoreline Stabilization Program section of Article 401. The licensee states that after the approval of the Original Plan, agencies found that erosion in areas not adjacent to human occupation is natural, and so denied authorization to perform shoreline stabilization on some sites. The licensee completed stabilization for sites 10, 13–19, 21–26, 33, and 1D; and cancelled stabilization for sites 11, 20, 27–32, 34–36, 2D, 3D, and 25D.

The licensee will fund the continuation of the Adjoining Landowner Stabilization Program (ALSP) using the balance of $1.75 million, minus the costs of completing stabilization of site 12. This money may be expended on ALSP sites without restriction to timing. These funds will cover design, permitting, construction, and construction management costs of ALSP sites that are implemented by the licensee. There will be no restrictions on ALSP projects in terms of estimated cost or length or any other such restriction. The licensee will continue to perform ALSP work until the balance of the $1.75 million is expended. Thereafter, the licensee's obligation to fund the ALSP expires.

l. *Locations of the Application:* This filing may 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. 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, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: February 21, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–04007 Filed 2–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Institution of Section 206 Proceeding and Refund Effective Date

	Docket Nos.
Flemington Solar, LLC	EL23–32–000
Frenchtown I Solar, LLC	EL23–33–000
Frenchtown II Solar, LLC	EL23–34–000
Frenchtown III Solar, LLC	EL23–35–000
Lakehurst Solar, LLC	EL23–36–000
PA Solar Park, LLC	EL23–37–000
Pilesgrove Solar, LLC	EL23–38–000
PA Solar Park II, LLC	EL23–39–000

On February 21, 2023, the Commission issued an order in Docket Nos. EL23–32–000, EL23–33–000, EL23–34–000, EL23–35–000, EL23–36–000, EL23–37–000, EL23–38–000, and EL23–39–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Flemington Solar, LLC, Frenchtown I Solar, LLC, Frenchtown II Solar, LLC, Frenchtown III Solar, LLC, Lakehurst Solar, LLC, PA Solar Park, LLC, Pilesgrove Solar, LLC, and PA Solar Park II, LLC's Rate Schedules remain just and reasonable. *Flemington Solar, LLC,* 182 FERC ¶ 61,110 (2023).

The refund effective date in Docket Nos. EL23–32–000, EL23–33–000, EL23–34–000, EL23–35–000, EL23–36–000, EL23–37–000, EL23–38–000, and EL23–39–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket Nos. EL23–32–000, EL23–33–000, EL23–34–000, EL23–35–000, EL23–36–000, EL23–37–000, EL23–38–000, and EL23–39–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2021), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this

document via the internet through the Commission's Home Page *http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: February 22, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–04113 Filed 2–27–23; 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 rate filings:

Docket Numbers: ER21–2635–001.
Applicants: Hecate Energy Johanna Facility LLC.
Description: Notice of Change in Status of Hecate Energy Johanna Facility LLC.
Filed Date: 2/17/23.
Accession Number: 20230217–5236.
Comment Date: 5 p.m. ET 3/10/23.

Docket Numbers: ER22–1205–002.
Applicants: Evergy Kansas Central, Inc.
Description: Compliance Filing to December 21, 2022 Order of Evergy Kansas Central, Inc.
Filed Date: 2/17/23.
Accession Number: 20230217–5237.
Comment Date: 5 p.m. ET 3/10/23.

Docket Numbers: ER23–510–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Tariff Amendment: 2023–02–21_SA 3740 Deficiency Response for J1421 1st Rev GIA (J1421) to be effective 1/30/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5304.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1141–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6799; Queue No. AD1–013 to be effective 1/20/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5103.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1142–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6802; Queue No. AE2–214 to be effective 1/20/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5136.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1143–000.
Applicants: Narragansett Electric Company.
Description: The Narragansett Electric Company submits Notice of Cancellation of the Interconnection Agreement with Northeast Energy Associates Bellingham Facility.
Filed Date: 2/14/23.
Accession Number: 20230214–5206.
Comment Date: 5 p.m. ET 3/7/23.

Docket Numbers: ER23–1144–000.
Applicants: Southwestern Public Service Company.
Description: § 205(d) Rate Filing: LP&L Settlement Filing to be effective 4/23/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5189.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1145–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, SA No. 6307 and ICSA, SA No. 6308; Queue No. AD2–093 to be effective 4/24/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5219.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1146–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: Navajo Tribal Utility Authority—NITSA Rev 1 to be effective 2/15/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5234.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1147–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–02–21_SA 3371 SIGE-Crescent City Solar 1st Rev GIA (J856) to be effective 2/10/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5253.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1148–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA/CSA, Service Agreement Nos. 6683/6684; Queue No. AD2–096 to be effective 1/20/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5259.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1149–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original NSA, SA No. 6796; Queue No. AA1–034 to be effective 1/19/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5261.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1150–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA/CSA, Service Agreement Nos. 6681/6682; Queue No. AD2–092 to be effective 12/31/9998.
Filed Date: 2/21/23.
Accession Number: 20230221–5264.
Comment Date: 5 p.m. ET 3/14/23.

Docket Numbers: ER23–1151–000.
Applicants: New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: NYISO 205 filing of revisions re: responsibilities for NUFs to be effective 4/23/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5278.
Comment Date: 5 p.m. ET 3/14/23.

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 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–04023 Filed 2–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–59–000]

Colorado Interstate Gas Company, L.L.C.; Wyoming Interstate Company, L.L.C.; Notice of Application and Establishing Intervention Deadline

Take notice that on February 15, 2023, Colorado Interstate Gas Company, L.L.C. (CIG) and Wyoming Interstate Company, L.L.C. (WIC), Post Office Box 1087, Colorado Springs, Colorado 80944, filed a joint application in Docket No. CP23–59–000, pursuant to section 7(c) of the Natural Gas Act (NGA), to reduce the maximum allowable operating pressure (MAOP) of its Powder River Lateral, and to the extent necessary, to partially abandon the Powder River Lateral (Lateral) to accommodate the decrease in the Lateral's capabilities to provide transportation as a result of the decrease in the MAOP. Concurrently, CIG and WIC are jointly requesting, pursuant to section 7(b) of the NGA, the termination of the CIG/WIC Capacity Lease Agreement currently in effect which provides capacity on Line No. 72A to WIC and capacity through the Laramie Jumper Compressor unit to CIG, all as more fully set forth in the request which is on file with the Commission and open to 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://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this prior notice request should be directed to Francisco Tarin, Director, Regulatory, Colorado Interstate Gas Company, L.L.C. and Wyoming Interstate Company, L.L.C, P.O. Box 1087, Colorado Springs, Colorado 80944; by telephone at (719) 667–7517; or by email at *CIGregulatoryaffairs@kindermorgan.com,* or David Cain, Assistant General Counsel, Colorado Interstate Gas Company, L.L.C. and Wyoming Interstate Company, L.L.C., P.O. Box 1087, Colorado Springs, Colorado 80944; by telephone at (713) 520–4534; or by email at *David_Cain@kindermorgan.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 March 15, 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 March 15, 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 March 15, 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/resources/guides/how-to/intervene.asp.*

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

[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.

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 March 15, 2023. The filing of a comment alone will not serve to make the filer a party to the 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 CP23–59–000 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 CP23–59–000.

To mail via USPS, use the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To mail 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 on the applicant either by mail at: Francisco Tarin, Director, Regulatory, Colorado Interstate Gas Company, L.L.C. and Wyoming Interstate Company, L.L.C, P.O. Box 1087, Colorado Springs, Colorado 80944; or by email (with a link to the document) at *CIGregulatoryaffairs@kindermorgan.com;* or David Cain, Assistant General Counsel, Colorado Interstate Gas Company, L.L.C. and Wyoming Interstate Company, L.L.C., P.O. Box 1087, Colorado Springs, Colorado 80944, or email (with a link to the document) at: *David_Cain@kindermorgan.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 *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: February 22, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–04066 Filed 2–27–23; 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. 2736–046]

Idaho Power Company; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

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.:* 2736–046.

c. *Date filed:* February 14, 2023.

d. *Applicant:* Idaho Power Company (Idaho Power).

e. *Name of Project:* American Falls Hydroelectric Project (project).

f. *Location:* On the Snake River, in Power County, Idaho, near the City of American Falls, Idaho. The project occupies 7.37 acres of United States lands administered by the U.S. Bureau of Reclamation and Bureau of Land Management.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* David Zayas, Idaho Power Company, P.O. Box 70 (83707), 1221 West Idaho Street, Boise, ID 83702; (208) 388–2915; email at *dzayas@idahopower.com.*

i. *FERC Contact:* Kristen Sinclair at (202) 502–6587, or *kristen.sinclair@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and

serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* April 15, 2023.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* 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: American Falls Hydroelectric Project (P–2736–046).

m. The application is not ready for environmental analysis at this time.

n. *Project Description:* The existing American Falls Hydroelectric Project is located at Reclamation's American Falls Dam and consists of: (1) three 18-foot-diameter, 240-foot-long, steel-lined penstocks, that connect upstream with similar U.S. Bureau of Reclamation penstocks and the intake works; (2) a reinforced concrete powerhouse containing three 22.5 MW turbines for total installed capacity of 67.5 MW; (3) a 2,300-foot-long, 138-kilovolt (kV) overhead transmission line extending from the powerhouse downstream along the west bank of the Snake River, and across the river to the American Falls Switchyard; (4) a tailrace; (5) recreation facilities; and (6) appurtenant facilities. The project generates an annual average of 395,000 megawatt-hours.

Idaho Power is not proposing any changes to the current operations of the Project, as Project operations are completely dependent on Reclamation's operation of the dam and available flows. Reclamation owns and operates the dam and is responsible for irrigation delivery, controlling flows, ramping rates, reservoir operations, and flood control operations, among others.

As part of the license application, Idaho Power filed a settlement agreement between itself and the Idaho Department of Fish and Game (IDFG) that resolves issues related to project effects of turbine mortality on trout. As part of the settlement agreement, Idaho Power proposes to increase the poundage of hatchery-reared trout to be stocked by Idaho Power annually from 8,000-pounds to 24,000-pounds, with the size (fish per pound), time of stocking, and location determined by IDFG in consultation with Idaho Power. Before release, IDFG will certify the general health and condition of the fish.

o. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (*e.g.,* license application) 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 documents (P–2736). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19) issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. *Procedural schedule:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter (if necessary): March 2023.

Request Additional Information (if needed): March 2023.

Issue Notice of Acceptance: June 2023.

Issue Scoping Document 1 for comments: July 2023.

Request Additional Information (if necessary): September 2023.

Issue Scoping Document 2: October 2023.

Issue Notice of Ready for Environmental Analysis: October 2023.

q. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: February 21, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–04008 Filed 2–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER02–2001–020, ER13–2230–001, ER16–722–000, ER21–2089–000, ER12–2402–000, ER12–2403–000, ER12–2400–000]

Electric Quarterly Reports; Premier Empire Energy, LLC; Current Power & Gas Inc.; Elephant Energy, LLC; Liberty Power Maryland LLC; Liberty Power Holdings LLC; Liberty Power District of Columbia LLC; Order on Intent To Revoke Market-Based Rate Authority

Before Commissioners: Willie L. Phillips, Acting Chairman; James P. Danly, Allison Clements, and Mark C. Christie.

1. Section 205 of the Federal Power Act (FPA), 16 U.S.C. 824d, and 18 CFR part 35 (2021), require, among other things, that all rates, terms, and conditions for jurisdictional services be filed with the Commission. In Order No. 2001, the Commission revised its public utility filing requirements and established a requirement for public utilities, including power marketers, to file Electric Quarterly Reports.[1]

2. The Commission requires sellers with market-based rate authorization to file Electric Quarterly Reports summarizing contractual and transaction information related to their market-based power sales as a condition for retaining that authorization.[2]

[1] *Revised Pub. Util. Filing Requirements,* Order No. 2001, 99 FERC ¶ 61,107, *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074, *reh'g denied,* Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filing,* Order No. 2001–C, 101 FERC ¶ 61,314 (2002), *order directing filing,* Order No. 2001–D, 102 FERC ¶ 61,334, *order refining filing requirements,* Order No. 2001–E, 105 FERC ¶ 61,352 (2003), *order on clarification,* Order No. 2001–F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements,* Order No. 2001–G, 120 FERC ¶ 61,270, *order on reh'g and clarification,* Order No. 2001–H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements,* Order No. 2001–I, 125 FERC ¶ 61,003 ¶ 31,282 (2008). *See also Filing Requirements for Elec. Util. Serv. Agreements,* 155 FERC ¶ 61,280, *order on reh'g and clarification,* 157 FERC ¶ 61,180 (2016) (clarifying Electric Quarterly Reports reporting requirements and updating Data Dictionary).

[2] *See Refinements to Policies & Procs. for Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.,* Order No. 816, 153 FERC ¶ 61,065, at P 353 (2015), *order on reh'g,* Order No. 816–A, 155 FERC ¶ 61,188 (2016); *Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub.*

Commission staff's review of the Electric Quarterly Reports indicates that the following six public utilities with market-based rate authorization have failed to file their Electric Quarterly Reports: Premier Empire Energy, LLC, Current Power & Gas Inc., Elephant Energy, LLC, Liberty Power Maryland LLC, Liberty Power Holdings LLC, and Liberty Power District of Columbia LLC. This order notifies these public utilities that their market-based rate authorizations will be revoked unless they comply with the Commission's requirements within 15 days of the date of issuance of this order.

3. In Order No. 2001, the Commission stated that,

[i]f a public utility fails to file a[n] Electric Quarterly Report (without an appropriate request for extension), or fails to report an agreement in a report, that public utility may forfeit its market-based rate authority and may be required to file a new application for market-based rate authority if it wishes to resume making sales at market-based rates.[3]

4. The Commission further stated that,

[o]nce this rule becomes effective, the requirement to comply with this rule will supersede the conditions in public utilities' market-based rate authorizations, and failure to comply with the requirements of this rule will subject public utilities to the same consequences they would face for not satisfying the conditions in their rate authorizations, including possible revocation of their authority to make wholesale power sales at market-based rates.[4]

5. Pursuant to these requirements, the Commission has revoked the market-based rate tariffs of market-based rate sellers that failed to submit their Electric Quarterly Reports.[5]

6. Sellers must file Electric Quarterly Reports consistent with the procedures set forth in Order Nos. 2001, 768,[6] and 770.[7] The exact filing dates for Electric Quarterly Reports are prescribed in 18 CFR 35.10b (2021). As noted above, Commission staff's review of the Electric Quarterly Reports for the period up to the third quarter of 2022 identified six public utilities with market-based rate authorization that failed to file Electric Quarterly Reports. Commission staff contacted or attempted to contact these entities to remind them of their regulatory obligations. Despite these reminders, the public utilities listed in the caption of this order have not met these obligations. Accordingly, this order notifies these public utilities that their market-based rate authorizations will be revoked unless they comply with the Commission's requirements within 15 days of the issuance of this order.

7. In the event that any of the above-captioned market-based rate sellers have already filed its Electric Quarterly Reports in compliance with the Commission's requirements, its inclusion herein is inadvertent. Such market-based rate seller is directed, within 15 days of the date of issuance of this order, to make a filing with the Commission identifying itself and providing details about its prior filings that establish that it complied with the Commission's Electric Quarterly Report filing requirements.

8. If any of the above-captioned market-based rate sellers do not wish to continue having market-based rate authority, that seller may file a notice of cancellation with the Commission pursuant to section 205 of the FPA to cancel its market-based rate tariff.

The Commission orders:

(A) Within 15 days of the date of issuance of this order, each public utility listed in the caption of this order shall file with the Commission all delinquent Electric Quarterly Reports. If a public utility subject to this order fails to make the filings required in this order, the Commission will revoke that public utility's market-based rate authorization and will terminate its electric market-based rate tariff. The Secretary is hereby directed, upon expiration of the filing deadline in this order, to promptly issue a notice, effective on the date of issuance, listing the public utilities whose tariffs have been revoked for failure to comply with the requirements of this order and the Commission's Electric Quarterly Report filing requirements.

(B) The Secretary is hereby directed to publish this order in the **Federal Register**.

By the Commission.

Issued: February 22, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–04067 Filed 2–27–23; 8:45 am]

BILLING CODE 6717–01–P

Utils., Order No. 697, 119 FERC ¶ 61,295, at P 882, *clarified,* 121 FERC ¶ 61,260 (2007), *order on reh'g,* Order No. 697–A, 123 FERC ¶ 61,055, *clarified,* 124 FERC ¶ 61,055, *order on reh'g,* Order No. 697–B, 125 FERC ¶ 61,326 (2008), *order on reh'g,* Order No. 697–C, 127 FERC ¶ 61,284 (2009), *order on reh'g,* Order No. 697–D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel* v. *FERC,* 659 F.3d 910 (9th Cir. 2011).

[3] Order No. 2001, 99 FERC ¶ 61,107 at P 222.

[4] *Id.* P 223.

[5] *See, e.g., Electric Quarterly Reports,* 82 FR 60,976 (Dec. 26, 2017); *Electric Quarterly Reports,* 80 FR 58,243 (Sep. 28, 2015); *Electric Quarterly Reports,* 79 FR 65,651 (Nov. 5, 2014).

[6] *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act,* Order No. 768, FERC 140 FERC ¶ 61,232 (2012), *order on reh'g,* Order No. 768–A, 143 FERC ¶ 61,054 (2013), *order on reh'g,* Order No. 768–B, 150 FERC ¶ 61,075 (2015).

[7] *Revisions to Elec. Q. Rep. Filing Process,* Order No. 770, 141 FERC ¶ 61,120 (2012).

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: RP23–450–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: REX 2023–02–21 Negotiated Rate Agreement Amendments to be effective 2/21/2023.
Filed Date: 2/21/23.
Accession Number: 20230221–5275.
Comment Date: 5 p.m. ET 3/6/23.

Docket Numbers: RP23–451–000.
Applicants: Texas Eastern Transmission, LP.
Description: Compliance filing: TETLP February 2023 Penalty Disbursement Report to be effective N/A.
Filed Date: 2/21/23.
Accession Number: 20230221–5335.
Comment Date: 5 p.m. ET 3/6/23.

Docket Numbers: RP23–452–000.
Applicants: Millennium Pipeline Company, LLC.
Description: § 4(d) Rate Filing: RAM 2023 to be effective 4/1/2023.
Filed Date: 2/22/23.
Accession Number: 20230222–5048.
Comment Date: 5 p.m. ET 3/6/23.

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 22, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–04110 Filed 2–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4334–000]

EONY Generation Limited; Notice of Authorization for Continued Project Operation

The license for the Philadelphia Hydroelectric Project No. 4334 was issued for a period ending January 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 4334 is issued to EONY Generation Limited for a period effective February 1, 2023, through January 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before January 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that EONY Generation Limited is authorized to continue operation of the Philadelphia Hydroelectric Project under the terms and conditions of the prior license until the issuance of a new license for the project or other disposition under the FPA, whichever comes first.

Dated: February 21, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–04005 Filed 2–27–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0078; FRL–10738–01–OCSPP]

Cyantraniliprole; Pesticide Product Registration; Receipt of Application for New Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received an application to register new uses for pesticide products containing cyantraniliprole, 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 30, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0078, 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: 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?

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/commenting-epa-dockets.*

II. Registration Application

EPA has received an application to register pesticide products containing cyantraniliprole, a currently registered active ingredient. 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 this application. Notice of receipt of this application does not imply a decision by the Agency on this application.

- *EPA File Symbol:* 279–9613, 279–9615, 279–9616. *Docket ID Number:* EPA–HQ–OPP–2023–0078. *Applicant:* FMC Corporation, 2929 Walnut St., Philadelphia, PA 19104. *Active Ingredient:* Cyantraniliprole. *Product Type:* Insecticide. *Proposed Use:* Herb

group 25, hops, papaya, spice group 26 and greenhouse lettuce. Crop group expansions to field corn subgroup 15–22C; sweet corn subgroup 15–22D; and rice subgroup 15–22F. Crop group conversions to edible podded bean subgroup 6–22A; edible podded pea subgroup 6–22B; succulent shelled bean subgroup 6–22C; succulent shelled pea subgroup 6–22D; pulses, dried shelled bean, except soybean subgroup 6–22E; pulses, dried shelled pea subgroup 6–22F; and forage and hay of legume vegetables (except soybean) subgroup 7–22A. *Contact:* RD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: February 17, 2023.

Daniel Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2023–04015 Filed 2–27–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0215]

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its obligations under the Paperwork Reduction Act of 1995, invites the general public and other Federal agencies to take this opportunity to comment on the request to renew the existing information collection (OMB Control No. 3064–0215) for its eighth biennial survey of households, which has been renamed the FDIC National Survey of Unbanked and Underbanked Households (Household Survey). This survey was previously named the Survey of Household Use of Banking and Financial Services. The Household Survey is scheduled to be conducted in partnership with the U.S. Census Bureau as a supplement to its June 2023 Current Population Survey (CPS). The survey collects information on U.S. households' use of bank accounts, prepaid cards, nonbank online payment services and nonbank financial transaction services, and bank and nonbank credit. The results of these biennial surveys will be published by the FDIC, and help inform policymakers, bankers, and researchers about bank account ownership and how households use the banking system and nonbank products and services to meet their financial needs. On November 14, 2022, the FDIC requested comment for 60 days on the proposed information collection. No comments were received. The FDIC hereby gives notice of its plan to submit to OMB a request to approve this information collection, and again invites comment on the information collection.

DATES: Comments must be submitted on or before March 30, 2023.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *Agency Website: https://www.fdic.gov/resources/regulations/federal-register-publications/.*
- *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Manny Cabeza (202–898–3767), Regulatory Counsel, MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street NW building (located on F Street NW), on business days between 7:00 a.m. and 5:00 p.m.

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: Manny Cabeza, Regulatory Counsel, 202–898–3767, *mcabeza@fdic.gov,* MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently approved collection of information:

Title: FDIC National Survey of Unbanked and Underbanked Households.

OMB Number: 3064–0215.

Frequency of Response: Once.

Affected Public: Individuals residing in U.S. Households.

Estimated Number of Respondents: 40,000.

Average time per Response: 9 minutes (0.15 hours) per respondent.

Estimated Total Annual Burden: 6,000 hours.

General Description of Collection

The FDIC is committed to expanding Americans' access to safe, secure, and affordable banking services, which is integral to the FDIC's mission of maintaining the stability of and public confidence in the U.S. financial system. The FDIC National Survey of Unbanked and Underbanked Households (Household Survey) is one contribution to this end. The Household Survey is also a key component of the FDIC's efforts to comply with a Congressional mandate contained in section 7 of the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (Reform Act) (Pub. L. 109–173), which calls for the FDIC to conduct ongoing surveys ''on efforts by insured depository institutions to bring those individuals and families who have rarely, if ever, held a checking account, a savings account or other type of transaction or check cashing account at an insured depository institution (hereafter in this section referred to as the 'unbanked') into the conventional finance system.'' Section 7 further instructs the FDIC to consider several factors in its conduct of the surveys, including: (1) ''what cultural, language and identification issues as well as transaction costs appear to most prevent 'unbanked' individuals from establishing conventional accounts;'' and (2) ''what is a fair estimate of the size and worth of the ''unbanked'' market in the United States.''

The Household Survey collects information on bank account ownership which provides a factual basis for measuring the number and percentage of households that are unbanked. The Household Survey is the only population-representative survey conducted at the national level that provides state-level estimates of the size and characteristics of unbanked households for all 50 states and the District of Columbia. The Household Survey also collects information from unbanked households about the reasons that they do not have a bank account and their interest in having a bank account.

Increasingly, financial products and services are provided by nonbanks, many through the use of a mobile phone app. Households are selecting different combinations of bank and nonbank financial products and services to meet their core banking needs. Consequently, the Household Survey has broadened its focus to include a wide range of bank and nonbank financial products and services and to collect information on whether and how households are using these in combination.

To obtain this information, the FDIC partners with the U.S. Census Bureau, which administers the Household Survey supplement (FDIC Supplement) to households that participate in the CPS. The FDIC supplement has been

administered every other year since January 2009. The previous survey questionnaires and survey results can be accessed through the following link: *http://fdic.gov/analysis/household-survey.*

In accordance with the statutory mandate to conduct the surveys on an ongoing basis, the FDIC already has in place arrangements for conducting the eighth Household Survey as a supplement to the June 2023 CPS. Prior to finalizing the 2023 survey questionnaire, the FDIC seeks to solicit public comment on whether changes to the existing instrument are desirable and, if so, to what extent. It should be noted that, as a supplement of the CPS survey, the Household Survey needs to adhere to specific parameters that include limits in the length and sensitivity of the questions that can be asked of CPS respondents. Interested members of the public may obtain a copy of the proposed survey questionnaire on the following web page: *https://www.fdic.gov/resources/regulations/federal-register-publications/2023/2023-fdic-household-survey-instrument.pdf.*

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, 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 respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on February 23, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–04070 Filed 2–27–23; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

TIME AND DATE: Thursday, March 2, 2023 at 10:30 a.m.

PLACE: Hybrid Meeting: 1050 First Street, NE, Washington, DC (12th Floor) and Virtual.

Note: For those attending the meeting in person, current COVID–19 safety protocols for visitors, which are based on the CDC COVID–19 Community Level in Washington, DC, will be updated on the Commission's contact page by the Monday before the meeting. See the contact page at *https://www.fec.gov/contact/.* If you would like to virtually access the meeting, see the instructions below.

STATUS: The March 2, 2023 open meeting has been canceled.

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer. Telephone: (202) 694–1220.

Individuals who plan to attend in person and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Laura E. Sinram, Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the meeting date.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

Vicktoria J. Allen,

Deputy Secretary of the Commission.

[FR Doc. 2023–04152 Filed 2–24–23; 11:15 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in or to Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

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 question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the 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 15, 2023.

A. Federal Reserve Bank of Atlanta (Erien O. Terry, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *Oconee Financial Corporation, Watkinsville, Georgia*; to acquire Elberton Federal Savings & Loan Association, Elberton, Georgia, and thereby engage in operating a savings association pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–04098 Filed 2–27–23; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, with revision, the Reporting Requirements Associated with Regulation Y for Extension of Time to Conform to the Volcker Rule (FR Y–1; OMB No. 7100–0333).

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, *nuha.elmaghrabi@frb.gov,* (202) 452–3884.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board

authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements (which contain more detailed information about the information collections and burden estimates than this notice), and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportingforms/home/review* or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

Collection title: Reporting Requirements Associated with Regulation Y for Extension of Time to Conform to the Volcker Rule.

Collection identifier: FR Y–1.

OMB control number: 7100–0333.

Effective Date: The revisions are applicable as of February 28, 2023.

General description of collection: The Board's Regulation Y—Bank Holding Companies and Change in Bank Control (12 CFR part 225, subpart K) provides that a banking entity or Board-supervised nonbank financial company may, under certain circumstances, request an extension of time to conform its activities to the requirements of section 13 of the Bank Holding Company Act of 1956 (BHC Act),[1] also known as the Volcker Rule.[2]

Frequency: Annual, event-generated.

Respondents: Insured depository institutions (other than certain limited-purpose trust institutions and any insured depository institution that has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets), any company that controls such an insured depository institution, any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106), and any affiliate or subsidiary of any of the foregoing, and nonbank financial companies designated by the Financial Stability Oversight Council that engage in proprietary trading activities or make investments in covered funds.

Total estimated number of respondents: 1.

Total estimated annual burden hours: 12.[3]

Current actions: On October 18, 2022, the Board published a notice in the **Federal Register** (87 FR 63069) requesting public comment for 60 days on the extension, with revision, of the FR Y–1. The Board proposed to revise the FR Y–1 to no longer include a provision related to extended transition periods for illiquid funds for banking entities since they were required to completely divest from such funds by July 21, 2022. The comment period for this notice expired on December 19, 2022. The Board did not receive any comments. The revisions will be implemented as proposed.

Board of Governors of the Federal Reserve System, February 23, 2023.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–04082 Filed 2–27–23; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Selected Balance Sheet Items for Discount Window Borrowers (FR 2046; OMB No. 7100–0289).

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, *nuha.elmaghrabi@frb.gov,* (202) 452–3884.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements (which contain more detailed information about the information collections and burden estimates than this notice), and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportingforms/home/review* or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Information Collection

Collection title: Selected Balance Sheet Items for Discount Window Borrowers.

Collection identifier*: FR 2046.*

OMB control number: 7100–0289.

General description of collection: The Board's Regulation A—Extensions of Credit by Federal Reserve Banks (12 CFR part 201) requires that Reserve Banks review balance sheet data in determining whether to extend credit and to help ascertain whether undue use is made of such credit. Balance sheet data are collected on the FR 2046 report from certain institutions that borrow from the discount window in order to monitor discount window borrowing.

Frequency: On occasion.

Respondents: Depository institutions.

Total estimated number of respondents: Primary and Secondary Credit, 1; Seasonal Credit, 32; Seasonal Credit, borrower in questionable financial condition, 1.

Total estimated annual burden hours: Primary and Secondary Credit, 1; Seasonal Credit, 88; Seasonal Credit,

[1] 12 U.S.C. 1851.

[2] The term ''banking entity'' is defined in section 13(h)(1) of the BHC Act (12 U.S.C. 1851(h)(1)). See *Respondents* section of this notice for the full meaning.

[3] More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at *https://www.federalreserve.gov/apps/reportingforms/home/review.* On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR Y–1.

borrower in questionable financial condition, 1.[1]

Current actions: On October 13, 2022, the Board published a notice in the **Federal Register** (87 FR 62100) requesting public comment for 60 days on the extension, without revision, of the FR 2046. The comment period for this notice expired on December 12, 2022. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, February 23, 2023.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–04081 Filed 2–27–23; 8:45 am]

BILLING CODE 6210–01–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 14, 2023.

A. Federal Reserve Bank of Cleveland (Bryan S. Huddleston, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566. Comments can also be sent electronically to *Comments.applications@clev.frb.org:*

1. *Jane France Richards and Thomas Norris Richards, both of Owingsville, Kentucky;* as the Richards Family Group, a group acting in concert to acquire voting shares of Bath County Banking Company, and thereby indirectly acquire voting shares of Owingsville Banking Company, both of Owingsville, Kentucky.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–04000 Filed 2–27–23; 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 15, 2023.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Benjamin Saunders, Sheridan, Wyoming*; to acquire voting shares of Converse County Capital Corporation, and thereby indirectly acquire voting shares of The Converse County Bank, both of Douglas, Wyoming.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–04097 Filed 2–27–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0161; Docket No. 2022–0053; Sequence No. 23]

Submission for OMB Review; Reporting Purchases From Sources Outside the United States

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding reporting purchases from sources outside the United States.

DATES: Submit comments on or before March 30, 2023

ADDRESSES: Written comments and recommendations for this 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 Review—Open for Public Comments'' or by using the search function.

Additionally, submit a copy to GSA through *https://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0161, Reporting Purchases from Sources Outside the United States. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please

[1] More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at *https://www.federalreserve.gov/apps/reportingforms/home/review.* On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR 2046.

check *www.regulations.gov,* approximately two to three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB control number, Title, and any Associated Form(s):

9000–0161, Reporting Purchases from Sources Outside the United States.

B. Need and Uses

This clearance covers the information that offerors must submit to comply with the FAR provision 52.225–18, Place of Manufacture. This provision requires offerors of manufactured end products to indicate in response to a solicitation, by checking a box, whether the place of manufacture of the end products it expects to provide is predominantly manufactured in the United States or outside the United States. Contracting officers use the information as the basis for entry into the Federal Procurement Data System for further data on the rationale for purchasing foreign manufactured items. The data is necessary for analysis of the application of the Buy American statute and the trade agreements.

C. Annual Burden

Respondents: 50,106.

Total Annual Responses: 2,600,361.

Total Burden Hours: 26,004.

D. Public Comment

A 60-day notice was published in the **Federal Register** at 87 FR 77614, on December 19, 2022. No comments were received.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division, by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0161, Reporting Purchases from Sources Outside the United States.

Janet Fry,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2023–04040 Filed 2–27–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0034; Docket No. 2022–0053; Sequence No. 24]

Submission for OMB Review; Examination of Records by Comptroller General and Contract Audit

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding examination of records by Comptroller General and contract audit.

DATES: Submit comments on or before March 30, 2023.

ADDRESSES: Written comments and recommendations for this 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 Review—Open for Public Comments'' or by using the search function.

Additionally, submit a copy to GSA through *https://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0034, Examination of Records by Comptroller General and Contract Audit. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0034, Examination of Records by Comptroller General and Contract Audit.

B. Need and Uses

This clearance covers the information that contractors must submit to comply with the following Federal Acquisition Regulation (FAR) requirements:

FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Products and Commercial Services. Paragraph (d) of this clause requires contractors to make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction by the Comptroller General of the United States, or an authorized representative. As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form.

FAR 52.214–26, Audit and Records—Sealed Bidding. This clause requires contractors required to submit certified cost or pricing data in connection with the pricing of a modification under a contract to make all records available to the contracting officer, or its authorized representative, including computations and projections related to the proposal for the modification; the discussions conducted on the proposal(s), including those related to negotiating; pricing of the modification; or performance of the modification. This clause requires contractors to make all records available to the Comptroller General of the United States, or an authorized representative, in the case of pricing a modification. This clause allows the Comptroller General to interview any current employee regarding such transactions.

FAR 52.215–2, Audit and Records—Negotiation. This clause requires contractors to maintain records for cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contracts, or any combination of these, for contracting officers, or an authorized representative, to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of a contract. The right of examination includes inspection at all reasonable times of contractor's plants, or parts of them, engaged in performing the

pertinent contract. Contractors required to submit certified cost or pricing data in connection with a pricing action under a contract must make all records available to the contracting officer, or its authorized representative, including computations and projections related to the proposal for the contract, subcontract, or modification; the discussions conducted on the proposal(s), including those related to negotiating; pricing of the contract, subcontract, or modification; or performance of the contract, subcontract or modification. Also, this clause requires contractors to make all records available to the Comptroller General of the United States, or an authorized representative, to examine any of the contractor's directly pertinent records involving transactions under the pertinent contract or subcontract. This clause allows the Comptroller General to interview any current employee regarding such transactions.

The information must be retained so that audits necessary for contract surveillance, verification of contract pricing, and reimbursement of contractor costs can be performed. This information collection does not require contractors to create or maintain any record that the contractor does not maintain in its ordinary course of business.

C. Annual Burden

Respondents: 19,033.

Total Annual Responses: 93,578.

Total Burden Hours: 93,578.

D. Public Comment

A 60-day notice was published in the **Federal Register** at 87 FR 77613, on December 19, 2022. No comments were received.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division, by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0034, Examination of Records by Comptroller General and Contract Audit, in all correspondence.

Janet Fry,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2023–04039 Filed 2–27–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

CDC/HRSA Advisory Committee on HIV, Viral Hepatitis and STD Prevention and Treatment

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with regulatory provisions, the Centers for Disease Control and Prevention (CDC) and the Health Resources and Services Administration (HRSA) announce the following meeting for the CDC/HRSA Advisory Committee on HIV, Viral Hepatitis and STD Prevention and Treatment (CHAC). This meeting is open to the public, limited only by the number of audio and web conference lines (1,000 audio and web conference lines are available). Members of the public are welcome to listen to the meeting by accessing the telephone number and web access provided in the addresses section below. Time will be available for public comment (registration is required to provide oral comment).

DATES: The meeting will be held on April 18 and 19, 2023, from 9 a.m. to 4:30 p.m., EDT. Written comments must be submitted by April 28, 2023. Registration to make oral comments must be submitted by April 4, 2023.

ADDRESSES: The telephone access number is 1–669–254–5252, Webinar ID: 160 343 1340, and the Passcode is 59009399. The web conference access is *https://cdc.zoomgov.com/j/1603431340?pwd=VnB3SmRrRFA0OWF2bUpVMGgzbW51QT09,* and the Passcode is .6*m=vQb. The number of available audio and web conference lines is 1,000.

FOR FURTHER INFORMATION CONTACT: Marah Condit, MS, Committee Management Lead, National Center for HIV, Viral Hepatitis, STD, and TB Prevention, CDC, 1600 Clifton Road NE, Mailstop US8–6, Atlanta, Georgia 30329–4027; Telephone: (404) 639–3423; Email: *nchhstppolicy@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The CDC/HRSA Advisory Committee on HIV, Viral Hepatitis and STD Prevention and Treatment (CHAC) is charged with advising the Secretary of Health and Human Services, the Director, CDC, and the Administrator, HRSA, regarding objectives, strategies, policies, and priorities for HIV, viral hepatitis, and STD prevention and treatment efforts including (1) surveillance; (2) epidemiologic, behavioral, health services, and laboratory research; (3) identification of policy issues and opportunities related to prevention and treatment including but not limited to professional education, healthcare delivery, social determinants of health, research, and prevention and treatment services; (4) strategic issues influencing the ability of CDC and HRSA to fulfill their missions; (5) development and implementation of federal programs focused on prevention and treatment; and (6) provide support to the agencies in their response to emerging health needs.

Matters To Be Considered: The agenda will include discussions on (1) sexual health, (2) equitable scale-up of interventions, (3) mpox, and (4) youth and STD testing. Agenda items are subject to change as priorities dictate.

Public Participation

Written Public Comment: Members of the public are welcome to submit written comments in advance of the meeting. Written comments must be submitted by emailing *nchhstppolicy@cdc.gov* with subject line ''Spring CHAC Public Comment Registration'' by April 28, 2023.

Oral Public Comment: Individuals who would like to make an oral comment during the public comment period must register by emailing *nchhstppolicy@cdc.gov* with subject line ''Spring CHAC Public Comment Registration'' by April 4, 2023. The public comment period is on April 18, 2023, 3:45 p.m., EDT.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–04044 Filed 2–27–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Award of a Single-Source Cooperative Agreement To Fund Institute of Epidemiology Disease Control and Research in Bangladesh, Institut National Hygiene Publique in Cote d'Ivoire, and Ghana Health Service in Ghana

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces three separate awards to fund the Institut of Epidemiology Disease Control and Research (IEDCR), the Institut National Hygiene Publique (INHP), and the Ghana Health Service (GHS). The awards will protect Americans and people worldwide from public health threats by building capacity within their respective countries to strengthen public health preparedness; early pathogen detection to mitigate the impact of global disease outbreaks and public health; and bolstering rapid response to global health emergencies.

DATES: The period for these awards will be September 30, 2023 through September 29, 2028.

FOR FURTHER INFORMATION CONTACT: Prianca Reddi, Division of Global Health Protection, Center for Global Health, Centers for Disease Control and Prevention, 1600 Clifton Rd., Atlanta, GA, Telephone: 404–498–2117, E-Mail: *DGHPNOFOs@cdc.gov.*

SUPPLEMENTARY INFORMATION: The single-source award will provide support around disease surveillance and outbreak response, including establishing routine surveillance and developing information technology tools and systems. Broad areas of support include, but are not limited to: emergency management, ensuring countries have the knowledge and resources they need, including emergency operations centers that can mount a fast, coordinated response when outbreaks happen; safe laboratory systems and diagnostics, building the capacity to identify disease threats close to the source and inform decision-making; and developing the workforce, training frontline responders, laboratorians, disease detectives, emergency managers, and other health professionals who are responsible for taking the lead when crisis strikes.

IEDCR, INHP, and GHS are in a unique position to conduct this work, as they are host government ministries of health with the authority to support health service delivery through capacity building and oversee the national coordination of surveillance, preparedness, prevention, and response activities to all forms of health threats and public health emergencies.

Summary of the Award

Recipient: Institute of Epidemiology Disease Control and Research, Institut National Hygiene Publique, and Ghana Health Service.

Purpose of the Award: The purpose of these awards is to support disease surveillance and outbreak response, emergency management, safe laboratory systems and diagnostics and developing the public health workforce in Bangladesh, Cote d'Ivoire, and Ghana.

Amount of Award: For IEDCR, the approximate year 1 award funding amount is $750,000 in Federal Fiscal Year (FFY) 2023, subject to the availability of funds. Funding amounts for years 2–5 will be set at continuation. For INHP, the approximate year 1 award funding amount is $1,000,000 in Federal Fiscal Year (FFY) 2023, subject to the availability of funds. Funding amounts for years 2–5 will be set at continuation. For GHS, the approximate year 1 award funding amount is $2,000,000 in Federal Fiscal Year (FFY) 2023, subject to the availability of funds. Funding amounts for years 2–5 will be set at continuation. The total 5-year period amount for the three recipients is $18,750,000, subject to the availability of funds.

Authority: This program is authorized under section 307 of the Public Health Service Act [42 U.S.C. 242*l*] and section 301(a) [42 U.S.C. 241(a)] of the Public Health Service Act.

Period of Performance: September 30, 2023 through September 29, 2028.

Dated: February 22, 2023.

Terrance Perry,

Chief Grants Management Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–04014 Filed 2–27–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)–RFA–CE23–004: Research Grants for Preventing Violence and Violence Related Injury; Amended Notice of Closed Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)– RFA–CE23–004: Research Grants for Preventing Violence and Violence Related Injury; March 29, 2023, 8:30 a.m.–5:30 p.m., EDT, Videoconference, in the amended FRN. The meeting was published in the **Federal Register** on February 22, 2023, Volume 88, Number 35, page 10905.

The meeting is being amended to remove the second day and should read as follows:

Date: March 28, 2023.

Time: 8:30 a.m.–5:00 p.m. (EDT)

Place: Videoconference.

The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Aisha L. Wilkes, M.P.H., Scientific Review Officer, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341, Telephone: (404) 639–6473; Email: *AWilkes@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–04043 Filed 2–27–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10716]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by May 1, 2023.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: , Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10716 Applicable Integrated Plan Coverage Decision Letter

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Applicable Integrated Plan Coverage Decision Letter; *Use:* Sections 1859(f)(8) of the Act require development of unified grievance and appeals processes for D–SNPs, to the extent feasible. We finalized the implementation of this regulation for integrated organization determinations at § 422.631, effective January 1, 2021. This rule requires applicable integrated plans to send an enrollee a written notice of any adverse decision on an integrated organization determination using a notice that is written in plain language and contains the information detailed at § 422.631(d)(1)(iii).

Applicable integrated plans as defined at § 422.561 are required to issue form CMS–10716 when a request for either a medical service or payment is denied in whole or in part after considering both the Medicare or Medicaid benefit. Applicable integrated plans issue this form to enrollees when the plan reduces, stops, suspends, or denies, in whole or in part, a request for a service or item (including a Part B drug) or a request for payment of a service or item (including a Part B drug) that the enrollee has already received. The form provides the enrollee with information regarding their right to an appeal of the applicable integrated plan's decision and the enrollee will use the instructions to navigate the appeal process. *Form Number:* CMS–10716 (OMB control number: 0938–1386); *Frequency:* Occasionally; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 112; *Total Annual Responses:* 24,716; *Total Annual Hours:* 4,120. (For policy questions regarding this collection contact Kristi Sugarman Coats at 415–744–3629.)

Dated: February 23, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–04068 Filed 2–27–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0333]

Richard M. Fleming; Denial of Hearing on Application for Termination of Debarment

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is denying Dr. Richard M. Fleming's (Dr. Fleming's) request for a hearing and denying his application for termination of debarment under the Federal Food, Drug, and Cosmetic Act (FD&C Act). Dr. Fleming has failed to file information and analyses sufficient to create a basis for a hearing concerning this action.

DATES: This order is applicable February 28, 2023.

ADDRESSES: You may be submit comments 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

• *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–2013–N–0333 for ''Richard M. Fleming; Denial of Hearing on Application for Termination of Debarment.'' 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.'' 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, 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. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT: Rachael Vieder Linowes, Office of Scientific Integrity, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4206, Silver Spring, MD 20993, 240–402–5931.

SUPPLEMENTARY INFORMATION:

I. Background

On April 24, 2009, Dr. Fleming, the president of, and sole physician at, Fleming Heart and Health Institute, P.C. (FHHI), pled guilty to one felony count of healthcare fraud, in violation of 18 U.S.C. 1347 and 2, and one felony count of mail fraud, in violation of 18 U.S.C. 1341 and 2. On August 20, 2009, the U.S. District Court for the District of Nebraska entered a judgment of conviction against Dr. Fleming on these counts and sentenced Dr. Fleming to 5 years of probation. In pleading guilty to those offenses, Dr. Fleming admitted that his convictions stemmed from two separate actions. Dr. Fleming, through his practice at FHHI, performed various imaging studies and submitted reimbursement claims to Medicare and Medicaid. Dr. Fleming's felony healthcare fraud related to the submission of a reimbursement claim. Dr. Fleming admitted to knowingly executing and attempting to execute a scheme to defraud Medicare and Medicaid healthcare benefit programs in connection with the delivery of and payment for healthcare benefits, items, and services, namely by submitting payment claims for tomographic myocardial perfusion imaging studies that he did not actually perform. Dr. Fleming's felony mail fraud violation related to money paid to him to conduct a clinical study of a soy chip food product for the purpose of evaluating health benefits. As Dr. Fleming admitted during his guilty plea, he received approximately $35,000 for conducting a clinical trial, but he fabricated data for certain subjects.

By letter dated November 18, 2013, pursuant to section 306(b)(2)(B)(ii)(I) of the FD&C Act (21 U.S.C. 335a(b)(2)(B)(ii)(I)), FDA's Office of Regulatory Affairs (ORA) notified Dr. Fleming of its proposal to debar him for 10 years based on those convictions. On September 28, 2018, FDA debarred Dr. Fleming for 10 years from providing services in any capacity to a person with an approved or pending drug product application. Following that debarment, Dr. Fleming made various submissions from September 2018 to October 2018, which FDA construed as a petition for reconsideration and denied on November 28, 2018.

On March 15, 2022, Dr. Fleming applied for termination of debarment pursuant to section 306(d)(1) of the FD&C Act. Absent a conviction reversal, FDA may grant an application to terminate debarment pursuant to section 306(b)(2)(B) only when ''termination serves the interests of justice and adequately protects the integrity of the drug approval process'' (see section 306(d)(3)(B)).

By letter dated July 12, 2022, ORA offered Dr. Fleming an opportunity for a hearing under 21 CFR part 12 on a proposal to deny his application for termination of debarment. In the letter, ORA stated that, considering all the favorable and unfavorable information in light of the remedial public health purposes underlying debarment, terminating Dr. Fleming's debarment would not best serve the interests of justice and would not adequately protect the integrity of the drug approval process.

Under the authority delegated by the Commissioner of Food and Drugs, the Chief Scientist has considered Dr. Fleming's request for a hearing. Hearings are granted only if there is a genuine and substantial issue of fact. Hearings will not be granted on issues of policy or law, on mere allegations, denials, or general descriptions of positions and contentions, or on data and information insufficient to justify the factual determination urged (see § 12.24(b) (21 CFR 12.24(b))).

The Chief Scientist has considered Dr. Fleming's arguments, as well as the proposal to deny Dr. Fleming's application for termination of debarment and concludes that there is no genuine and substantial issue of fact requiring a hearing. Further, the Chief Scientist finds that Dr. Fleming's application does not satisfy the grounds for terminating debarment.

II. Arguments

In his response to ORA's proposal to deny his request for termination, Dr. Fleming concedes that the convictions underlying his debarment pursuant to section 306(b)(2)(B)(ii)(I) of the FD&C Act have not been reversed. FDA could therefore only terminate his debarment under section 306(d)(3)(B) if the Agency determined that such termination would serve the interests of justice and adequately protect the integrity of the drug approval process. In the application to terminate his debarment, Dr. Fleming presented three reasons for terminating his debarment: (1) that he was effectively debarred in the period between when he was convicted of the two felony offenses on which his debarment was based and when FDA finalized his debarment; (2) that he has taken training courses related to billing and ethics; and (3) that he has taken steps to prevent future mistakes in billing and collecting data.

In proposing to deny Dr. Fleming's application to terminate his debarment, ORA weighed the seriousness and nature of the offenses that led to his debarment, including his culpability, against his statements regarding other mitigating factors. After accounting for his assertions that he had effectively been debarred since his original convictions, ORA found that Dr. Fleming had not established that terminating his debarment would serve the interests of justice or adequately protect the integrity of the drug approval process. In his request for a hearing on ORA's proposal, Dr. Fleming repeats some of the arguments from his application for termination of debarment and provides some additional context related to his own views on drug regulation, the criminal justice system, and other ethical considerations. He further clarifies some of the corrective actions he has implemented with respect to patient billing.

As a preliminary matter, the Chief Scientist notes Dr. Fleming's request in his application for termination of debarment that FDA consider the time starting from when he was convicted in 2009 as ''time served.'' Dr. Fleming contended that, because he was convicted in 2009, ''the effective period of debarment has been 12+ years.'' While Dr. Fleming does not renew this argument in his request for a hearing on ORA's proposal, the timing of when he was convicted, when ORA proposed his debarment, and when FDA finalized his debarment is not in dispute. Notwithstanding his arguments to the contrary, FDA did not debar Dr. Fleming until the Agency issued the final order debarring him in September 2018. Neither his convictions nor ORA's proposal to debar him started his debarment period pursuant to the Agency's authority under section 306(b)(2)(B)(ii)(I) of the FD&C Act. He thus cannot now argue that his ultimate debarment in September 2018 had any effect whatsoever on him before that time. The Chief Scientist therefore agrees with ORA that terminating his debarment on that basis would not serve the interests of justice or adequately protect the integrity of the drug approval process.

The Chief Scientist further agrees with ORA that Dr. Fleming has not shown that terminating his debarment would serve the interests of justice or adequately protect the drug approval process—even in light of the additional assertions and arguments proffered in support of his hearing request on ORA's proposal. Both offenses underlying his debarment are felony fraud convictions related to the regulation of drugs. As noted in ORA's proposal to deny Dr. Fleming's application for termination, the pattern of fraudulent conduct on which his convictions were based calls into question his ability to comply with the FD&C Act and indicates that he poses a threat to the drug approval process if he were allowed to participate in it. In light of the conduct underlying the convictions on which Dr. Fleming's debarment was based, his assertions that he has taken some courses and adopted corrective measures relative to billing patients and collecting data do not come close to showing that terminating his debarment would serve the interests of justice and adequately protect the drug approval process in the sense contemplated by section 306(d)(3)(B)(ii). Dr. Fleming has thus presented no material factual dispute for a hearing on ORA's proposal to deny the application to terminate his debarment.

III. Conclusion

Therefore, the Chief Scientist, under authority delegated to her, denies Dr. Fleming's application for termination of debarment under section 306(d) of the FD&C Act. A hearing on this request is not necessary because there are no genuine and substantial issues of fact (see § 12.24(b)).

Any person with an approved or pending drug product application who knowingly uses the services of Dr. Fleming, in any capacity during his period of debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Dr. Fleming provides services in any capacity to a person with an approved or pending drug product application, he will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Dr. Fleming during his period of debarment (section 306(c)(1)(B) of the FD&C Act).

Dated: February 22, 2023.

Namandjé N. Bumpus,

Chief Scientist.

[FR Doc. 2023–04003 Filed 2–27–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Secretary; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Interagency Autism Coordinating Committee.

The meeting will be open to the public for virtual viewing via NIH Videocast. Advanced registration is recommended. Individuals who plan to attend the meeting virtually and need special assistance or other reasonable accommodations to virtually view the meeting should notify the Contact Person listed below at least seven (7) business days in advance of the meeting. The open session can be accessed from the NIH Videocast website (*http://videocast.nih.gov/*).

Name of Committee: Interagency Autism Coordinating Committee.

Date: April 4, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Meeting Access: https://videocast.nih.gov/watch=49068.

Agenda: To discuss business, updates, and issues related to ASD research and services activities.

Cost: The meeting is free and open to the public.

Registration: A registration web link will be posted on the IACC website (*www.iacc.hhs.gov*) prior to the meeting. Pre-registration is recommended.

Deadlines: Written/Virtual Public Comment Due *Date:* Wednesday, March 22,

2023, by 5:00 p.m. ET Public Comment Guidelines.

For public comment instructions, see below.

Contact Person: Ms. Rebecca Martin, Office of Autism Research Coordination, National Institute of Mental Health, NIH, Phone: 301–435–0886, *Email: IACCPublicInquiries@mail.nih.gov*.

Public Comments

The IACC welcomes written and oral public comments from members of the autism community and asks the community to review and adhere to its Public Comment Guidelines. In the *2016–2017 IACC Strategic Plan,* the IACC listed the ''Spirit of Collaboration'' as one of its core values, stating that, ''We will treat others with respect, listen with open minds to the diverse views of people on the autism spectrum and their families, thoughtfully consider community input, and foster discussions where participants can comfortably offer opposing opinions.'' In keeping with this core value, the IACC and the NIMH Office of Autism Research Coordination (OARC) ask that members of the public who provide public comments or participate in meetings of the IACC also adhere to this core value.

A limited number of slots are available for individuals to provide a ~3-minute summary or excerpt of their written comment to the Committee during the meeting. For those interested in that opportunity, please indicate ''Interested in providing oral comment'' in your written submission, along with your name, address, email, phone number, and professional/organizational affiliation so that OARC staff can contact you if a slot is available for you to provide a summary or excerpt of your comment during the meeting.

For any given meeting, priority for comment slots will be given to individuals and organizations that have not previously provided comments in the current calendar year. This will help ensure that as many individuals and organizations as possible have an opportunity to share comments. Commenters going over their allotted 3-minute slot may be asked to conclude immediately in order to allow other comments and the rest of the meeting to proceed on schedule.

Public comment submissions received by 5:00 p.m. ET on Wednesday, March 22, 2023, will be provided to the Committee prior to the meeting for their consideration. Any written comments received after 5:00 p.m. ET, Wednesday, March 22, 2023, may be provided to the Committee either before or after the meeting, depending on the volume of comments received and the time required to process them in accordance with privacy regulations and other applicable Federal policies. The Committee is not able to respond individually to comments. All public comments become part of the public record. Attachments of copyrighted publications are not permitted, but web links or citations for any copyrighted works cited may be provided. For public comment guidelines, see: *https://iacc.hhs.gov/meetings/public-comments/guidelines/.*

Technical Issues

If you experience any technical problems with the webcast, please email *IACCPublicInquiries@mail.nih.gov.*

Disability Accommodations

All IACC Full Committee Meetings provide Closed Captioning through the NIH videocast website. Individuals whose full participation in the meeting will require special accommodations (*e.g.,* sign language or interpreting services, etc.) must submit a request to the Contact Person listed on the notice at least seven (7) business days prior to the meeting. Such requests should include a detailed description of the accommodation needed and a way for the IACC to contact the requester if more information is needed to fill the request. Special requests should be made at least seven (7) business days prior to the meeting; last-minute requests may be made but may not be possible to accommodate.

Additional Information

Information about the IACC is available on the website: *http://www.iacc.hhs.gov.*

Dated: February 22, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–04060 Filed 2–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 Neurological Disorders and Stroke Special Emphasis Panel; AD/ADRD Digital Neuropathological Platforms for Advanced Analytics (U24) Review.

Date: March 17, 2023.

Time: 11:30 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Mir Ahamed Hossain, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223, *mirahamed.hossain@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS.)

Dated: February 22, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–04062 Filed 2–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious 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 Allergy and Infectious Diseases Special Emphasis Panel; Molecular Dynamics of HIV (R01 Clinical Trial Not Allowed).

Date: April 6–7, 2023.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G34, Rockville, MD 20892, (Virtual Meeting).

Contact Person: Vishakha Sharma, Ph.D., Scientific Review Officer, Scientific Review Program Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G34, Rockville, MD 20852, 301–761–7036, *vishakha.sharma@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 22, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–04061 Filed 2–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Pathway to Independence Awards (K99/R00) B.

Date: March 28, 2023.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: David W. Miller, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Bethesda, MD 20892–9608, 301–443–9734, *millerda@mail.nih.gov*.

Name of Committee: National Institute of Mental Health Special Emphasis Panel Review: Gut Function & CNS Co-Morbidities in PLWH.

Date: March 29, 2023.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Bethesda, MD 20892, 301–435–1260, *jasenka.borzan@nih.gov*.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; BRAIN Initiative Fellows: Ruth L. Kirschstein National Research Service Award (NRSA) Individual Postdoctoral Fellowship (F32).

Date: March 29, 2023.

Time: 11:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Emma Perez-Costas, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Rockville, MD 20892, 301–827–9275, *emma.perez-costas@nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: February 22, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–04059 Filed 2–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2022–0012]

Agency Information Collection Activities: Communications Assets Survey and Mapping (CASM) Tool

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: 30-Day notice and request for comments; reinstatement without change, OMB Control Number: DHS–1670–0043.

SUMMARY: The Emergency Communications Division (ECD within the Cybersecurity and Infrastructure Security Agency (CISA) is issuing a 30-day notice and request for comments to extend use of Information Collection Request (ICR) 1670–0043. CISA will submit the ICR to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted March 30, 2023. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to OMB Desk Officer, Department of Homeland Security and sent via electronic mail to *dhsdeskofficer@omb.eop.gov.*

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the OMB Control Number 1670–0043—replace.

Comments submitted in response to this notice may be made available to the public through relevant websites. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kendall Carpenter, 202–744–1580, *kendall.carpenter@cisa.dhs.gov.*

SUPPLEMENTARY INFORMATION: CISA previously published this information collection request (ICR) in the **Federal Register** on October 10, 2022 for a 60-day public comment period. Zero comments were received by CISA. The purpose of this notice is to allow additional 30-days for public comments.

The CISA ECD, formed under Title XVIII of the Homeland Security Act of 2002, 6 U.S.C. 571 *et seq.,* as amended, is required to develop and maintain the Nationwide Emergency Communications Plan (NECP). The vision of the NECP is to ensure emergency response personnel can communicate as needed, on demand, and as authorized. To achieve this vision, ECD provides the Communications Assets and Survey Mapping (CASM) Tool. The CASM Tool is the primary resource nationwide for the emergency communications community to inventory and share asset and training information for the purpose of planning public safety communications operability and interoperability.

ECD provides the CASM Tool as a secure and free nationwide database to contain communications capabilities for

use by Federal, State, Local, Territorial, and Tribal (SLTT) emergency personnel. CASM allows Federal employees and SLTT Statewide Interoperability Coordinators (SWIC) to inventory emergency communication equipment and resources. The information entered is voluntary and used by SWIC to support tactical planning and coordination during emergencies. ECD does not utilize the information entered into CASM. ECD only provides, maintains, and stores the information entered in the CASM database and only has administrative access to the information entered. All information is collected via electronic means. The CASM registration and database tool is available online via *https://casm.dhs.gov/.* Users can also access and enter information via the CASM Resource Finder mobile app.

This is a renewal for an existing information collection not a new collection. OMB is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

3. Enhance the quality, utility, and clarity of the information to be collected.

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 submissions of responses.

Analysis

Agency: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

Title: Communications Assets Survey and Mapping Tool.

OMB Number: CISA–1670–0043.

Frequency: Annually.

Affected Public: State, Local, Tribal, and Territorial entities.

Number of Respondents: 56.

Estimated Time per Respondent: 5 Minutes (0.08 hours) per registration or 30 minutes (0.50 hours) for tool modules.

Total Burden Hours: 341.

Total Annualized Respondent Opportunity Cost: $16,215.

Total Annualized Respondent Out-of-Pocket Cost: $0.

Total Annualized Government Cost: $3,000,000.

Robert J. Costello,

Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2023–04076 Filed 2–27–23; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2023–0002]

Notice of President's National Infrastructure Advisory Council Meeting

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: Notice of Federal Advisory Committee Act (FACA) meeting; request for comments.

SUMMARY: CISA is publishing this notice to announce the following President's National Infrastructure Advisory Council (NIAC) meeting.

DATES:

Meeting Registration: Registration is required to attend the meeting and must be received no later than 5 p.m. Eastern Time (ET) on March 9, 2023. For more information on how to participate, please contact *NIAC@cisa.dhs.gov.*

Speaker Registration: Registration to speak during the meeting's public comment period must be received no later than 5 p.m. ET on March 9, 2023.

Written Comments: Written comments must be received no later than 5 p.m. ET on March 9, 2023.

Meeting Date: The NIAC will meet on March 14, 2023, from 2 p.m. to 6 p.m. ET. The meeting may close early if the council has completed its business.

ADDRESSES: The National Infrastructure Advisory Council's open session will be held in-person at 1650 Pennsylvania Ave NW, Washington, DC; however, members of the public may participate via teleconference only. Requests to participate will be accepted and processed in the order in which they are received. For access to the conference call bridge, information on services for individuals with disabilities, or to request special assistance, please email *NIAC@cisa.dhs.gov* by 5 p.m. ET on March 9, 2023. The NIAC is committed to ensuring all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Erin McJeon at *NIAC@cisa.dhs.gov* as soon as possible.

Comments: The council will consider public comments on issues as listed in the **SUPPLEMENTARY INFORMATION** section below. Associated materials for potential discussions during the meeting will be available for review at *https://www.cisa.gov/niac* by March 8. Comments should be submitted by 5 p.m. ET on March 9,2023 and must be identified by Docket Number CISA–2023–0002. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Please follow the instructions for submitting written comments.
- *Email: NIAC@cisa.dhs.gov.* Include the Docket Number CISA–2023–0002 in the subject line of the email.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the Docket Number for this action. Comments received will be posted without alteration to *www.regulations.gov,* including any personal information provided. You may wish to read the Privacy & Security Notice which is available via a link on the homepage of *www.regulations.gov.*

Docket: For access to the docket and comments received by the National Infrastructure Advisory Council, please go to *www.regulations.gov* and enter docket number CISA–2023–0002.

A public comment period will take place from 3:50 p.m. to 4 p.m. Speakers who wish to participate in the public comment period must email *NIAC@cisa.dhs.gov* to register. Speakers should limit their comments to 3 minutes and will speak in order of registration. Please note that the public comment period may end before the time indicated, depending on the number of speakers who register to participate.

FOR FURTHER INFORMATION CONTACT: Erin McJeon, 202–819–6196, *NIAC@cisa.dhs.gov.*

SUPPLEMENTARY INFORMATION: The NIAC is established under section 10 of E.O. 13231 issued on October 16, 2001, continued and amended under the authority of E.O. 14048, dated September 30, 2021. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. 10 (Pub. L. 117–286). The NIAC provides the President, through the Secretary of Homeland Security, advice on the security and resilience of the Nation's critical infrastructure sectors.

Agenda: The National Infrastructure Advisory Council will meet in an open

session on Tuesday, March 14, 2023, from 2 p.m. to 6 p.m. ET to discuss NIAC activities. The open session will include: (1) a period for public comment; (2) a report to the Council from the NIAC's Cross-Cutting Infrastructure Policy Challenges Subcommittee; (3) deliberation and vote on Cross-Cutting Infrastructure Policy Challenges Subcommittee recommendations; and (4) updates on additional study topics.

Erin McJeon,

Designated Federal Officer, National Infrastructure Advisory Council, Cybersecurity and Infrastructure Security Agency, Department of Homeland Security.

[FR Doc. 2023–04001 Filed 2–27–23; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–11]

30-Day Notice of Proposed Information Collection: Nonprofit Application and Recertification for FHA Mortgage Insurance Programs OMB Control No.: 2502–0540

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 30, 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.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 7th Street SW, Room 8210, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. 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 22, 2022 at 87 FR 78704.

A. Overview of Information Collection

Title of Information Collection: Nonprofit Application and Recertification for FHA Mortgage Insurance Programs.

OMB Approval Number: 2502–0540.

OMB Expiration Date: April 30, 2023.

Type of Request: Extension of currently approved collection.

Form Numbers: None.

Description of the need for the information and proposed use: Specific information and related documents are needed to determine the eligibility of Nonprofit organizations for the participation in FHA-insured mortgage transactions.

Respondents: Nonprofit organizations.

Estimated Number of Respondents: 173.

Estimated Number of Responses: 173.

Frequency of Response: Annually.

Average Hours per Response: 60.

Total Estimated Burden: 9,398.

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. 2023–04051 Filed 2–27–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7066–N–03]

60-Day Notice of Proposed Information Collection: Application for Community Compass TA and Capacity Building Program NOFA and Awardee Reporting, OMB Control No.: 2506–0197

AGENCY: The Office of Community Planning and Development, 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 60 days of public comment.

DATES: *Comments Due Date: May 1, 2023.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be sent within 60 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 60-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: Anna Guido, Reports Management Officer, REE, Department of Housing

and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; telephone 202–402–5535 for Anna (this is not a toll-free number) or email at or *Anna.P.Guido@hud.gov* for a copy of the proposed forms or other available information.

FOR FURTHER INFORMATION CONTACT: Kenneth Rogers, Senior Technical Assistance (TA) Specialist, Kenneth Rogers at *Kenneth.W.Rogers@hud.gov* or telephone 202–402–4396. 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. Guido.

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: Application for HUD—Technical Assistance and Capacity Building Program Notice of Funding Availability (NOFA).

OMB Approval Number: 2506–0197.

Type of Request: Extension.

Form Number: SF–424, SF424CB, SF–424CBW, SF–425, SF–LLL, HUD–2880, HUD–50070, HUD–4131, HUD–4132, HUD–4133, HUD–4134, HUD–4135, HUD–4136, HUD–4138, and *Grants.gov* Lobbying Form Certification.

Description of the need for the information and proposed use: Application information is needed to determine competition winners, *i.e.,* the technical assistance providers best able to develop efficient and effective programs and projects that increase the supply of affordable housing units, prevent and reduce homelessness, improve data collection and reporting, and use coordinated neighborhood and community development strategies to revitalize and strengthen their communities. Additional information is needed during the life of the award from the competition winner, *i.e.,* the technical assistance providers to fulfill the administrative requirements of the award.

Application/Pre-Award

Respondents: Profit and non-profit organizations.

Estimated Number of Respondents: 60.

Estimated Number of Responses: 60.

Frequency of Response: 1.

Average Hours per Response: 118.14.

Application/Pre-Award Total Estimated Burden: 7088.40.

Post-Award

Estimated Number of Respondents/Awardees: 30.

Work Plans: 10 per year/awardee.

Average Hours per Response: 18.

Reports: 4 per year/awardee.

Average Hours per Response: 6.

Recordkeeping: 12 per year/awardee.

Average Hours per Response: 16.

Post-Award Total Estimated Burden: 11070.

Total Estimated Burdens: 18,158.40.

Information collection	Number of respondents	Frequency of response	Responses per Annum	Burden hour per response	Annual burden hours	Hourly cost per response *	Annual cost
Application/Pre-Award	60	1	60	118.14	7,088.40	$66.88	$474,072.19
Post-Award							
Work Plans	30	10	300	18	5400	66.88	361,152.00
Reports	30	4	120	5.85	702	66.88	46,949.76
Recordkeeping	30	12	360	13.8	4968	66.88	332,259.84
Total					18,158.40		1,214,433.79

* Estimated cost for respondents is calculated from the June 2018 Department of Labor Bureau of Labor Statistics report on Employer Costs for Employee Compensation determined that the hourly rate of management, professional and related wages and salaries averaged $41.71 per hour plus $19.03 per hour for fringe benefits for a total $60.74 per hour.

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.

Principal Deputy Assistant Secretary for Community Planning and Development, Marion McFadden, having reviewed and approved this document, is delegating the authority to electronically sign this document to submitter, Aaron Santa Anna, who is the Federal Register Liaison for HUD, for purposes of publication in the **Federal Register**.

Aaron Santa Anna,

Federal Register Liaison for the Department of Housing and Urban Development.

[FR Doc. 2023–04064 Filed 2–27–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7066–N–02]

60-Day Notice of Proposed Information Collection: Emergency Solutions Grant Data Collection, OMB Control No.: 2506–0089

AGENCY: Office of Community Planning and Development, 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 60 days of public comment.

DATES: *Comments Due Date:* May 1, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be sent within 60 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 60-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: Anna Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; telephone 202–402–5535 for Anna (this is not a toll-free number) or email at *Anna.P.Guido@hud.gov* for a copy of the proposed forms or other available information.

FOR FURTHER INFORMATION CONTACT: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW, Room 7262, Washington, DC 20410. 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. Guido.

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: Emergency Solutions Grants Program Recordkeeping Requirements.

OMB Approval Number: 2506–0089.

Type of Request: Extension.

Form Number: N/A.

Description of the need for the information and proposed use: This submission is to request an revision of a currently approved collection for the reporting burden associated with program and recordkeeping requirements that Emergency Solutions Grants (ESG) program recipients will be expected to implement and retain. This submission is limited to the recordkeeping burden under the ESG program. To see the regulations for the ESG program and applicable supplementary documents, visit the ESG page on the HUD Exchange at *https://www.hudexchange.info/programs/esg/.* The statutory provisions and the implementing interim regulations (also found at 24 CFR 576) that govern the program require these recordkeeping requirements.

Respondents: ESG recipient and subrecipient lead persons.

Estimated Number of Respondents: The ESG record keeping requirements include 18 distinct activities. Each activity requires a different number of respondents ranging from 20 to 78,000. There are 78,000 unique respondents.

Estimated Number of Responses: 546,116.

Frequency of Response: Each activity also has a unique frequency of response, ranging from once annually to monthly.

Average Hours per Response: Each activity also has a unique associated number of hours of response, ranging from 15 minutes to 12 hours and 45 minutes.

Total Estimated Burdens: The total number of hours needed for all reporting is 387,522 hours.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
576.100(b)(2) Emergency Shelter and Street Outreach Cap	360	1	360	1	360	45.14	16,250.40
576.400(a) Consultation with Continuums of Care	360	1	360	6	2,160.00	45.14	97,502.40
576.400(b) Coordination with other Targeted Homeless Services	2,360.00	1	2,360.00	8	18,880.00	45.14	852,243.20
576.400(c) System and Program Coordination with Mainstream Resources	2,360.00	1	2,360.00	16	37,760.00	45.14	1,704,486.40
576.400(d) Centralized or Coordinated Assessment	2,000.00	1	2,000.00	3	6,000.00	45.14	270,840.00
576.400(e) Written Standards for Determining the Amount of Assistance	808	1	808	5	4,040.00	45.14	182,365.60
576.400(f) Participation in HMIS	78,000.00	1	78,000.00	0.5	39,000.00	45.14	1,760,460.00
576.401(a) Initial Evaluation	50,000.00	1	50,000.00	1	50,000.00	45.14	2,257,000.00
576.401(b) Recertification	20,000.00	2	40,000.00	0.5	20,000.00	45.14	902,800.00
576.401(d) Connection to Mainstream Resources	78,000.00	3	234,000.00	0.25	58,500.00	45.14	2,640,690.00
576.401(e) Housing retention plan	50,000.00	1	50,000.00	0.75	37,500.00	45.14	1,692,750.00
576.402 Terminating Assistance	808	1	808	4	3,232.00	45.14	145,892.48
576.403 Habitability review	52,000.00	1	52,000.00	0.6	31,200.00	45.14	1,408,368.00
576.405 Homeless Participation	2,360.00	12	28,320.00	1	28,320.00	45.14	1,278,364.80
576.500 Recordkeeping Requirements	2,360.00	1	2,360.00	12.75	30,090.00	45.14	1,358,262.60
576.501(b) Remedial Actions	20	1	20	8	160	45.14	7,222.40
576.501(c) Recipient Sanctions	360	1	360	12	4,320.00	45.14	195,004.80
576.501(c) Subrecipient Response	2,000.00	1	2,000.00	8	16,000.00	45.14	722,240.00
Total	78,000.00		546,116.00		387,522.00		17,492,743.08

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.

Principal Deputy Assistant Secretary for Community Planning and Development, Marion McFadden, having reviewed and approved this document, is delegating the authority to electronically sign this document to submitter, Aaron Santa Anna, who is the Federal Register Liaison for HUD, for purposes of publication in the **Federal Register**.

Aaron Santa Anna,

Federal Register Liaison, Department of Housing and Urban Development.

[FR Doc. 2023–04072 Filed 2–27–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–MB–2023–0003; FXMB123109WEBB0–234–FF09M26000; OMB Control Number 1018–0019]

Agency Information Collection Activities; North American Woodcock Singing Ground Survey

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing to renew an information collection without change.

DATES: Interested persons are invited to submit comments on or before May 1, 2023.

ADDRESSES: Send your comments on the information collection request (ICR) by one of the following methods (reference Office of Management and Budget (OMB) Control Number 1018–0019 in the subject line of your comment):

- *Internet (preferred): https://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–HQ–MB–2023–0003.
- *Email: Info_Coll@fws.gov.*
- *U.S. mail:* Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. 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: In accordance with the Paperwork Reduction Act (PRA, 44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies 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.

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. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you 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 Migratory Bird Treaty Act (16 U.S.C. 703–712) designates the Department of the Interior as the primary agency responsible for managing migratory bird populations frequenting the United States and setting hunting regulations that allow for the well-being of migratory bird populations. These responsibilities dictate that we gather accurate data on various characteristics of migratory bird populations.

The North American Woodcock Singing Ground Survey is an essential part of the migratory bird management program. Federal, State, Provincial, Tribal, and local conservation agencies conduct the survey annually to provide the data necessary to determine the population status of the American woodcock. In addition, the information is vital in assessing the relative changes in the geographic distribution of the species. We use the information primarily to develop recommendations for hunting regulations. Without information on the population's status, we might promulgate hunting regulations that:

- Are not sufficiently restrictive, which could cause harm to the woodcock population, or
- Are too restrictive, which would unduly restrict recreational opportunities afforded by woodcock hunting.

State, local, Tribal, Provincial, and Federal conservation agencies, as well as other participants, use Form 3–156 to conduct annual field surveys. Instructions for completing the survey and reporting data are on the reverse of the form. Observers can scan/email, scan/upload via link, mail, or fax Form 3–156 to the Division of Migratory Bird Management, or enter the information electronically through the internet, *https://migbirdapps.fws.gov/woodcock.*

We collect observer information (name, telephone, email address, and mailing address) so that we can contact the observer if questions or concerns arise. Observers provide information on:

- Sky condition, temperature, wind, and precipitation.
- Stop number.
- Odometer reading.
- Time at each stop.

- Number of American Woodcock males heard peenting (calling).
- Disturbance level.
- Comments concerning the survey.

We use the information that we collect to analyze the survey data and prepare reports. Assessment of the population's status serves to guide the Service, the States, and the Canadian Government in the annual promulgation of hunting regulations.

The public may request a copy of Form 3–156 contained in this information collection by sending a request to the Service Information Collection Clearance Officer (see **ADDRESSES**).

Title of Collection: North American Woodcock Singing Ground Survey.

OMB Control Number: 1018–0019.

Form Number: Form 3–156.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: State, Provincial, local, and Tribal Governments.

Total Estimated Number of Annual Respondents: 820.

Total Estimated Number of Annual Responses: 820.

Estimated Completion Time per Response: Varies from 1.75 hours to 1.88 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 1,537.

Respondent's Obligation: Voluntary.

Frequency of Collection: Annually.

Total Estimated Annual Nonhour Burden Cost: None.

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.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2023–04074 Filed 2–27–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/A0A501010.999900; OMB Control Number 1076–0136]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Indian Self-Determination and Education Assistance Act Programs

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 30, 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=202302-1076-002* 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 Steven Mullen, Information Collection Clearance Officer, Office of Regulatory Affairs and Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1001 Indian School Road NW, Suite 229, Albuquerque, New Mexico 87104; *comments@bia.gov;* (202) 924–2650. 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/do/PRAOMBHistory?ombControlNumber=1076-0136.*

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: Regulations at 25 CFR 900 codify the Indian Self-Determination and Education Assistance Act (ISDEAA), which authorizes and directs the Bureau of Indian Affairs (BIA) to contract or compact with and fund Indian Tribes and Tribal organizations that choose to take over the operation of programs, services, functions and activities (PSFAs) that would otherwise be operated by the BIA. These PSFAs include programs such as law enforcement, social services, and tribal priority allocation programs. The data is maintained by BIA's Office of Indian Services, Division of Self-Determination.

Title of Collection: Indian Self-Determination and Education Assistance Act Programs.

OMB Control Number: 1076–0136.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Federally recognized Indian Tribes, Tribal organizations and contractors.

Total Estimated Number of Annual Respondents: 567.

Total Estimated Number of Annual Responses: 7,063.

Estimated Completion Time per Response: Varies from 4 hours to 122 hours.

Total Estimated Number of Annual Burden Hours: 127,127 hours.

Respondent's Obligation: Required to Obtain a Benefit.

Frequency of Collection: Annually.

Total Estimated Annual Nonhour Burden Cost: $0.

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. 2023–04036 Filed 2–27–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L13100000.PP0000.LLHQ310000.234; OMB Control No. 1004–0196]

Agency Information Collection Activities; Oil and Gas Leasing: National Petroleum Reserve—Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before May 1, 2023.

ADDRESSES: Send your written comments on this information collection request (ICR) by mail to Darrin King, Information Collection Clearance Officer, U.S. Department of the Interior, Bureau of Land Management, Attention PRA Office, 440 W 200 S #500, Salt Lake City, UT 84101; or by email to *BLM_HQ_PRA_Comments@blm.gov.* Please reference Office of Management and Budget (OMB) Control Number 1004–0196 in the subject line of your comments. Please note that the electronic submission of comments is recommended.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Jennifer Spencer by email at *j35spenc@blm.gov,* or by telephone at (307) 775–6261. 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. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

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), all information collections require approval under the PRA. We may not conduct or sponsor, and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies 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.

We are especially interested in public comment addressing the following:

(1) 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) 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 the agency might minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you 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: This OMB Control Number covers paperwork requirements for operators and operating rights owners in the National Petroleum Reserve—Alaska (NPRA). In accordance with the National Petroleum Reserves Production Act (42 U.S.C. 6501–6508) and regulations at 43 CFR part 3130 (subparts 3130, 3133, 3135, 3137, and 3138), a respondent may apply to the Bureau of Land Management (BLM) for a competitive oil and gas lease and may propose a unit agreement that meets the requirements for unitized exploration and development of oil and gas resources of the NPRA. This OMB Control Number is currently scheduled to expire on August 31, 2023. The BLM plans to request that OMB renew this OMB Control Number for an additional three years.

Title of Collection: Oil and Gas Leasing: National Petroleum Reserve—Alaska (43 CFR part 3130).

OMB Control Number: 1004–0196.

Form Numbers: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Participants in the oil and gas leasing program within National Petroleum Reserve—Alaska.

Total Estimated Number of Annual Respondents: 21.

Total Estimated Number of Annual Responses: 21.

Estimated Completion Time per Response: Varies from 15 minutes to 80 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 218.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and, notwithstanding any other provision of law, 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.*).

Darrin A. King,

Information Collection Clearance Officer.

[FR Doc. 2023–04069 Filed 2–27–23; 8:45 am]

BILLING CODE 4310–84–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–410 (Fifth Review)]

Light-Walled Rectangular Pipe and Tube From Taiwan

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty order on light-walled rectangular pipe and tube from Taiwan would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on July 1, 2022 (87 FR 39562) and determined on October 4, 2022, that it would conduct an expedited review (88 FR 2374, January 13, 2023).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on February 22, 2023. The views of the Commission are contained in USITC Publication 5410 (February 2023), entitled *Light-Walled Rectangular Pipe and Tube from Taiwan: Investigation No. 731–TA–410 (Fifth Review).*

By order of the Commission.

Issued: February 22, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–04002 Filed 2–27–23; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Job Corps Application Data

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before March 30, 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: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Workforce Innovation and Opportunity Act (WIOA) authorizes the collection of information from Job Corps applicants to determine eligibility for the Job Corps program. The ETA 652, Job Corps Applicant Data Sheet, is completed by the admissions representative in collaboration with each applicant to determine the applicant's eligibility for the Job Corps program in accordance with WIOA and Job Corps policy. The form is also used to collect socio-demographic and employment barriers information for program planning, evaluation, and data reporting purposes. In this ICR revision, ETA is proposing that the ETA 682 be eliminated and replaced with verbal questions during admission about whether applicants have dependents and childcare. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 25, 2022 (87 FR 31912).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–ETA.

Title of Collection: Job Corps Application Data.

OMB Control Number: 1205–0025.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 139,948.

Total Estimated Number of Responses: 139,948.

Total Estimated Annual Time Burden: 11,421 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: February 22, 2023.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2023–04055 Filed 2–27–23; 8:45 am]

BILLING CODE 4510–FT–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0016]

Derricks Standards Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements contained in its Derricks Standards.

DATES: Comments must be submitted (postmarked, sent, or received) by May 1, 2023.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov.* Documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (OSHA–2010–0016). OSHA will place comments and requests to speak, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates. For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, the reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and incidents (see 29 U.S.C. 657). The OSH Act also requires OSHA to obtain such information with a minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining said information (see 29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement as well as how they use it. The purpose of these requirements is to prevent death and serious injuries among workers by ensuring that the derrick is not used to lift loads beyond its rated capacity and that all the ropes are inspected for wear and tear.

Paragraph (c)(1) requires that for permanently installed derricks a clearly legible rating chart must be provided with each derrick and securely affixed to the derrick. Paragraph (c)(2) requires that for non-permanent installations the manufacturer must provide sufficient information from which capacity charts can be prepared by the employer for the particular installation. The capacity charts must be located at the derrick or at the jobsite office. The data on the capacity charts provide information to the workers to assure that the derricks are used as designed and not overloaded or used beyond the range specified in the charts.

Paragraph (f)(2)(i)(d) requires that warning or out of order signs must be placed on the derrick hoist while adjustments and repairs are being performed.

Paragraph (g)(1) requires employers to thoroughly inspect all running rope in use, and to do so at least once a month. In addition, before using rope that has been idle for at least a month, it must be inspected as prescribed by paragraph (g)(3) and a record prepared to certify that the inspection was done. The certification records must include the inspection date, the signature of the person conducting the inspection, and the identifier of the rope inspected. Employers must keep the certification records on file and available for inspection. The certification records provide employers, workers, and OSHA compliance officers with assurance that the ropes are in good condition. The Standard requires the disclosure of charts and inspection certification records if requested during an OSHA inspection.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

There is no change in burden hours in the information collection requirements in this standard. The costs are adjusted due to updated calculations.

Type of Review: Extension of a currently approved collection.

Title: Derricks Standard (29 CFR 1910.181).

OMB Control Number: 1218–0222.

Affected Public: Business or other for-profits.

Number of Respondents: 1,050.

Frequency of Responses: On occasion.

Total Responses: 7,750.

Average Time per Response: Varies.

Estimated Total Burden Hours: 1,336.

Estimated Cost (Operation and Maintenance): $90,300.

IV. Public Participation—Submission of Comments on This Notice and internet Access to Comments and Submissions

You may submit comments in response to this document as follows:

(1) electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. Please note: While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID–19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service. All comments, attachments, and other material must identify the agency name and the OSHA docket number (Docket No. OSHA–2010–0016) for the ICR. You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify electronic comments by your name, date, and the docket number so that the Agency can attach them to your comments.

Due to security procedures, the use of regular mail may cause a significant delay in the receipt of comments.

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website.

All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on February 14, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–04056 Filed 2–27–23; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Wage and Hour Division

Agency Information Collection Activities; Comment Request; Information Collection—Housing Occupancy Certificates Under the Migrant and Seasonal Agricultural Worker Protection Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice and request for comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Wage and Hour Division is soliciting comments concerning its proposal to extend Office of Management and Budget (OMB) approval of the Information Collection: Housing Occupancy Certificate under the Migrant and Seasonal Agricultural Worker Protection Act. A copy of the proposed information request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before May 1, 2023.

ADDRESSES: You may submit comments identified by OMB Control Number 1235–0006 by either one of the following methods: Email: *WHDPRAComments@dol.gov;* Mail, Hand Delivery, Courier: Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Robert Waterman, Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1–866–487–9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

I. Background: The Wage and Hour Division (WHD) of the Department of Labor (Department) administers the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801 *et seq.* MSPA protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping. MSPA also requires farm labor contractors and farm labor contractor employees to register with the Department and to obtain special authorization before housing workers, using a vehicle to transport workers, or driving such vehicles. MSPA requires any person who owns or controls any facility or real property that is used to house migrant agricultural workers to post a copy of the certificate of occupancy at the site of the facility or real property. The certificate attests that a state, local, or federal agency conducted a housing safety and health inspection and verified that the facility or real property meets the applicable safety and health standards. Migrant agricultural workers may not be housed at any facility or real property without such certificate of occupancy. The original certificate must be retained by the person who owns or controls the facility or real property for 3 years and

made available for inspection upon the Department's request. The Department makes optional form WH–520 available for these purposes. Form WH–520 is both an information gathering form and a certificate of occupancy that WHD issues when it is the federal agency conducting the safety and health inspection.

II. Review Focus: The Department is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Enhance the quality, utility, and clarity of the information to be collected;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions: The Department seeks an approval for the extension of this information collection that requires any person owning or controlling any facility or real property to be occupied by migrant agricultural workers to obtain a certificate of occupancy.

Type of Review: Extension.

Agency: Wage and Hour Division.

Title: Housing Occupancy Certificate—Migrant and Seasonal Agricultural Worker Protection Act.

OMB Number: 1235–0006.

Affected Public: Business or other for-profit, Not-for-profit institutions, Farms.

Total Respondents: 10.

Total Annual Responses: 10.

Estimated Total Burden Hours: 0.67 hours.

Estimated Time per Response: 3–4 minutes.

Frequency: Annual.

Total Burden Cost (capital/startup): $0.

Total Burden Costs (operation/maintenance): $28.41.

Dated: February 21, 2023.

Amy DeBisschop,

Director, Division of Regulations, Legislation, and Interpretation.

[FR Doc. 2023–04058 Filed 2–27–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Wage and Hour Division

Agency Information Collection Activities; Comment Request; Information Collections: Employee Polygraph Protection Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department) is soliciting comments concerning a proposed extension of the information collection request (ICR) titled, ''Employee Polygraph Protection Act.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995. The Department proposes to extend its information collection without change to existing requirements. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. A copy of the proposed information request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before May 1, 2023.

ADDRESSES: You may submit comments identified by Control Number 1235–0005 by either one of the following methods: *Email: WHDPRAComments@dol.gov; Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for Office of Management and Budget (OMB) approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1–866–487–9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

I. Background

The Wage and Hour Division (WHD) of the Department of Labor (DOL) administers the Employee Polygraph Protection Act of 1988 (EPPA), 29 U.S.C. 2001 *et seq.* The EPPA prohibits most private employers from using any lie detector tests either for pre-employment screening or during employment. The Act contains an exemption applicable to federal, state, and local government employers. The EPPA also contains several limited exemptions authorizing polygraph tests under certain conditions, including testing (1) by the federal government of experts, consultants, or employees of Federal contractors engaged in national security intelligence or counterintelligence functions; (2) of employees the employer reasonably suspects of involvement in a workplace incident resulting in economic loss or injury to the employer's business; (3) of some prospective employees of private armored cars, security alarm and security guard firms; and (4) of some current and prospective employees of certain firms authorized to manufacture, distribute, or dispense controlled substances. WHD may assess civil money penalties against employers who violate any EPPA provision. This amount increases annually due to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Enhance the quality, utility, and clarity of the information to be collected;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; or

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions

The Department of Labor seeks an approval for the extension of this information collection that requires employers to make, maintain, and preserve records in accordance with statutory and regulatory requirements.

Type of Review: Extension.

Agency: Wage and Hour Division.

Title: Employee Polygraph Protection Act.

OMB Control Number: 1235–0005.

Affected Public: Business or other for-profit, Not-for-profit institutions.

Total Respondents: 164,000.

Total Annual Responses: 757,400.

Estimated Total Burden Hours: 68,779.

Estimated Time per Response: 30–45 minutes.

Frequency: On occasion.

Total Burden Cost (Capital/Startup): $0.

Total Burden Costs (Operation/Maintenance): $0.

Dated: February 21, 2023.

Amy DeBisschop,

Director, Division of Regulations, Legislation, and Interpretation.

[FR Doc. 2023–04057 Filed 2–27–23; 8:45 am]

BILLING CODE 4510–27–P

NUCLEAR REGULATORY COMMISSION

[NRC–2022–0137]

Information Collection: Access Authorization

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''Access Authorization.''

DATES: Submit comments by March 30, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2022–0137 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0137.

• *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.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML23047A408. The supporting statement and burden spreadsheet are available in ADAMS under Accession Nos. ML23011A288 and ML22200A113.

• *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.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''Access Authorization.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on August 31, 2022, 87 FR 53511.

1. *The title of the information collection:* Access Authorization.

2. *OMB approval number:* 3150–0046.

3. *Type of submission:* Revision.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* On occasion.

6. *Who will be required or asked to respond:* NRC-regulated facilities and other organizations requiring access to NRC-classified information, and NRC contractors with access to classified information or who hold a sensitive position.

7. *The estimated number of annual responses:* 534 (456 reporting responses plus 78 recordkeepers).

8. *The estimated number of annual respondents:* 300.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 226 hours (160 hours reporting + 66 hours recordkeeping).

10. *Abstract:* NRC collects information on individuals in order to determine their eligibility for an NRC access authorization for access to classified information. NRC-regulated facilities and other organizations are required to provide information to the NRC when requested on the cleared individual and maintain records to ensure that only individuals with the adequate level of protection are provided access to NRC classified information and material.

For the Nuclear Regulatory Commission.

Dated: February 23, 2023.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–04052 Filed 2–27–23; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Notice of Submission for a New Information Collection Common Form: Personnel Vetting Questionnaire

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM) is notifying the general public and other Federal agencies that OPM proposes to request the Office of Management and Budget (OMB) approve a new information collection request (ICR) titled Personnel Vetting Questionnaire (PVQ). The proposed information collection will streamline multiple existing information collections, as well as the renewal cycle for them, commensurate with on-going efforts to improve personnel vetting processes and the experience of individuals undergoing personnel vetting. OPM is proposing to discontinue the information collections for OMB control numbers 3206–0261, 3206–0258, and 3206–0005 as these information collections will become parts of the new Personnel Vetting Questionnaire information collection and assigned a new OMB control number.

DATES: Comments are encouraged and will be accepted until March 30, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''*Currently under Review—Open for Public Comments*'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by email to *SuitEAforms@opm.gov,* or by contacting Alexys Stanley, 202–606–1800, or U.S. Office of Personnel Management, Suitability Executive Agent Programs, P.O. Box 699, Slippery Rock, PA 16057.

SUPPLEMENTARY INFORMATION:

This notice announces that OPM has submitted to OMB a request for approval of a new information request, Personnel Vetting Questionnaire (PVQ) (OMB No. 3206–XXXX). The information collection (OMB No. 3206–XXXX) was previously published in the **Federal Register** on November 23, 2022 at 87 FR 71700, allowing for a 60-day public comment period (''60-day Notice''). OPM received approximately 280 comments from 55 commenters in response to its request for this collection, which are addressed in the Supplemental Statement of this ICR package. The purpose of this notice is to allow an additional 30 days for public comments. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of 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 proposed 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 submissions of responses.

Background

On November 23, 2022, OPM published 87 FR 71700 requesting comment for the new PVQ information collection. OPM received 55 submissions (5 of which were duplicate submissions) containing approximately 280 comments. Multiple comments were received on the following topics:

- Collection of sex or gender information
- Collection of information regarding past use of marijuana
- Consolidation of multiple vetting questionnaires into the PVQ
- Collection and adjudication of information regarding mental health
- Collection and adjudication on foreign contacts and interests

In addition, multiple comments requested minor edits to the proposed questions for clarity or to correct formatting or punctuation. Finally, a number of comments addressed Federal policies and fell outside the scope of comment on the proposed information collection. All comments received are addressed in a spreadsheet included as supporting documentation in the ICR package.

Comments Regarding Collection of Sex and Gender Information

Unlike the current investigative questionnaires, the PVQ will not require the respondent to indicate ''Male'' or ''Female,'' and the PVQ uses gender inclusive terminology, such as parent and sibling, rather than terms that are not gender inclusive, such as mother, father, sister, brother. Eight of eleven comments received regarding OPM's approach to collection of information about sex and gender favored the approach. OPM received three comments opposing OPM's proposal to eliminate the requirement to indicate ''male'' or ''female.'' One commenter was concerned about the impact on data checks. OPM previously addressed this potential concern in the 60-day Notice. Another commenter expressed concern that the proposed collection does not require individuals to report transition as, in their opinion, it ''could be

exploited.'' Another commenter asserted that higher rates of depression in the LGBTQ population are a reason to exclude them from the candidate pool. OPM did not make changes to the proposed collection in response to these comments. As noted in 60-day Notice regarding the proposed information collection, the Federal Government is actively taking ''steps to mitigate any barriers in security clearance and background investigation processes for LGBTQ+ employees and applicants, in particular transgender and gender non-conforming and non-binary employees and applicants,'' per Executive Order (E.O.) 14035, *Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce.* Further, it is the U.S. Government's longstanding position that a diagnosis of a mental health condition, in and of itself, is not a reason to revoke or deny eligibility for access to classified information or for holding a sensitive position, suitability or fitness to obtain or retain Federal or contract employment, or eligibility for physical or logical access to federally controlled facilities or information systems. An employee-led organization affiliated with a Federal agency requested that OPM provide individuals the option to indicate their pronouns on the form. In response to this comment, OPM added the option for respondents to provide their pronouns if they wish. OPM added this option in order to facilitate interaction between investigators and those undergoing the personnel vetting process and to prevent unintentional misgendering.

Collection of Information Regarding Past Use of Marijuana

Nine comments were received that expressed support for OPM's approach in separating questions regarding marijuana use from those regarding other controlled substances and limiting the timeframe for reporting past use of marijuana. Of these, six comments recommended OPM further limit or eliminate inquiry regarding marijuana use. Five comments opposed OPM's approach. OPM did not change its approach to the collection of information regarding use of marijuana as a result of the comments received. As OPM explained in the 60-day Notice, the proposed PVQ takes into account changes in the legal landscape and societal norms regarding marijuana use. OPM concurs with one of the commenters who fully supported the new approach and stated: ''The PVQ should reflect that because most Americans live in states where marijuana is legal, they should not be prevented from serving in the Federal Government. By only asking about marijuana use in the last 90-days (as opposed to last 7 years), the PVQ will greatly expand the pool of candidates available for Federal employment. [. . .] OPM has a duty to ensure that the Federal Government workforce accurately represents America.''

Consolidation of Multiple Questionnaires into the PVQ

As noted in the 60-day Notice, the PVQ will consolidate the following ICRs: Office of Management and Budget (OMB) No. 3206–0261 Questionnaire for Non-Sensitive Positions (SF 85), OMB No. 3206–0258 Questionnaire for Public Trust Positions and Supplemental Questionnaire for Selected Positions (SF 85P and SF 85P–S), and OMB No. 3206–0005 Questionnaire for National Security Positions (SF 86) into one comprehensive information collection, consisting of four parts. Individual respondents will be asked to complete only the parts that are appropriate to the risk and sensitivity of their position, also known as their position designation, as directed by the Federal agency requesting their background investigation consistent with guidance issued by OPM and the Office of the Director of National Intelligence as the Suitability and Credentialing Executive Agent and the Security Executive Agent, respectively. OPM received five comments in support of this approach and none opposed.

Collection and Adjudication of Information Regarding Mental Health

OPM received two comments recommending expansion of the list of reportable mental health diagnoses. One commenter questioned why ''major depressive or anxiety orders'' are not included in the PVQ. Another suggested that individuals with depression should be investigated to determine the depth of their condition. OPM did not make changes to the proposed PVQ as a result of these comments. As explained in the 60-day Notice, while the intent of questioning about psychological and emotional conditions has always been to surface any concerns regarding the individual's judgment or reliability, the approach has shifted from asking about all mental health treatment or counseling to a more tailored set of questions regarding hospitalization and specific diagnoses. By following this approach, the PVQ seeks to reduce perceived stigma associated with seeking mental health treatment or counseling by limiting the scope of questioning from what was previously asked on the Questionnaire for National Security Positions (SF 86) and the Supplemental Questionnaire for Selected Positions (SF 85P–S).

Collection of Information Regarding Foreign Contacts and Interests

A nonprofit organization encouraged OPM to re-evaluate the questions regarding foreign connections and foreign activities. The organization indicated that these questions have not been updated for decades and do not seem to reflect today's advances in information and technological environment bringing the world closer. The organization opined the effect is that individuals end up collecting and providing information on foreign relationships which are trivial or incidental and not adjudicatively relevant; thus delaying the personnel vetting process by creating additional work for the investigative and adjudicative process. OPM agrees that with today's modern advances individuals have more connections to foreign nationals. In comparison to prior personnel vetting questionnaires, however, the reportable timeframe for many of the questions within this area has been reduced, and the PVQ clarifies the types of associations that must be reported. For example, in collecting the respondent's contacts with foreign nationals, the instructions limit the reporting to foreign nationals with whom they have feelings of affection, a romantic relationship, are bound by social, moral, financial, or legal obligations or with whom they have shared information about themselves that, if known, could be used to influence them to act against the interest of the U.S. government. The clarification in this question helps decrease superfluous reporting of incidental foreign contacts. In response to recommendations from several other commenters, OPM also reduced the scope of questioning regarding whether an individual has lived, worked, or attended school in a foreign country.

Analysis: The following analysis of the burden associated with this information collection is specific to OPM as the agency sponsoring the common form. Other agencies will be required to seek expedited approval to use the common form by submitting their agency-specific burden analyses to OMB.

Agency: Office of Personnel Management.

Title: Personnel Vetting Questionnaire.

OMB Number: 3206–XXXX.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 319.

Estimated Time per Respondent: 140 minutes.

Total Burden Hours: 780 hours.

U.S. Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

[FR Doc. 2023–04106 Filed 2–27–23; 8:45 am]

BILLING CODE 6325–66–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–113 and CP2023–116]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* March 1, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–113 and CP2023–116; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 14 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* February 22, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* March 1, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–04053 Filed 2–27–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

International Product Change—Priority Mail Express International, Priority Mail International & First-Class Package International Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a Priority Mail Express International, Priority Mail International & First-Class Package International Service contract to the list of Negotiated Service Agreements in the Competitive Product List in the Mail Classification Schedule.

DATES: Date of notice: February 28, 2023.

FOR FURTHER INFORMATION CONTACT: Christopher C. Meyerson, (202) 268–7820.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 22, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 14 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–113 and CP2023–116.

Tram T. Pham,

Attorney, Ethics and Legal Compliance.

[FR Doc. 2023–04077 Filed 2–27–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96965; File No. SR–CBOE–2022–057]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Increase Position Limits for Options on Apple Inc. Stock

February 22, 2023.

I. Introduction

On November 7, 2022, Cboe Exchange, Inc. (''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Cboe Rules 8.30 and 8.42 to increase the position and exercise limits for options on Apple Inc. (''AAPL'') stock. The proposed rule change was published for comment in the **Federal Register** on

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

November 25, 2022.[3] On December 22, 2022, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[5] This order institutes proceedings pursuant to Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposal

Currently, Exchange Rule 8.30 establishes position limits for equity options of 25,000 contracts, 50,000 contracts, 75,000 contracts, 200,000 contracts, or 250,000 contracts on the same side of the market or such other number of option contracts as may be fixed from time to time by the Exchange.[7] The position limit applicable to a class is determined based on the trading volume and outstanding shares of the underlying security.[8] Based on the criteria in Exchange Rule 8.30, Interpretation and Policy .02, the position limit for AAPL options currently is 250,000 contracts and, pursuant to Exchange Rule 8.42, the exercise limit for AAPL options is also 250,000 contracts.[9]

The Exchange states that when an underlying security undergoes a stock split, the number of outstanding options is proportionately increased and the exercise price is proportionately decreased.[10] For example, if a security undergoes a 4–1 stock split, an investor that held one option with an exercise price of $100 on 100 shares of stock ABC prior to the stock split would hold four ABC options, each on 100 shares and each with an exercise price of $25, following the stock split.[11] In response to the increase in option positions that results from a stock split, the position (and exercise) limit for the option overlying that security is multiplied by the number of shares issued per single outstanding share as part of the stock split.[12] For example, using the same 4–1 example, if the position limit for an option before a 4–1 stock split is 250,000 contracts, the position limit for the option overlying that security will be multiplied by four to 1,000,000 contracts.[13] The Exchange states that this increase prevents investors holding the maximum positions from immediately being over the position limit at the time of the stock split.[14] The Exchange further states that this position limit increase is temporary and lasts until the last outstanding option position at the time of the stock split has expired, at which time the position limit reverts to the pre-stock-split level.[15]

The Exchange states that the position and exercise limits for AAPL options were 250,000 contracts at the time of the AAPL 4–1 stock split on August 31, 2020.[16] Following the stock split, the position limit was increased to 1,000,000 contracts.[17] The position limit for AAPL options remained at 1,000,000 contracts until September 16, 2022 (when the last option position that was outstanding at the time of the stock split expired), when the position limit reverted back to 250,000 contracts.[18] The Exchange states that, given the significant activity in AAPL options (and the underlying security), it understands that numerous customers held more than 250,000 AAPL option contracts at that time, putting their holdings above the position limit.[19] The Exchange further states that it understands from these customers that the reduced position limit may be impeding trading activity and their ability to implement investment strategies in AAPL options, including the use of effective hedging vehicles or income generating strategies (*e.g.,* buy-write or put-write strategies), and the ability of market-makers to make liquid markets with tighter spreads in AAPL options, potentially causing the transfer of volume to the over-the-counter (''OTC'') market.[20] The Exchange states that OTC transactions, which are not publicly disclosed, do not contribute to the price discovery process on a public exchange or other lit markets.[21]

The Exchange believes that it is appropriate to increase the AAPL option position limit to 1,000,000 contracts so market participants may continue to trade AAPL options in the same manner and at the same levels as they have for the prior two years, which could enable liquidity providers to maintain liquidity levels on the Exchange and allow other market participants to continue to trade on the Exchange rather than shift their volume to the OTC market.[22] The Exchange believes the larger market capitalization of AAPL stock, as well as the highly liquid market for AAPL stock and the overlying options since the stock split, reduces the concerns regarding potential market manipulation and/or disruption in the underlying market following an increase in the position limit.[23] The Exchange states that the continued demand for trading AAPL options for legitimate economic purposes despite the reduced position limit warrants a reversion to the 1,000,000-contract position limit that existed for the prior two years.[24]

The Exchange further states that the proposed position limit of 1,000,000 contracts for AAPL options, which was the AAPL option position limit for two years, is the same as existing position limits for options on the iShares Russell 2000 ETF (''IWM''), the iShares MSCI Emerging Markets ETF (''EEM''), iShares China Large-Cap ETF (''FXI''), and iShares MSCI EAFE ETF (''EFA'').[25] The Exchange states that, to support the proposed position limit increase, it considered the liquidity of the underlying security, the value of the underlying security and relevant marketplace, the AAPL share and option volume, and the liquidity of the noted exchange-traded products (''ETPs'').[26]

The Exchange provided the information in the table below regarding the average daily volume (''ADV'') for AAPL shares and options on AAPL stock traded during specified time periods prior to the 2020 stock split, between the stock split and the position limit reversion, and since the position limit reversion: [27]

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[3] *See* Securities Exchange Act Release No. 96353 (November 18, 2022), 87 FR 72568 (November 25, 2022) (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 96570 (December 22, 2022), 87 FR 80212 (December 29, 2022). The Commission designated February 23, 2023, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] Pursuant to Exchange Rule 8.42, the exercise limit for an equity option is the same as the position limit established in Exchange Rule 8.30 for that equity option. *See id.* at n. 3.

[8] *See* Notice, 87 FR at 72568 and Exchange Rule 8.30, Interpretation and Policy .02.

[9] *See* Notice, 87 FR at 72569.

[10] *See id.* (citing Options Clearing Corporation (''OCC'') Bylaws, Article VI, Section 11A(a); and *Characteristics and Risks of Standardized Options* at 19).

[11] *See* Notice, 87 FR at 72569.

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.* The Commission understands that this type of temporary position limit increase following a stock split occurs pursuant to the direction of the OCC.

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.* and Exchange Rule 8.30, Interpretation and Policy .07.

[26] *See* Notice, 87 FR at 72569.

[27] *See id.*

Date range	ADV (shares)	ADV (option contracts)
January 3, 2020 through August 31, 2020 (date of the stock split)	170,468,316	870,304
September 1, 2020 through December 31, 2021	101,001,141	1,661,627
January 1, 2022 through September 16, 2022 (date of the position limit reversion)	88,458,041	1,354,430
September 17, 2022 through October 24, 2022 (time since the position limit reversion)	91,683,969	1,425,372

In addition, the Exchange states that as of October 24, 2022, AAPL had a market capitalization of $2.4 trillion (16.07 billion shares outstanding with a share price of $149.45).[28] For comparison, the Exchange provided the information below for IWM, EEM, FXI, and EFA from January 1, 2022, through October 24, 2022:[29]

Product	ADV (ETF shares)	ADV (option contracts)	Shares outstanding (millions)	Fund market cap (USD) (billions)	Share value (USD)
IWM	31,358,610	840,721	291.10	50.49	173.44
EEM	47,767,767	183,342	578.25	19.62	33.93
FXI	39,007,654	159,703	176.70	3.80	21.53
EFA	29,953,566	123,262	705.60	41.83	59.28

The Exchange states that while these are ETPs, rather than stocks, ETP shares trade in the same manner as stocks and, except for those set forth in Exchange Rule 8.30, Interpretation and Policy .07, position limits on ETP options are determined in the same manner as the position limits for options on stocks.[30]

The Exchange believes that the liquidity in the AAPL shares and their overlying options, AAPL's significantly large market capitalization, and the overall market landscape for AAPL stock and options support the proposal to increase its position limit.[31] The Exchange states that, given the robust liquidity in and value of AAPL stock, the Exchange does not anticipate that the proposed increase in the position limit would create significant price movements because the relevant market is large enough to adequately absorb potential price movements that may be caused by larger trades.[32] To reduce the chances of potential manipulation if trading in AAPL stock declines, proposed Exchange Rule 8.30, Interpretation and Policy .02(g) provides that if the most recent six-month trading volume of AAPL stock totals less than 200,000,000 shares or the most recent six-month trading volume of AAPL stock totals less than 150,000,000 shares and AAPL stock has fewer than 600,000,000 shares currently outstanding, the position limit for AAPL options will be determined as set forth in paragraphs (a) through (e) of Interpretation and Policy .02.[33] The Exchange states that these proposed levels are twice the current volume and share levels of an underlying security for the overlying option to be eligible for the 250,000-contract option position limit.[34]

The Exchange states that the reporting requirements for AAPL options will remain unchanged under the proposal.[35] The Exchange states that it will continue to require that each Trading Permit Holder (''TPH'') or TPH organization that maintains positions in AAPL options on the same side of the market, for its own account or for the account of a customer, report certain information to the Exchange, including the options' positions, whether such positions are hedged and, if so, a description of the hedge(s).[36] Although Market-Makers, including Designated Primary Market-Makers,[37] will continue to be exempt from the reporting requirement, the Exchange states that it may access Market-Maker position information.[38] In addition, the Exchange states that its requirement that TPHs file reports with the Exchange for any customer who held aggregate large long or short positions on the same side of the market of 200 or more option contracts of any single class for the previous day will remain at this level for AAPL options and will continue to serve as an important part of the Exchange's surveillance efforts.[39]

The Exchange believes that its and other SROs' existing surveillance procedures and reporting requirements are capable of properly identifying disruptive and/or manipulative trading activity.[40] The Exchange represents that it has adequate surveillances in place to detect potential manipulation, as well as reviews in place to identify continued compliance with the Exchange's listing standards.[41] According to the Exchange, these procedures utilize daily

[28] *See id.*

[29] *See id.* at 72570.

[30] *See id.* Exchange Rule 8.30, Interpretation and Policy .07 provides that the position limits under Exchange Rule 8.30 applicable to options on shares or other securities that represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that satisfy the criteria set forth in Exchange Rule 4.3.06 shall be the same as the position limits applicable to equity options under Exchange Rule 8.30 and Interpretations and Policies thereunder, except for the position limits established in Exchange Rule 8.30, Interpretation and Policy .07 for specified securities, including IWM, EEM, FXI, and EFA.

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] A Market-Maker is a ''Trading Permit Holder registered with the Exchange pursuant to Rule 3.52 for the purpose of making markets in option contracts traded on the Exchange and that has the rights and responsibilities set forth in Chapter 5, Section D of the Rules.'' A Designated Primary Market-Maker is a ''TPH organization that is approved by the Exchange to function in allocated securities as a Market-Maker (as defined in Rule 8.1) and is subject to the obligations under Rule 5.54 or as otherwise provided under the rules of the Exchange.'' *See* Exchange Rule 1.1.

[38] The Exchange states that the OCC, through the Large Option Position Reporting system, acts as a centralized service provider for TPH compliance with position reporting requirements by collecting data from each TPH or TPH organization, consolidating the information, and ultimately providing detailed listings of each TPH's report to the Exchange and to the Financial Industry Regulatory Authority, Inc., acting as its agent pursuant to a regulatory services agreement. *See* Notice, 87 FR at 72570, n. 11.

[39] *See* Notice, 87 FR at 72570. *See also* Exchange Rule 8.43.

[40] *See* Notice, 87 FR at 72570.

[41] *See id.*

monitoring of market activity via automated surveillance techniques to identify unusual activity in both options and the underlying securities, as applicable.[42] In addition, the Exchange states that the disclosures in Schedules 13D or 13G,[43] which are used to report ownership of stock that exceeds 5% of a company's total stock issue, could assist in providing information in monitoring for potential manipulative schemes.[44]

The Exchange believes that the current financial requirements imposed by the Exchange and by the Commission adequately address concerns regarding potentially large, unhedged positions in AAPL options.[45] The Exchange states that current margin and risk-based haircut methodologies serve to limit the size of positions maintained by any one account by increasing the margin and/or capital that a TPH must maintain for a large position held by itself or by its customer.[46] In addition, the Exchange states that Rule 15c3–1 under the Act[47] imposes a capital charge on TPHs to the extent of any margin deficiency resulting from the higher margin requirement.[48]

III. Proceedings To Determine Whether To Approve or Disapprove SR–CBOE–2022–057 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[49] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[50] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposed rule change with the Act and, in particular, Section 6(b)(5) of the Act,[51] which requires that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.'' [52] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[53] and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[54]

As discussed above, the Exchange has proposed to increase the position and exercise limits for AAPL options from 250,000 contracts to 1,000,000 contracts. Following the AAPL 4–1 stock split on August 31, 2020, the AAPL option position limit temporarily increased from 250,000 contracts to 1,000,000 contracts until September 16, 2022, when the position limit reverted to 250,000 contracts.[55] The Exchange states that it understands from customers that the reduced position limit may be impeding trading activity and their ability to implement investment strategies in AAPL options, including the use of effective hedging vehicles or income generating strategies, and the ability of market-makers to make liquid markets with tighter spreads in AAPL options.[56] The Exchange believes that it is appropriate to increase the AAPL position limit to 1,000,000 option contracts so market participants may continue to trade AAPL options in the same manner and at the same levels as they did when the position limit temporarily was 1,000,000 contracts.[57]

Position and exercise limits serve as a regulatory tool designed to address manipulative schemes and adverse market impact surrounding the use of options.[58] The proposal is novel in that currently, outside of exceptions to accommodate temporary OCC-initiated adjustments, the maximum stock option position and exercise limits permitted under exchange rules are 250,000 contracts. In addition to being novel, the proposed fourfold increase in the position and exercise limits for AAPL options would be a substantial increase from current levels, and raises the potential for adverse impacts in the underlying market for AAPL stock. According to the Exchange, the larger market capitalization of AAPL stock, as well as the highly liquid market for AAPL stock and the overlying options since the stock split, mitigates these concerns.[59]

The trading volume of the stock underlying a stock option is one of the two metrics that determines a stock option's position limit.[60] As set forth in the proposal, AAPL stock ADV declined significantly during the post-split period when the AAPL option position limit temporarily was 1,000,000 contracts, and as of October 24, 2022, AAPL stock's ADV had decreased almost by half from its ADV prior to the stock split.[61] While the Exchange states that

[42] *See id.* The Exchange believes these procedures have been effective for the surveillance of AAPL option trading and the Exchange will continue to employ them. *See id.* at n. 13.

[43] 17 CFR 240.13d–1.

[44] *See* Notice, 87 FR at 72570.

[45] *See id.*

[46] *See id.* at 72570, n. 15 (citing Exchange Rule 10.3 regarding margin requirements).

[47] 17 CFR 240.15c3–1.

[48] *See* Notice, 87 FR at 72570.

[49] 15 U.S.C. 78s(b)(2)(B).

[50] *Id.*

[51] 15 U.S.C. 78f(b)(5).

[52] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[53] *See id.*

[54] *See id.*

[55] *See* Notice, 87 FR at 72569.

[56] *See id.*

[57] *See id.*

[58] *See, e.g.,* Securities Exchange Act Release No. 68086 (October 23, 2012), 77 FR 65600 (October 29, 2012) (SR–CBOE–2012–066).

[59] *See* Notice, 87 FR at 72569.

[60] *See id.* at 72568 and Exchange Rule 8.30, Interpretation and Policy .02.

[61] *See* Notice, 87 FR at 72569. The Commission cannot discern whether the post-stock-split ADV figures for AAPL stock set forth in the proposal are adjusted for the split; here, the Commission assumes that they are not. In addition, a Cboe study on the impact of stock splits on trading activities finds that split-adjusted volume in mega-capitalization stocks increased slightly one-week post-split but, in the two-week to six-month period post-split, the median executed share volume decreased about 48%, compared to volume a week pre-split. *See* Cboe study on the impact of stock split on trading activities at: *https://www.cboe.com/insights/posts/stock-splits-lead-to-split-results-in-trading/.* This study also finds that the median number of options contracts traded in mega-capitalization stocks decreased approximately 49% one week post-split and remained down through the six-month period post-split. In the case of option contracts in AAPL, the study finds that the split-adjusted number of AAPL option contracts traded decreased about 52%, averaging 0.9 million contracts traded daily post-split compared to 1.9 million contracts traded daily pre-split. Also, while

the market for AAPL stock and the overlying options is highly liquid,[62] the proposal does not adequately explain why a fourfold position (and exercise) limit increase is warranted given the significant decrease in AAPL stock ADV described in the proposal.

In addition, the proposal does not explain why, in light of the AAPL stock trading volume decrease described in the proposal, a 1,000,000-contract position limit for AAPL options is necessary for market participants to trade in the same manner and at the same levels as they did when the position limit temporarily was 1,000,000 contracts. Although the Exchange states that the 250,000-contract position limit for AAPL options may be impeding customers' trading activity and their ability to implement investment and hedging strategies, the proposal provides no detail to support these assertions, such as the number of customers affected or the hedging or investment strategies that these customers are unable to execute because of the lower position limit.[63] Similarly, the Exchange states that the 250,000-contract positon limit may be impeding the ability of market makers to make liquid markets with tighter spreads in AAPL options, but the proposal provides no information indicating that market makers' quoted spreads have widened or that they have reduced the size associated with their quotes. Further, market makers' positions in AAPL options would not count towards the current position limit to the extent covered by existing equity hedge or other exemptions.[64]

Further, the proposal justifies the proposed position limit, in part, through a comparison to options on certain broad-based index exchange-traded funds (''ETF(s)'') that currently have a 1,000,000-contract position limit,[65] but does not provide sufficient information to explain why the underlying markets for the broad-based index ETFs are sufficiently comparable to the market for AAPL stock, or sufficient information to independently support a finding that the proposed position limit increase would not have an adverse market impact. Unlike an ETF, a stock, such as AAPL, is not subject to the creation and redemption processes that apply to ETFs, nor to the issuer arbitrage mechanisms that help to keep an ETF's price in line with the value of its underlying portfolio when overpriced or trading at a discount to the securities on which it is based. The Commission previously has considered how these processes and mechanisms may serve to mitigate the potential price impact that might otherwise result from increased position limits for an ETF option.[66]

Accordingly, the proposal does not provide an adequate basis for the Commission to conclude that the proposal would be consistent with Section 6(b)(5) of the Act.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5), or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,[67] any request for an opportunity to make an oral presentation.[68]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on its concerns expressed above regarding the proposal's consistency with the Act, and seeks commenters' views as to whether the proposed position and exercise limits for AAPL options could have an adverse market impact.

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by March 21, 2023. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by April 4, 2023. 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 No. SR–CBOE–2022–057 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 No. SR–CBOE–2022–057. The 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

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the Exchange's proposal focuses on AAPL, the Commission understands that some evidence suggests that, as a general matter, share trading volume may be unchanged or decrease after a stock split. *See, e.g.,* Patrick Dennis, *Stock Splits and Liquidity: The Case of the Nasdaq –100 Index Tracking Stock,* the Financial Review, 38, 2003, 415–433; Thomas E. Copeland, *Liquidity Changes Following Stock Splits,* the Journal of Finance, 34, 1, 1979, 115–141.

[62] *See* Notice, 87 FR at 72569; *see also id.* at 72571 (stating that, while the ADV of AAPL stock is lower than it was prior to the 2020 stock split, it is still more than 50% of the pre-stock-split ADV, and that the ADV of AAPL options since the 2020 stock split is almost double the ADV prior to the stock split).

[63] Some hedging transactions and positions are exempt from position limits. *See* Exchange Rule 8.30, Interpretation and Policy .04(a).

[64] *See, e.g.,* Exchange Rule 8.30, Interpretation and Policy .04.

[65] *See* Notice, 87 FR at 72571 (stating that AAPL stock ADV is currently approximately two to three time higher than the ADV of IWM, EEM, FXI, and EFA, and that AAPL option ADV is currently anywhere from almost twice to more than ten times the ADV of options on IWM, EEM, FXI, and EFA).

[66] *See* Securities Exchange Act Release No. 93525 (November 4, 2021), 86 FR 62584, 62587 (November 10, 2021) (order approving File No. SR–Cboe–2021–029).

[67] 17 CFR 240.19b–4.

[68] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 No. SR–CBOE–2022–057 and should be submitted by March 21, 2023. Rebuttal comments should be submitted by April 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[69]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–04032 Filed 2–27–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96963; File No. SR–NASDAQ–2022–079]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Amend Rules 4702(b)(14) and (b)(15) Concerning Dynamic M–ELO Holding Periods

February 22, 2023.

On December 21, 2022, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to replace the static holding period requirements for Midpoint Extended Life Orders and Midpoint Extended Life Orders Plus Continuous Book with dynamic holding periods. The proposed rule change was published for comment in the **Federal Register** on January 10, 2023.[3] The Commission received comments on the proposed rule change.[4]

Section 19(b)(2) of the Act[5] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is February 24, 2023. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and comments received. Accordingly, pursuant to Section 19(b)(2) of the Act,[6] the Commission designates April 10, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NASDAQ–2022–079).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–04031 Filed 2–27–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96966; File No. SR–NASDAQ–2023–004]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the Fees the Exchange Charges Companies Seeking Review of a Delisting Determination, Public Reprimand Letter, or Written Denial of an Initial Listing Application

February 22, 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 10, 2023, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, 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 modify the fees the Exchange charges companies seeking review of a delisting determination, public reprimand letter, or written denial of an initial listing application.

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The Nasdaq Stock Market LLC Rules

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5815. Review of Staff Determinations by Hearings Panel

When a Company receives a Staff Delisting Determination or a Public Reprimand Letter issued by the Listing Qualifications Department, or when its application for initial listing is denied, it may request in writing that the Hearings Panel review the matter in a written or an oral hearing. This section sets forth the procedures for requesting a hearing before a Hearings Panel, describes the Hearings Panel and the possible outcomes of a hearing, and sets forth Hearings Panel procedures.

(a) Procedures for Requesting and Preparing for a Hearing.

(1)–(2) No changes.

(3) Fees.

Within 15 calendar days of the date of the Staff Delisting Determination, Public Reprimand Letter, or written denial of an initial listing application, the Company must submit a hearing fee of [$10,000] *$20,000. However, if the hearing request relates to a Staff Delisting Determination dated on or before February 10, 2023, the Company must submit a hearing fee of $10,000.*

(4)–(6) No changes.

(b)–(d) No changes.

5820. Appeal to the Nasdaq Listing and Hearing Review Council

A Company may appeal a Panel Decision to the Listing Council. The Listing Council may also call for review a Panel Decision on its own initiative. This Rule 5820 describes the procedures applicable to appeals and calls for review.

(a) Procedure for Requesting Appeal.

A Company may appeal any Panel Decision to the Listing Council by submitting a written request for appeal and a fee of [$10,000] *$15,000* to the Nasdaq Office of Appeals and Review within 15 calendar days of the date of the Panel Decision. *However, if the appeal relates to a Panel Decision dated*

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[69] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 92844 (January 4, 2023), 88 FR 1438.

[4] All comments received by the Commission on the proposed rule change are available on the Commission's website at: *https://www.sec.gov/comments/sr-nasdaq-2022-079/srnasdaq2022079.htm.*

[5] 15 U.S.C. 78s(b)(2).

[6] *Id.*

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

on or before February 10, 2023, the applicable fee is $10,000. An appeal will not operate as a stay of the Panel Decision. Upon receipt of the appeal request and the applicable fee, the Nasdaq Office of Appeals and Review will acknowledge the Company's request and provide deadlines for the Company to provide written submissions.

(b)–(e) No changes.

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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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Nasdaq Listing Rule 5815, companies may seek review of a determination by the Nasdaq's Listing Qualifications Department (''LQ Staff'') to deny initial listing or delist a company's securities or to issue a Public Reprimand Letter, by requesting a hearing before an independent Hearings Panel (the ''Hearings Panel''). Listing Rule 5815(a)(3) provides that to request a hearing, the company must, within 15 calendar days of the date of the LQ Staff delisting determination, public reprimand letter, or written denial of an initial listing application, submit a hearing fee in the amount of $10,000. Companies may also appeal a Hearings Panel decision to the Nasdaq Listing and Hearing Review Council (the ''NLHRC''). Listing Rule 5820(a) requires a company seeking such an appeal to submit a fee of $10,000. Nasdaq last changed these fees in 2013.[3] Nasdaq now proposes to increase the fee for review by a Hearings Panel to $20,000 and the fee to appeal a Hearings Panel decision to the NLHRC to $15,000. Nasdaq is increasing the fees because the costs incurred in preparing for and conducting hearings and appeals have increased since the fees were last changed.

The costs of the review process include significant time and resources to maintain the infrastructure for the processes and to prepare for and conduct individual hearings and appeals. For example, with respect to review by the Hearings Panels, Nasdaq incurs expenses related to the Nasdaq staff that facilitates the hearings and provides legal counsel and support to the independent Hearings Panel members, the honorarium paid to the Hearings Panel members, and the cost of maintaining a transcript of the hearing. LQ Staff reviews each company's submissions to the Hearings Panel and provides the Hearings Panel with its analysis of the company's plans; LQ Staff also provides written submissions in support of the delisting, listing denial, or Public Reprimand determination. In addition, in some matters LQ Staff attends hearings to respond to presentations by the company and answer questions from the Hearings Panel members. Where hearings are held in person, Nasdaq also incurs expenses related to securing and maintaining a location for the hearings and travel expenses for Hearings Panel members. Staff also must manage and coordinate the Hearings Panel dockets, maintain the systems that track hearing matters, draft initial decisions for review by the Hearings Panel members, and monitor post-hearing compliance efforts in matters where the Hearings Panel has granted the company a period of time to cure a deficiency.

There are also additional costs associated with the NLHRC review of every Hearings Panel decision, in determining whether to call that decision for review as described in Rule 5820(b). In that regard, Nasdaq incurs expenses related to the Nasdaq staff that facilitates the call for review process and that provides legal counsel and support to the NLHRC members, as well as the honorarium paid to the NLHRC members. When a matter is called for review, Nasdaq also incurs costs related to the staff in the Listing Qualifications Department, which reviews the company's submissions to the NLHRC and provides the NLHRC with LQ Staff's analysis of the company's plans and any issues identified by the NLHRC in its call for review. Nasdaq staff also must manage and coordinate the NLHRC docket, maintain the systems that track call for review matters, and draft initial decisions for review by NLHRC members. Nasdaq believes that these additional costs for the call for review process are appropriately considered as part of the cost of the Hearings Panel review, since every Hearings Panel decision is subject to review by the NLHRC and the decision as to whether to call a matter for review rests with the NLHRC.

Where a company appeals a matter to the NLHRC, there are similar additional costs as well, which Nasdaq believes should be borne by the company through the appeal fee. Specifically, like where a decision is called for review, when a company appeals a decision Nasdaq incurs expenses related to the Nasdaq staff that facilitates the process and that provides legal counsel and support to the NLHRC members, the honorarium paid to the NLHRC members, LQ Staff review and analysis of the company's submissions to the NLHRC, management of the docket, maintaining the systems that track NLHRC appellate matters and drafting the initial decisions for review by NLHRC members.

Throughout the hearing and NLHRC process, the Exchange incurs costs to maintain and upgrade its electronic systems for tracking companies and maintaining a clear record, as required by Nasdaq and SEC rules.[4] It also maintains lists on its website, updated every business day, that reflect the status of all companies in the deficiency process[5] and frequently asked questions providing transparency to companies and investors about the delisting and deficiency process, as well as the initial listing process.[6]

All of these expenses have increased in the ten years since the fees were last changed in 2013. In addition, due to changes in procedures over time, Nasdaq devotes more staff time and resources to certain matters.[7]

[3] Securities Exchange Act Release No. 68676 (January 16, 2013) 78 FR 4914 (January 23, 2013) (approving [sic] SR–NASDAQ–2013–004).

[4] *See* Nasdaq Rule 5840(a). See also Rule 420(e) of the SEC Rules of Practice, 17 CFR 201.420(e) which requires Nasdaq to certify and file a copy of the record upon which a delisting or denial was based where the company requests Commission review of Nasdaq's action.

[5] *See https://listingcenter.nasdaq.com/IssuersPendingSuspensionDelisting.aspx* and *https://listingcenter.nasdaq.com/NonCompliantCompanyList.aspx.*

[6] *See https://listingcenter.nasdaq.com/Material_Search.aspx?mcd=LQ.* Users can view more than 30 Frequently Asked Questions about the hearings and appeals processes and hundreds more about the processes associated with specific listing rule deficiencies. In addition, there are summaries of over 100 prior NLHRC decisions.

[7] For example, in October 2020 the Commission approved changes to the procedures governing the introduction of information during the hearing process. As a result, whereas previously companies typically provided a single submission to the Hearings Panel, companies now typically submit both a Written Submission and a Written Update to the Hearings Panel, and LQ Staff must review and react to each. *See* Rule 5815(a)(5) and Securities Exchange Act Release No. 90201 (October 15, 2020) 85 FR 67024 (October 21, 2020) (approving SR–NASDAQ–2020–002).

Accordingly, Nasdaq proposes to increase the fee to request review by a Hearings Panel to $20,000 and the fee for an appeal to the NLRHC to $15,000. Nasdaq believes that this is an equitable allocation based on the expenses incurred in connection with each portion of the overall appellate process.

The revised fees for a hearing will be applicable to issuers that are sent a delisting determination, public reprimand letter, or written denial of an initial listing application after February 10, 2023, the date of filing of this proposed rule change. Similarly, the revised fees for an appeal of a Hearings Panel decision to the NLHRC will be applicable to issuers that receive a Hearings Panel decision after February 10, 2023. The current fees will remain in effect for any company that received a Staff delisting determination, denial of a listing application, or public reprimand letter, or a Hearings Panel decision on or before February 10, 2023.[8]

The revised fees will allow Nasdaq to recoup a portion of the expenses it incurs in the review and appeal processes that will more closely approximate its actual costs associated with those processes. The Exchange has reviewed all costs associated with delisting appeals and does not expect or intend that the fees will exceed the costs.[9]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[11] 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.

Specifically, the proposed fee increase is reasonable because it will better reflect Nasdaq's costs related to hearings and appeals. Nasdaq has not increased these fees since 2013,[12] but its costs have increased since that time. The fees will help offset the costs of conducting hearings and appeals, which serve to ensure that Nasdaq's listing standards are properly enforced for the protection of investors. The proposed changes are equitable and not unfairly discriminatory because they would apply equally to all companies that choose to request a hearing for review of a delisting determination, public reprimand letter or denial of initial listing, or to appeal a Hearings Panel decision. In addition, aligning the fees for hearings with the underlying costs of the review process is equitable because doing so will help minimize the extent that companies that are compliant with all listing standards may subsidize the costs of review for companies that are non-compliant.

Nasdaq also believes that the proposed fees are consistent with the investor protection objectives of Section 6(b)(5) of the Act [13] in that they are designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market systems, and in general to protect investors and the public interest. Specifically, the fees are designed to provide adequate resources for appropriate preparation to conduct reviews of Nasdaq Listing Qualifications' staff determinations and appeals of Hearings Panel decisions, which help to assure that the Exchanges' listing standards are properly enforced and investors are protected.

Nasdaq also believes that the proposed changes are consistent with Section 6(b)(7) of the Act,[14] in that the proposed fees are consistent with the provision by the Exchange of a fair procedures for the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange. In particular, the Exchange believes that the proposed amended fees should not deter listed issuers from availing themselves of the right to appeal because the fees will still be set at a level that will be affordable for listed companies. Nasdaq does not believe that the proposed fee is unduly burdensome or would discourage any company from seeking a hearing or appeal.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. As discussed above, this proposed fee is based on the increase in costs to the Exchange to provide a delisting review process, which is in turn necessary to ensure investor protection as well as a transparent process for issuers. Moreover, the market for listing services is extremely competitive and listed companies may freely choose alternative venues based on the aggregate fees assessed, and the value provided by each listing. This rule proposal does not burden competition with other listing venues, which are similarly free to align their fees on the costs incurred by the process they offer. For this reason, and the reasons discussed in connection with the statutory basis for the proposed rule change, Nasdaq does not believe that the proposed rule change will result in any burden on competition for listings.

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) of the Act [15] and paragraph (f)(2) of Rule 19b–4 thereunder.[16] 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.

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

[8] Companies are notified about their ability to request a hearing, and the fees associated with such a hearing, in the Staff determination letter. They are notified of the fees associated with an appeal in the Hearings Panel decision, which also includes a notice of the right to appeal. As proposed, Nasdaq would only charge the new fee to companies that were not already advised of the prior fee in the applicable decision letter.

[9] A precise cost-per-hearing analysis is not possible given the need to maintain an infrastructure for which the Exchange incurs expenses irrespective of the number of hearings or appeals requested in a given year.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

[12] Securities Exchange Act Release No. 68676, *supra.*

[13] 15 U.S.C. 78f(b)(5).

[14] 15. U.S.C. 78f(b)(7).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(2).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2023–004 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–NASDAQ–2023–004. 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–NASDAQ–2023–004, and should be submitted on or before March 21, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–04033 Filed 2–27–23; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17791 and #17792; SOUTH DAKOTA Disaster Number SD–00138]

Presidential Declaration of a Major Disaster for Public Assistance Only for the Oglala Sioux Tribe

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the Oglala Sioux Tribe (FEMA–4688–DR), dated 02/20/2023.

Incident: Severe Winter Storms and Snowstorm.

Incident Period: 12/12/2022 through 12/25/2022.

DATES: Issued on 02/20/2023.

Physical Loan Application Deadline Date: 04/21/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 11/20/2023.

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 President's major disaster declaration on 02/20/2023, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Area: Oglala Sioux Tribe.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 17791 B and for economic injury is 17792 0.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–04108 Filed 2–27–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17757 and #17758; California Disaster Number CA–00366]

Presidential Declaration Amendment of a Major Disaster for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 7.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of CALIFORNIA (FEMA–4683–DR), dated 01/14/2023.

Incident: Severe Winter Storms, Flooding, Landslides, and Mudslides.

Incident Period: 12/27/2022 through 01/31/2023.

DATES: Issued on 02/22/2023.

Physical Loan Application Deadline Date: 03/16/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 10/16/2023.

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: The notice of the President's major disaster declaration for the State of California, dated 01/14/2023, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Amador.

Contiguous Counties (Economic Injury Loans Only): All contiguous counties have been previously declared.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–04104 Filed 2–27–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17793; WASHINGTON Disaster Number WA–00112 Declaration of Economic Injury]

Administrative Declaration of an Economic Injury Disaster for the State of Washington

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Economic Injury Disaster Loan (EIDL) declaration for the State of Washington dated 02/22/2023.

Incident: Main Street Fire.

Incident Period: 10/28/2022.

DATES: Issued on 02/22/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 11/22/2023.

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 EIDL declaration, applications for economic injury 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: Pierce.

Contiguous Counties:

Washington: King, Kitsap, Kittitas, Lewis, Mason, Thurston, Yakima.

The Interest Rates are:

	Percent
Businesses and 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 economic injury is 177930.

The State which received an EIDL Declaration #17793 is Washington.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2023–04107 Filed 2–27–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 11998]

30-Day Notice of Proposed Information Collection: Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, Maintenance of Records by DDTC Registrants, Annual Brokering Report, Brokering Prior Approval (License)

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments up to March 30, 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: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Andrea Battista, who may be reached at *battistaal@state.gov* or 202–992–0973.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements.
- *OMB Control Number:* 1405–0093.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* PM/DDTC.
- *Form Number:* No form.
- *Respondents:* Business, Nonprofit Organizations, or Persons who intend to furnish defense services or technical data to a foreign person.
- *Estimated Number of Respondents:* 580.
- *Estimated Number of Responses:* 4,430.
- *Average Time per Response:* 2 hours.
- *Total Estimated Burden Time:* 8,860.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.
- *Title of Information Collection:* Maintenance of Records by Registrants.
- *OMB Control Number:* 1405–0111.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* Directorate of Defense Trade Controls (PM/DDTC).
- *Form Number:* No form.
- *Respondents:* Persons registered with DDTC who conduct business regulated by the International Traffic in Arms Regulations (ITAR, 22 CFR parts 120–130).
- *Estimated Number of Respondents:* 9,100.
- *Estimated Number of Responses:* 9,100.
- *Average Time per Response:* 20 hours.
- *Total Estimated Burden Time:* 182,000 hours.
- *Frequency:* Annually.
- *Obligation to Respond:* Mandatory.
- *Title of Information Collection:* Annual Brokering Report.
- *OMB Control Number:* 1405–0141.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Directorate of Defense Trade Controls (DDTC).
- *Form Number:* No Form.
- *Respondents:* Respondents are any person/s who engages in the United States in the business of manufacturing or exporting or temporarily importing defense articles.
- *Estimated Number of Respondents:* 1,200.
- *Estimated Number of Responses:* 1,200.
- *Average Time per Response:* 2 hours.
- *Total Estimated Burden Time:* 2,400 hours.
- *Frequency:* Annually.
- *Obligation to Respond:* Required to Obtain or Retain Benefit.
- *Title of Information Collection:* Brokering Prior Approval.
- *OMB Control Number:* 1405–0142.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Directorate of Defense Trade Controls (DDTC).
- *Form Number:* DS–4294.
- *Respondents:* Respondents are U.S. and foreign persons who wish to engage in International Traffic in Arms Regulations (ITAR)-controlled brokering of defense articles and defense services.
- *Estimated Number of Respondents:* 170.
- *Estimated Number of Responses:* 170.

• *Average Time per Response:* 2 hours.
• *Total Estimated Burden Time:* 340 hours.
• *Frequency:* On Occasion.
• *Obligation to Respond:* Required to Obtain Benefit.

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
• Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
• Enhance the quality, utility, and clarity of the information to be collected.
• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

DDTC regulates the export and temporary import of defense articles and services enumerated on the USML in accordance with the Arms Export Control Act (AECA) (22 U.S.C. 2751 *et seq.*) and the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). In accordance with ITAR § 124.1, any person who intends to furnish defense services or technical data to a foreign person must submit a proposed technical assistance, manufacturing, or distribution license agreement and obtain prior authorization from DDTC for such agreement. Amendments to existing agreements must also be submitted for approval. The electronic mechanism utilized for submitting, reviewing, and approving agreement proposals is the Defense Export Control and Compliance System, DECCS. Specifically, this process utilizes the DSP–5 license application as the primary instrument or ''vehicle'' for transmitting agreements and their respective amendments from one phase of the adjudication process to the next.

The ITAR requires persons registered with DDTC to maintain records pertaining to defense trade-related transactions. This information collection approves the record-keeping requirements imposed on registrants by the ITAR. Respondents to this collection may submit their records to DDTC as supporting documentation for disclosures of potential violations of the AECA. The method by which respondents submit these records is approved under OMB control no. 1405–0179. DDTC uses these records to analyze industry compliance processes and procedures, and to help assess whether the activity in question might merit administrative sanctions or referral to the Department of Justice for possible criminal prosecution.

In accordance with part 129 of the ITAR, U.S. and foreign persons required to register as a broker shall provide annually a report to DDTC enumerating and describing brokering activities by quantity, type, U.S. dollar value, purchaser/recipient, and license number for approved activities and any exemptions utilized for other covered activities. This information is currently used in the review of munitions export and brokering license applications and to ensure compliance with defense trade statutes and regulations. As appropriate, such information may be shared with other U.S. Government entities.

In accordance with part 129 of the International Traffic in Arms Regulations (ITAR), U.S. and foreign persons who wish to engage in ITAR-controlled brokering activity of defense articles and defense services must first register with DDTC. Brokers must then submit a written request for approval to DDTC and must receive DDTC's consent prior to engaging in such activities unless exempted. This information is currently used in the review of the brokering request submitted for approval and to ensure compliance with defense trade statutes and regulations. It is also used to monitor and control the transfer of sensitive U.S. technology.

Methodology

Respondents will submit information as attachments to relevant license applications or requests for other approval.

Respondents may maintain records in any format consistent with the provisions in ITAR § 122.5.

Brokering Reports are submitted annually with Statement of Registration renewals. Applicants are referred to ITAR part 129 for guidance on information to submit regarding proposed brokering activity. Applicants may submit a Brokering Prior Approval Request electronically via DDTC's Defense Export Control and Compliance System (DECCS), using the DS–4294.

Kevin E. Bryant,
Deputy Director, Office of Directives Management, Department of State.

[FR Doc. 2023–04017 Filed 2–27–23; 8:45 am]
BILLING CODE 4710–25–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–0474]

Agency Information Collection Activities: Requests for Comments; Clearance for a Renewed Information Collection: Privacy International Civil Aviation Organization (ICAO) Address

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection involves an aircraft operator's request for a privacy ICAO address through a web-based application process. The information to be collected is necessary to qualify for the authorized use of the privacy ICAO address services and for monitoring to support continued airworthiness and enforcement activities.

DATES: Written comments should be submitted by May 1, 2023.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Send comments to FAA at the following address: Mr. Evan Setzer, Program Manager, Surveillance and Broadcast Services, AJM–42, Program Management Organization, Federal Aviation Administration, 600 Independence Ave. SW, Wilbur Wright Building, Washington, DC 20597.

By fax: 202–267–1277 (Attention: Mr. Evan Setzer, Program Manager, Surveillance and Broadcast Services, AJM–42, Program Management Organization, Federal Aviation Administration).

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Mr. Jamal A. Wilson, Surveillance and Broadcast Services, AJM 42, PIA Project Lead at *jamal.wilson@faa.gov* or at (202)267–4301.

SUPPLEMENTARY INFORMATION:

Public Comments Invited

You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection renewal.

OMB Control Number: 2120–0779.

Title: Privacy International Civil Aviation Organization (ICAO) Address Program.

Form Numbers: Not applicable.

Type of Review: Renewal of an information collection.

Background: In 2010, the FAA issued a final rule mandating equipage requirements and performance standards for Automatic Dependent Surveillance-Broadcast (ADS–B) Out avionics on aircraft operating in certain airspace after December 31, 2019. Aircraft operators must be equipped with ADS–B Out to fly in most controlled airspace. Federal Regulations 14 CFR 91.225 and 14 CFR 91.227 contain requirement details. Each registered aircraft is assigned an aircraft registration number and an ICAO 24-bit aircraft address. This is also referred to as a ''Mode S Code'' in some FAA documents and websites, including the FAA Aircraft Registry. Where a 1090-MHz Extended Squitter (1090ES) transponder is required for ADS–B Out compliance, this ICAO 24-bit aircraft address, based on current transponder avionics standards, is openly broadcasted on the 1090 MHz frequency in transponder replies and ADS–B messages. Subsequently, the nature of openly broadcasting makes the identity of the aircraft publicly available. Industry stakeholders have long suggested that FAA develop a process for aircraft operators who seek anonymity such that their aircraft movements and identity cannot be traced or seen by privately owned sensors that monitor the 1090 MHz frequency and combine this with other downlinked ADS–B and Mode S data being disseminated using the internet. The FAA intends to develop a process for operators who wish to mask their aircraft movements and identity for a period while flying within the sovereign airspace of the United States. Participation in the assignment of privacy ICAO Code addresses is voluntary. Only U.S. registered aircraft can be assigned a privacy ICAO aircraft address. No operator can use a privacy ICAO aircraft address for a U.S.-registered aircraft unless that operator is authorized to use a third-party flight identification for that same aircraft. No unique privacy ICAO address will be assigned to more than one U.S.-registered aircraft at any given time. Once approved, the operator will be assigned a privacy ICAO address. The operator will be required to notify the FAA when their avionics have been loaded with the assigned temporary ICAO 24-bit aircraft address. Owners and operators must verify that the ICAO 24-bit aircraft address (Mode S code) broadcast by their ADS–B equipment matches the assigned privacy ICAO address for their aircraft. Operators can verify what ICAO 24-bit aircraft address is being broadcast by their aircraft by visiting: *https://adsbperformance.faa.gov/PAPRRequest.aspx.* For monitoring privacy ICAO address use, the information will be downloaded by the FAA and entered into the FAA's ADS–B Performance Monitor [Docket No. FAA–2017–1194 published in **Federal Register**, December 20, 2017, as Document Number: 2017–27202].

Information Collected: Information collected by privacy ICAO address program includes aircraft registration number, permanent ICAO address, and aircraft owner's information to include phone number, email address, and physical address.

Respondents: Intended for operators who seek anonymity such that their aircraft movements and identity cannot be easily traced or seen by privately owned sensors that monitor the 1090 MHz frequency. FAA estimates up to 15,000 respondents.

Frequency: Frequency will be occasional based on specific scenarios. An operator can change privacy ICAO aircraft addresses, but no more often than once every 20 days. In the event real-world security concerns become evident, an operator can elect to change their PIA address sooner than 20 days.

Estimated Average Burden per Response: Approximately 15 minutes per application.

Estimated Total Annual Burden: 12,563 hours.

Issued in Washington, DC, on February 22, 2023.

Stanton Brunner,

Program Manager for Service Performance and Sustainment Team (AJM–422), Federal Aviation Administration.

[FR Doc. 2023–04021 Filed 2–27–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. DOT–NHTSA–2023–0002]

Draft Model Minimum Uniform Crash Criteria (MMUCC) Guideline, Sixth Edition; Extension of Comment Period

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Extension of comment period.

SUMMARY: NHTSA received a petition to extend the comment period for a Request for comments (RFC) notice on the Draft Model Minimum Uniform Crash Criteria (MMUCC) Guideline, Sixth Edition. NHTSA published an RFC notice announcing the draft of MMUCC on February 2, 2023. The comment period for the RFC notice was scheduled to end on April 3, 2023. NHTSA is extending the comment period for the February 2, 2023 RFC notice by 30 days.

DATES: The comment period for the RFC notice published on February 2, 2023 at 88 FR 7128, is extended to May 3, 2023.

ADDRESSES: You may submit comments bearing the Federal Docket Management System Docket ID, Docket DOT–NHTSA–2023–0002 using any of the following methods:

- *Federal Rulemaking Portal:* Go to *https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Send comments to: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590.
- *Fax:* Written comments may be faxed to (202) 493–2251.
- *Hand Delivery:* If you plan to submit written comments by hand or courier, please do so at 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m./Eastern Time, Monday through Friday, except Federal holidays.

Please submit all comments to the Docket by May 3, 2023.

When you submit your comments, please remember to mention the agency

and the docket number of this document within your correspondence. Please note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Please see the ''Privacy Act'' heading below.

Privacy Act: Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comments, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on January 17, 2008 (*73 FR 3336*) or at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices* (select ''Department Wide System of Record Notices,'' then select DOTALL 14 Federal Docket Management System.)

Confidential Information: If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, 1200 New Jersey Avenue SE, Washington, DC 20590. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation (*49 CFR part 512*).

Docket: For access to the docket to read the proposed changes to MMUCC, background documents, or comments received, go to *https://www.regulations.gov* at any time and follow the online instructions for accessing the dockets. Or go to West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Eastern Time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information, please contact Beau Burdett, National Center for Statistics and Analysis, NHTSA (telephone: 202–366–7338 or email: *beau.burdett@dot.gov*).

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; *49 CFR 1.49;* and DOT Order 1351.29A.

Chou Lin Chen,

Associate Administrator, National Center for Statistics and Analysis.

[FR Doc. 2023–04018 Filed 2–27–23; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[DOT–NHTSA–2022–0105]

National Emergency Medical Services Advisory Council; Notice of Public Meeting

AGENCY: National Highway Traffic Safety Administration, U.S. Department of Transportation (DOT).

ACTION: Notice of public meeting.

SUMMARY: This notice announces a meeting of the National Emergency Medical Services Advisory Council (NEMSAC).

DATES: This meeting will be held in-person and simultaneously transmitted via virtual interface. It will be held on May 10–11, 2023, from 12:00 p.m. to 5:00 p.m. ET. Pre-registration is required to attend this meeting. Once registered, a link permitting access to the meeting will be distributed to registrants by email. If you wish to speak during the meeting, you must submit a written copy of your remarks to DOT by May 4, 2023.

Notifications containing specific details for this meeting will be published in the **Federal Register** no later than 30 days prior to the meeting dates.

ADDRESSES: General information about the Council is available on the NEMSAC internet website at *www.ems.gov.* The registration portal and meeting agenda will be available on the NEMSAC internet website at *www.ems.gov* at least one week in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Clary Mole, EMS Specialist, National Highway Traffic Safety Administration, U.S. Department of Transportation is available by phone at (202) 868–3275 or by email at *Clary.Mole@dot.gov.* Any committee-related requests should be sent to the person listed in this section.

SUPPLEMENTARY INFORMATION:

I. Background

NEMSAC is authorized under section 31108 of the Moving Ahead for Progress in the 21st Century (MAP–21) Act of 2012, codified at 42 U.S.C. 300d–4 as a Federal Advisory Committee. The purpose of NEMSAC is to serve as a nationally recognized council of emergency medical services (EMS) representatives to provide advice and consult with:

a. The Federal Interagency Committee on Emergency Medical Services (FICEMS) on matters relating to EMS issues; and

b. The Secretary of Transportation on matters relating to EMS issues affecting DOT.

The NEMSAC provides an important national forum for the non-Federal deliberation of national EMS issues and serves as a platform for advice on DOT's national EMS activities. NEMSAC also provides advice and recommendations to the FICEMS.

II. Agenda

At the meeting, the agenda will cover the following topics:

- Newly Appointed Representatives take the Oath of Office
- Introductions and Updates from Federal Emergency Medical Services Liaisons
- Updates on NHTSA Initiatives
- Subcommittee Reports
- Officer Elections

III. Public Participation

This meeting will be open to the public. We are committed to providing equal access to this meeting for all participants. Persons with disabilities in need of an accommodation should send a request to the individual in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than May 4, 2023.

A period of time will be allotted for comments from members of the public joining the meeting. Members of the public may present questions and comments to the Council using the live chat feature available during the meeting. Members of the public may also submit materials, questions, and comments in advance to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Members of the public wishing to reserve time to speak directly to the Council during the meeting must submit a request. The request must include the name, contact information (address, phone number, and email address), and organizational affiliation of the individual wishing to address NEMSAC; it must also include a written copy of prepared remarks and must be forwarded to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than May 4, 2023.

All advance submissions will be reviewed by the Council Chairperson and Designated Federal Officer. If

approved, advance submissions shall be circulated to NEMSAC representatives for review prior to the meeting. All advance submissions will become part of the official record of the meeting.

Authority: 42 U.S.C. 300d–4(b); 49 CFR part 1.95(i)(4).

Issued in Washington, DC.

Nanda Narayanan Srinivasan,

Associate Administrator, Research and Program Development.

[FR Doc. 2023–04083 Filed 2–27–23; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0045]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Request for Comment; Influence of Drivers' Internal Reasoning on Speeding

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments on a proposed collection of information.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) summarized below will be submitted 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. This ICR is for a new collection of information for which NHTSA intends to seek OMB approval for a one-time voluntary survey of licensed drivers regarding speeding. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on October 25, 2022. NHTSA received comments from one organization and two individuals, which we address below.

DATES: Comments must be submitted on or before March 30, 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 Stacy Jeleniewski, Ph.D., Office of Behavioral Safety Research (NPD–310), (202) 366–2752 (office), (202) 981–3173 (cell), *Stacy.Jeleniewski@dot.gov,* National Highway Traffic Safety Administration, W46–491, 1200 New Jersey Avenue SE, Washington, DC 20590.

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 to OMB.

Title: Influence of Drivers' Internal Reasoning on Speeding.

OMB Control Number: New.

Form Number: NHTSA Form 1659.

Type of Request: Approval of a New Information Collection.

Type of Review Requested: Regular.

Length of Approval Requested: Three years from date of approval.

Summary of the Collection of Information: NHTSA is seeking approval to conduct a survey of 1,500 licensed drivers in Washington State age 18 and older regarding speeding. The study will coordinate with the Washington Traffic Safety Commission and Washington Department of Licensing to survey drivers in the State who received one or more speeding convictions in the last three years and drivers not convicted of speeding in that same time-frame. Participation in the study will be voluntary. The study will use a self-administered web-based survey with a paper survey option available. The survey will include general and speeding-specific questions about moral reasoning (judgments about rightfulness and wrongfulness), legal reasoning (judgments about lawfulness and unlawfulness), and attitudes and perceptions of laws, enforcement, and sanctions. Past speeding behavior and intent to speed in the future will also be assessed.

In conducting the proposed research, the survey will use computer-assisted web interviewing (*i.e.,* a programmed, self-administered, web survey) to facilitate ease of use and maximize data accuracy. Although web will be the primary data collection mode, a paper questionnaire will be sent to households that do not respond to the web invitations. The proposed survey will be anonymous, and the survey will not collect any personal identifying information. This collection only requires respondents to report their answers; there are no record-keeping costs to the respondents. Individuals receiving a survey invitation will receive compensation in return for their activities.

The results of this research will assist NHTSA in better understanding how to develop successful programs to improve driver safety. The technical report will be distributed to a variety of audiences interested in improving highway safety. This collection will inform the development of countermeasures, particularly in the areas of communications and outreach intended to reduce speeding.

Description of the Need for the Information and Proposed Use of the Information: NHTSA was established to reduce the number of deaths, injuries, and economic losses resulting from motor vehicle crashes on the Nation's highways. As part of this statutory mandate, NHTSA is authorized to conduct research as a foundation for the development of traffic safety programs. Title 23, United States Code, Section 403 gives the Secretary of Transportation (NHTSA by delegation) authorization to use funds appropriated to conduct research and development activities, including demonstration projects and the collection and analysis of highway and motor vehicle safety data and related information, with respect to all aspects of highway and traffic safety systems and conditions relating to vehicle, highway, driver, passenger, motorcyclist, bicyclist, and pedestrian characteristics; crash causation and investigations; and human behavioral factors and their effect on highway and traffic safety. Speeding behavior is an area for which NHTSA has developed comprehensive programs to meet its injury reduction goals. The major components of speeding safety programs are education, enforcement, and outreach, with legislative efforts added to the mix.

Speeding continues to be a major safety problem. In 2019, speeding was a contributing factor in 26% of fatal, 12% of injury, and 9% of property-damage-only crashes. Motor vehicle crashes in 2019 where at least one driver was speeding accounted for 9,478 fatalities. That same year, 326,000 people were injured in speeding-related traffic

crashes.[1] To address this safety problem, NHTSA has provided State Highway Safety Offices and safety advocates with information on attitudes and behaviors of drivers who speed, including changes across time, and classified speeder types.[2] [3] NHTSA is continuing these efforts and attempting to assist the development of more tailored countermeasures by conducting this new study to evaluate additional psychological factors that may predict speeding behavior.

In order to design countermeasures that address directly the factors that influence speeding behavior and intention to engage in this behavior, it is necessary to understand as much as possible about the internal reasoning of drivers who speed. Insight into factors such as judgments about whether speeding is morally right or wrong and perceptions of the legitimacy of the speed laws, enforcement, and sanctions can help to develop tailored and effective interventions. This study will examine these factors by conducting a survey of speeders and non-speeders. NHTSA will use the findings to assist States, localities, and communities in developing and refining countermeasures that will aid in their efforts to reduce speeding behavior and speeding-related crashes and injuries.

NHTSA will disseminate the information from this study in a technical report. The technical report will provide aggregate (summary) statistics and tables as well as the results of statistical analysis of the information, but it will not include any personally identifiable information (PII). The technical report will be shared with State highway offices, local governments, and those who develop traffic safety communications that aim to reduce speeding behavior and speeding-related crashes.

60-Day Notice: A **Federal Register** notice with a 60-day comment period soliciting public comments on the described information collection was published on October 25, 2022 (87 FR 64536). One organization, the Texas Department of Transportation (TxDOT), and two individuals provided comments. The individual comments were descriptions regarding the personal motivations of the writers for speeding and their own perceived risk on roadways. TxDOT expressed support for the project and recommended that the scope be expanded to include additional States, including Texas. TxDOT also inquired what roadway types will be the focus of the study.

In response to TxDOT's recommendation to include multiple States, at present the study is delimited to a single State to yield uniformity in traffic laws. If it should become of interest to expand the scope to multiple States, the willingness of Texas to participate will be considered. In response to the specific roadway types of interest to the study, the study is designed to cover essentially the full range of driving situations so all roadway types are included.

Affected Public: Participants are eligible for the survey if they are (1) licensed drivers in the State of Washington at the time the sample is drawn; (2) age 18 and older; (3) randomly selected from the total drivers in Washington State in three groups based on the number of speeding convictions on their driver record (0; 1; and 2+).

Estimated Number of Respondents: Participation in this study will be voluntary. The study anticipates contacting up to 4,545 adult licensed drivers from Washington State to obtain a target sample of 1,500 completed surveys.

Frequency: The study will be conducted one time during the three-year period for which NHTSA is requesting approval.

Estimated Total Annual Burden Hours: NHTSA estimates the approximate time to complete the survey is 20 minutes per participant. Details of the burden hours for each wave in the survey are included in Table 1 below. When rounded up to the nearest whole hour for each data collection effort, the total estimated annual burden from the project activities for 1,500 participants is 501 hours.

BILLING CODE 4910–59–P

[1] National Center for Statistics and Analysis. (2021, October). *Speeding: 2019 data* (Traffic Safety Facts. Report No. DOT HS 813 194). National Highway Traffic Safety Administration.

[2] Richard, C.M., Campbell, J.L., Lichty, M.G., Brown, J.L., Chrysler, S., Lee, J.D., Boyle, L., & Reagle, G. (2012, August). *Motivations for speeding, Volume I: Summary report.* (Report No. DOT HS 811 658). Washington, DC: National Highway Traffic Safety Administration.

[3] Schroeder, P., Kostyniuk, L., & Mack, M. (2013, December). *2011 National Survey of Speeding Attitudes and Behaviors.* (Report No. DOT HS 811 865). Washington, DC: National Highway Traffic Safety Administration.

Table 1. Estimated Total Burden for Survey.

Wave	Number of Contacts	Participant Type	Estimated Burden per Sample Unit	Frequency of Burden	Number of Sample Units	Total Burden Hours*
Wave 1 (Initial Invitation)	4,545	Recruited participant – Eligible respondent	20	1	495	165
Wave 2 (Reminder Postcard #1)	4,050	Recruited participant – Eligible respondent	20	1	297	99
Wave 3 (1st Survey Mailing – NHTSA Form 1659)	3,753	Recruited participant – Eligible respondent	20	1	376	126
Wave 4 (Reminder Postcard #2)	3,377	Recruited participant – Eligible respondent	20	1	188	63
Wave 5 (2nd Survey Mailing – NHTSA Form 1659)	3,189	Recruited participant – Eligible respondent	20	1	144	48
Total						501

* Rounded up to the nearest hour.

Estimated Total Annual Burden Cost: Participation in this study is voluntary, and there are no costs to respondents beyond the time spent completing the questionnaires.

Public Comments Invited: You are asked to comment on any aspects of this information collection, including (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29A.

Nanda Narayanan Srinivasan,

Associate Administrator, Research and Program Development.

[FR Doc. 2023–04037 Filed 2–27–23; 8:45 am]

BILLING CODE 4910–59–C

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0661]

Agency Information Collection Activity: State Veterans Homes Construction & Acquisition Grant Program (SVHCGP)

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Health Administration (VHA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 1, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Grant Bennett, Office of Regulations, Appeals, and Policy (10BRAP), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *Grant.Bennett@va.gov.* Please refer to ''OMB Control No. 2900–0661'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0661'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA'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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: State Veterans Homes Construction & Acquisition Grant Program (SVHCGP), VA Forms 10–0388–1, 10–0388–2, 10–0388–3, 10–0388–4, 10–0388–5, 10–0388–6, 10–0388–7, 10–0388–8, 10–0388–9, 10–0388–10, 10–0388–12, 10–0388–13.

OMB Control Number: 2900–0661.

Type of Review: Reinstatement of a previously approved collection.

Abstract: 38 U.S.C. Sections 8133(a) and 8135(a) authorize and appropriate expenditure of funds for State Home Domiciliary, Nursing Home, and Hospital Care. These portions of the U.S.C. require, among other things, that the State applicant provide the Department of Veterans Affairs (VA) with an application. Only State governments and recognized federal tribes (their governments) will submit the information to complete an application for the State Veterans Homes Construction Grant Program (SVHCGP); private groups or citizens are not eligible. Applicants will complete VA Forms 10–0388–1, 10–0388–2, 10–0388–3, 10–0388–4, 10–0388–5, 10–0388–6, 10–0388–7, 10–0388–8, 10–0388–9, 10–0388–10, 10–0388–12, and 10–0388–13 to apply for the SVHCGP and to certify compliance with VA requirements. VA uses this information, along with other documents submitted to evaluate the feasibility of the projects for VA participation, to determine eligibility for a grant awards.

Affected Public: State, Local, or Tribal Governments.

Estimated Annual Burden: 1,200 hours.

Estimated Average Burden per Respondent: 24 hours.

Frequency of Response: On occasion.

Estimated Number of Respondents: 50.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–04050 Filed 2–27–23; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of Transportation

Federal Highway Administration

23 CFR Part 680
National Electric Vehicle Infrastructure Standards and Requirements; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 680

[FHWA Docket No. FHWA–2022–0008]

RIN 2125–AG10

National Electric Vehicle Infrastructure Standards and Requirements

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule establishes regulations setting minimum standards and requirements for projects funded under the National Electric Vehicle Infrastructure (NEVI) Formula Program and projects for the construction of publicly accessible electric vehicle (EV) chargers under certain statutory authorities, including any EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway. The standards and requirements apply to the installation, operation, or maintenance of EV charging infrastructure; the interoperability of EV charging infrastructure; traffic control device or on-premises signage acquired, installed, or operated in concert with EV charging infrastructure; data, including the format and schedule for the submission of such data; network connectivity of EV charging infrastructure; and information on publicly available EV charging infrastructure locations, pricing, real-time availability, and accessibility through mapping applications.

DATES: This final rule is effective March 30, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. Gary Jensen, Office of Natural Environment, (202) 366–2048, or via email at *Gary.Jensen@dot.gov,* or Ms. Dawn Horan, Office of the Chief Counsel (HCC–30), (202) 366–9615, or via email at *Dawn.M.Horan@dot.gov.* Office hours are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, the notice of proposed rulemaking (NPRM), all comments received, and all background material may be viewed online at *www.regulations.gov* using the docket number listed above. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.federalregister.gov* and the Government Publishing Office's website at *www.GovInfo.gov.*

Executive Summary

This final rule establishes regulations that set minimum standards and requirements for projects funded under the NEVI Formula Program, projects for the construction of publicly accessible EV chargers funded under Title 23, United States Code (U.S.C.).[1] This also includes any publicly accessible EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway.

The FHWA is directed by paragraph (2) under the Highway Infrastructure Program heading in title VIII of division J of the Bipartisan Infrastructure Law (BIL) (enacted as the Infrastructure Investment and Jobs Act) (Pub. L. 117–58) (Nov. 15, 2021) to create minimum standards and requirements for NEVI-funded projects. 135 Stat. 429, 1424. Congress specified that ''funds made available under'' the NEVI Formula Program are ''subject to the minimum standards and requirements.'' As outlined in statute, the purpose of the NEVI Formula Program is to ''provide funding to States to strategically deploy EV charging infrastructure and to establish an interconnected network to facilitate data collection, access, and reliability.'' This purpose is satisfied by creating a convenient, affordable, reliable, and equitable network of chargers throughout the country. Prior to the establishment of this rule, there were no national standards for the installation, operation, or maintenance of EV charging stations, and wide disparities exist among EV charging stations in key components, such as operational practices, payment methods, display of price to charge, speed and power of chargers, and information communicated about the availability and functioning of each charging station. The FHWA is also directed by Section 11129 of BIL, which amends 23 U.S.C. 109, to ensure that certain EV charging station standards apply to all projects that install EV charging infrastructure using funds provided under Title 23, U.S.C. This final rule does not conflict with or supersede the implementing regulations for other Title 23, U.S.C. statutory requirements. This final rule enables States or other designated recipients to implement federally funded charging station projects in a standardized fashion in order to build a convenient, accessible, reliable, and equitable charging network across the country that can be utilized by all EVs regardless of vehicle brand. Such standards provide reliable expectations for travel in an EV across and throughout the United States, regardless of which State you charge in, and support a national workforce skilled and trained in charging station installation and maintenance.

The BIL specifically requires minimum standards and requirements be developed related to at least six areas:

(1) Installation, operation, and maintenance by qualified technicians of EV infrastructure. The FHWA requires general consistency with regard to the installation, operation, and maintenance and technician qualifications of the NEVI Formula Program projects and projects for the construction of publicly accessible EV chargers that are funded under Title 23, U.S.C., including any EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway. In terms of standards for installation, operation, and maintenance, charging stations are required to contain a minimum number of ports, types of connectors, payment methods, and requirements for customer support services. In terms of technician qualifications, there are minimum requirements for training, and certification standards for technicians installing, operating, and maintaining chargers to ensure consistency around quality installation and safety across the network. This final rule provides the traveling public with reliable expectations for their EV charging experience anywhere that NEVI Formula funds or Title 23, U.S.C. funds, including Federal funds for projects that are treated as a project on a Federal-aid highway, are used to construct EV charging infrastructure. In addition to requirements that are customer-facing, a series of additional requirements provide less visible, yet critical, standardization and uniformity for how charging stations would be installed, maintained, and operated. These types of requirements address topics such as the certification of charging equipment, security, long-term stewardship, the qualifications of technicians installing and maintaining charging stations, and the privacy of customer data conveyed. This final rule also explains what the program income can be used for when there is net income from the sale, use, lease, or lease renewal of real property

[1] Refer to ''DOT Funding and Financing Programs with EV Eligibilities'' chart on pages 10–11 in the NEVI Formula Program Guidance, available at *https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf.*

acquired, or when there is income or revenue earned from the operation of the EV charging station.

(2) Interoperability of EV charging infrastructure. The requirements relating to interoperability similarly address less visible standardization along the national EV charging network. The FHWA is working to establish a seamless national network of EV charging infrastructure that can communicate and operate on the same software platforms from one State to another. The FHWA establishes interoperability requirements through this final rule for charger-to-EV communication, charger-to-charger network communication, and charging network-to-charging network communication to ensure that chargers are capable of the communication necessary to perform smart charge management and Plug and Charge.

(3) Traffic control devices and on-premise signs acquired, installed, or operated. The Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD) found at 23 CFR part 655 and the Highway Beautification regulation at 23 CFR part 750 address requirements about traffic control devices and on-premise signs.

(4) Data requested related to EV charging projects subject to this rule, including the content and frequency of submission of such data. The FHWA outlines data submittal requirements that are applicable under specified circumstances. States and other designated recipients are required to submit data to identify charging station use, reliability, and cost information. This final rule serves an important coordination role by standardizing submissions of large amounts of data from charging stations across the United State while providing the Joint Office of Energy and Transportation (Joint Office) [2] with the data needed to create the public EV charging database outlined in BIL.

(5) Network connectivity of EV charging infrastructure. This final rule outlines network connectivity requirements for charger-to-charger network communication, charging network-to-charging network communication, and charging network-to-grid communication. These requirements address standards meant to allow for secure remote monitoring, diagnostics, control, and updates. These requirements will help address cybersecurity concerns while mitigating against stranded assets (whereby any provider abandons operations at any particular charging station).

[2] *https://www.driveelectric.gov.*

(6) Information on publicly available EV charging infrastructure locations, pricing, real-time availability, and accessibility though mapping applications. This final rule establishes requirements to standardize the communication to consumers of price and availability of each charging station. Specifically outlined in the final regulation, States and other designated recipients are required to ensure that basic charging station information (such as location, connector type, and power level), real-time status, and real-time price to charge would be available free of charge to third-party software developers through application programming interface. These requirements enable effective communication with consumers about available charging stations and help consumers make informed decisions about trip planning and when and where to charge their EVs. This final rule also establishes requirements for public transparency when EV charging prices are to be set by a third party. This will protect the public from price gouging.

This final rule applies to the 50 States, the District of Columbia, and Puerto Rico, consistent with the definition of the term ''State'' in 23 U.S.C. 101(a). This final rule also applies to other designated recipients of Title 23 funds and recipients of other Federal funds for projects treated as a project on a Federal-aid highway.

The FHWA completed an analysis of this final rule, as described in detail in the ''Regulatory Impact Analysis (RIA)'' available in the docket. The RIA supports this final rule and estimates the costs and benefits associated with establishing minimum standards and requirements, derived from the costs of implementing the regulation for each provision of the rule. All of the topics for the minimum standards and requirements are required under Paragraph (2) under the Highway Infrastructure Program heading in title VIII of division J of BIL. To estimate these costs, the RIA compares the costs and benefits of proposed provisions to the costs and benefits of the options States and other designated recipients would likely choose for their own charger programs in the absence of the rule. In many cases, the analysis found that States and other designated recipients would likely choose the same requirements that are found in this final rule.

Background

Creation of the NEVI Formula Program

The BIL included two new programs with a total of $7.5 billion in dedicated funding to help make EV chargers and alternative fueling facilities accessible to all Americans. As one of these two new programs, the NEVI Formula Program provides $5 billion as the first major Federal funding program that focuses on a nationwide development of EV charging infrastructure. The FHWA released program guidance for the NEVI Formula Program, available at *https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf%20*), as was required by BIL within 90 days of enactment. This program guidance outlined funding features, information about required State EV Infrastructure Deployment Plans, project eligibility provisions, program administration, and technical assistance and tools.

EV Funding Options

In addition to NEVI, there are other Title 23 programs that can be used to plan for and build EV chargers; support workforce training for new technologies; and integrate EVs as part of strategies to address commuter, freight, and public transportation needs. For more information see the *Federal Funding is Available for Electric Vehicle Charging Infrastructure on the National Highway System* released April 22, 2022.[3] There also may be other sources of Federal funds that are available for EV charging infrastructure projects.

Statutory Authority for NEVI Formula Program Minimum Standards and Requirements

The BIL required FHWA to release a set of minimum standards and requirements for the implementation of the NEVI Formula Program under Paragraph (2) under the Highway Infrastructure Program heading in title VIII of division J. This final rule directly addresses the requirements in BIL. This final rule also directly addresses the EV Charging Stations standards requirement added to 23 U.S.C. 109 by Section 11129 of BIL for projects using Title 23, U.S.C. funds for EV charging infrastructure. Through the provision of minimum standards and requirements, this final regulation helps set reliable expectations for the experience of EV charging across the nation.

[3] Federal Funding is Available for Electric Vehicle Charging Infrastructure on the National Highway System, available at *https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/resources/ev_funding_report_2022.pdf.*

Notwithstanding any other provisions of law, nothing in this final rule is intended to be construed to prevent States and other designated recipients from establishing more stringent EV charging infrastructure requirements towards building a convenient, affordable, reliable, and equitable national charging network. The BIL required establishment of a Joint Office in the Department of Transportation and the Department of Energy (DOE) to study, plan, coordinate, and implement issues of joint concern between the two Agencies. The DOT and DOE coordinated on both the NEVI Formula Program Guidance and development of the minimum standards and requirements found in this final rule.

Need for This Final Rule

There are no other existing national standards for EV charging stations, although there may be some State standards that exist. Prior to the establishment of this final rule, for any given charging station, the charger manufacturer, charging network, charging network provider, charging station owner, charging station operator, and even the utility providing electricity, may all have been different entities, all with different expectations for contracts, maintenance, operations, and customer response. Because EV charging is a relatively new technology, there is wide diversity in the market from small start-up companies to major multinational corporations. This diversity of entities results in a variety of charging station operations, leaving consumers with a learning curve every time they encounter a new EV charging station. The consumer education required for each use of a new charging station, unreliability of the charging station function, and issues from the historical lack of standardized technician qualifications each exacerbate existing hurdles for the widespread adoption of EVs, including range anxiety and safety risks. Range anxiety is a concept whereby consumers fear that a vehicle has insufficient electrical charge to reach its destination or another charging station and would therefore strand the vehicle's occupants. This also includes the anxiety that chargers would not be available where and when needed. Furthermore, the lack of other minimum standards for chargers reduced the reliability of a consistent charging experience (*e.g.,* the charger meets their needs, is working and available, etc.) for consumers when they encounter a new charging station. Beyond standardizing consumer and industry expectations, this final rule outlines minimum standards and requirements to ensure the appropriate use of Federal funds on a new technology and market, and greatly enhances consumer confidence and public safety.

Benefits of This Final Rule

The FHWA believes that the establishment of this final rule provides a powerful antidote to these issues, helps create energy independence, and encourages more widespread adoption of EVs because EV consumers will be more confident in the availability, safety, and consistency of EV charging stations. Accordingly, by encouraging the adoption and expansion in use of EVs, Title 23 investments in EV charging infrastructure have the potential to significantly address the transportation sector's outsized contributions to climate change. President Biden, American families, automakers, and autoworkers agree: the future of transportation is electric. The electric vehicle future is cleaner, more equitable, and more affordable. It provides an economic opportunity to support good-paying, union jobs across the installation and maintenance of the charging infrastructure as well as in American supply chains as automakers continue investing in manufacturing clean vehicles and the batteries that power them.[4] Currently, the transportation sector is both the largest source of U.S. carbon dioxide emissions,[5] and is increasingly vulnerable because of the higher temperatures, more frequent and intense precipitation, and sea level rise associated with the changing climate. Much of existing transportation infrastructure was designed and constructed without consideration of these circumstances. The Sixth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC), released on August 7, 2021, confirms that human activities are increasing greenhouse gas concentrations that have warmed the atmosphere, ocean, and land at a rate that is unprecedented in at least the last 2000 years.[6] According to the report, global mean sea level has increased between 1901 and 2018, and changes in extreme events such as heatwaves, heavy precipitation, hurricanes, wildfires, and droughts have intensified since the last assessment report in 2014.[7] These changes in extreme events, along with anticipated future changes in these events because of climate change, threaten the reliability, safety and efficiency of the transportation system. At the same time, transportation contributes significantly to the causes of climate change[8] and each additional ton of CO_2 produced by the combustion of fossil fuels contributes to future warming and other climate impacts. By encouraging widespread adoption of a zero-emissions transportation mode, this final rule will supercharge America's efforts to lead the electric future and align with recent Executive Orders (E.O.) 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,'' 86 FR 7037 (Jan. 25, 2021), E.O. 14008, ''Tackling the Climate Crisis at Home and Abroad,'' 86 FR 7619 (Feb. 1, 2021), and a U.S. target of achieving a 50 to 52 percent reduction from 2005 levels of economy-wide net greenhouse gas (GHG) pollution in 2030, on a course toward reaching net-zero emissions economywide by no later than 2050.[9] Section 1 of E.O. 13990 articulates

[4] White House Fact Sheet: The Biden-Harris Electric Vehicle Charging Action Plan (December 13, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/13/fact-sheet-the-biden-harris-electric-vehicle-charging-action-plan/.*

[5] See EPA Inventory of U.S. Greenhouse Gas Emissions and Sinks, available at *https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks.*

[6] See IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, available at *https://www.ipcc.ch/report/ar6/wg1/.*

[7] IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Pe´an, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press. In Press.

[8] Jacobs, J.M., M. Culp, L. Cattaneo, P. Chinowsky, A. Choate, S. DesRoches, S. Douglass, and R. Miller, 2018: Transportation. In Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, pp. 479–511. doi:10.7930/NCA4.2018.CH12.

[9] White House Fact Sheet: The Biden-Harris Electric Vehicle Charging Action Plan (December 13, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/13/fact-sheet-the-biden-harris-electric-vehicle-charging-action-plan/,* White House Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/;* White House Fact Sheet: President Biden's Leaders Summit on Climate (Apr. 23, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-president-bidens-leaders-summit-on-climate/.*

national policy objectives, including listening to the science, improving public health and protecting the environment, reducing GHG emissions, and strengthening resilience to the impacts of climate change. E.O. 14008 recommits the United States to the Paris Agreement and calls on the United States to begin the process of developing its nationally determined contribution to global GHG reductions. 86 FR at 7620. E.O. 14008 also calls for a Government-wide approach to the climate crisis and acknowledges opportunities to create well-paying, union jobs to build a modern, sustainable infrastructure, to provide an equitable, clean energy future, and to put the U.S. on a path to achieve net-zero emissions, economywide, no later than 2050. 86 FR at 7622. This final rule also supports the principle set forth in section 213 of E.O. 14008 ''to ensure that Federal infrastructure investment reduces climate pollution.'' 86 FR at 7626. Reducing the barriers to charging infrastructure will enable the rapid expansion of zero-emission vehicles, a central component of the U.S. Long Term Strategy to reach net-zero greenhouse gas emissions by 2050.[10] Enabling wider adoption of EVs may also have significant benefits to equity and environmental justice whereby a national network of EV charging infrastructure reduces disparities in access to transportation infrastructure and health effects.[11]

Another benefit of this final rule is the opportunity to advance both equity and environmental justice for communities that have been underserved by transportation infrastructure and overburdened by costs and environmental harms by supporting widescale national EV adoption and the deployment of EV charging infrastructure. *See* Public Law 117–58, 135 Stat. 429, 1423 (in developing guidance concerning the NEVI Formula Program, the Secretary of Transportation and the Secretary of Energy shall consider ''the need for publicly available electric vehicle charging infrastructure in rural corridors and underserved or disadvantaged communities.''); *see also* E.O. 13985, ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,'' 86 FR 7009 (Jan. 20, 2021); E.O. 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' 59 FR 7629 (Feb. 16, 1994). When determining where EV charging stations should be located, there should be engagement with rural, underserved, and disadvantaged communities, as appropriate, to ensure that the deployment, installation, operation, and use of EV charging infrastructure can achieve equitable and fair distribution of benefits and services. Historically, innovations in clean energy and transportation have not been deployed evenly across communities. This has resulted in underserved, overburdened, and disadvantaged communities being left behind.

Achieving the USDOT's long-term goals requires the equitable deployment of EV infrastructure. The NEVI Formula Program funding, along with funding for EV charging infrastructure provided through applicable Title 23 programs, provides an opportunity to ensure these investments remove barriers for disadvantaged communities and create safeguards to prevent or mitigate potential harms. Consideration of the benefits and harms is in accordance with E.O. 13985, ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,'' 86 FR 7009 (Jan. 20, 2021), which requires the Federal Government to pursue a comprehensive approach to advance racial equity and support for underserved communities, and E.O. 14008, which created the Justice40 Initiative, which established a goal that 40 percent of the overall benefits of certain Federal investments flow to disadvantaged communities, 86 FR at 7626. In the absence of the NEVI Formula Program and other federally funded EV charging infrastructure investments, the market will not prioritize the installation of EV chargers in low or medium income densely populated urban communities where the cost of real estate is relatively higher or in sparsely populated rural areas lacking access to transportation alternatives. If access to EV chargers is dictated by these market forces, then rural areas, underserved communities, and disadvantaged communities will experience delayed and diminished access to this clean energy technology and the transportation infrastructure that is vital to a healthy economy. Such an outcome would not support widescale national EV adoption and the deployment of EV charging infrastructure. It would also be at odds with E.O. 13985.

This final rule complements the February 10, 2022, NEVI Formula Program Guidance, which encouraged EV chargers to be spaced a maximum distance of 50 miles apart along designated Alternate Fuel Corridors (AFCs), by requiring minimum standards for the development of each station to achieve fully built out status. Providing minimum standards and requirements for the development of each charging station helps to ensure equitable access to clean transportation options and the electric grid across all communities, increasing parity in clean energy technology access and adoption. Over the long-term, according to the DOE, EV ownership is usually less expensive than ownership of gasoline-powered vehicles.[12] Additionally, the low cost of operation makes some EVs less expensive on a monthly basis, compared to equivalent gasoline-powered vehicles, when vehicle purchase price is financed. Thus, increased adoption in communities could be associated with a community-wide decrease in transportation energy cost burdens. In communities where transportation corridors see a mode-share shift from gasoline-powered vehicles to EVs, there will be a marked reduction in environmental exposures to transportation emissions. Widespread adoption of EVs in the U.S. would also increase our energy resilience by increasing the share of vehicles that operate on energy sources that are domestically produced and regulated and support energy independence and create domestic jobs.

The NEVI Formula Program and other federally funded EV charging infrastructure investments also address the acknowledgement in E.O. 14008 that the path to a net-zero emissions economy provides opportunities to create well-paying, union jobs to build a modern sustainable infrastructure. 86 FR 7622. This final rule outlines minimum qualifications for technicians working on-site at charging stations. Minimum skill, training, and certification standards for technicians ensure that the deployment of charging infrastructure will support stable career-track employment for workers across the country, creating more openings for workers to pursue training in the electrical trades—critical occupations for the clean energy transition. By requiring on-site installation, maintenance, and operations to be

[10] The Long-Term Strategy of the United States, Pathways to Net-Zero Greenhouse Gas Emissions by 2050, available at *https://www.whitehouse.gov/wp-content/uploads/2021/10/US-Long-Term-Strategy.pdf*.

[11] U.S. Department of Transportation Strategic Plan FY 2022–2026.

[12] *https://afdc.energy.gov/calc/*. This tool calculates the total cost of vehicle ownership. Selecting the 2022 Ford Mustang Mach-E RWD and an equivalent gasoline-powered vehicle, such as the 2022 Ford Explorer RWD Gasoline, shows that the EV's total cost of ownership breaks even with the conventional vehicle after 5 years when gasoline price is set at $4.50/gallon and the state of Ohio is selected.

performed by a well-qualified, highly-skilled, and certified, licensed, and trained workforce, this final rule also increases the safety and reliability of charging station function and use, and mitigates project delivery issues such as cost overruns and delays.

This final rule establishes minimum standards and requirements specific to the use of NEVI Formula Program funds, funds made available under Title 23, U.S.C. for projects for the construction of publicly accessible EV chargers, and any EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway. Consistent with E.O. 14036, ''Promoting Competition in the American Economy,'' 86 FR 36987 (July 14, 2021), if successfully deployed, an interoperable EV charging network can be expected to give EV manufacturers more space to experiment, innovate, and pursue the new ideas leading to more choices, better service, and lower prices especially with regard to the EVs themselves. E.O. 14036 also calls for a Government-wide approach to ensuring improved access for entrepreneurs and better service for consumers by reducing the ability for companies to make products difficult to replace or service.

This final rule aligns closely with E.O. 14036 by promoting competition and opening the EV charging market to new entrants. It does so both generally, by establishing transparent standards, and specifically, by including interoperability standards which require standard protocols for communication between EVs, chargers, and charging networks. The interoperability requirements include network switching requirements which ensure that it is not prohibitively difficult to switch network providers after charging infrastructure is installed.

Summary of This Final Rule

Applicability

This final rule establishes applicability of these regulations to projects funded under the NEVI Formula Program and projects for the construction of publicly accessible EV chargers under certain statutory authorities, including any EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway, except where explicit limited applicability is noted in the regulatory text.

Procurement Process

This final rule establishes a requirement for there to be public transparency regarding the process of how the price will be determined and set for EV charging.

Number of Charging Ports

This final rule establishes a requirement for the number of ports at a charging station. Any time charging stations are installed there is a required minimum of 4 ports, notwithstanding the type of port (Direct Current Fast Charger (DCFC) or alternating current (AC) Level 2 or a combination of DCFC and AC Level 2). Additionally, in all instances when a DCFC charging station is installed along and designed to serve users of designated AFCs, there must be at least four network-connected DCFC charging ports.

Connector Types

This final rule establishes a requirement that each DCFC port must have a Combined Charging System (CCS) Type 1 connectors. This final rule also allows DCFC charging ports to have other non-proprietary connectors so long as each DCFC charging port is capable of charging a CCS-compliant vehicle.

Power Level

This final rule establishes a requirement that each DCFC located along and designed to serve users of designated AFCs must simultaneously deliver up to 150kW, as requested by the EV, and that each AC Level 2 port be capable of providing at least 6 kW per port simultaneously across all AC ports with an option to allow the customer to consent to accept a lower power level to allow power sharing or to participate in smart charge management programs. This final rule also clarifies that power sharing is permissible above the minimum 150-kW per-port requirement for DCFCs.

Availability

This final rule establishes a requirement that each charging station along designated AFCs and intended to serve the users of designated AFCs must be available 24 hours per day, 7 days per week and charging stations not along AFCs and not intended to serve the users of designated AFCs must be available for use and accessible to the public at least as frequently as the business operating hours of the site host.

Payment Methods

This final rule establishes a requirement that charging stations must provide a contactless payment method that accepts major credit and debit cards and accept payment through either an automated toll-free phone number or a short message/messaging system (commonly abbreviated as SMS). Payment methods must be accessible to persons with disabilities, not require a membership, not affect the power flow to vehicles, and provide access for those that are limited English proficient.

Equipment Certification

This final rule establishes a requirement that all equipment is appropriately certified and that all AC Level 2 chargers are ENERGY STAR certified.

Security

This final rule establishes a requirement that States are required to implement appropriate physical strategies for the location of the charging station and cybersecurity strategies that protect consumer data and protect against the risk of harm to, or disruption of, charging infrastructure and the grid.

Long-Term Stewardship

This final rule establishes a requirement that chargers are maintained in compliance with this regulation for a minimum of 5 years.

Qualified Technician

This final rule establishes a requirement that the workforce installing, maintaining, and operating the chargers has appropriate licenses, certifications, and training. This final rule also requires that all electricians installing, operating, or maintaining EV supply equipment have a certification from the Electric Vehicle Infrastructure Training Program (EVITP) or graduation or a continuing education certificate from a registered apprenticeship program. Additionally, for projects that require more than one electrician, at least one electrician must be an enrolled in an electrical registered apprenticeship program. This final rule also clarifies that non-electrical work must be performed in accordance with State requirements.

Customer Service

This final rule establishes a requirement that EV charging customers must have a mechanism to report issues with charging infrastructure. These reporting mechanisms must provide multilingual services and be compliant with the American with Disabilities Act of 1990.

Customer Data Privacy

This final rule establishes a requirement that charging station operators only collect, process, and retain personal information strictly necessary to provide the charging

service to a customer and take reasonable measures to safeguard customer data.

Use of Program Income

This final rule establishes a requirement that the use of income derived from the real property shall be used for Title 23, U.S.C., eligible projects and that the use of income derived from the operation of the EV charging facility shall be used for debt services, return on investment for private financing, improvement or maintenance of the EV charging station, payments under public-private partnerships, or other Title 23 purposes.

Interoperability of EV Charging Infrastructure

This final rule establishes certain interoperability requirements for charger-to-EV communication, charger-to-charger-network communication, and charging-network-to-charging network communication, as well as a requirement for chargers to be designed to securely switch charging network providers without any changes to hardware.

Traffic Control Devices or On-Premise Signs Acquired, Installed, or Operated

This final rule establishes compliance with the MUTCD and 23 CFR part 750 for on-premise signs.

Data Submittal

This final rule establishes quarterly and annual data submittal for all projects funded under the NEVI Formula Program and projects for the construction of publicly accessible EV chargers under certain statutory authorities, including any EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway. This final rule also establishes one-time data submittal requirements for both the NEVI Formula Program projects and grants awarded under 23 U.S.C. 151(f) for projects that are for EV charging stations located along and designed to serve the users of designated AFCs. This final rule also establishes a requirement applicable only to the NEVI Formula Program projects that a Community Engagement Outcomes Report must be included in the State EV Infrastructure Deployment Plan.

Charging Network Connectivity of EV Charging Infrastructure

This final rule establishes charging network connectivity requirements for charger-to-charger-network communication, charging-network-to-charging-network communication, and charging-network-to-grid-communication, as well as a requirement that chargers must remain functional if communication with the charging network is temporarily disrupted.

Information on Publicly Available EV Charging Infrastructure Locations, Pricing, Real Time Availability, and Accessibility Through Mapping

This final rule establishes requirements for information on publicly available EV charging infrastructure locations, pricing, real time availability, and accessibility through mapping. The regulations specify that these specific data fields that must be available, free of charge, to third party software developers. The regulation also specifies how the price for EV charging must be displayed and stipulates that the price must be the real-time price and any other fees in addition to the price for electricity must be clearly displayed and explained. This final rule also establishes that each charging port must have an average annual uptime greater than 97 percent.

Other Federal Requirements

Finally, this final rule species that all applicable Federal statutory and regulatory replacement apply to the EV charger projects.

Summary of Comments

The FHWA published its NPRM at 87 FR 37262 on June 22, 2022. The FHWA received 384 submissions to the docket resulting in more than 1,700 individual comments in response to the NPRM. The FHWA received comments from a wide array of advocacy and interest groups, including comments representing EV coalitions, energy coalitions, transportation advocacy groups, as well as equity/environmental justice interest groups, accessibility advocates, and natural environment advocacy groups, among others; 31 State government offices, including State departments of transportation, and three associations of States (the American Association of State Highway Transportation Officials (AASHTO), the Northeast States for Coordinated Air Use Management, and the Western Governors Association); city and county governmental agencies, private companies (primarily representing energy companies, vehicle manufacturing companies, and charging equipment companies); and individual private citizens, identified and anonymous.

Summary of Significant Changes Made in This Final Rule as Compared to the NPRM

Section 680.106(b) was revised regarding the minimum number of charging ports at each charging station. This section now requires all stations along, and designed to serve users of, designated AFCs to include at least four network-connected DCFC charging ports capable of simultaneously charging at least four EVs. This section also now requires all stations that are not located along, or designed to serve users of, designated AFCs to include at least a total of four charging ports; these charging ports can be either all DCFC or AC Level 2 or a combination of DCFC and AC Level 2.

Section 680.106(e) was revised to specify different availability requirements for charging stations located along designated AFCs, and charging stations not located along, and not designed to serve users of, designated AFCs.

Section 680.106(f) was revised to also require an automated toll-free calling or an SMS as an additional payment method.

Section 680.108 was revised to incorporate regulations that were previously shown under § 680.114 in the proposed rule, as these standards were identified to apply to interoperability. This section was also modified to specify that chargers must be capable of using Open Charge Point Interface (OCPI) for interoperability.

Section 680.112 was revised to clarify which programs were subject to the reporting requirements as well as reduce the data reporting burden by removing the requirement for reporting the cost of electricity under the previous proposed § 680.112(b)(6), reducing the frequency of reporting of the previous proposed § 680.112(b)(7) to annually from quarterly, and changing of the previous proposed § 680.112(b)(8)–(9) to one-time reporting requirements rather than quarterly. The community engagement outcomes report was changed to include a requirement to address this information in the annual State EV Infrastructure Deployment Plan rather than as a separate report. To address Confidential Business Information (CBI) concerns, all quarterly, annual, or one-time data that is made public is required to be aggregated and anonymized.

Section 680.114 was revised to remove interoperability requirements (which were moved to § 680.108). This section was also revised to include a requirement that chargers remain functional if communication with the

charging network is temporarily disrupted.

Section 680.116 was revised to clarify exclusions for the uptime calculation including additional exclusions for scheduled maintenance, vandalism, natural disasters, and limited hours of operation. Under Third Party Data Sharing § 680.116(c), several data elements were removed that are of less importance for improving customer experience, several data elements were added that are necessary for an improved customer experience, and the data were re-organized into nine, more logical categories, which also clarify data that are required at the port level vs. station level.

Section-by-Section Discussion

This final rule was developed in response to comments received on the NPRM. The following paragraphs summarize major comments received and any substantive changes made to each section in this final rule. Editorial or minor changes in language are not addressed in this document. For sections where no substantive changes are discussed, the substantive proposal from the NPRM has been adopted in this final rule.

General Comments

Although not directly related to proposed regulatory language, several comments were received on the topic of spacing for EV chargers encouraged to be every 50 miles in order to be considered fully built out through the NEVI Formula Program, as defined by the NEVI Formula Program Guidance (*https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf*). In that guidance, the 50-mile distance was determined in order to ensure that older model EVs are not excluded when considering both the mile ranges all EVs are capable of and the desire to provide EVs a similar experience as gasoline-powered vehicles with regards to the frequency of gasoline stations to utilize and choose from along long-distance travel routes. No changes to the distance were made in this final rule, but there is a process through which States can request exceptions.[13]

Section 680.102 Applicability

Other Title 23-Funded Chargers

Several commenters opposed or questioned the broad applicability of the proposed rule beyond projects funded under the NEVI Formula Program to other projects for the construction of publicly accessible EV chargers under Title 23, U.S.C. Some commenters addressed concern that the application of the rule to all Title 23 funded projects would detract from the ability to construct medium-duty and heavy-duty (MD/HD) EV charging infrastructure using a broad range of currently available funding sources, while other commenters requested clarification about the application of the rule for Title 23 funded EV charging projects. Several States and organizations representing State DOTs requested clarification on which specific subsections of the rule would only apply to NEVI Formula Program funds, and which subsections would apply to all Title 23 programs.

Yet other commenters oppose the applicability of the rule to all Title 23 programs outright, requesting more flexibility for States and other designated recipients to determine standards to meet local needs with the broad range of Federal funding programs. Commenters also pointed out specific EV infrastructure eligibilities under other Title 23 funds that are not specifically provided for in the proposed rule, such as the eligibility of vehicle to grid (V2G) infrastructure through the Surface Transportation Block Grant Program.

Finally, several commenters identified that application of the proposed rule to all Title 23 programs would also restrict the ability to install alternating-current (AC) Level 2 charging which, in turn, would impact the ability to address charging for multi-unit dwellings, which would drastically hamper the ability of the NEVI Formula Program and Title 23 programs to address equity in EV charging access and benefits.

FHWA Response: This final rule enables States and other designated recipients to implement federally-funded charging station projects in a standardized fashion across a national EV charging network that can be utilized by all EVs regardless of vehicle brand. Such standards provide consumers with reliable expectations for travel in an EV across and throughout the United States and support a national workforce skilled and trained in charger installation and maintenance. Because of this, FHWA has modified the language describing applicability in this final rule to apply to projects funded under the NEVI Formula Program, projects for the construction of publicly accessible EV chargers that are funded with funds made available under Title 23, U.S.C., and any publicly accessible EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway. The parts of the rule that apply only to the NEVI Formula Program are clearly identified. To address some of the concerns expressing opposition to the application of the proposed rule across all Title 23 funded projects, FHWA revised language in the final rule to provide increased flexibility in the use of funds to install different types of chargers. Additional flexibility is provided for projects that are not located along AFCs, including the flexibility to install AC Level 2 chargers and DCFCs at lower power levels.

As further discussed in the following section, FHWA decided not to broaden the applicability of this final rule to include minimum standards for MD/HD EV charging infrastructure primarily so as not to preempt the pace of the technological innovation. While not regulating specific minimum standards for MD/HD, V2G, or other potentially eligible uses of Title 23 funds, this final rule also does not preclude the implementation of these technologies where not otherwise prohibited.

Medium Duty/Heavy Duty Vehicles

Many commenters supported specifically addressing the needs of MD/HD EVs in addition to the needs of EV passenger vehicles. Several commenters identified the environmental, air quality, rural economy, and equity benefits of ensuring that the applicability of the regulation addressed the needs and parameters of the evolving MD/HD EV sector. Commenters further elaborated that, by not specifically addressing the unique needs of MD/HD EV charging in the regulation, FHWA would be de facto discouraging investment in the needs of MD/HD EVs. Several commenters recommended that funding be set aside specifically for MD/HD EV charging infrastructure. Some commenters requested that separate minimum standards be released to address the

[13] As described in *https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf,* ''As part of the development and approval of State Plans, and in very limited circumstances, a State may submit a request for discretionary exceptions from the requirement that charging infrastructure is installed every 50 miles along that State's portion of the Interstate Highway System within 1 travel mile of the Interstate, as provided in the Alternative Fuel Corridors request for nominations criteria. All approved exceptions will be supported by a reasoned justification from the State that demonstrates the exception will help support a convenient, affordable, reliable, and equitable national EV charging network. Exceptions must be clearly identified and justified in State plans. Additional coordination with FHWA and the Joint Office may be necessary before any exception is approved. Exceptions will be approved on a case-by-case basis and will be adjudicated prior to approval of a Plan.''

unique needs of MD/HD EV charging, and yet other commenters requested that this final rule be modified to address MD/HD needs. Despite acknowledging the unique needs of MD/HD EVs, several commenters identified that the MD/HD EV sector is less evolved than the light-duty EV charging sector and that, because this portion of the industry is still in its infancy, there may be a need to continue to monitor technological developments before solidifying certain requirements specific to MD/HD EV needs.

In fact, commenters pointed out that MD/HD EV charging technologies are evolving and will be used in a number of ways. While many medium-duty vehicles will likely charge at fleet depots and operate under hub-and-spoke business models where they would not venture significant distances from their base locations, a growing sector of MD/HD vehicles will require on-corridor charging. Some commenters therefore suggested that these requirements be designed so as to consider the future accommodation of power demands and site use/circulation needs of long-haul trucking. Yet other commenters requested that requirements address MD/HD EV charging needs immediately, with some suggesting that a certain number of federally-funded EV charging parking spaces be designed to accommodate MD/HD needs.

Site design is a common topic of consideration in the comments addressing MD/HD needs. Several commenters requested that the regulation require that each charging station include at least one pull-through space sized appropriately for MD/HD needs. Commenters specifically identified that while MD/HD charging sites can be compatible with light-duty (LD) charging, charging stations designed to meet LD needs will not be suitable for MD/HD commercial vehicles. Several commenters requested that FHWA develop a site design template which incorporates the needs of MD/HD charging to assist the industry in ensuring these needs are met. In addition to support for pull-through design, commenters mentioned MD/HD vehicles have different turning radii which impact both on-site circulation and ingress/egress, and that MD/HD vehicles may have greater needs for on-site or nearby amenities as MD/HD charging may require longer dwell times. Conversely, one commenter noted that, if MD/HD charging is not a primary purpose of a charging station, site design requirements which consider MD/HD needs would be unnecessarily burdensome and wasteful.

Many commenters identified an opportunity to coordinate MD/HD charging with required off-duty breaks for long-haul truckers. One commenter noted that the regulation should consider dwell time needs for MD/HD charging and ensure that dwell time fees not penalize MD/HDs for their longer dwell times for charging. A handful of commenters identified a need to modify EV charging signage so as to help long-haul truckers identify MD/HD charging opportunities that can best align with their Federal hours of service (HOS) requirements. Site design and collocation of amenities accommodating MD/HD needs could serve multiple purposes beyond charging and required HOS breaks; the gap in long-haul trucking duty cycle could also be leveraged for required inspections.

Many commenters opposed the availability requirements under proposed § 680.106(e) whereby charging stations would be required to be available for use by the public 24 hours a day, 7 days a week on a year-round basis. Commenters pointed to language in BIL which would allow for charging stations to be restricted to ''authorized commercial motor vehicle operators from more than one company'' [14] and identified that the requirement for near-constant public access would restrict many important MD/HD charging applications, such as those on port properties or for fleet charging.

In addition to identifying unique site design requirements of MD/HD vehicles, many of the commenters discussed differing MD/HD power level needs. Several commenters mentioned that most MD/HD vehicles required DCFC charging over 50 kW, with several commenters supportive of requiring 350 kW or 1 MW to satisfy MD/HD needs. A few commenters also mentioned an increased interest from the MD/HD EV sector in wireless charging technologies, which is noted in its potential ability to better address wear and tear from the MD/HD vehicles. Commenters also pointed out that MD/HD vehicles may require different connectors from LD vehicles. Commenters mention both the Megawatt Charging System (MCS) charging connector (SAE J3271) which is rated for charging at a much larger maximum rate, and the Society of Automotive Engineers (SAE) J3068 connector as appropriate for MD/HD charging, also noting that the market is continuing to evolve at a rapid pace, and it may be too early to determine the appropriate uniform plug standard to serve these vehicles.

Finally, commenters noted that cybersecurity is of particular concern for MD/HD charging because the trucking industry is a high-value target for malicious actors and cybercriminals. As such, commenters requested consideration for specific cybersecurity requirements related to EV charging.

FHWA Response: The FHWA notes that several of the comments provided recommendations that are not within the purview of this final rule. For example, the final rule does not impact program funding and thus cannot regulate a set-aside for future MD/HD charging infrastructure or cybersecurity requirements. The FHWA also cannot regulate minimum standards that have not yet been identified or innovated in the industry. As was emphasized by several of the commenters, FHWA understands that the MD/HD charging industry is very nascent and rapidly evolving; as such, FHWA has not modified the language in this final rule to specifically accommodate MD/HD needs so as not to preempt the pace of the technological innovation. The rule does not preclude MD/HD charging infrastructure and FHWA strongly encourages project sponsors to consider future MD/HD needs. The FHWA will continue to monitor the technological advancements in the MD/HD industry for consideration as to whether further regulation is needed to provide applicable minimum standards and requirements at a future date. The FHWA specifically encourages the inclusion of pull-through EV charging parking stalls in the design of EV charging stations. Pull-through EV charging parking stalls are acknowledged as better suited to the needs of MD/HD vehicles.

Section 680.104 Definitions

AC Level 2

Commenters indicated that AC Level 2 chargers can operate on circuits from 208 volts to 240 volts, with 208-volt circuits more common in commercial installations.

FHWA Response: The FHWA agrees that AC Level 2 charging can utilize circuits from 208 volts to 240 volts, depending on the application. The definition has been modified in this final rule to incorporate the 208-volt charging use case.

[14] Paragraph (2) under the Highway Infrastructure Program heading in title VIII of division J of BIL, states that ''Provided further, that funds made available under this paragraph in this act shall be for projects directly related to the charging of the vehicle and only for electric vehicle charging infrastructure that is open to the general public or to authorized commercial motor vehicle operators from more than one company.''

Charger

The FHWA received a comment requesting that the definition of ''charger'' be clarified to indicate whether chargers are required to accommodate the charging of multiple vehicles simultaneously, or whether a ''charger'' could refer to an instrument which charges only one vehicle at a time. Additional clarity was also requested to distinguish ''charger'' from ''charging station'' with a request to include requirements for basic amenities in the definition for charging station.

FHWA Response: The definition for charger is intentionally broad so as to cover instances where the device can include one or more charging ports to charge one or more vehicles simultaneously. Further specificity regarding the definitions of ''charger'' or ''charging station'' would amount to operational requirements which are dealt with in § 680.106.

Charging Station

The FHWA received comments requesting clarity to distinguish ''charger'' from ''charging station'' with a request to include requirements for basic amenities in the definition for charging station.

FHWA Response: Further specificity regarding the definitions of ''charger'' or ''charging station'' would amount to operational requirements which are dealt with in § 680.106. No changes were made to the definition.

Charging Station Operator

In further review of the proposed regulation text, FHWA found a need to clarify the responsibilities assigned to the charging station operator as belonging to the owner of the chargers. This clarification was needed in order to identify the responsible parties for the final regulations where the language ''charging station operator'' is used. The definition has been modified in this final rule to identify the responsibilities of the owner of the chargers and supporting equipment and facilities.

Contactless Payment Methods

The FHWA received a few comments requesting that the definition of ''contactless payment methods'' explicitly include payment by mobile application in order to provide another effective accessible payment option.

FHWA Response: The FHWA agrees that payment by mobile application linked to a particular charging station would provide another effective accessible payment option. Although payment by mobile application would be inherently included in the proposed definition as ''another payment device,'' the definition has been modified in this final rule to explicitly incorporate payment by mobile application.

Cryptographic Agility

The FHWA received a comment stating that the use of the term ''cryptographic agility'' was preferred to the term ''encryption systems'' as used in § 680.106(h).

FHWA Response: In addition to revising the reference in the proposed rule in § 680.106(h) (see section-by-section discussion of these changes below), FHWA found a need to define the term ''cryptographic agility'' as this is not a common or otherwise well-defined term.

Direct Current Fast Charger (DCFC)

Several commenters identified that DCFC can be delivered through a multitude of different iterations of power phases and voltage and, as such, that the definition for DCFC should be rooted in the output of DC electricity, not the particular characteristics of input or output power, which vary. Multiple commenters said that the proposed definition of DCFC, which stated that DCFC use 3-phase, 480-volt input power, would effectively prohibit the use of 150-kW DCFCs operating on lower-voltage, single-phase input power with supplementary battery and/or solar energy systems.

FHWA Response: The FHWA agrees that the defining characteristic of DCFC is the ability to deliver an output of direct-current electricity to the EV. The definition has been modified in this final rule to remove references to input power characteristics.

Distributed Energy Resource

One commenter recommended modifying the definition of ''Distributed energy resource'' to explicitly include EVs as a type of distributed energy resource, citing the role of EVs in supplying power for the grid using V2G technology.

FHWA Response: While FHWA acknowledges the power supply role that EVs play in a V2G environment, the definition of ''Distributed energy resource'' does not exclude EVs as written and, therefore, requires no modification.

Electric Vehicle

The FHWA received a comment that the definition for ''electric vehicle'' specify that the vehicle can receive electricity from an external power source so as to exclude hybrid vehicles which are charged through regenerative braking and their internal combustion engines.

FHWA Response: The FHWA agrees that EVs should be defined by receiving electricity from an external power source. The definition has been modified in this final rule to specify charging from an external power source. The definition has also been modified to refer to ''motor vehicle'' to align with terminology common in industry. Language has also been added to the definition to clarify that electric bicycles are not included in this definition for the purposes of this rule. The FHWA excluded electric bicycles from this definition in order to avoid application of inadvertent regulations with unintended consequences to electric bicycle charging.

Megawatt Charging Standard

The FHWA received a comment that the regulation should include a definition for Megawatt Charging Standard (MCS) which has yet to be finalized but is anticipated to serve as the industry standard connector type for charging heavy-duty trucks.

FHWA Response: The FHWA acknowledges that MD/HD charging technologies are more nascent than LD charging technologies. This final rule does not preclude the use of MCS; however, since the industry standard for MCS, SAE J3271, has not yet been finalized, FHWA has intentionally not revised this final rule to incorporate MCS in an effort to not inadvertently create restrictions on these emerging technologies at this time.

Open Charge Point Protocol

The FHWA received a comment taking issue with the proposed definition for Open Charge Point Protocol (OCPP)'s reference to ''network,'' stating that ''network'' is an ambiguous term that could mean software, wireless communications, or even a company's combined hardware and technology.

FHWA Response: This final rule includes a definition for ''charging network'' that clarifies the ambiguity identified in the OCPP definition.

Plug and Charge

The FHWA received a comment requesting additional specificity in the definition for ''Plug and Charge'' to provide clarity regarding use of International Organization for Standardization (ISO) 15118 because several disparate definitions are in use in the industry.

FHWA Response: The FHWA agrees that ''Plug and Charge'' was intended to correlate to ISO 15118. The definition

has been modified in this final rule to incorporate specific reference to utilization of ISO 15118 and digital certificates for authentication.

Power Sharing

The FHWA received comments regarding the use of the term ''smart charge management'' that indicated there was confusion in the use of this term and what is typically referred to as either ''power sharing'' or ''automated load management'' by the industry.

FHWA Response: The FHWA included the use of the term ''power sharing'' in this final rule in order to distinguish ''smart charge management'' activities from ''power sharing'' activities. A definition for ''power sharing'' has been included in this final rule for this reference.

Public Key Infrastructure

The FHWA received comments recommending that FHWA require consideration of ''public key infrastructure'' (PKI) in the development of cybersecurity strategies included in State EV Infrastructure Deployment Plans under § 680.106(h)(2).

FHWA Response: The FHWA included the use of the term ''public key infrastructure'' in this final rule in order to describe an important additional cybersecurity strategy recommended by a commenter. A definition for ''public key infrastructure'' has been included in this final rule for this reference.

Smart Charge Management

The FHWA received a few comments on the definition of ''smart charge management.'' One commenter requested that the definition be revised to disconnect the concept of chargers controlling the amount of power dispensed from the concept that chargers can respond to external power demand signals, the latter potentially running contrary to the needs of customers at fast charging stations. Another commenter requested that the definition be revised to include the concept that chargers respond to external pricing signals, noting that electricity pricing is one of the most important methods utilized by smart charge management to incentivize drivers and operators to charge EVs at times when it is more beneficial to the grid.

FHWA Response: The FHWA acknowledges that the proposed definition conflated the concept of smart charge management with the concept of power sharing among chargers at the same station. Smart charge management involves controlling charging power levels in response to external conditions and is typically applied in situations where EVs are connected to chargers for long periods of time, such that prolonging charging for the benefit of the grid is not objectionable to charging customers. In contrast, power sharing involves dynamically curtailing power levels of charging ports, based on the total power demand of all EVs concurrently charging at the same station. The FHWA agrees that responding to external power demand signals is not a typical component of power sharing and it can be detrimental to the customer experience in fast charging applications. The FHWA agrees that smart charge management may involve both external power demand and price signals. The definition of smart charge management has been modified in this final rule and the definition of power sharing has been added in response to commenters to avoid confusion.

Third Party

The FHWA received a comment requesting that the regulation define ''Third party'' to include any entity other than the State DOT.

FHWA Response: The FHWA understands the desire to have all parties defined, however FHWA maintains that the proposed language retains the State or other direct recipient's ability to define their own contract terms specific to their own procurement process. A definition for third party was not added.

Section 680.106 Installation, Operation, and Maintenance by Qualified Technicians of Electric Vehicle Charging Infrastructure

Procurement Process Transparency for the Operation of EV Charging Stations

Many comments were submitted on § 680.106(a) Procurement Process Transparency. Notably, most of the commenters on this topic from State DOTs were generally supportive of the flexibility of the language in the proposed regulation; some went so far as to state that additional procurement requirements could impose unnecessary burden on States or postulated that excessive requirements would discourage desired private sector participation. State DOTs also requested that the regulation not be modified to require or imply rate regulation by the State and allow for the market to ultimately dictate price.

Most industry commenters that mentioned this topic were enthusiastically supportive of the concept of procurement and price transparency. A few private sector commenters expressed concerns (shared by a few State DOT commenters) that the regulation should allow for trade secret, CBI, and intellectual property protections when requiring reporting how private charging networks set their price. On the other end of the spectrum, a few industry commenters requested the publication of specific data to include a list of eligible DCFCs that meet minimum NEVI requirements and meet the minimum standards and requirements for funding under the NEVI Formula Program and projects funded under Title 23, U.S.C., or that the Federal government maintain a national directory of EV suppliers and EV supply equipment with key metrics for use by the States and industry.

Several industry commenters requested that Requests for Proposal (RFP) and proposal documents be published on the Joint Office website and that the Joint Office maintain a bidding docket which would allow the States (and the public) access to compare bids received across the country.

Some commenters requested clarification on language in the proposed rule. In particular, it was noted that the phrase ''price and cost data'' in § 680.106(a)(2)(v) (currently § 680.106(a)(5)) is vague and open to interpretation. Other commenters suggested additional fields of data collection to expound on ''price and cost data'' requirements and other fields of interest. Suggested additional data included objectively qualified ''total cost of ownership,'' average installation costs, projected peak demand charges, and required infrastructure upgrades. Other commenters noted concerns with requiring specific metrics for price and cost data. One commenter noted that the price of electricity will most likely be dependent on the cost charged by the utility, but the reporting of operations and maintenance costs for each site could be a useful independent additional metric. Another commenter asserted that station-specific fees such as idle fees or any other dwell-time-related charges should remain the responsibility of site hosts and network operators and not be reported to the State DOT.

One commenter also noted a concern with showing the proposed contract with an awardee and requested that this language under § 680.106(a)(2)(iv) be changed to ''executed.''

FHWA Response: Most State DOTs submitting comments on this topic lauded the flexibility in the proposed regulation language, noting the importance of flexibility to allow for interpretation through diverse State law

and potential trade secret, CBI, and intellectual property protections. As such, FHWA has not included revisions to ''price and cost data'' as required under § 680.106(a)(2)(v) (currently § 680.106(a)(5)). The FHWA agrees with the value of maintaining a nationwide database for applicable RFP documents and proposals and will consider opportunities to facilitate the creation of such a database. The FHWA disagrees that the language in § 680.106(a)(2)(iv) (currently § 680.106(a)(4)) should be changed to ''executed''. The purpose of this regulation is to increase transparency of the procurement process undertaken by States and other direct recipients and the language in the final rule under § 680.106(a)(4) ensures that the contract proposed by States and other direct recipients is available for public review prior to execution. Noting the support for EV charging procurement and price transparency in the comments, FHWA also removed the restricted applicability language in the proposed rule to broaden the application of this provision to all projects otherwise subject to this rule.

Number of Charging Ports

The FHWA received a significant amount of comments on the number of chargers proposed in § 680.106(b). Many commenters supported the proposed minimum requirement as written for a minimum of four charging network-connected DCFC ports capable of simultaneously charging at least four EVs. Other commenters were generally supportive of the four-port minimum requirement but suggested that in some instances an exception process should be allowed so as to reduce the number of ports at certain stations to a minimum of two. Commenters suggested that the existing NEVI Formula Program exception process be expanded to allow for reducing the number of ports (or power requirements at each port), whereby States could submit exceptions for sites that are particularly remote, that have greater difficulty in receiving adequate power, or that would otherwise never be financially self-sustaining. Alternatively, some commenters suggested that the requirement remain at a minimum of four ports, but that States or other designated recipients be allowed to ''phase in'' to this requirement over several years with an initial requirement of two ports constructed along with spacing and make-ready power investments to support the future installation of the remaining two ports. Another alternative proposed was that the four-port minimum requirement remain, but States or other designated recipients retain flexibility to install fewer than four ports in certain prescribed circumstances to include geographic location in a county with less than 50 persons per square mile of land area.

Other commenters suggested that the regulation allow the minimum four-port requirement to be met by aggregating charging ports installed at multiple locations in close proximity rather than in the immediate vicinity on one site.

In contrast to the aforementioned commenters, a handful of commenters also recommended that the minimum required number of charging ports be either a larger number (6 or 8) or a smaller number (1 or 2), providing States or other designated recipients flexibility to increase beyond the minimum number required as needed. Commenters recommending a larger minimum-port requirement expected future demand for EV charging along AFCs to rapidly increase and wanted to future-proof facilities for excessive queuing. Commenters recommending fewer than four ports for the requirement indicated that the four-port minimum requirement would be overly burdensome in many instances, particularly rural areas, and a smaller requirement would provide States or other designated recipients the flexibility to increase the number of ports as-needed.

A few other comments were also submitted opposing a minimum required number of ports altogether, recommending instead that the final regulation indicate that the number of ports at a charging station should correlate to individualized projections for use.

Other commenters focused on the implementation of the rule rather than the content. The language in the proposed rule stated that § 680.106(b) applies only to NEVI Formula Program projects. However, commenters pointed out that the February 10, 2022, NEVI Formula Program Guidance indicates that States would have additional flexibility to determine the type and location of any additional EV charging infrastructure after the Secretary of Transportation has certified that the State's AFCs for EVs are fully built out. Commenters elaborated on benefits of providing flexibility for States to use NEVI Formula Program funds for AC Level 2 charging sites for redundancy, equity, and network coverage, and requested that FHWA provide for this flexibility in this final rule.

One commenter recommended including a requirement for at least one AC Level 2 charger along with at least one AC Level 1 charger at each charging station (in addition to the four-port DCFC requirement). The benefit of these AC Level 1 and 2 chargers would be to provide emergency redundance, to provide more affordable charging options, and to power e-bikes and e-scooters.

The International Association of Fire Chiefs also submitted a comment detailing multiple safety recommendations. Among these recommendations was a suggestion that no more than two charging ports be placed side-by-side at an EV charging station, in order to mitigate the threat of thermal runaway.

FHWA Response: The FHWA continues to see value in regulating a minimum number of ports at charging stations and clarifies that this section regulates the number of charging ports. This final rule allows for a predictable, standardized, and forward-looking charging capacity for EV drivers throughout the country when Federal funds are used. The FHWA agrees with the many commenters that were supportive or generally supportive of a four-port minimum requirement at each charging station. A minimum number of four ports per station will help ensure that Federal dollars are invested in a cost-effective manner by providing economies of scale when building out new stations for fixed costs such as grid connection. Moreover, a four-port minimum will help mitigate the risk of underbuilding and needing to expand capacity at stations soon after they are built to accommodate new demand. The four-port minimum requirement also allows for sufficient redundancy should one or more port be experiencing downtime. It also allows for redundant capacity for EVs users that have planned to stop and charge at a station along their planned travel routes, should those EVs users encounter occupied ports at the time of their intended charging stop. The wide support among the comments for a minimum of four ports also indicates that four ports strikes the correct balance of desired redundancy and capacity while not overly burdening a minimum requirement.

However, FHWA agrees that, in certain circumstances, there may be situations where a four-port DCFC minimum requirement might not be warranted. The FHWA did not agree that an appropriate response to these circumstances would be the implementation of an exception process or phase-in requirement whereby a smaller number of ports would be allowed for a temporary period or indefinitely in specified circumstances. Introducing inconsistency in the number of ports along the national

network would be undesirable as it would make the entire charging network less convenient, reliable, and equitable. The language in this final rule has instead been modified to clarify that any time charging stations are installed there is a required minimum of 4 ports, notwithstanding the type of port (DCFC or AC Level 2 or a combination of DCFC and AC Level 2). Additionally, in all instances when a charging station is installed along and designed to serve users of designated AFCs, there must be at least four network-connected DCFC charging ports.

The FHWA recognizes that there may be some locations that are geographically located along a designated AFC where an EV charging station is intended to serve local EV users and communities rather than the vehicles traveling on the AFCs such as at local business establishments or community service locations like community centers, town halls, or libraries. These are the types of locations that may still warrant an EV charger installation but are not intended to serve the users of designated AFCs and therefore may not need the four DCFC charging ports. This results in flexibility to install community-focused chargers in close proximity to AFC corridors, and not have the four network-connected DCFC charging ports requirement apply. Accordingly, FHWA would not count these types of stations with less than four DCFC charging ports in the assessment of distance requirements of charging stations along corridors. Also, by removing the language from the proposed rule that restricted this regulation to NEVI Formula Program funds, the revised language in this final rule removes the implicit prohibition on NEVI-funded AC Level 2 Chargers and allows for the implementation of charging stations with AC Level 2 Chargers using NEVI Formula Program funding, at the discretion of the State, according to program guidelines after the State's AFCs for EV Charging have been certified as fully built out.

The FHWA also acknowledges comments detailing site design recommendations regarding the proximate location of multiple charging ports to address fire safety. However, site design recommendations are not specifically addressed in this final rule as they are governed by other laws or authorities and typically involve complex decisions to accommodate context-specific needs. The FHWA also acknowledges that fire prevention strategies may be addressed in § 680.106(h)(1) where FHWA requires States and other direct recipients to implement physical security strategies.

Connector Type

The FHWA received many comments on the proposed rule's discussion of connector type. Many commenters supported the proposed requirement for DCFC chargers to use CCS Type 1 connectors. Commenters stated that the domestic EV market had mostly aligned around the use of CCS Type 1 connectors. The FHWA also received a large number of comments that, while generally supportive of the proposed CCS connector requirement, recommended the inclusion of CHAdeMO connectors as well. CHAdeMO proponents lauded the importance of accommodating CHAdeMO connectors for a few primary reasons. First, commenters noted that CHAdeMO was proposed for vehicles being released in the domestic market as late as 2025, meaning that, based on their projected battery lives, CHAdeMO vehicles would be on the roads until at least 2035. Accommodating CHAdeMO vehicles would allow the chargers subject to this rule to support second-hand EV ownership, which would be more accessible for low-income groups and thus enable chargers subject to this rule to better support low-income communities. Second, commenters noted that CHAdeMO already provides bidirectional charging capabilities, a technology that is very new for CCS vehicles using ISO 15118. Commenters recommended several improvements to the regulation to allow for greater consideration of CHAdeMO connectors including: providing for use of NEVI Formula Program funds and all eligible Title 23 funds for CHAdeMO connectors beyond Fiscal Year 2022 NEVI funding; stipulating that CHAdeMO connectors deliver the same power level stipulated for CCS; and allowing for a temporary exception of the ISO 15118 requirement for bidirectional charging for CHAdeMO vehicles. Some commenters went so far as to recommend specific numbers of CHAdeMO connectors required per site, where other commenters suggested that States or other designated recipients be encouraged to do analysis to identify if their local markets had a need to support CHAdeMO vehicles.

The FHWA also received a few comments in opposition to CCS as the connector standard for DCFCs. Some commenters noted that CCS plugs were bulky and difficult to manage when compared to Tesla plugs, posing additional accessibility issues for users. Other commenters noted that the MD/HD EV charging community would likely need a different type of standard connector, but that this portion of the industry had not yet matured or coalesced around an appropriate connector standard to list for DCFC charging.

The FHWA also received several comments about the proposed AC Level 2 charging port connector, J1772. Most commenters were generally supportive of the proposed AC Level 2 connector type. One commenter recommended modifications to the proposed rule to allow for J1772 connectors to not be permanently attached so as to allow AC Level 2 chargers to more seamlessly integrate into existing urban parking spaces. Another commenter recommended that the rule be modified to allow AC Level 2 chargers a temporary waiver from the requirement to adopt Plug and Charge or ISO 15118 compliance. A few commenters also recommended that both J1772 and J3068 connectors be allowable connector types for AC Level 2 charging.

The FHWA also received a few comments in opposition to the J1772 connector standard. Most of these commenters recommended that FHWA instead require J3068 connectors for AC Level 2 charging. Commenters lauded J3068 for its ability to service MD/HD charging and to allow for vehicle-to-grid charging once the standard is developed.

The FHWA also received several comments discussing battery swapping and wireless charging needs. These commenters generally opposed addressing battery swapping and wireless charging in this rule because these technologies have not yet developed sufficiently for standards. A few commenters recommended that FHWA ensure the final regulation would not prohibit the future use of battery swapping or wireless charging technologies once the industry matures.

Although FHWA received many comments in support of the proposed regulation as written, FHWA did receive a few comments opposing the inclusion of a standard allowing proprietary connectors. These commenters warned that provisions allowing for the inclusion of proprietary connectors would serve to further bifurcate the market and undermine the standardization of the industry. One commenter recommended that if proprietary connectors be allowed, that they must deliver the same power level stipulated for CCS and that they should be allowed through NEVI Formula Program funds only after four CCS DCFC charging ports were provided at a site.

FHWA Response: Commenters overwhelmingly supported the CCS

connector standard and verified that the industry is moving to adopt CCS as a market standard; therefore, FHWA requires CCS Type 1 connectors for each DCFC port through this final rule. Although a few commenters preferred Tesla connectors, most of the Tesla products are proprietary and do not address the needs of the majority of EV makes and models available in the domestic market. However, on November 11, 2022, Tesla announced its ''North American Charging Standard'' (NACS), which makes its existing and previously proprietary Electric Vehicle charging port and connector available for broad and open public use, including to network operators and vehicle manufacturers. In the announcement, Tesla noted that charging providers were planning to offer NACS charging ports at public charging infrastructure. This rulemaking allows permanently attached non-proprietary connectors (such as NACS) to be provided on each charging port so long as each DCFC charging port has at least one permanently attached CCS Type 1 connector and is capable of charging a CCS-compliant vehicle.

The FHWA agrees with commenters that CHAdeMO connectors provide value to a segment of the market in the near term. The FHWA believes that allowing the option of installing CHAdeMO connectors using the first year of the NEVI Formula Program funding allocation gives States sufficient opportunity to ensure equitable charging access according to local needs, while limiting the cost of installing and maintaining a connector that is becoming less common in the industry. Recognizing the need for flexibility to accommodate the evolving technological needs of charging in the future, FHWA modified the language of this final rule to allow DCFC charging ports to have other non-proprietary connectors (specifically identifying NACS and CHAdeMO) in addition to the required four CCS connectors so long as each DCFC charging port is capable of charging a CCS-compliant vehicle. The language was also modified to clarify that each charging port must still be accessible through a CCS connector. This avoids the possibility of having an entire charging port that a consumer cannot use if there are only non-CCS connectors attached to it. This also reflects comments that warned against the bifurcation of the market by clearly elevating the prominence of the CCS standard while still providing a bridge to other types of connectors to allow time for the market to transition.

The FHWA also continues to require J1172 for AC Level 2 charging in this final rule. The FHWA agrees that J3068 connectors may have future benefits, particularly for MD/HD charging applications. However, the proposed rule would already allow for but does not require the use of, J3068 connectors for AC Level 2 charging. Therefore, FHWA has not modified the language in this final rule to specifically accommodate J3068 connectors.

The FHWA also agrees with commenters that it is premature to include requirements regarding battery swapping or wireless charging.

Comments regarding ISO 15118 requirements are addressed in the discussion of § 680.108.

Power Level

The FHWA received a significant amount of comments on the proposed rule's discussion of minimum power per DCFC charging port. Many commenters expressed general comfort with a requirement for a minimum power per DCFC charging port of 150 kW; however, some commenters requested that the final rule clarify that the minimum station power capability be required at or above 450 kW, rather than 600 kW, in order to provide for more realistic maximum simultaneous usage of charging infrastructure. Commenters clarified that EVs demand the greatest amount of power at the beginning of their charging session, so rarely would four cars be charging at the full 150 kW simultaneously. Requiring less power per charging station would allow sites to be less demanding on the power grid and also generally less expensive to install and operate. Other commenters recommended that, to address this dynamic of maximum grid power needed per site and to facilitate power sharing or smart charge management more vigorously, this final rule removes the word simultaneous from the requirement to provide at least 150 kW per charging port ''simultaneously'' across all charging ports. Commenters indicated that facilitating power sharing or smart charge management could have significant positive impacts on the reduction of peak load, which provides value to all charging stations but is particularly critical in providing for MD/HD charging. One commenter asked that charging stations with greater than 2.5 MW capacity be exempted from simultaneous minimum charging power requirement of 150 kW. One commenter said that the proposed 150-kW power requirement is reasonable, given that it allows power sharing when charging vehicles capable of 350 kW that are projected to enter the market by 2030. Multiple commenters stated that smart charge management is not appropriate for fast charging stations on highway corridors because even if a driver willfully chooses to reduce their charge rate for load management purposes at a corridor DCFC station, they may be impeding other drivers that need a quick charge from using the charging equipment. Other commenters questioned the power delivery mechanism required by the proposed rule and requested that FHWA clarify if distributed energy resources (DERs) were eligible.

Other commenters were opposed to the requirement for a minimum power per DCFC charging port of 150 kW. Some commenters recommended that the proposed requirement is simply too aggressive and that the industry is not quite ready to supply the needed number of DCFCs at that size. These commenters requested that FHWA consider a temporary waiver or exception process allowing charging stations to delay or to be individually exempted from the power requirement. Still other commenters opposed the 150 kW requirement outright because they felt it would not best address the market needs. Some commenters pointed to the need for fast charging at a more moderate intensity for applications outside of designated AFCs in the communities. These chargers could efficiently meet needs in communities while providing 50 kW to 100 kW of maximum power per port, while being cheaper to install. Indeed, several commenters identified that requiring 150 kW, rather than 50 kW or 100 kW, removes an opportunity to take advantage of scale. Reducing the required maximum power per port allows for more charging stations to be installed in context-sensitive applications. One commenter argued that, because current EV battery design limits the amount of time an individual vehicle can use the full charging port power rating, smaller DCFCs can more efficiently and quickly charge some vehicles than larger DCFCs by providing higher average power transferred to vehicles. This commenter went on to argue that on sites with multiple smaller DCFC chargers, if combined with load-sharing technologies when several ports are not in use at a site, higher power level delivery is possible at any individual port. Another commenter recommended removing the word ''maximum'' from the DCFC power requirement to avoid confusion.

Other commenters opposed the 150 kW requirement because they did not feel it adequately addressed the needs of emerging technologies such as ''in-motion'' wireless charging or MD/HD charging.

Where commenters have suggested waivers or exceptions from the 150 kW power requirement per port, and even where commenters have suggested that the minimum power per port be lowered from the proposed 150 kW requirement outright, commenters have suggested that site infrastructure be upgradeable to enable future provision of higher power levels on site. One commenter recommended that any lower powered charging ports be installed with conduit ready for upgrade to 150 kW power delivery.

Several commenters requested that FHWA consider providing for an exception process to the power level requirements based on grid constraints, lower traffic volumes, or cost prohibitive site constraints. Other commenters requested that FHWA specifically regulate that, when an excess of four chargers is provided on a particular site, station and port power requirements be less restrictive for the additional chargers.

Other commenters requested that FHWA consider the needs for future charging through incorporation of a higher power requirement. Multiple commenters requested that FHWA require a minimum of 350 kW per port to shorten charging time for EV drivers, citing consumer survey research and listing the many currently available or announced EVs capable of charging at power levels above 150 kW. A few commenters requested that at least one DCFC port be capable of delivering a minimum power of 350 kW, while others requested that FHWA not prohibit or discourage the provision of ports capable of delivering 350 kW of power. Multiple commenters recommended specifying a required range of output voltages for DCFCs to ensure that chargers can supply power to vehicles with different battery voltages. They stated that this is important because newer EVs are frequently incorporating high-voltage battery packs above 500V and chargers with sufficiently high voltage capability will limit charging speed or not be able to charge some vehicles. Commenters recommended either 200 volts or 250 volts as the minimum and 950 volts or 1000 volts as the maximum DCFC output voltage. One commenter pointed out that Build America, Buy America compliant 350 kW DCFCs are not currently available, requesting that FHWA issue a time-limited waiver for these chargers so that they could be installed in appropriate locations.

Most comments received about AC Level 2 power requirements were supportive of FHWA's proposed rule. A few commenters wrote specifically about the power levels proposed for AC Level 2 charging ports. One commenter recommended that the 6-kW proposed requirement be replaced with a 9-kW requirement, another commenter recommended it be replaced with a 48-amp requirement, and another commenter recommended replacing the word ''maximum'' with ''minimum'' for AC Level 2 charging. Another commenter said that it is not possible to specify a power requirement for all locations, but rather the private sector should be allowed to choose power levels suitable to meet customer needs. Several commenters requested that the AC Level 2 minimum power requirement be written to allow more flexibility for power sharing and smart charge management in locations where vehicles are expected to dwell for long periods of time, in order to reduce cost and provide vehicle-grid integration benefits.

Additionally, one commenter provided the general recommendation that FHWA require that all chargers be clearly labeled with the maximum power they are capable of delivering per port.

FHWA Response: The FHWA agrees that, in general, requiring less power per charging station, either by installing chargers with lower power capacity or by allowing dynamic power sharing, would allow sites to be less demanding on the power grid and also generally less expensive to install and operate. However, charging station power requirements must also be set to ensure a consistent and satisfying customer experience regardless of which charging port a customer selects and how many other ports are currently in use. Therefore, the requirement that each DCFC must simultaneously deliver up to 150 kW, as requested by an EV, was retained as a minimum requirement to provide a standard, reasonably high level of charging service for DCFCs. Likewise, the requirement that each AC Level 2 port be capable of providing at least 6 kW per port simultaneously across all AC ports was retained, but a provision was added to allow EV charging customers to consent to accept lower power to allow power sharing or to participate in smart charge management programs.

Furthermore, FHWA updated this final rule to clarify that power sharing is permissible above the minimum 150 kW per-port requirement for DCFCs and 6 kW per-port requirement for AC Level 2 chargers. Given the strong market trend toward EV charging power capacity above 150 kW for DCFC and above 6 kW for AC Level 2 charging, this allows flexibility to manage the cost of charging stations designed to meet current and future demand for significantly increased power. The FHWA agrees with the recommendation to specify required DCFC output voltage and has updated this final rule to include the requirement that each DCFC port support output voltages between 250 volts DC and 920 volts DC. Regardless of the operating voltage of the battery, so that EVs are able to receive at least 150 kW per port, FHWA suggests that DCFC connectors be rated with a current carrying capacity of greater than or equal to 375 Amps. Also, FHWA agrees that smart charge management is usually not appropriate for fast charging stations, so reference to it was removed from the DCFC power requirement in this final rule.

The FHWA acknowledges that the power level of AC Level 2 chargers is typically specified in terms of amperage, but this final rule retains the 6-kW specification to provide a consistent customer experience, regardless of the circuit voltage of a particular AC Level 2 charger. The 6-kW requirement accommodates an AC Level 2 port with a 30-amp max current rating that is connected to a 208-volt AC power supply.

The FHWA has concluded that the provision of multiple levels of power availability at charging stations would detract from the goal of standardization and from the ability to deliver a convenient, affordable, reliable, and equitable solution for EV charging. The FHWA also considered the requests to modify the power level requirements to accommodate emerging technologies and found that the minimum power level requirements in this final rule sufficiently accommodates emerging technologies to serve the needs of MD/HD EVs. Technologies such as in-road wireless charging are nascent, so FHWA finds addressing standards in this final rule to be premature. The FHWA will continue to monitor the technological advancements in inductive and catenary charging for consideration as to whether further regulation is needed to provide applicable minimum standards and requirements at a future date.

Finally, FHWA removed the word ''maximum'' from the DCFC and AC Level 2 power requirements and reworded the requirements to resolve confusion, as suggested by commenters.

Availability

The FHWA received several comments regarding proposed availability regulations. In general, commenters were supportive of the requirement for stations to be available 24 hours per day, 7 days per week;

however, many commenters requested that FHWA require or encourage charging sites to be collocated with travel amenities, specifically the availability of restrooms and manned payment support services. Commenters also proposed that a toll-free customer service hotline be provided at each charging station to offer technical and payment support.

Other commenters opposed the proposed requirement for near-constant site access and usability, citing the restricted hours of several prime candidates for charging stations such as local or State parks or the typical environment of MD/HD charging. One commenter recommended that availability instead align with the use of the Manual of Uniform Traffic Control Device's description of hours of operation (Section 2J.01 of the current 2009 edition). Commenters noted that MD/HD charging may be best provided, in some instances, on private sites that have restricted hours and entry.

Other commenters were generally supportive of the availability of stations available 24 hours per day, 7 days per week, but requested this final rule specify limited exceptions to this availability. Requested specified exceptions included needs for scheduled maintenance, natural disasters, vandalism, and unforeseen circumstances.

FHWA Response: The FHWA sees value in providing for near-constant access for public charging along designated AFCs; however, FHWA agrees with a need for flexibility to allow for some more restricted availability in some community charging locations, such as public parks. Therefore, FHWA has amended the language in the rule to allow for less restrictive hours for charging stations located off designated AFCs and require that the charging station must be available for use and accessible to the public at least as frequently as the business operating hours of the site host. This creates a minimum access timeframe, while allowing longer access if the site host chooses and site hosts are encouraged to keep their chargers open at all times the charging stations are physically accessible. While FHWA agrees that although there are advantages to collocating charging sites with travel amenities where feasible, this is not required by regulation in the final rule to both provide flexibility in locating stations where they are otherwise needed but these amenities are not available, and to reduce the cost burden for installation. The FHWA finds that the language in the proposed rule provided for sufficient exceptions to other availability requirements and has not made further modifications to the language specifying limited availability exceptions.

Payment Methods

The FHWA received a significant number of comments regarding payment methods as described in the proposed rule. Many commenters recommended that this final rule include provisions for additional payment methods. There was broad support among commenters for requiring the clear display of a toll-free phone number staffed by real-time customer support available to take payments or assist with customer service issues. Another option discussed in the comments for increasing the accessibility of payment methods was the use of a QR code which could also specify options for users that are hard of hearing or are limited English proficient.

A number of commenters also supported the inclusion of a requirement for contact-based credit card readers activated through a swipe, chip, or dip. Commenters pointed out that prepaid cash cards, identified as being particularly useful in unbanked and underbanked communities, usually lack ''tap'' based contactless features and require either a swipe, chip, or dip to complete a transaction. Where prepaid cards are identified as a potential solution to make EV charging payment more accessible to low-income communities, commenters noted that prepaid cards may incur high upfront and reload fees that present another hurdle for access.

In contrast, FHWA also received comments supporting the contactless payment requirement and opposing the addition of a contact-based payment option. These commenters argued that contactless credit cards are widely available and becoming ever more present in the marketplace, and that where contactless credit cards are not available most users would own a cell phone which would enable mobile-based payments. These commenters also pointed out potential issues with the inclusion of contact-based payment methods. Contact-based credit card readers are susceptible to malicious practices such as skimming whereby thieves capture credit card information from a cardholder through the insertion of a small device in the point of information transfer. Malfunctions with contact-based credit card payments are also cited as being responsible for a large portion of reported downtime of existing chargers, potentially contributing to the failure of stations in meeting uptime requirements. Another point made by these commenters is that the needs of unbanked and underbanked groups are more appropriately addressed through the provision of technologies and programs that work with contactless payment features rather than in addition to them. Examples of these techniques include the provision of free digital accounts or discount codes for charging sessions, or the provision of prepaid cards with ''tap'' contactless technology.

Other commenters focused on aspects of the proposed rule that could be improved to make payment more accessible to disabled populations. Some commenters requested that FHWA consider the access to payment displays along with access to the angle of the screen and card reader from a seated position. One commenter noted that Section 508 of the Rehabilitation Act would be triggered when designing the information displayed through the payment system and when it becomes information and communication technology.

Yet other commenters discussed the proposed requirement to provide Plug and Charge payment capabilities. Many commenters were supportive of the Plug and Charge requirement, stating that this new technology is an improvement in the industry. Other commenters argued that it is premature to require Plug and Charge payment capabilities because the technology is still extremely new. Some commenters offered that FHWA should encourage but not mandate Plug and Charge payment capabilities.

Other commenters complained that the proposed regulation did not adequately address the needs of the MD/HD charging community. This community often charges through enterprise agreements. Commenters cautioned that FHWA should be careful so as not to craft the rule to unintentionally hinder application to MD/HD charging.

Commenters also pointed out the need for vendors to be able to offer charging even through prolonged network outages or in the event of natural disasters. Vendors could either have a mechanism to store payment information and charge users at a later time when systems are fully functional, or to offer free charging when system connectivity is down. Other commenters suggested that FHWA should allow for free charging both as a back-up for emergency situations and at the will of the vendor/site owner.

These commenters also raised questions about site connectivity. A few commenters requested FHWA explicitly require charging stations to ensure

availability of communication signals, noting that in some remote areas communication signals, including internet and cell phone service, are limited or challenging.

FHWA Response: While FHWA agrees that contactless payment methods are critical to the future of the industry, FHWA also agrees that the addition of other payment options could improve the accessibility of charging stations to disadvantaged communities. The FHWA added the requirement that charging stations provide EV charging customers an automated toll-free phone number where customers can provide their debit/credit card information via phone to an automated system in order to initiate charging or an SMS where customers can provide their debit/credit information via text to an automated system in order to initiate charging. If choosing a toll-free phone number, this phone line need not be staffed by live operators, thus reducing the burden of this final rule. The use of an automated toll-free phone number can help to alleviate many of the concerns regarding the inclusion of contact-based (*i.e.,* EMV/Magswipe readers) payment methods. From a cost perspective, establishing an automated toll-free phone number or SMS is substantially cheaper than implementing physical hardware and economically scales across many chargers, because a single number can be used to service many different locations. In fact, most major service providers already have options to call for payment, and of the over 55,000 chargers listed on the Alternative Fuels Data Center, fewer than 700 do not have a phone number associated with them—indicating a strong precedent. The FHWA recognizes that the toll-free calling and SMS options are not perfect accessibility solutions. Consumers who are unbanked, underbanked, or may not have access to a credit/debit card may be able to use this option with a pre-paid card. However, consumers who do not have access to a cell phone, customers that are deaf or hard of hearing, or users who do not have cellular signal may not be able to properly utilize the charging infrastructure through provision of an automated toll-free phone number alone. Nevertheless, these options seek to minimize the drawbacks of contact-based technology while substantially decreasing the accessibility issues related to having a minimum contactless payment requirement. The FHWA is not requiring scannable graphic methods of payments due to the questions surrounding cybersecurity and being able to ensure a payment is securely transmitted to the intended destination.

The language in the proposed rule also already stipulates that payment options must be ''accessible to persons with disabilities.'' Additionally, several commenters expressed concern regarding the accessibility of payment mechanisms to individuals with disabilities. As such, FHWA recommends that States or other designated recipients ensure all station designs should consider recommendations from the U.S. Access Board's recently released ''Design Recommendations for Accessible Electric Vehicle Charging Stations.'' This document, released in July 2022, provides guidance on issues such as reach height for those in wheelchairs and auditory mechanisms for the visually impaired, among others. These measures will be critical to ensure that disabled individuals will not be unduly burdened by design issues related to charger/station design. The additional payment method options of either an automated toll-free phone number or an SMS is the result of concerns raised for those users who may have run into accessibility challenges if required to use certain payment methods.

The FHWA also agrees that, although there are some concerns with contact-based options for credit card payments, States and other designated recipients should be allowed to include these options. Contact-based options for credit card payments are allowable under the language of the proposed rule, therefore this final rule has not been modified to further accommodate them.

The FHWA also acknowledges that although Plug and Charge is a new technology, its recent commercial introduction is the result of many automakers' plans to incorporate the feature into their products since the first version of the standard was published in 2014. Additionally, commenters from the automotive industry supportive of the rulemaking's proposal indicate that Plug and Charge based on the first or ISO 15118–20 versions of the standard will likely soon become a valuable feature in widespread mass market EV models. Charging hardware capable of supporting ISO 15118 software updates is required through several State EV charging programs by mid-2023 to support Plug and Charge, and in addition could provide grid integration and resiliency benefits as vehicles with bi-directional charging capabilities are released into the market. In order to capitalize on the benefits of Plug and Charge capabilities while acknowledging requests from several commenters for a need for additional time for compliance with the associated technological requirements, FHWA has modified the language in this final rule to more fully address a phased requirement for Plug and Charge capabilities through language in § 680.108 by adding the compliance date of February 28, 2024.

The FHWA also considered the implications of the language in the proposed rule regarding payment methods for MD/HD charging applications. Because charging stations are statutorily required to either serve the general public or to serve commercial motor vehicles from more than one company, fleets with enterprise payment agreements must still use some method of payment or authentication. This can be accommodated by the same near-field-communication system that accepts payment from major debit and credit card providers or through Plug and Charge.

The FHWA agrees that charging stations should require that charging be facilitated where payment systems may be down, including in emergency scenarios. In instances such as natural disaster evacuations or other such emergencies, people may be relying on chargers to function with limited connectivity. The FHWA has modified this final rule to include a requirement that chargers remain functional in these instances through new language in § 680.114(d).

The FHWA notes that connectivity challenges in remote areas should be addressed by the States and other designated recipients during siting and development, often through contracting, of charging station sites. The FHWA emphasizes the importance of connectivity in order to provide EV charging services and notes that there is assistance available for States both through the NEVI Formula Program and other funding sources in order to fund fully connected charging stations, and that there are market-based solutions to provide connectivity through satellite even where other connectivity challenges persist.

Finally, even though the option of allowing free charging was implicit in the proposed requirements, FHWA modified the language in this final rule to specify that payment mechanisms may be omitted from charging stations if charging is provided for free.

Equipment Certification

The FHWA received a handful of comments regarding equipment certification. A few commenters requested clarification in this final rule for the exact standards for certification

to be used. Some commenters recommended that FHWA require documentation of charger certification to Underwriters Laboratories (UL) standards, specifying that UL 2594 be used for AC chargers and UL 2202 be used for DCFCs. One commenter requested that FHWA specify that EV charging be governed by the National Fire Protection Association (NFPA) 70, National Electrical Code (NEC) Article 625, Electric Vehicle Charging System.

Other commenters wrote in agreement with FHWA that ENERGY STAR certification for DCFCs was premature. These commenters requested that, if ENERGY STAR certification were to be required for DCFC, that FHWA phase the timeline for certification.

FHWA Response: The FHWA agrees that there is value in specifying the standards that should be used to certify DCFCs and AC Level 2 chargers, such as UL 2202 and 2594, respectively; however, specific standards were not incorporated in this final rule to allow industry to use newer versions of the standards as they become available to ensure evolving best practices for safety be taken into account.

The FHWA recognizes that National Electrical Code standards apply to construction permitting rather than equipment certification and are thus not addressed in this rule. The language in the proposed rule required ENERGY STAR certification only of AC Level 2 chargers, for which standards are well-established. Therefore, FHWA did not include modifications to the language in the proposed rule regarding ENERGY STAR certification.

Security

The FHWA received a substantial number of comments on the proposed language regarding both on-site physical security and cybersecurity. With regard to physical security, many commenters recommended that FHWA require both street and on-site lighting to illuminate and make visible access to chargers and charging activities. Some commenters also recommended that on-site security personnel be either mandated or encouraged. Commenters noted that, at least where manned security was not feasible, FHWA should require the provision of emergency call boxes and closed-circuit television cameras (CCTV). Some commenters recommended FHWA require design features that encouraged safety through environmental design, such as requiring that chargers be visible to passersby and unobstructed from the view of the street by buildings, other utilities, or large landscaping features. Several commenters mentioned that FHWA should encourage chargers to be collocated with commercial amenities when possible, encouraging free access to restrooms, seating areas, and drinking water. Other commenters recommended that FHWA mandate that charging sites include weather protected coverings.

Other commenters focused on the importance of requiring fire protection protocols be in-place at all charging stations. One commenter provided a list of recommended NFPA standards for requirement to include: NFPA 25: Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems; NFPA 70: National Electrical Code®; NFPA 70B: Recommended Practice for Electrical Equipment Maintenance; NFPA 900: Building Energy Code; NFPA 13: Standard for installation of Sprinkler Systems; and NFPA 70E: Standard for electrical Safety in the Workplace®.

Another commenter provided a list of recommended required National Electrical Installation Standards (NEIS) to include: ANSI NECA 303—Standard for Installing Closed-Circuit Television Systems (CCTV); ANSI NECA 416—Recommended Practice for Installing Energy Storage Systems (ESS); ANSI NECA 417—Recommended Practice for Designing, Installing, Operating, and Maintaining Microgrids; and ANSI NECA 701—Standard for Energy Management, Demand Response, and Energy Solutions.

An even more substantial number of commenters specifically addressed FHWA's proposed language regarding cybersecurity. Generally, commenters agreed that additional specificity regarding cybersecurity is needed for States. Some commenters asserted that cybersecurity at charging stations should not be the responsibility of States, but of the private vendors operating charging stations. The AASHTO's comments identified that cybersecurity requirements would likely be passed through from States to the private sector. Some commenters identified that FHWA should confer with the General Services Administration fleet management team and the petroleum industry to identify cybersecurity practices in use that may be applicable for this rule.

Indeed, several commenters identified collaboration opportunities for FHWA to develop the most appropriate cybersecurity strategies for charging stations. Commenters specifically mentioned collaboration opportunities for FHWA with the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency, the U.S. Department of Energy's Office of Cybersecurity, Energy Security and Emergency Response (CESER), Society of Automotive Engineers International, and the National Association of State Energy Officials (NASEO) as potential partners to develop consensus-based cybersecurity standards for EV charging infrastructure. One commenter also requested that FHWA consult with the National Highway Traffic Safety Administration (NHTSA) and the Federal Motor Carrier Safety Administration (FMCSA) on the latest cybersecurity research being conducted regarding MD/HD charging. Other commenters provided specific recommendations regarding cybersecurity strategies that FHWA should require. Several commenters recommended that FHWA require that regular testing of cybersecurity features be conducted and certified by parties that have no other ownership or financial interest in the charging site.

Commenters also mentioned specific standards that could be utilized to provide cybersecurity. Several commenters recommended that FHWA incorporate reference to standards in the National Institute of Standards and Technology (NIST) catalog of standards in order to protect the charging station and sensitive customer information from cyberattacks. Specific standards recommended from this catalog include: NIST SP 800–63 Digital Identity Guidelines; NIST SP 800–175 A and B Guideline for Using Cryptographic Standards; NIST SP 800–94 Guide to Intrusion Detection and Prevention Systems (IDPS); NIST SP 800–92 Guide to Computer Security Log Management; NIST SP 800–40 Guide to Enterprise Patch Management; NIST SP 800–61 Computer Security Incident Handling Guide; NIST SP–800–161 Supply Chain Risk Management Practices for Federal Information Systems and Organizations; and NIST SP–800–53 Security and Privacy Controls for Information Systems and Organizations. Other standards were also recommended for FHWA to include Payment Card Industry (PCI) Data Security standard (DSS) attestation through PCI DSS 3.2.1 for the processing, transmission, or storage of cardholder data or the use of ISO 27001 or SOC 2 for the attestation of customer data.

Other commenters recommended that FHWA include performance standards mandating minimum requirements for cybersecurity rather that selecting any particular protocols or solutions. Recommended performance standards included methods to ensure operating system software is authenticated during the initial stage of turning on or else shut down, ensuring that over-the-air updates can be issued remotely, and

that sensitive data are protected through encryption. Other commenters recommended that FHWA require that all communications must have a minimum of 128-bit encryption or simply that all communications must be authenticated using certificates.

A few commenters identified the importance of secure communications for cybersecurity. Some commenters recommended that broadband or cellular infrastructure be added to any chargers, and that hardwired ethernet communications for chargers should be encouraged. One commenter expressed that it is not clear what the statement ''secure operation during communication outages'' means.

Other commenters encourage FHWA to strengthen the language in the proposed rule from ''may address'' to ''shall address'' to require particular cybersecurity strategies to be implemented. Another commenter pointed out that ''appropriate encryption systems'' is an indefinite term and would be improved by replacement with ''cryptographic agility,'' which is more specific. Yet other commenters recommended adding support of multiple PKIs to the list of cybersecurity strategies that should be addressed.

One commenter identified a potential issue with the inclusion of cybersecurity strategies and encouraged FHWA to prohibit the use of invoking cybersecurity law to suppress truthful disclosures of defects in subsidized products and services.

FHWA Response: The FHWA agrees that physical security of charging station sites can be improved from consideration of additional strategies to include visibility from passersby, monitoring using security cameras, and the provision of emergency call boxes. The FHWA has modified language in this final rule to include consideration of these additional physical security strategies. The FHWA also agrees that other strategies mentioned by commenters could provide physical security benefits to include collocating charging stations with manned amenities, public access to restrooms, and drinking fountains. The FHWA encourages States and other designated recipients to collocate charging stations with these amenities when possible, but recognizes that many charging stations will be placed in rural and remote areas where this collocation may not possible and therefore will not modify the language in this final rule to require collocation. The FHWA also encourages States and other designated recipients to require any necessary fire prevention strategies but leaves the regulation of these codes to the building industry rather than incorporating in this final rule.

The FHWA considered comments on specific cybersecurity standards to incorporate. Given the lack of cybersecurity standards specifically focused on EV charging infrastructure and the complexity of existing cybersecurity policies, practices, and standards across Federal and State government agencies and industries, FHWA leaves cybersecurity provisions in this final rule as areas of consideration by States to allow evolution of State NEVI cybersecurity plans outside the regulatory process. The FHWA did update cybersecurity strategies of consideration to more holistically reflect the scope of standards recommended in comments. The FHWA acknowledges that multiple, ongoing government and industry efforts are determining the appropriate application of both existing appropriate cybersecurity standards and best practices from other industries to the EV charging industry. The Joint Office will provide ongoing technical assistance to States to communicate the progress and findings of these efforts.

The FHWA agrees with the recommendation that States consider strategies regarding both third-party cybersecurity testing and certification and the support of emerging PKIs and has modified the language in this final rule to include consideration of these strategies. The FHWA also agrees to add language in this final rule to explain that the selection of ''appropriate encryption systems'' to ''cryptographic agility,'' meaning the capacity to rapidly update or switch between data encryption systems, algorithms and processes without the need to redesign the protocol, software, system, or standard. The FHWA also changed the phrase ''secure operation during communication outages'' to ''continuity of operation when communication between the charger and charging network is disrupted'' for clarity.

Long-Term Stewardship

The FHWA received many comments about the proposed regulation's discussion of long-term stewardship requirements. Many commenters were supportive of the proposed requirement for compliance with NEVI standards for at least 5 years; however, several commenters questioned if FHWA intended for all NEVI requirements to sunset after 5 years or just certain requirements. Many commenters also identified a need for continued operations and maintenance planning beyond 5 years. In fact, some commenters cautioned against, and asked FHWA to consider opportunities to prevent, widespread retirement, removal, or relocation of chargers at the conclusion of the proposed 5-year stewardship requirement. Commenters particularly cautioned against the impact of retirement of charging stations after 5 years in low-income communities where EV adoption rates may be slower.

One proposal to guard against the premature removal of chargers was to extend the long-term stewardship requirement to 10 years. Commenters pointed out that most chargers have a life cycle that extends at least 10 years, so extending this requirement to 10 years would more efficiently use Federal dollars. Other commenters noted that, in order to achieve financial viability, many charging stations could benefit from longer-term support from the public sector.

Yet other commenters stated that minimum standards and requirements should be indefinite, or specifically that charger projects completed with NEVI or Title 23, U.S.C. funds could be owned by private sector contractors indefinitely after the sunsetting of long-term stewardship requirements. Moreover, commenters stated that, should a contract be terminated by the State or other designated recipient, that State or other designated recipient should be required to transfer ownership to another EVSP using Open Charge Point Protocol (OCPP).

One commenter identified that utility interconnections may take several months and often over a year from the construction of chargers to operations and, as such, recommended that FHWA consider revising language in this final rule to regulate standards from the date of start of operation rather than installation.

FHWA Response: The FHWA agrees that there are concerns with establishing a minimum standard for long-term stewardship that does not cover the typical lifecycle of the infrastructure in question. However, FHWA also notes that EV charging technology is relatively new and the expected useful life of most chargers has yet to be verified at this national scale. As such, FHWA retained the language in the proposed rule to require at least 5 years of compliance in this final rule. The FHWA also agrees that the wording of the proposed rule created confusion about which minimum standards would be required to comply with the long-term stewardship requirement; therefore, FHWA has revised the language in this final rule to specify that this provision discusses compliance with all

applicable standards in this final rule. Finally, FHWA agreed with and correspondingly modified the language in this final rule to clarify that application of long-term stewardship begins when chargers are first operational.

Qualified Technician

The FHWA received many comments, including over a hundred comments submitted with identical content from different submitters, opposing the positive training requirements in the proposed rule. Many commenters asserted that licensed electricians are already trained and fully skilled in all of the content taught in EVITP, and that this proposed additional requirement would be excessive. These commenters stated that neither EVITP nor registered apprenticeship programs were available in all areas of the country or affordable to all populations. Commenters feared that these proposed requirements would exacerbate existing limits on the electrical workforce and ultimately serve to bottleneck widespread charger deployment.

Many commenters took issue with the option to achieve the regulation through registered apprenticeship programs for electricians, stating that USDOT is not involved with any existing registered apprenticeship programs and, as such, no existing registered apprenticeship programs would qualify. Commenters also pointed out that registered apprenticeship programs are already underutilized and result in existing workforce shortages. Other commenters did not oppose the proposed requirements as written but recommended that FHWA include other training program options to expand opportunities to a larger sector of the workforce.

Other commenters identified concerns with positive qualification requirements in general, identifying the competitive disadvantage for smaller electrical contractors which include a disproportionate number of the woman and minority-owned electrical contracting businesses. Commenters asked if FHWA could consider on the job experience in lieu of the proposed requirements, especially in the first few years of the program. Other commenters asked if these training requirements could be waived altogether for the first few years of the program so as to prevent a workforce shortage from impacting the ability to efficiently deploy chargers nationwide.

A few commenters also wrote in support of the proposed regulation as written, citing the benefits of EVITP as a comprehensive training program that was regularly updated. Some commenters acknowledged the benefits of the proposed training requirements but requested that States and other designated recipients be given an opportunity to assess the strength of their workforce in identifying if they needed a waiver from training requirements for the first few years of deployment.

Many commenters opposed the application of training requirements to non-electrical work and/or low-risk electrical work activities required for on-site maintenance. One commenter also identified that graduates of registered apprenticeship programs should not be penalized and should have an opportunity to meet the training requirements through continuing education courses.

FHWA Response: The FHWA agrees that there are concerns with the potential impact of positive education/training requirements on workforce bottlenecks and in establishing additional hurdles for access to jobs for disadvantaged communities. However, as stated in the NEVI Formula Program Guidance, FHWA recommends that States and other designated recipients take proactive steps to work with training providers, workforce boards, labor unions, and other worker organizations, community-based organizations, and non-profits to build a local workforce that will support the EV network in compliance with the training and certification requirements in this final rule. States and other direct recipients should familiarize themselves with the Federal funding options that are available for workforce development and training related to EV infrastructure.[15]

The FHWA notes that this training program is highly endorsed from a large cross-section of EV charging stakeholders from both labor and industry. The EVITP is the only EV charging-specific, brand-neutral, training program that exists today and is utilized by both large and small contractors. The DOT, DOE, and Department of Labor (DOL) will work with State, local, and industry partners to continue to expand the pool of talent for EVITP certified electricians as the online certification can be completed in 20 hours. Costs for certification requirements are an eligible use of funds under the NEVI program. The FHWA agrees with comments that tout the need for a comprehensive training and certification process to specifically address the needs of EV charging in light of the significant issues experienced with uptime and reliability amongst EV chargers on the road prior to the implementation of this final rule. A February 2023 J.D. Power report indicates that a survey including 26,500 charging attempts at Level 2 and DC fast chargers in all 50 States found that drivers cannot reliably charge at public charging stations, with the rate of failure increasing nearly 50 percent over the past two years, from 15 percent in the first quarter of 2021 to over 21 percent by the fourth quarter of 2022.[16] The FHWA aims to address this reliability issue in three ways by: (1) increasing the requirements for technical skills and qualifications specifically related to electrical components of EV chargers which require proper maintenance and prompt attention; (2) requiring minimum uptime (see § 680.116(b)); and (3) requiring data for duration of outage and error codes associated with an unsuccessful charging session (see § 680.112(a)).

The EVITP was created through a collaboration of automakers, EVSE manufacturers, educational institutions, utility partners, electric industry professionals, and other key stakeholders in the EV charging market to provide qualified electricians with ''the most comprehensive training available in the market today.'' After considering the comments, FHWA has decided that, in order to create a convenient affordable, reliable, equitable national charging network, and in order to contribute to readying the workforce for green good-paying jobs, there is a need to retain most of the language in this section as proposed.

Further, FHWA believes that requiring these qualifications will communicate to industry groups, technical colleges, and other educational groups the need for these training programs, and thus expedite the development and deployment of these necessary educational training programs. Greater availability of these training programs will also provide opportunity for smaller electrical contractors, including woman and minority-owned electrical contracting businesses. The FHWA also clarifies that the EVITP certification is only applicable to electricians in installation, operations, and maintenance; non-electricians involved in operations and

[15] DOT funding and financing programs with EV eligibilities can be found in The National Electric Vehicle Infrastructure (NEVI) Formula Program Guidance, available at *https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf.*

[16] *https://www.autonews.com/mobility-report/ev-drivers-struggle-declining-reliability-charging-network.*

maintenance are not required to be EVITP certified in the proposed or final rule.

Despite receiving substantial comments in opposition, FHWA maintains that EVITP is the appropriate training program which provides comprehensive training for the installation of EV supply equipment. The FHWA has addressed concerns with the EVITP by including an option that States and other designated recipients can meet the requirement through another registered electrical apprenticeship program that includes charger-specific training. The DOT, DOL, and DOE are prepared to work with industry to establish new charger-specific registered apprenticeship programs.

The FHWA did agree that either graduation from a registered apprenticeship program or certifying completion of a continuing education from a registered apprenticeship program could appropriately demonstrate the qualifications of electricians. As such, FHWA modified the language in this final rule to allow for a continuing education certificate from a registered apprenticeship program to qualify electricians to meet this requirement. The FHWA acknowledges that registered apprenticeship programs are currently underutilized and may not meet the requirements identified in this final rule. However, FHWA sees registered apprenticeship programs as appropriate training pathways that can easily be modified to incorporate sufficient EV-specific training. The FHWA also notes that registered apprenticeship programs have existing capacity which can be utilized to quickly ramp-up EV-specific training for a significant number of electricians. As such, FHWA modified the language in this final rule to accommodate appropriate registered apprenticeship programs as one of several options to meet electrician training requirements.

Customer Service

The FHWA received a handful of comments on the proposed customer service regulations outlined in the proposed rule. Several commenters requested that FHWA require a toll-free customer service hotline be clearly displayed and staffed 24/7 to address issues, customer payment requests, or service issues. Commenters further requested that customer service be accessible through scannable graphics and provide American with Disabilities Act (ADA)-compliant access to service in multiple languages. Some commenters asked that, in addition to requiring a toll-free customer service hotline, FHWA require on-site technicians or service kiosks for every charging site. Other commenters requested that charging stations include an audio customer service call button.

FHWA Response: This final rule retains the requirement that charging customers have a way to report outages, malfunctions, and other issues with charging infrastructure. However, FHWA is not prescribing how this should be accomplished and is, therefore, not requiring the suggested specific methods such as customer service hotlines, on-site technicians, service kiosks, or audio call buttons. Some of these methods may be useful at certain locations, but FHWA believes it would be overly burdensome from a cost perspective and thus not appropriate to require them broadly via regulation. Additionally, FHWA is not requiring customer service be accessible through scannable graphics due to cybersecurity concerns.

Customer Data Privacy

The FHWA received a handful of comments regarding language in the proposed regulation addressing customer data privacy. Most of these commenters generally supported requirements to collect, process, and retain only that personal information strictly necessary to provide the charging service. Some commenters provided recommendations to strengthen the intent of this proposed regulation. One commenter recommended that certain types of customer data be made completely confidential under Federal law and exempt from public records requests or at least restricted from disclosure to those who seek it for commercial purposes only. Another commenter recommended that FHWA require routine log rotation/deletion of older records after a set interval. Another commenter recommended that FHWA protect user payment information by requiring that charging stations be compliant with Payment Card Industry (PCI) Data Security standard (DSS) 3.2.1 for the processing, transmission, or storage of cardholder data. One commenter warned that requiring compliance with ISO 15118 will make all charging sessions immediately identifiable and recommended that FHWA require States and other designated recipients to make publicly available only regional-level aggregates of data to anonymize user information for commercial purposes.

Other commenters generally supported the proposed regulation but noted that some data are needed by industry for research and analysis in order to optimize future market-based solutions. To that end, a few commenters requested that FHWA allow additional information to be collected with the customer's express consent.

FHWA Response: The FHWA agrees that there are additional strategies that could improve the protection of customer data privacy once the data has been collected; however, these strategies are best deployed by the Joint Office of Energy and Transportation as the hosts of the national database and will not be regulated by this rule. (For more information on the national database, see § 680.112 Data Submittal.) The FHWA also agrees that it is beneficial for charging stations to be compliant with industry standard protections for cardholder data privacy and has modified the language in the proposed rule to incorporate PCI DSS. However, because PCI DSS versions update on a frequent basis, FHWA stopped short of requiring compliance with a particular version of PCI DSS, and instead states that chargers and charging networks should be compliant with appropriate PCI DSS standards.

Use of Program Income

The FHWA received many comments regarding § 680.106(m) ''Use of program income.'' Most commenters maintained that the rate of return on chargers should be market-driven and based on the pricing of labor, materials, and electricity. Some commenters mentioned that determining a ''reasonable'' rate of return would be difficult for States and other designated recipients because they do not have experience in managing for-profit charging stations. Without this experience, commenters argue that States and other designated recipients could unintentionally cap return on investment below levels that the market could sustain, which would, in turn, disrupt both the EV charging market and future deployment of chargers. These concerns were raised by both industry and States.

Commenters also mention that EV charging station service providers often manage their sites on a portfolio-wide basis, where some charging stations in a network/corridor are more profitable and effectively subsidize underperforming, but critical, charging stations. Commenters further indicated that some charging stations are monitored for profitability over a series of years, not on an annual or quarterly basis. These commenters requested that this final rule be revised to acknowledge that a reasonable rate of return may be

evaluated over multiple years and multiple charging stations.

FHWA Response: The language in the proposed rule was provided to call attention to existing requirements in Federal law regarding the use of program income;[17] therefore, FHWA has not modified the language in this final rule. This final rule inherently includes flexibility to consider market forces and the other issues raised by commenters by using the term ''reasonable return on investment.'' However, FHWA would draw to the attention of States and other designated recipients the comments that identify that reasonable return is identified by the industry over multiple years and across multiple charging stations.

Other—Site Design

The FHWA received several comments recommending that this final rule regulate components of site design for charging stations. In addition to comments discussed above regarding site design for physical security, FHWA received comments about site design to accommodate MD/HD vehicles, to address accessibility needs, and to address fire safety. In particular, commenters recommended that FHWA develop a template for site design to accommodate MD/HD vehicles. Commenters with MD/HD vehicle concerns noted that charging station sites should be designed with at least one pull-through station and ingress/egress and circulation plans meant to accommodate the turning radii of large trucks.

Many commenters also supported the considerations for accessible site design as published in the ''Design Recommendations for Accessible Electric Vehicle Charging Stations'' guidance published by the U.S. Access Board in 2022.[18]

Fire prevention and protection organizations also submitted specific comments regarding site design towards fire prevention and safety. These commenters suggested that no more than two charging ports be placed side-by-side and that charging infrastructure should be placed at a distance away from building and overhead power lines, and outside of floodplains. These commenters also recommended that charging equipment be installed per the latest National Electric Codes and appropriate National Fire Protection Association standards.

FHWA Response: The FHWA agrees that site design for charging stations would include many important considerations; however, the site design recommendations listed are all either governed by other laws or authorities or require complex decisions in order to accommodate context-specific needs. Therefore, FHWA has not modified this final rule to incorporate site design recommendations. However, FHWA strongly encourages States and other designated recipients to consider recommendations in addition to and beyond those provided for through the ''Design Recommendations for Accessible Electric Vehicle Charging Stations'' guidance published by the U.S. Access Board in 2022.[19] Some considerations could include allowing for one or more pull-through charging stations and on-site circulation and ingress/egress design that accommodates medium- and heavy-duty vehicles that may access the site for charging. The FHWA also appreciates the comments regarding fire prevention which are best addressed through § 680.106(h)(1) where FHWA requires States and other direct recipients to implement physical security strategies.

Section 680.108 Interoperability of Electric Vehicle Charging Infrastructure

Charger-to-EV-Communication

The FHWA received a significant number of comments in response to the proposed language under § 680.108. Many commenters were supportive of the language as written in the proposed rule. Commenters praised the reference to ISO 15118 for interoperability for many reasons. A few commenters mentioned that ISO 15118 is a preferred standard for interoperability because it is an open standard that is in use both nationally and internationally. Commenters mentioned that ISO 15118 is complementary of other reference manuals referenced in the proposed rule. Other commenters noted that requiring ISO 15118 is consistent with regulations already in place in California. Benefits of ISO 15118 include that it can facilitate V2G and that it is one key to enabling the use of Plug and Charge technologies.

Other commenters were supportive of referencing conformance to ISO 15118 but recommended additional modifications to the language in this section of the rule. Several commenters mentioned a need for chargers to additionally conform to a complementary set of standard-specific requirements such as PKI in order to achieve interoperability. Other commenters identify that OpenADR standards should also be considered by FHWA as part of this suite of standards that contribute to interoperability. Commenters also pointed out that, in order to achieve interoperability, ISO 15118 must be integrated into both the chargers and the EVs. Indeed, many EVs on the market have not yet implemented ISO 15118. Commenters identified that yet other EVs, those that use CHAdeMO or Tesla connectors, do not require ISO 15118 for interoperability features. In light of this, several commenters recommended that FHWA modify the language in the rule so as to require that chargers are ISO 15118 ''hardware ready,'' rather than conforming to ISO 15118.

Other commenters requested that the final rule be broadened to require communication with all vehicles that have implemented ISO 15118 (not just CCS-compliant vehicles). This would allow for future interoperability of MD/HD charging even if, as is likely, these vehicles will not use CCS connectors. One commenter identified that this would impact low-income communities specifically because of these communities' increased dependence on public transit which would require MD/HD charging. Yet other commenters recommended the addition of language to accommodate interoperability of AC Level 2 charging through either ISO 15118 with an SAE J1172 connector or through SAE J3068 connectors. The SAE J3068 connectors may possibly in the future provide for interoperability features to include enabling of Plug and Charge and V2G, while proposing a lower cost and a greater capability to address MD/HD needs.

Conversely, FHWA received many comments opposed to the proposed regulation to conform with ISO 15118. Several commenters characterized the primary benefits of ISO 15118 as enabling Plug and Charge payment, which they stated is new and only one of several types of innovative payment techniques. As aforementioned, several commenters pointed out that many EVs in the current market do not support power management through ISO 15118. A few commenters also stated that there are security concerns with the implementation of ISO 15118 in that it provides a point of entry for cyber attacks when the charger decrypts and then re-encrypts signals from the vehicle.

Other commenters point out the shortcomings of ISO 15118 for V2G purposes, especially because it does not enable V2G for AC Level 2 chargers. In fact, commenters noted that there is limited commercial availability of AC Level 2 chargers that can conform to ISO

[17] 23 U.S.C. 156.

[18] ''Design Recommendations for Accessible Electric Vehicle Charging Stations'', available at *https://www.access-board.gov/tad/ev/*.

[19] Ibid.

15118 or that can enable Plug and Charge.

There are also versioning concerns that commenters presented. The newest version of ISO 15118 (ISO 15118–20) provides the greatest benefits but is not yet widely implemented nor is it backwards compatible to the next most recent version in use (ISO 15118–2).

Indeed, several commenters argued that the market is not yet mature enough for a single protocol, and FHWA should develop a performance standard instead. These commenters state that a performance standard would allow for alternatives to Plug and Charge that are not otherwise provided for through the regulation of ISO 15118. These commenters also note that months if not years are required in order to coordinate the ISO 15118 standard amongst EV manufacturers, charging network providers, and PKI providers. In contrast, FHWA also received several comments explicitly opposing a performance standard for interoperability, preferring the minimum standard outlined in the proposed rule.

FHWA Response: Although many chargers on the market today are not yet using ISO 15118, FHWA sees value in establishing a national standard for compliance and has found ISO 15118 to be the most appropriate standard for this purpose. Therefore, FHWA has maintained a requirement for full hardware conformance to ISO 15118, including conformance to ISO 15118–3 and hardware capability for implementation of both ISO 15118 Parts 2 and 20. A performance standard was not used since it benefits the entire network to coalesce as quickly and simply as possible around defined standards in fast-moving technology, which this final rule creates. Commenters indicated that a limited number of EVs are currently compliant with ISO 15118–2, and that a larger number of vehicle models are expected to be compliant with ISO 15118–20 in the future. The potential to support additional drivers on an undetermined future timeframe need not delay the near-term improvements to drivers' experience made possible by implementing ISO 15118 within the initial chargers installed under the NEVI. Acknowledging the level of effort required for charger manufacturers that have not yet implemented ISO 15118–2 software, FHWA requires conformance of software to ISO 15118–2 and Plug and Charge capability by one year after the date of publication of this final rule in the **Federal Register**.

The FHWA sees value in third-party certification of ISO 15118 but acknowledges there is currently limited capacity to accomplish it or to regulate compliance with third party certification.

The FHWA acknowledges the benefits of the OpenADR standard but notes that several similar standards have been successfully deployed in the existing EV charging environment, with different electric utilities requiring, trialing, or considering different standards. It would be premature to select a single standard for communication between charging networks and electric utilities or intermediaries at this time. The FHWA acknowledges the challenges the industry is currently addressing in identifying appropriate PKIs, but notes that this challenge is better addressed by the private sector rather than by regulation. Similar challenges have been appropriately addressed by the private sector regarding credit card payment and telecommunications.

Charger to Charger-Network Communication and Charging-Network-to-Charging-Network Communication

Other commenters identified a need to discuss other standards in this section in addition to ISO 15118. Commenters recommended that FHWA recognize the interoperable environment created by ISO 15118 in conjunction with OCPP and OCPI. One commenter noted that OCPP and OCPI work in conjunction to allow non-ISO 15118 compliant EVs to initiate and pay for charging.

Commenters recommended that FHWA require third-party certification of OCPP. Other commenters warned that tools and laboratory facilities capable of performing that certification are in short supply and that a third-party certification requirement could create unnecessary delays to charging station deployment.

FHWA Response: The FHWA also recognizes that OCPP and OCPI play a role in interoperability and, as such, moved and modified language from another provision in this final rule (§ 680.114) to clarify the interrelated roles of these three reference documents in interoperability. (See also the section-by-section analysis of § 680.114 for further discussion of comments received regarding OCPP and OCPI.) The FHWA sees the improvements in OCPP 2.0.1 over previous versions as compelling benefits to the EV charging ecosystem, while also acknowledging the level of effort required for charger manufacturers and charging network providers to update systems to OCPP 2.0.1. Therefore, this final rule will allow for a transition period between OCPP 1.6J and 2.0.1, requiring that chargers and charging networks conform to OCPP 2.0.1 by one year after the date of publication of this final rule in the **Federal Register**. The FHWA believes one year is an appropriate transition period to allow chargers and charging networks to conform to a standard for software that is currently available in the marketplace. The FHWA sees value in third-party certification of OCPP but acknowledges there is currently limited capacity to accomplish it or to regulate compliance with third party certification.

Network Switching Capability

A handful of commenters identified that interoperability is not facilitated through conformance to standards alone but requires that companies facilitate the efficient and free transfer of infrastructure from one provider to another at the point of transfer between contracts.

FHWA Response: The FHWA also recognizes that network switching is an interoperability and consumer protection concern that implicates the long-term stewardship of the equipment and station operations overall. As such, FHWA moved the relevant proposed language from § 680.114 to this section in this final rule.

Section 680.110 Traffic Control Devises or On-Premises Signs Acquired, Installed or Operated

MUTCD

Several commenters encouraged FHWA to issue the next edition of the MUTCD so that traffic control devices installed in conjunction with EV infrastructure projects are consistent with the most current MUTCD requirements.

Several commenters recommended removing § 680.110 entirely as the requirements are covered elsewhere in Title 23, Code of Federal Regulations.

Several commenters suggested more information be incorporated into advance signing such as number of stations available, power level, and compatibility with MD/HD vehicles.

FHWA Response: A Notice of Proposed Amendments (NPA) to issue a new edition of the MUTCD was published at 85 FR 80898 in the December 14, 2020, **Federal Register** for public comment. The comments received will inform the rulemaking action and the 11th edition of the MUTCD. The BIL directs U.S. DOT to update the MUTCD by no later than May 15, 2023. Section 680.110 includes only references to 23 CFR part 655 and 23 CFR part 750. Because EV infrastructure will involve private-sector

and other entities that are less familiar with these provisions than transportation agencies, there is value in providing a cross-reference to the information. Sign complexity, information load on drivers, and ensuring that signs convey a clear, simple meaning are all important considerations with traffic control devices. The information road users need to be guided to charging stations is being considered in the ongoing MUTCD rulemaking.[20]

Section 680.112 Data Submittal

Quarterly and Annual Data Requirements

Many commenters stated that the proposed data collection requirements are burdensome, excessive, and unnecessary. Several State DOTs recommended that the data proposed for collection should be reviewed to verify its use to the program and future operation of the charging network so that only data that are necessary for these efforts is collected. To reduce costs for station providers and State agencies, data that is necessary to inform continued buildout of the charging network should be identified and data beyond that necessity should not be required. Another commenter suggested that FHWA consider which sets of data are critical for the long-term success of the NEVI program and which data are unnecessary or could be collected only in the first year.

Many commenters suggested that the data elements identified for quarterly reporting should be changed to annual. It was requested that FHWA review the proposed quarterly data to determine if it is efficient and reasonable to collect on a quarterly basis.

Many commenters recommended that standardized methods be established for data collection, validation, and utilization. Specific ideas included standardized templates for reporting and efficient, automated processes for data submission. Some commenters recommended a data collection system built upon the current system in use for the U.S. DOE's Alternative Fuels Data Center which is already in use by States and could be replicated or extended for use for NEVI data submission.

Several commenters suggested that reporting be aligned with annual reporting requirements already in place by certain States, such as California, and noted that the California Air Resources Board EV Charging Station Open Access Regulation has established fairly comprehensive data collection requirements through a specified template that is submitted annually during the first quarter of the year. The commenters suggested that FHWA review California's submission timelines and templates and align them to the extent possible.

Several commenters suggested a working group or technical committee be established to work out the details of data collection, efficient reporting methods, and business confidentiality concerns.

A few commenters suggested some additional data elements. One of these recommended alignment with the existing data collection requirements of the California Electric Vehicle Infrastructure Project. The commenter stated that aligning these requirements with NEVI will leverage industry-accepted standards, prevent duplicative data collection efforts, and enhance the evaluation of key program parameters. Another comment recommended collecting data associated with each charging session and at each station on a monthly basis to more accurately measure reliability experienced by customers to respond more quickly in the short-term and better understand and correct reliability problems over time. A few commenters noted the need to collect data related to the total cost charged to customers. Other commenters said the data requested on uptime is opaque and requested additional data to allow the verification of uptime metrics reported.

Many private sector commenters were concerned that some of the required data are CBI and competitively sensitive. Sections 680.112(b)(6)–(b)(9) of the proposed rule were specifically noted by several commenters, with the data on maintenance costs (paragraph 7) and acquisition costs (paragraph 8) of particular concern. If data that may be CBI is necessary, strong parameters were recommended for collection, storage, and analysis, including aggregating and anonymizing sensitive data prior to dissemination or publication.

For § 680.112(b)(8) (currently § 680.112(c)(4)), related to grid connection and upgrade cost on the utility side of the electric meter, several commenters noted the wide variability in how these costs are categorized, set, and collected across States and electric companies and how that limits the usefulness in making direct comparisons. The cost data may be useful in comparing project costs for EV charging stations within a particular electric company service area but could potentially be misleading when used to make comparisons between electric companies. Other commenters spoke to challenges related to collecting utility cost data and questioned the need for data reporting of utility costs beyond what is already reported to utility commissions. Commenters from utilities recommended streamlining reporting by using high-level cost categories and suggested (1) system upgrades, (2) distribution work, and (3) new service work.

FHWA Response: The FHWA reviewed and revised the proposed data elements to ensure that the data required are the elements most critical for managing and improving the NEVI Formula Program and federally funded EV charging initiatives. In order to strike the correct balance, considering the burden of data collection against the need to continue to provide a method of monitoring the success of the NEVI Formula Program, FHWA was careful in recrafting § 680.112 so as to retain the critical data while reducing the burden on States and other direct recipients. As a result, selected data elements were deleted or are required at a less frequent interval in the language in the final rule. As specified below, one data element was deleted from the former § 680.112(b), one data element was moved from the list of required quarterly submittals in the former § 680.112(b) to the revised § 680.112(b) which now requires an annual data submittal, two data elements were moved from the list of required quarterly submittals in the former § 680.112(b) to the revised § 680.112(c) which now requires a one-time data submittal, and one data element was moved from the list of required annual data submittals in the former § 680.112(c) to the revised § 680.112(c) which now requires a one-time data submittal. Other data elements were clarified through language revision or by separating into more specific elements. The former § 680.112(b) was moved from a quarterly submittal requirement to a one-time submittal requirement under the revised § 680.112(c) and, for clarification, was separated into two separate required data fields (revised as § 680.112(c)(3) and § 680.112(c)(4)).

After streamlining data requirements, a few data field requirements were deemed critical and also added to the quarterly data submittals through § 680.112(a) to include § 680.112(a)(2), § 680.112(a)(6), and § 680.112(a)(8) to increase the clarity of the data submittal request and to address comments suggesting additional data fields.

The FHWA acknowledges the sensitivity of some of the data requested and clarified in this final rule for quarterly, annual, and one-time data submissions that any data made public

[20] *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=2125-AF85.*

will be aggregated and anonymized to protect confidential business information. Although this rule does not include a requirement to show validation of the data submitted, the data provided will be publicly displayed and should be able to be verified if requested. The FHWA reorganized this section to remove the general applicability paragraph and insert specific applicability as the first sentence to § 680.112(c) and (d). For § 680.112(a) and (b), FHWA has included this data requirement for all NEVI Formula Program projects and projects funded under Title 23, U.S.C., including any EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway. Although these two paragraphs were limited in the proposed rule to NEVI Formula Program projects, FHWA believes the importance of this data spans beyond just NEVI Formula Program projects and the intent of BIL is to collect useful and meaningful data for all EV charging stations where Federal funding is used. For § 680.112(a), FHWA maintains that the quarterly frequency of the data submission is necessary for on-going monitoring and analysis of use and reliability. Most quarterly data elements can be transmitted automatically from the chargers.

The FHWA added a qualifier to the data field ''charging station location identifier'' to require that this identifier is the same charging station name or identifier used to describe the same station in the data set made available to third parties in § 680.116(c)(1). An additional data field was added to identify the charging port in use, so that data describing charging sessions can be linked to the port that conducted the session. This field must be consistent with the charging port identifier in § 680.116(c)(2). The requirement that identifiers be consistent across data sets is necessary to allow the Joint Office to join the two data sets to perform analysis necessary to manage and improve the NEVI Formula Program. This requirement also streamlines data reporting and avoids requiring redundant data fields in the quarterly data set.

The FHWA added payment method per session to § 680.112(a) to provide insight into the types of payment methods used by EV charging customers. This information is necessary to inform policy updates related to required payment methods.

In response to commenters requesting means of verifying uptime measurements submitted by charging station operators or charging network providers, FHWA added the requirement to report two data fields that underlie the uptime calculation, T_outage and T_excluded, in addition to the uptime metric itself.

Given the inherent difficulty of collecting electricity cost information that is isolated to electricity for charging vehicles, due to the uncertainty of separately metered stations, FHWA removed the requirement for reporting electricity cost from § 680.112(b)(6) and instead will estimate electricity cost based on charging session data.

Regarding recurring maintenance and repair cost information (§ 680.112(b)(1)), FHWA modified the frequency of reporting to an annual basis.

Regarding submission of acquisition costs (formerly § 680.112(b)(8)) and distributed energy resource installed capacity (formerly § 680.112(b)(9)), FHWA changed these items to be a one-time submission per charging station that occurs annually for charging stations not yet reported, rather than quarterly. The FHWA also included clarification as to what programs this data submittal is applicable to by inserting language that specifies that this paragraph applies only to both the NEVI Formula Program projects and grants awarded under 23 U.S.C. 151(f) for projects that are for EV charging stations located along and designed to serve the users of designated AFCs. Although the data submittal under this paragraph was limited in the proposed rule to NEVI Formula Program projects, FHWA believes the importance of this data spans beyond just NEVI Formula Program projects and the intent of BIL is to collect useful and meaningful data for all EV charging stations that are along and designed to serve the users of designated AFCs where Federal money is used. Additionally, FHWA streamlined and clarified ''aggregate grid connection and upgrade cost on the utility side of the electric meter'' to the more standardized utility categories of (1) total distribution costs and (2) total service costs. This final rule clarifies that only the costs paid to the electric utility as part of the project need to be reported.

The due date for annual data was specified as on or before March 1, beginning in 2024. This aligns with some State reporting cycles and provides time between annual data reporting and submission of State EV Infrastructure Deployment Plan updates.

To facilitate the collection of data required in this section, and in accordance with its Congressional mandate, the Joint Office will establish and manage a national database and analytics platform that will streamline submission of data from States and their contractors. Using the platform, States will be able to produce reports, conduct analysis, and access data for their program assessment activities. The platform will also provide a public-facing dashboard for communication of aggregated, anonymized information.

Community Engagement Outcomes

Several commenters suggested that community engagement data be incorporated into the annual State EV Infrastructure Deployment Plan updates, reducing the amount of staff time required to create a separate reporting document. Metrics and the status of community engagement activities could be tied to what the States proposed in their Plan and included in the Plan update. Several commenters also supported the Community Engagement Outcomes Report overall and suggested a few ways in which the report could be developed, including suggestions to: (1) condition funding for future years on meeting robust engagement requirements, including community engagement and equity and inclusion efforts by States; (2) describe how community engagement informed station siting and operations; (3) describe how workforce opportunities were integrated into community engagement efforts; and (4) describe engagement with disabled community members.

A few commenters recommended a similar approach for the information related to private entity participation in State or local business opportunity certification programs (§ 680.112(c)(2) in the NPRM), in terms of including it in the annual State EV Infrastructure Deployment Plan update.

FHWA Response: Community Engagement Outcomes was modified to require inclusion in the annual State EV Infrastructure Deployment Plan, rather than as a separate report. Content expectations will be included and updated in the annual Plan guidance. This will allow the type of information and data from States to be the most beneficial for informing and improving community engagement efforts and outcomes. The FHWA also clarified that this paragraph is only applicable to NEVI Formula Program projects.

Section 680.114 Charging Network Connectivity of Electric Vehicle Charging Infrastructure

Charger-to-Charger Network Communication

The FHWA received many comments regarding the proposed language in § 680.114. In general, commenters were

supportive of the proposed rule as written. Commenters were generally supportive of the language under the proposed ''Charger-to-Charger Network,'' identifying that OCPP allows for standard communications between chargers and central control at charging networks. The OCPP was supported because of its ability to allow site hosts to effectively manage both chargers and charging activity and its ability to allow for the appropriate collection of data in order to create a seamless and consistent user experience. Multiple commenters pointed out that the recently published OCPP version 2.0.1 has substantial benefits over its predecessor, OCPP 1.6J, with regard to cybersecurity, planned support for ISO 15118, and other functionalities. Another commenter stated that imposing a requirement for OCPP 2.0.1, instead of requiring OCPP 1.6 or later, would seem to offer no discernable benefit. One commenter recommended that this section be modified to explicitly allow end user load monitoring and management.

The FHWA also received a few comments in opposition of pointing to OCPP as the preferred standard. These commenters stated that OCPP was relatively new and choosing a standard would be premature at this time. Many commenters noted that the proposed rule requires implementation of OCPP version 2.0.1 and explained that most EV charging providers are currently operating with OCPP version 1.6J. They requested a transition period be allowed in this final rule to give industry time to update their systems to implement OCPP 2.0.1. Other commenters recommended that OCPP 2.0.1 be required immediately to realize its benefits more quickly.

FHWA Response: The FHWA agrees with commenters that, although there is some diversity among standards currently used by the industry, OCPP and OCPI are appropriate references for this section and the industry is moving towards these references as de-facto standards. However, based on comments FHWA found it more logical to include regulations referencing OCPP and OCPI in § 680.108, and therefore moved references to these standards to this section under ''interoperability.'' Note that FHWA allows for a one-year transition period for conformance to the latest versions of OCPP and OCPI to allow chargers and charging networks sufficient time to conform to a standard for software that is not currently widely used but is currently available in the marketplace. (See also the section-by-section analysis of § 680.108 for further discussion of comments received regarding OCPP and OCPI.)

The FHWA does not feel that it is critical to mandate end user load monitoring and management in the minimum standards provided for in this rule.

Charging-Network-to-Charging-Network Communication

The FHWA also received comments on ''Charging-Network-to-Charging Network.'' Commenters were generally supportive of the proposed requirement to allow for roaming in order to allow EV drivers to seamlessly locate and charge at different charging stations managed by different networks without different memberships or toggling between different mobile applications. Commenters were generally supportive of the language in the proposed rule and the reference to OCPI which, it was noted, is currently the standard used in California. One commenter did note, however, that there is no existing credentialing system applicable to charging network to charging network payment processing. This commenter took specific issue with the use of the term ''credential'' in the context of charging-network-to-charging-network communication.

FHWA Response: In this final rule, ''credentials'' was replaced with ''method of identification'' to clarify the requirement that charging-network-to-charging-network communication allow roaming.

Charging-Network-to-Grid Communication

The FHWA received a few comments specific to ''Charging-Network-to-Grid Communication.'' Most commenters were supportive of the language in the proposed rule as written. One commenter offered that the benefits of this regulation were minimal because of proposed requirements for power levels which dampened opportunities for effective power demand management activities which would otherwise be governed by this section.

Another commenter recommended that FHWA replace references to ''network'' with ''back-end software'' because they felt network was too ambiguous.

FHWA Response: Comments addressing the proposed language in this section were addressed by FHWA in other relevant sections as follows. The FHWA modified the power level requirements under § 680.106(d) to allow for power demand management amongst applicable AC Level 2 chargers. By allowing for power demand management elsewhere in the final rule, the language provided under this section becomes more important and addresses the comments received that the benefits of the regulation were minimal because power demand management was not allowed under the proposed rule.

The FHWA also considered whether the reference to a ''charging network'' was too ambiguous as used under this requirement and determined that the charging network is the appropriate reference for which secure communications should be regulated for charging network to grid communication. Charging network is defined under § 680.104 and identifies specifically a collection of interconnected chargers. This regulation is meant to ensure that collections of chargers are themselves able to securely communicate with the grid, ensuring secure communications within the entire charging environment. This is best accomplished where FHWA specifies the secure communications of collections of interconnected chargers with the grid, not generic ''back-end software'' with the grid.

Based on this analysis, FHWA made no changes to this section in the final rule.

Disrupted Network Connectivity

The FHWA also received comments that generally applied to § 680.114. Many commenters pointed out the importance of connectivity for charger operations to enable remote diagnostics, remote start, data collection, payment processing, power distribution and other critical activities. Several commenters recommended FHWA mandate high-speed (4G LTE) broadband connectivity at sites. Other commenters asked how to accommodate charging stations in areas with limited cellular and internet connectivity and recommended that FHWA address this concern in this final rule. As described in § 680.106(f), commenters recommended that chargers be required to continue to operate in the event of lost communication.

The FHWA also received comments that were generally supportive of the proposed § 680.114 as written, but recommended language clarifications. One commenter recommended that FHWA modify language to clarify that network connectivity obligations rest with the station operator and not the charger.

FHWA Response: The FHWA agrees that connectivity is a particular challenge in remote areas, but notes that, outside of temporary disruptions, connectivity is critical for the functioning of the charging environment and therefore encourages States and other designated recipients to work

closely with contractors in siting and development of charging stations to ensure sufficient broadband and cellular connectivity availability. The FHWA notes that there are satellite-based connectivity solutions available that may address concerns in remote areas. In the event of communication disruption, FHWA agrees that there is a need to require charging capabilities when network connectivity has been lost. This is important to ensure a positive customer experience and to avoid stranding drivers, especially during times of emergency. The FHWA has therefore included modifications in the language in this final rule to require chargers to function when communication is lost, sometimes referred to as ''defaulting to charge.''

With regard to recommended language clarifications, the proposed requirement referenced chargers to indicate a correlation with function, not obligation. The obligation of the requirements will fall to the States and other designated recipients and parties contractually obligated to the States and other designated recipients.

Section 680.116 Information on Publicly Available Electric Vehicle Charging Infrastructure Locations, Pricing, Real-Time Availability, and Accessibility Through Mapping Applications

Pricing ($/kWh)

Many commenters noted that $/kWh pricing is ideal and would be the clearest and most understandable way to communicate price to customers. However, State laws in several States prohibit this, allowing pricing in $/kWh only for utilities. The pricing structure of $/minute was identified as another option with the idea of using several tiers of price for a range of power levels, to account for different vehicle charge rates and variable charge rates within a charging session. Several commenters recommended this or other alternatives to provide an option for those States that have State law prohibitions of pricing by $/kWh.

A State DOT noted that in 2012 their State Legislature required the State to adopt rules to provide definitions, methods of sale, labeling requirements, and price-posting requirements for charging stations to allow for consistency for consumers and the industry. The State has been using the National Institute of Standards and Technology requirements for EV charging infrastructure since 2014 when weights and measures officials adopted the kilowatt-hour as the unit of measurement for method of sale. Their recommendation was that all States communicate price in a standard dollar per kilowatt-hour value but the comment was indicative that some work needs to be done at the State level to make this possible.

FHWA Response: A single, uniform, nationwide communication of pricing to customers, regardless of where they are travelling in the United States, is in the national interest; therefore $/kWh was retained. Liquid fuels are priced in a single, nation-wide unit of price per gallon that is simple and clear to customers. So, too, here a simple, understandable communication to customers of price with a common unit is important for transparency and customer protections. The FHWA recognizes that this transition may require changes in some States choosing to receive NEVI funds, and FHWA has allowed one year from the date of rule publication in the **Federal Register** for potentially impacted States to determine how to proceed.

Price Transparency

There were many comments related to price transparency, demand charges for electricity, and price gouging. Several commenters recommended that all fees be clearly identified to customers at the charging site, without reliance on an application or website. In addition to the charging price, other examples of fees include parking/dwelling fees, connection fees, and fees charged for occupying the site after charging is complete. One commenter suggested stabilizing customers' expectations by not changing the $/kWh as frequently as electricity prices may be fluctuating on the open market by setting a daily price.

FHWA Response: This final rule was changed in regard to how costs are communicated, requiring that the $/kWh price to charge be transparently communicated prior to initiating a charge and that any other fees, such as fees charged for occupying the site after charging is complete, be clearly explained via an application, website, or other means in a manner of like prominence to the price anytime the price is displayed. Communication of fees via applications is commonly used, currently, and the requirement to share pricing structure with third party software developers has been retained. Display of fees and payment information cannot be membership-based, and the provision of a publicly available website is also encouraged. Parking fees and time limits may also be communicated with signage or other displays.

Uptime Calculation

Many comments were received regarding the proposed 97 percent uptime requirement, with most commenters supportive of that threshold. A State DOT suggested that all NEVI stations comply with a requirement for robust maintenance and repair plans to accompany charger installations. These plans could demonstrate how each charging port at a station, and the station overall, will achieve uptime standards through routine maintenance and timely repairs.

Several commenters requested that uptime be calculated on a per-station basis, rather than on a per-port basis, stating that this incentivizes building larger stations to ensure a minimum number of charging ports are operational. Another commenter said the precision of the equation should be minutes, not hours. Other commenters expressed that the phrase ''the charging port successfully dispenses electricity as expected'' is incomplete because it does not define what is meant by ''as expected.''

Several commenters noted that scheduled maintenance should not count against uptime, especially if that maintenance occurs during periods of low utilization. Others recommended additional exclusions for situations outside the station operator's control such as vandalism, emergency scenarios, certain weather factors, etc. One commenter suggested the first year of the program be a test year because enforcing the uptime requirement will be complex. After collecting data for one year to better understand the factors that impact uptime, more stringent standards could go into effect in the remaining years of the program.

FHWA Response: The definition of when a charger is considered ''up'' was updated in this final rule to remove the phrase ''as expected'' and instead stipulate that charging ports must dispense electricity in accordance with requirements for minimum power level found in § 680.106(d). The calculation of uptime in this final rule remains at the per-port level, as high reliability at the port level is important to improve customer experience and confidence in charging infrastructure. On the recommendation of a commenter, the equation was updated to calculate uptime to the nearest minute, rather than hours, to increase the precision of the calculation and make calculation more uniform across all charging station operators and charging network providers.

The proposed calculation for charging port uptime included the variable *T_excluded = total hours of outage in previous year for reasons outside the charging station operator's control.* The FHWA agrees with the recommendation to explicitly define the conditions when downtime can be excluded from the calculation of uptime. The FHWA also sees value in specifying additional conditions than those listed in the NPRM. Vandalism, natural disasters, and limited hours of operation were added as allowable reasons for exclusion. Proposed language stating ''outages caused by the vehicle'' was updated for precision to ''failure to charge or meet the EV charging customer's expectation for power level due to the fault of the vehicle.'' Scheduled maintenance was also added, and charging station operators are encouraged to conduct regular preventative maintenance during period of low demand to minimize disruption to customers. As a performance standard, the methods for achieving the port uptime threshold will not be prescribed by FHWA. Uptime reporting will not be delayed.

The FHWA acknowledges that the uptime calculation does not address all categories of failure or ways that chargers may fail to provide a satisfying customer experience. Alternate or additional approaches to regulating charging reliability could include requiring chargers to successfully complete a high percentage of charging sessions or to successfully initiate charging sessions after a minimal number of attempts. However, insufficient data are available to set reasonable thresholds for such requirements. Instead, FHWA modified requirements for data reporting in § 680.112(b) to collect error code data to better understand the nature and frequency of charging session problems.

The FHWA also acknowledges that enforcement of the uptime requirement will be complex; however, in contrast to a recommendation in the comments, FHWA does not see sufficient benefit in delaying the uptime requirement as uptime is a key complaint received regarding those chargers existing prior to the implementation of this final rule. The FHWA would prefer to immediately implement this important regulation, acknowledging that enforcement techniques will evolve over time.

Third-Party Data Sharing

Many private sector commenters expressed concern about unfair competition if charging network data sharing is overly broad. Commenters noted that making the data freely available will, in effect, translate into charging networks subsidizing competitors' new business models that could then unfairly attract drivers to use their mobile applications and payment/subscription services. Another concern was that real-time operational data on a per-session basis would allow competitors to determine rate of utilization, proprietary business information that operators should not be required to share in the competitive market. Other commenters said that charging network providers already send most of this data to the Alternative Fuel Data Center (AFDC) so this requirement would lead to redundant work.

FHWA Response: The data for third-party data sharing were reviewed to identify which elements are necessary for improving customer experience. Some data elements were removed as unnecessary for that purpose, such as 'Date when charging station first became available for use' and 'Physical dimensions of the largest vehicle that can access a charging port at the charging station.' A few necessary elements were added, such as hours of operation since this final rule only requires those stations along AFCs to be open 24/7. Other data elements added include ''unique port identifier,'' ''accessibility by vehicle with trailer (pull-through stall),'' and ''charging station access type (public or limited to commercial vehicles). The remaining data elements were re-organized into nine, more logical categories. This also clarifies data that needs to be provided at the station level versus the port level. The concerns about sharing data with third parties is noted, but an improved customer experience is critical and the sharing of data is expected to increase business at charging stations. The FHWA acknowledges that the required submittal of some of these data are duplicative of optional data submitted through the AFDC, but because some of the data submitted to the AFDC contains data that is more commercially sensitive, a reduced data set for third-parties focused on customers was identified for § 680.116(c), rather than a single data set for both purposes.

Section 680.118 Other Federal Requirements

Disadvantaged Business Enterprise Program

In further internal review of the proposed regulation text, FHWA found a need to clarify that the Disadvantaged Business Enterprise (DBE) program does not apply to NEVI formula funds but may apply in some other instances. The FHWA modified the language in this final rule to identify situations where the DBE program may apply to projects subject to this final rule.

Build America, Buy America

Many comments were received on Build America, Buy America (BABA) and Buy America, which includes requirements for certain items permanently incorporated into a project to be produced domestically. Several commenters requested that FHWA provide more clarity and timely information on BABA and Buy America requirements for chargers funded through NEVI and other Title 23, U.S.C. programs including the process needed to demonstrate compliance. Commenters recommended that FHWA monitor the availability of U.S. made products, ensure that there is both adequate availability and competition, and issue waivers or waiver extensions, as appropriate. Several commenters recommended an incremental approach, particularly during the first years of the program, to ensure that the industry can achieve full compliance without significant delays. Others suggested that FHWA provide and maintain a list of approved manufacturers and products that comply with BABA and Buy America.

Several commenters expressed support for BABA and Buy America requirements, citing benefits to the U.S. economy and workers and reducing U.S. vulnerability to global supply chain disruptions.

FHWA Response: A 'Notice of Proposed Waiver of Buy America Requirements for Electric Vehicle Chargers' was published at 87 FR 53539 in the August 31, 2022, **Federal Register**. The Notice requested comments on a proposal to waive certain Buy America requirements under FHWA regulations and the BABA for the steel, iron, manufactured products, and construction materials in EV chargers in a manner that, over a deliberate transitional period, reduces the scope of the waiver. Comments closed on September 30, 2022, and will inform any future actions related to Buy America and chargers.

American With Disabilities Act

Several commenters submitted suggestions to improve charging station accessibility for persons with disabilities. Other commenters requested clarification on ADA requirements at charging stations.

FHWA Response: The U.S. Access Board published ''Design Recommendations for Accessible Electric Vehicle Charging Stations'' in

2022. Until any formal rules are proposed and finalized by the U.S. Access Board, FHWA recommends that charging stations be designed and constructed according to the U.S. Access Board Recommendations to demonstrate ADA compliance and optimize usability for persons with disabilities.

Severability

Congress created the NEVI program by statute and directed FHWA to establish the minimum standards and requirements for NEVI-funded projects, as outlined in this final rule. The purpose of this rule is to operate holistically in addressing a panoply of issues necessary to ensure efficient operation of this nationwide network. However, FHWA recognizes that certain provisions focus on unique topics. Therefore, FHWA finds that the various provisions of this final rule are severable and able to operate functionally if severed from each other. In the event a court were to invalidate one or more of this final rule's unique provisions, the remaining provisions should stand, thus allowing this congressionally mandated program to continue to operate.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The Office of Management and Budget (OMB) has determined that this rulemaking would be a significant regulatory action within the meaning of E.O. 12866, ''Regulatory Planning and Review'' 58 FR 51735 (Oct. 4, 1993).

The regulatory impact analysis (RIA) supports this proposed regulation and estimates the costs and benefits associated with establishing minimum standards and requirements. All of the topics for the minimum standards and requirements are required by BIL. To estimate these costs, the PRIA compared the costs and benefits of proposed provisions to the costs and benefits of the options States and other designated recipients would likely choose for their own charger programs in the absence of the rule. In many cases, the analysis found that States and other designated recipients would likely choose the same requirements that are found in the proposed rule. While many of the costs and benefits in the proposed rule are difficult to quantify, FHWA believes that the benefits justify the costs. The full regulatory impact analysis is available in the docket.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FHWA has evaluated the effects of this rule on small entities and has determined that it is not anticipated to have a significant economic impact on a substantial number of small entities. The rule would impact directly State governments, which are not included in the definition of small entity set forth in 5 U.S.C. 601. Small entities that may be impacted indirectly by a rulemaking are not subject to analysis under the Regulatory Flexibility Act, see *Mid-Tex Electric Cooperative, Inc.* v. *Federal Energy Regulatory Commission,* 773 F.2d 327 (D.C. Cir 1985). Therefore, FHWA certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $168 million or more in any one year (2 U.S.C. 1532). In addition, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism Assessment)

This rule has been analyzed in accordance with the principles and criteria contained in E.O. 13132, ''Federalism'' 64 FR 43255 (Aug. 10, 1999), and FHWA has determined that this rule would not have sufficient federalism implications to warrant the preparation of a federalism assessment. Regardless, FHWA could foresee the possibility of a conflict between § 680.116's condition that pricing be displayed in $/kWH and the laws of some States. As such, in accordance with section 4(d) of E.O. 13132, FHWA has, to the extent practicable, consulted with appropriate State and local officials in an effort to avoid any such conflict. The FHWA weighed those interests carefully in promulgating § 680.116. That section represents the best balance possible of State interests with the need to present a consistent, transparent, and easily-recognized nationwide pricing approach for EV charging.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this rule contains collection of information requirements for the purposes of the PRA. This rule identifies minimum standards and requirements for the implementation of NEVI Formula Program projects and projects for the construction of publicly accessible EV chargers that are funded with funds made available under Title 23, U.S.C., including any EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway. The collection of quarterly, annual, one-time and real-time data in support of 23 CFR 680.112(a), 23 CFR 680.112(b), 23 CFR 680.112(c), 23 CFR 680.112(d), and 23 CFR 680.116(c) is covered by OMB Control No. 2125–0674.

The FHWA has analyzed this proposed rule under the PRA and has determined the following:

Respondents: 52 State DOTs and awardees of grants under 23 U.S.C. 151(f).

Frequency: Quarterly reporting (23 CFR 680.112(a)). Annual reporting (23 CFR 680.112(b) and 23 CFR 680.112(d)). Real-time reporting (23 CFR 680.116(c)). (23 CFR 680.112(c)).

Estimated Average Burden per Response: Approximately 58 hours annually to complete, maintain, and submit requested data.

Estimated Total Annual Burden Hours: Approximately 10,816 hours annually.

National Environmental Policy Act

The FHWA has analyzed this rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded under 23 CFR 771.117(c)(20), which applies to the promulgation of rules, regulations, and directives. Categorically excluded actions meet the criteria for categorical exclusions under the Council on Environmental Quality regulations and under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA. This rule would establish a regulation on minimum standards and requirements for the NEVI Formula Program as directed by BIL to provide funding to States to

strategically deploy EV charging infrastructure and to establish an interconnected network to facilitate data collection, access, and reliability. The FHWA does not anticipate any adverse environmental impacts from this rule; no unusual circumstances are present under 23 CFR 771.117(b).

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this rule in accordance with the principles and criteria contained in E.O. 13175, ''Consultation and Coordination with Indian Tribal Governments'' 65 FR 67249 (Nov. 9, 2000). The rule would establish a regulation on minimum standards and requirements for the NEVI Formula Program to provide funding to States to strategically deploy EV charging infrastructure and to establish an interconnected network to facilitate data collection, access, and reliability. This measure applies to States that receive Title 23, U.S.C. Federal-aid highway funds, and it would not have substantial direct effects on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Accordingly, the funding and consultation requirements of E.O. 13175 do not apply and a Tribal summary impact statement is not required.

Executive Order 12898 (Environmental Justice)

E.O. 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' 59 FR 7629 (Feb. 16, 1994), requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA has determined that this rule does not raise any environmental justice issues.

Congressional Notification

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

Regulation Identifier Number

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 680

Grant programs—transportation, Highways and roads, Reporting and recordkeeping requirements, Transportation.

Issued under authority delegated in 49 CFR 1.81 and 1.85.

Shailen P. Bhatt,

Administrator, Federal Highway Administration.

■ In consideration of the foregoing, FHWA amends Title 23, CFR chapter I, subchapter G by adding part 680, to read as follows:

SUBCHAPTER G—ENGINEERING AND TRAFFIC OPERATIONS

PART 680—NATIONAL ELECTRIC VEHICLE INFRASTRUCTURE STANDARDS AND REQUIREMENTS

Sec.

Authority: 23 U.S.C. 109, 23 U.S.C. 315; Pub. L. 117–58, title VIII of division J.

§ 680.100 Purpose.

The purpose of this part is to prescribe minimum standards and requirements for projects funded under the National Electric Vehicle Infrastructure (NEVI) Formula Program and projects for the construction of publicly accessible electric vehicle (EV) chargers that are funded with funds made available under Title 23, United States Code, including any EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway.

§ 680.102 Applicability.

Except where noted, these regulations apply to all NEVI Formula Program projects as well as projects for the construction of publicly accessible EV chargers that are funded with funds made available under Title 23, United States Code, including any EV charging infrastructure project funded with Federal funds that is treated as a project on a Federal-aid highway.

§ 680.104 Definitions.

AC Level 2 means a charger that operates on a circuit from 208 volts to 240 volts and transfers alternating-current (AC) electricity to a device in an EV that converts alternating current to direct current to recharge an EV battery.

Alternative Fuel Corridor (AFC) means national EV charging and hydrogen, propane, and natural gas fueling corridors designated by FHWA pursuant to 23 U.S.C. 151.

CHAdeMO means a type of protocol for a charging connector interface between an EV and a charger (see *www.chademo.com*). It specifies the physical, electrical, and communication requirements of the connector and mating vehicle inlet for direct-current (DC) fast charging. It is an abbreviation of ''charge de move'', equivalent to ''charge for moving.''

Charger means a device with one or more charging ports and connectors for charging EVs. Also referred to as Electric Vehicle Supply Equipment (EVSE).

Charging network means a collection of chargers located on one or more property(ies) that are connected via digital communications to manage the facilitation of payment, the facilitation of electrical charging, and any related data requests.

Charging network provider means the entity that operates the digital communication network that remotely manages the chargers. Charging network providers may also serve as charging station operators and/or manufacture chargers.

Charging port means the system within a charger that charges one EV. A charging port may have multiple connectors, but it can provide power to charge only one EV through one connector at a time.

Charging station means the area in the immediate vicinity of a group of chargers and includes the chargers, supporting equipment, parking areas adjacent to the chargers, and lanes for vehicle ingress and egress. A charging station could comprise only part of the property on which it is located.

Charging station operator means the entity that owns the chargers and supporting equipment and facilities at one or more charging stations. Although this entity may delegate responsibility for certain aspects of charging station

operation and maintenance to subcontractors, this entity retains responsibility for operation and maintenance of chargers and supporting equipment and facilities. In some cases, the charging station operator and the charging network provider are the same entity.

Combined Charging System (CCS) means a standard connector interface that allows direct current fast chargers to connect to, communicate with, and charge EVs.

Community means either a group of individuals living in geographic proximity to one another, or a geographically dispersed set of individuals (such as individuals with disabilities, migrant workers, or Native Americans), where either type of group experiences common conditions.

Connector means the device that attaches an EV to a charging port in order to transfer electricity.

Contactless payment methods means a secure method for consumers to purchase services using a debit card, credit card, smartcard, mobile application, or another payment device by using radio frequency identification (RFID) technology and near-field communication (NFC).

Cryptographic agility means the capacity to rapidly update or switch between data encryption systems, algorithms, and processes without the need to redesign the protocol, software, system, or standard.

Direct Current Fast Charger (DCFC) means a charger that enables rapid charging by delivering direct-current (DC) electricity directly to an EV's battery.

Disadvantaged communities (DACs) mean census tracts or communities with common conditions identified by the U.S. Department of Transportation and the U.S. Department of Energy that consider appropriate data, indices, and screening tools to determine whether a specific community is disadvantaged based on a combination of variables that may include, but are not limited to, the following: low income, high and/or persistent poverty; high unemployment and underemployment; racial and ethnic residential segregation, particularly where the segregation stems from discrimination by government entities; linguistic isolation; high housing cost burden and substandard housing; distressed neighborhoods; high transportation cost burden and/or low transportation access; disproportionate environmental stressor burden and high cumulative impacts; limited water and sanitation access and affordability; disproportionate impacts from climate change; high energy cost burden and low energy access; jobs lost through the energy transition; and limited access to healthcare.

Distributed energy resource means small, modular, energy generation and storage technologies that provide electric capacity or energy where it is needed.

Electric Vehicle (EV) means a motor vehicle that is either partially or fully powered on electric power received from an external power source. For the purposes of this regulation, this definition does not include golf carts, electric bicycles, or other micromobility devices.

Electric Vehicle Infrastructure Training Program (EVITP) refers to a comprehensive training program for the installation of electric vehicle supply equipment. For more information, refer to *https://evitp.org/*.

Electric Vehicle Supply Equipment (EVSE) See definition of a charger.

Open Charge Point Interface (OCPI) means an open-source communication protocol that governs the communication among multiple charging networks, other communication networks, and software applications to provide information and services for EV drivers.

Open Charge Point Protocol (OCPP) means an open-source communication protocol that governs the communication between chargers and the charging networks that remotely manage the chargers.

Plug and Charge means a method of initiating charging, whereby an EV charging customer plugs a connector into their vehicle and their identity is authenticated through digital certificates defined by ISO–15118, a charging session initiates, and a payment is transacted automatically, without any other customer actions required at the point of use.

Power Sharing means dynamically limiting the charging power output of individual charging ports at the same charging station to ensure that the sum total power output to all EVs concurrently charging remains below a maximum power threshold. This is also called automated load management.

Private entity means a corporation, partnership, company, other nongovernmental entity, or nonprofit organization.

Public Key Infrastructure (PKI) means a system of processes, technologies, and policies to encrypt and digitally sign data. It involves the creation, management, and exchange of digital certificates that authenticate the identity of users, devices, or services to ensure trust and secure communication.

Secure payment method means a type of payment processing that ensures a user's financial and personal information is protected from fraud and unauthorized access.

Smart charge management means controlling the amount of power dispensed by chargers to EVs to meet customers' charging needs while also responding to external power demand or pricing signals to provide load management, resilience, or other benefits to the electric grid.

State EV infrastructure deployment plan means the plan submitted to the FHWA by the State describing how it intends to use its apportioned NEVI Formula Program funds.

§ 680.106 Installation, operation, and maintenance by qualified technicians of electric vehicle charging infrastructure.

(a) *Procurement process transparency for the operation of EV charging stations.* States or other direct recipients shall ensure public transparency for how the price will be determined and set for EV charging and make available for public review the following:

(1) Summary of the procurement process used;

(2) Number of bids received;

(3) Identification of the awardee;

(4) Proposed contract to be executed with the awardee;

(5) Financial summary of contract payments suitable for public disclosure including price and cost data, in accordance with State law; and

(6) Any information describing how prices for EV charging are to be set under the proposed contract, in accordance with State law.

(b) *Number of charging ports.* (1) When including DCFCs located along and designed to serve users of designated AFCs, charging stations must have at least four network-connected DCFC charging ports and be capable of simultaneously charging at least four EVs. (2) In other locations, EV charging stations must have at least four network-connected (either DCFC or AC Level 2 or a combination of DCFC and AC Level 2) charging ports and be capable of simultaneously charging at least four EVs.

(c) *Connector type.* All charging connectors must meet applicable industry standards. Each DCFC charging port must be capable of charging any CCS-compliant vehicle and each DCFC charging port must have at least one permanently attached CCS Type 1 connector. In addition, permanently attached CHAdeMO (*www.chademo.com*) connectors can be provided using only FY2022 NEVI Funds. Each AC Level 2 charging port

must have a permanently attached J1772 connector and must charge any J1772-compliant vehicle.

(d) *Power level.* (1) DCFC charging ports must support output voltages between 250 volts DC and 920 volts DC. DCFCs located along and designed to serve users of designated AFCs must have a continuous power delivery rating of at least 150 kilowatt (kW) and supply power according to an EV's power delivery request up to 150 kW, simultaneously from each charging port at a charging station. These corridor-serving DCFC charging stations may conduct power sharing so long as each charging port continues to meet an EV's request for power up to 150 kW.

(2) Each AC Level 2 charging port must have a continuous power delivery rating of at least 6 kW and the charging station must be capable of providing at least 6 kW per port simultaneously across all AC ports. AC Level 2 chargers may conduct power sharing and/or participate in smart charge management programs so long as each charging port continues to meet an EV's demand for power up to 6 kW, unless the EV charging customer consents to accepting a lower power level.

(e) *Availability.* Charging stations located along and designed to serve users of designated Alternative Fuel Corridors must be available for use and sited at locations physically accessible to the public 24 hours per day, 7 days per week, year-round. Charging stations not located along or not designed to serve users of designated Alternative Fuel Corridors must be available for use and accessible to the public at least as frequently as the business operating hours of the site host. This section does not prohibit isolated or temporary interruptions in service or access because of maintenance or repairs or due to the exclusions outlined in § 680.116(b)(3).

(f) *Payment methods.* Unless charging is permanently provided free of charge to customers, charging stations must:

(1) Provide for secure payment methods, accessible to persons with disabilities, which at a minimum shall include a contactless payment method that accepts major debit and credit cards, and either an automated toll-free phone number or a short message/messaging system (SMS) that provides the EV charging customer with the option to initiate a charging session and submit payment;

(2) Not require a membership for use;

(3) Not delay, limit, or curtail power flow to vehicles on the basis of payment method or membership; and

(4) Provide access for users that are limited English proficient and accessibility for people with disabilities. Automated toll-free phone numbers and SMS payment options must clearly identify payment access for these populations.

(g) *Equipment certification.* States or other direct recipients must ensure that all chargers are certified by an Occupational Safety and Health Administration Nationally Recognized Testing Laboratory and that all AC Level 2 chargers are ENERGY STAR certified. DCFC and AC Level 2 chargers should be certified to the appropriate Underwriters Laboratories (UL) standards for EV charging system equipment.

(h) *Security.* States or other direct recipients must implement physical and cybersecurity strategies consistent with their respective State EV Infrastructure Deployment Plans to ensure charging station operations protect consumer data and protect against the risk of harm to, or disruption of, charging infrastructure and the grid.

(1) Physical security strategies may include topics such as lighting; siting and station design to ensure visibility from onlookers; driver and vehicle safety; video surveillance; emergency call boxes; fire prevention; charger locks; and strategies to prevent tampering and illegal surveillance of payment devices.

(2) Cybersecurity strategies may include the following topics: user identity and access management; cryptographic agility and support of multiple PKIs; monitoring and detection; incident prevention and handling; configuration, vulnerability, and software update management; third-party cybersecurity testing and certification; and continuity of operation when communication between the charger and charging network is disrupted.

(i) *Long-term stewardship.* States or other direct recipients must ensure that chargers are maintained in compliance with this part for a period of not less than 5 years from the initial date of operation.

(j) *Qualified technician.* States or other direct recipients shall ensure that the workforce installing, maintaining, and operating chargers has appropriate licenses, certifications, and training to ensure that the installation and maintenance of chargers is performed safely by a qualified and increasingly diverse workforce of licensed technicians and other laborers. Further:

(1) Except as provided in paragraph (j)(2) of this section, all electricians installing, operating, or maintaining EVSE must meet one of the following requirements:

(i) Certification from the EVITP.

(ii) Graduation or a continuing education certificate from a registered apprenticeship program for electricians that includes charger-specific training and is developed as a part of a national guideline standard approved by the Department of Labor in consultation with the Department of Transportation.

(2) For projects requiring more than one electrician, at least one electrician must meet the requirements above, and at least one electrician must be enrolled in an electrical registered apprenticeship program.

(3) All other onsite, non-electrical workers directly involved in the installation, operation, and maintenance of chargers must have graduated from a registered apprenticeship program or have appropriate licenses, certifications, and training as required by the State.

(k) *Customer service.* States or other direct recipients must ensure that EV charging customers have mechanisms to report outages, malfunctions, and other issues with charging infrastructure. Charging station operators must enable access to accessible platforms that provide multilingual services. States or other direct recipients must comply with the American with Disabilities Act of 1990 requirements and multilingual access when creating reporting mechanisms.

(l) *Customer data privacy.* Charging station operators must collect, process, and retain only that personal information strictly necessary to provide the charging service to a consumer, including information to complete the charging transaction and to provide the location of charging stations to the consumer. Chargers and charging networks should be compliant with appropriate Payment Card Industry Data Security Standards (PCI DSS) for the processing, transmission, and storage of cardholder data. Charging Station Operators must also take reasonable measures to safeguard consumer data.

(m) *Use of program income.* (1) Any net income from revenue from the sale, use, lease, or lease renewal of real property acquired shall be used for Title 23, United States Code, eligible projects.

(2) For purposes of program income or revenue earned from the operation of an EV charging station, the State or other direct recipient should ensure that all revenues received from operation of the EV charging facility are used only for:

(i) Debt service with respect to the EV charging station project, including funding of reasonable reserves and debt service on refinancing;

(ii) A reasonable return on investment of any private person financing the EV

charging station project, as determined by the State or other direct recipient;

(iii) Any costs necessary for the improvement and proper operation and maintenance of the EV charging station, including reconstruction, resurfacing, restoration, and rehabilitation;

(iv) If the EV charging station is subject to a public-private partnership agreement, payments that the party holding the right to the revenues owes to the other party under the public-private partnership agreement; and

(v) Any other purpose for which Federal funds may be obligated under Title 23, United States Code.

§ 680.108 Interoperability of electric vehicle charging infrastructure.

(a) *Charger-to-EV communication.* Chargers must conform to ISO 15118–3 and must have hardware capable of implementing both ISO 15118–2 and ISO 15118–20. By February 28, 2024, charger software must conform to ISO 15118–2 and be capable of Plug and Charge. Conformance testing for charger software and hardware should follow ISO 15118–4 and ISO 15118–5, respectively.

(b) *Charger-to-Charger-Network Communication.* Chargers must conform to Open Charge Point Protocol (OCPP) 1.6J or higher. By February 28, 2024, chargers must conform to OCPP 2.0.1.

(c) *Charging-Network-to-Charging-Network Communication.* By February 28, 2024, charging networks must be capable of communicating with other charging networks in accordance with Open Charge Point Interface (OCPI) 2.2.1.

(d) *Network switching capability.* Chargers must be designed to securely switch charging network providers without any changes to hardware.

§ 680.110 Traffic control devices or on-premises signs acquired, installed, or operated.

(a) *Manual on Uniform Traffic Control Devices for Streets and Highways.* All traffic control devices must comply with part 655 of this subchapter.

(b) *On-premises signs.* On-property or on-premise advertising signs must comply with part 750 of this chapter.

§ 680.112 Data submittal.

(a) *Quarterly data submittal.* States and other direct recipients must ensure the following data are submitted on a quarterly basis in a manner prescribed by the FHWA. Any quarterly data made public will be aggregated and anonymized to protect confidential business information.

(1) Charging station identifier that the following data can be associated with. This must be the same charging station name or identifier used to identify the charging station in data made available to third-parties in § 680.116(c)(1);

(2) Charging port identifier. This must be the same charging port identifier used to identify the charging port in data made available to third-parties in § 680.116(c)(8)(ii);

(3) Charging session start time, end time, and any error codes associated with an unsuccessful charging session by port;

(4) Energy (kWh) dispensed to EVs per charging session by port;

(5) Peak session power (kW) by port;

(6) Payment method associated with each charging session;

(7) Charging station port uptime, T_outage, and T_excluded calculated in accordance with the equation in § 680.116(b) for each of the previous 3 months;

(8) Duration (minutes) of each outage.

(b) *Annual data submittal.* Beginning in 2024, States and other direct recipients must ensure the following data are submitted on an annual basis, on or before March 1, in a manner prescribed by FHWA. Any annual data made public will be aggregated and anonymized to protect confidential business information.

(1) Maintenance and repair cost per charging station for the previous year.

(2) For private entities identified in paragraph (c)(1) of this section, identification of and participation in any State or local business opportunity certification programs including but not limited to minority-owned businesses, Veteran-owned businesses, woman-owned businesses, and businesses owned by economically disadvantaged individuals.

(c) *One-time data submittal.* This paragraph (c) applies only to both the NEVI Formula Program projects and grants awarded under 23 U.S.C. 151(f) for projects that are for EV charging stations located along and designed to serve the users of designated AFCs. Beginning in 2024, States and other direct recipients must ensure the following data are collected and submitted once for each charging station, on or before March 1 of each year, in a manner prescribed by the FHWA. Any one-time data made public will be aggregated and anonymized to protect confidential business information.

(1) The name and address of the private entity(ies) involved in the operation and maintenance of chargers.

(2) Distributed energy resource installed capacity, in kW or kWh as appropriate, of asset by type (*e.g.,* stationary battery, solar, etc.) per charging station; and

(3) Charging station real property acquisition cost, charging equipment acquisition and installation cost, and distributed energy resource acquisition and installation cost; and

(4) Aggregate grid connection and upgrade costs paid to the electric utility as part of the project, separated into:

(i) Total distribution and system costs, such as extensions to overhead/underground lines, and upgrades from single-phase to three-phase lines; and

(ii) Total service costs, such as the cost of including poles, transformers, meters, and on-service connection equipment.

(d) *Community engagement outcomes report.* This paragraph (d) only applies to the NEVI Formula Program projects. States must include in the State EV Infrastructure Deployment Plan a description of the community engagement activities conducted as part of the development and approval of their most recently-submitted State EV Infrastructure Deployment Plan, including engagement with DACs.

§ 680.114 Charging network connectivity of electric vehicle charging infrastructure.

(a) *Charger-to-charger-network communication.* (1) Chargers must communicate with a charging network via a secure communication method. See § 680.108 for more information about OCPP requirements.

(2) Chargers must have the ability to receive and implement secure, remote software updates and conduct real-time protocol translation, encryption and decryption, authentication, and authorization in their communication with charging networks.

(3) Charging networks must perform and chargers must support remote charger monitoring, diagnostics, control, and smart charge management.

(4) Chargers and charging networks must securely measure, communicate, store, and report energy and power dispensed, real-time charging-port status, real-time price to the customer, and historical charging-port uptime.

(b) *Interoperability.* See § 680.108 for interoperability requirements.

(c) *Charging-network-to-charging-network communication.* A charging network must be capable of communicating with other charging networks to enable an EV driver to use a single method of identification to charge at Charging Stations that are a part of multiple charging networks. See § 680.108 for more information about OCPI requirements.

(d) *Charging-network-to-grid communication.* Charging networks must be capable of secure communication with electric utilities,

other energy providers, or local energy management systems.

(e) *Disrupted network connectivity.* Chargers must remain functional if communication with the charging network is temporarily disrupted, such that they initiate and complete charging sessions, providing the minimum required power level defined in § 680.106(d).

§ 680.116 Information on publicly available electric vehicle charging infrastructure locations, pricing, real time availability, and accessibility through mapping.

(a) *Communication of price.* (1) The price for charging must be displayed prior to initiating a charging transaction and be based on the price for electricity to charge in $/kWh. If the price for charging is not currently based on the price for electricity to charge an Electric Vehicle in $/kWh, the requirements of this subparagraph must be satisfied within one year from February 28, 2023.

(2) The price for charging displayed and communicated via the charging network must be the real-time price (*i.e.,* price at that moment in time). The price at the start of the session cannot change during the session.

(3) Price structure including any other fees in addition to the price for electricity to charge must be clearly displayed and explained.

(b) *Minimum uptime.* States or other direct recipients must ensure that each charging port has an average annual uptime of greater than 97%.

(1) A charging port is considered ''up'' when its hardware and software are both online and available for use, or in use, and the charging port successfully dispenses electricity in accordance with requirements for minimum power level (see § 680.106(d)).

(2) Charging port uptime must be calculated on a monthly basis for the previous twelve months.

(3) Charging port uptime percentage must be calculated using the following equation:

$$\mu = ((525{,}600 - (T\_outage - T\_excluded))/525{,}600) \times 100$$

where:

μ = port uptime percentage,

T_outage = total minutes of outage in previous year, and

T_excluded = total minutes of outage in previous year caused by the following reasons outside the charging station operator's control, provided that the charging station operator can demonstrate that the charging port would otherwise be operational: electric utility service interruptions, failure to charge or meet the EV charging customer's expectation for power delivery due to the fault of the vehicle, scheduled maintenance, vandalism, or natural disasters. Also excluded are hours outside of the identified hours of operation of the charging station.

(c) *Third-party data sharing.* States or other direct recipients must ensure that the following data fields are made available, free of charge, to third-party software developers, via application programming interface:

(1) Unique charging station name or identifier;

(2) Address (street address, city, State, and zip code) of the property where the charging station is located;

(3) Geographic coordinates in decimal degrees of exact charging station location;

(4) Charging station operator name;

(5) Charging network provider name;

(6) Charging station status (operational, under construction, planned, or decommissioned);

(7) Charging station access information:

(i) Charging station access type (public or limited to commercial vehicles);

(ii) Charging station access days/times (hours of operation for the charging station);

(8) Charging port information:

(i) Number of charging ports;

(ii) Unique port identifier;

(iii) Connector types available by port;

(iv) Charging level by port (DCFC, AC Level 2, etc.);

(v) Power delivery rating in kilowatts by port;

(vi) Accessibility by vehicle with trailer (pull-through stall) by port (yes/no);

(vii) Real-time status by port in terms defined by Open Charge Point Interface 2.2.1;

(9) Pricing and payment information:

(i) Pricing structure;

(ii) Real-time price to charge at each charging port, in terms defined by Open Charge Point Interface 2.2.1; and

(iii) Payment methods accepted at charging station.

§ 680.118 Other Federal requirements.

All applicable Federal statutory and regulatory requirements apply to the EV charger projects. These requirements include, but are not limited to:

(a) All statutory and regulatory requirements that are applicable to funds apportioned under chapter 1 of Title 23, United States Code, and the requirements of 2 CFR part 200 apply. This includes the applicable requirements of 23, United States Code, and Title 23, Code of Federal Regulations, such as the applicable Buy America requirements at 23 U.S.C. 313 and Build America, Buy America Act (Pub. L. No 117–58, div. G sections 70901–70927).

(b) As provided at 23 U.S.C. 109(s)(2), projects to install EV chargers are treated as if the project is located on a Federal-aid highway. As a project located on a Federal-aid highway, 23 U.S.C. 113 applies and Davis Bacon Federal wage rate requirements included at subchapter IV of chapter 31 of Title 40, U.S.C., must be paid for any project funded with NEVI Formula Program funds.

(c) The American with Disabilities Act of 1990 (ADA), and implementing regulations, apply to EV charging stations by prohibiting discrimination on the basis of disability by public and private entities. EV charging stations must comply with applicable accessibility standards adopted by the Department of Transportation into its ADA regulations (49 CFR part 37) in 2006, and adopted by the Department of Justice into its ADA regulations (28 CFR parts 35 and 36) in 2010.

(d) Title VI of the Civil Rights Act of 1964, and implementing regulations, apply to this program to ensure that no person shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(e) All applicable requirements of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), and implementing regulations, apply to this program.

(f) The Disadvantaged Business Enterprise (DBE) program does not apply to the NEVI Formula Funds; however, the DBE program may apply to other programs apportioned under chapter 1 of Title 23, United States Code.

(g) The Uniform Relocation Assistance and Real Property Acquisition Act, and implementing regulations, apply to this program by establishing minimum standards for federally funded programs and projects that involve the acquisition of real property (real estate) or the displacement or relocation of persons from their homes, businesses, or farms.

(h) The National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality's NEPA implementing regulations, and applicable agency NEPA procedures apply to this program by establishing procedural requirements to ensure that Federal agencies consider the consequences of their proposed actions on the human environment and inform the public about their decision making for major Federal actions significantly affecting the quality of the human environment.

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Part III

Department of Labor

Employment and Training Administration

20 CFR Part 655

Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA–2021–0006]

RIN 1205–AC05

Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (Department or DOL) is amending its regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H–2A nonimmigrant status (H–2A workers). Specifically, the Department is revising the methodology by which it determines the hourly Adverse Effect Wage Rates (AEWRs) for non-range occupations (*i.e.,* all occupations other than herding and production of livestock on the range) using a combination of wage data reported by the U.S. Department of Agriculture's (USDA) Farm Labor Reports (better known as the Farm Labor Survey, or FLS), and the Department's Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) survey, formerly the Occupational Employment Statistics (OES) survey prior to March 31, 2021. For the vast majority of H–2A job opportunities represented by the six Standard Occupational Classification (SOC) codes comprising the field and livestock worker (combined) wages reported by USDA, the Department will continue to rely on the FLS to establish the AEWRs where a wage is reported by the FLS. For all other SOC codes, the Department will use the OEWS survey to establish the AEWRs for each SOC code. Additionally, in circumstances in which the FLS does not report a wage for the field and livestock workers (combined) occupational group in a particular State or region, the Department will use the OEWS survey to determine the AEWR for that occupational group. These regulatory changes are consistent with the Secretary of Labor's (Secretary) statutory responsibility to certify that the employment of H–2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. The Department believes this methodology strikes a reasonable balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed.

DATES: This final rule is effective on March 30, 2023.

FOR FURTHER INFORMATION CONTACT: Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5311, Washington, DC 20210, telephone: (202) 693–8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

SUPPLEMENTARY INFORMATION:

Preamble Table of Contents

Table of Acronyms and Abbreviations

AEWR Adverse Effect Wage Rate
ALS Agricultural Labor Survey
ARIMA Autoregressive integrated moving average
ASB Agricultural Statistics Board
BLS Bureau of Labor Statistics
CFR Code of Federal Regulations
CO Certifying Officer
CPS Current Population Survey
CY calendar year
DOL U.S. Department of Labor
DWL deadweight loss
E.O. Executive Order
ECI Employment Cost Index
ETA Employment and Training Administration
FLR Farm Labor Report
FLS Farm Labor Survey
FY Fiscal Year
GVW Gross Vehicle Weight
H–2ALC H–2A Labor Contractor
INA Immigration and Nationality Act
IRCA Immigration Reform and Control Act of 1986
NAICS North American Industry Classification System
NASS National Agricultural Statistics Service
NPC National Processing Center
NPRM Notice of Proposed Rulemaking
O*NET Occupational Information Network
OES Occupational Employment Statistics
OEWS Occupational Employment and Wage Statistics
OFLC Office of Foreign Labor Certification
OIRA Office of Information and Regulatory Affairs
OMB Office of Management and Budget
Pub. L. Public Law
RFA Regulatory Flexibility Act of 1980
RIA Regulatory impact analysis
SBA Small Business Administration
SOC Standard Occupational Classification
Stat. U.S. Statutes at Large
SWA State Workforce Agency
U.S. United States
U.S.C. United States Code
USCIS U.S. Citizenship and Immigration Service
USDA U.S. Department of Agriculture
WHD Wage and Hour Division

I. Background

A. Legal Authority

The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes an ''H–2A'' nonimmigrant visa classification for a worker ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature.'' 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. 1184(c)(1), 1188.[1] Among other things, a prospective H–2A employer must first apply to the Secretary for a certification that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and (2) the employment of the H–2A workers in such services or labor will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). The INA prohibits the Secretary from issuing this certification—known as a ''temporary agricultural labor certification''—unless both of the above-referenced conditions are met and none of the conditions in 8 U.S.C. 1188(b) apply concerning strikes or lock-outs, labor certification program debarments, workers'

[1] For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

compensation assurances, and positive recruitment.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary, Employment and Training Administration (ETA), who, in turn, has delegated that authority to ETA's Office of Foreign Labor Certification (OFLC).[2] In addition, the Secretary has delegated to the Administrator, Wage and Hour Division (WHD), the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to ensure employer compliance with the terms and conditions of employment under the H–2A program.[3] Since 1987, the Department has operated the H–2A temporary agricultural labor certification program under regulations it promulgated pursuant to the INA. The standards and procedures applicable to the certification and employment of workers under the H–2A program are found in 20 CFR part 655, subpart B, and 29 CFR part 501.

When creating the H–2A visa classification, Congress charged the Department with, among other things, regulating the employment of nonimmigrant foreign workers in agriculture to guard against adverse impact on the wages of agricultural workers in the United States similarly employed. *See* 8 U.S.C. 1188(a)(1)(B). Congress, however, did not ''define adverse effect and left it in the Department's discretion how to ensure that the [employment] of farmworkers met the statutory requirements.'' [4] Thus, the Department has discretion to determine the methodological approach that best allows it to meet its statutory mandate.[5] The INA ''requires that the Department serve the interests of both farmworkers and growers—which are often in tension. That is why Congress left it to [the Department's] judgment and expertise to strike the balance.'' [6]

The AEWR is one of the primary ways the Department meets its statutory obligation to certify that the employment of H–2A workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed, while ensuring that employers can access legal agricultural labor. There is no statutory requirement that the Department determine the AEWR at the highest conceivable point, nor at the lowest, so long as it serves its purpose to guard against adverse impact on the wages of agricultural workers in the United States similarly employed.[7] The Department also considers factors relating to the sound administration of the H–2A program in deciding how to determine the AEWR.

B. Purpose for the Regulatory Action

The Department has determined this rulemaking is necessary to ensure that the employment of H–2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed. As discussed in the notice of proposed rulemaking (NPRM) published on December 1, 2021, concerns about the employment of foreign workers adversely affecting the wages of agricultural workers in the United States similarly employed are heightened in the H–2A program because the program involves an especially vulnerable population.[8] Setting the AEWR and requiring employers who desire to employ H–2A foreign workers to offer, advertise, and pay at least the AEWR when it is the highest applicable wage is one of the primary regulatory controls the Department uses to meet its statutory obligation to certify that the employment of H–2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed.[9] The AEWR's role in the Department's administration of the H–2A program is distinct from and complementary to local prevailing wage findings, which are specific to a particular crop or agricultural activity. In the absence of a local prevailing wage finding, or where there is a local prevailing wage finding but that finding is lower than the prevailing wage of workers performing similar work within an occupational classification and broader geographic area (*e.g.,* statewide or regional), the AEWR establishes a wage floor that serves to prevent localized wage stagnation or depression relative to the wages of workers similarly employed in areas and occupations in which employers desire to employ H–2A workers.

The Department has expressed concerns with the current methodology used to determine the AEWR in the H–2A program, which was set forth in the 2010 Final Rule,[10] and has engaged in rulemaking activities to address its concerns.[11] As discussed below regarding recent rulemaking and related litigation, the Department determined that the 2010 Final Rule AEWR methodology does not adequately prevent adverse effect on the wages of agricultural workers in the United States similarly employed in two principal ways. First, the 2010 Final Rule AEWR methodology uses Farm Labor Survey (FLS) wage data for field and livestock workers (combined) to determine a single AEWR for all non-range H–2A job opportunities in each State or region, including job opportunities in Standard Occupational Classification (SOC) codes that the FLS does not include in the field and livestock worker (combined) data collection (*e.g.,* supervisors, construction, logging, tractor-trailer truck drivers). Not only is an AEWR determined under this methodology not reflective of the wages of workers performing similar work in those SOC codes, but the SOC codes not included in FLS field and livestock worker (combined) data collection generally account for more specialized or higher paid job opportunities. As a result, an AEWR determined using FLS field and livestock worker (combined) data does not adequately guard against adverse effect on the wages of agricultural workers similarly employed in the United States in these SOC codes. Second, the 2010 Final Rule AEWR methodology does not enable the Department to determine an AEWR for all geographic areas in which employers may seek to employ H–2A workers (*e.g.,* Alaska or Puerto Rico) due to FLS' data collection methodology and procedures.[12] Although the Department

[2] *See* Secretary's Order 06–2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010); 20 CFR 655.101.

[3] *See* Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

[4] *AFL–CIO, et al.* v. *Dole,* 923 F.2d 182, 184 (D.C. Cir. 1991).

[5] *United Farmworkers* v. *Solis,* 697 F. Supp. 2d 5, 8–11 (D.D.C. 2010).

[6] *Dole,* 923 F.2d ad 187.

[7] *See* 68 FR 11,460, 11,464 (Apr. 9, 1987) (''[T]he labor certification program is not the appropriate means to escalate agricultural earnings above the adverse effect level or to set an 'attractive wage.'").

[8] *See* Proposed Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States,* 86 FR 68174, 68176 (Dec. 1, 2021) (2021 AEWR NPRM).

[9] An employer seeking H–2A workers is required to offer, advertise in its recruitment, and agree to pay a wage that is at least equal to the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, and pay at least that rate to workers for every hour or portion thereof worked during a pay period. 20 CFR 655.120(a), 655.121(l).

[10] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 75 FR 6884 (Feb. 12, 2010) (2010 Final Rule).

[11] *See, e.g.,* Proposed Rule, *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States,* 84 FR 36168, 36171 (July 26, 2019) (2019 NPRM); 2020 AEWR Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States,* 85 FR 70445, 70447–70465 (Nov. 5, 2020) (2020 AEWR Final Rule).

[12] USDA's National Agricultural Statistics Service (NASS) publishes *Farm Labor Methodology and Quality Measures,* a document that describes the methodology and quality measures used for the

Continued

requires consideration of several wage sources other than the AEWR (*e.g.,* local prevailing wage finding, State or Federal minimum wages) to determine the minimum wage rate an employer must offer, advertise in its recruitment, and pay covered workers, not all of those wage sources are available or applicable to H–2A applications in all circumstances (*e.g.,* a CBA or a local prevailing wage finding). Regardless of the availability or applicability of other wage sources, the AEWR currently serves as a primary wage source to protect against adverse effect relative to the wages of workers similarly employed in occupations and geographic areas included in FLS data collection. However, workers in geographic areas not included in FLS data collection procedures do not have an AEWR's protection against adverse effect.

To address these concerns, this rule revises the methodology by which the Department determines the hourly AEWRs for non-range occupations (*i.e.,* all occupations other than herding and production of livestock on the range).[13] Using a combination of wage data reported by the USDA FLS and the Department's BLS OEWS survey, the methodology adopted in this final rule enables the Department to establish appropriate AEWRs in all geographic areas and for all SOC codes in which employers may seek to employ H–2A workers, which the Department considers a reasonable approach that strikes an appropriate balance under the INA, as discussed below.

C. Recent Rulemaking

As part of the comprehensive H–2A program notice of proposed rulemaking published on July 26, 2019 (2019 NPRM), the Department proposed to adjust the methodology used to establish the AEWRs in the H–2A program.[14] That approach would have provided occupation-specific statewide hourly AEWRs for non-range occupations using data reported by FLS for the SOC code in the State or region, [15] if available, or data reported by the OES (now OEWS) survey for the SOC code in the State, if FLS data in the State or region was not available. At the time, the Department explained that establishing AEWRs based on data more specific to the agricultural services or labor being performed under the SOC system would better protect against adverse effect on the wages of agricultural workers in the United States similarly employed. For example, the Department expressed concern that the AEWR methodology under the 2010 Final Rule could have had an adverse effect on the wages of workers in higher paid agricultural SOC codes, such as supervisors of farmworkers and construction laborers, whose wages may have been inappropriately lowered by use of a single hourly AEWR based on the wage data collected for the six SOC codes covering field and livestock workers (combined).[16]

The Department received thousands of comments on the proposed changes to the methodology for setting the AEWRs in the 2019 NPRM. The commenters represented a wide range of stakeholders interested in the H–2A program, and their comments were both in support of and in opposition to the proposed changes to establish occupation-specific hourly AEWRs for non-range occupations.[17]

As the Department worked on drafting a comprehensive H–2A program final rule, USDA publicly announced, on September 30, 2020, its intent to cancel the planned October 2020 data collection and November 2020 publication of the Agricultural Labor Survey (ALS) and Farm Labor Reports (better known as the FLS).[18] The USDA's announcement created uncertainty regarding the annual average hourly gross wage rates for the six SOC codes covering field and livestock workers (combined) within the FLS that were necessary for the Department to establish and publish the hourly AEWRs for the next calendar year (CY) period on or before December 31, 2020, under the existing 2010 Final Rule methodology. To ensure AEWRs for each State were published before the end of CY 2020, the Department published the 2020 AEWR Final Rule on November 5, 2020, with an effective date of December 21, 2020.[19] In revising the AEWR methodology in the 2020 AEWR Final Rule, the Department acknowledged that USDA had suspended FLS data collection on at least two prior occasions, and that the USDA decision to cancel both the October data collection and the related November 2020 report was the subject of ongoing litigation.[20] In addition, the Department took into account the public comments received in response to the proposal to revise the AEWR methodology in the 2019 NRPM.

The 2020 AEWR Final Rule set the 2021 AEWR for the six SOC codes covering field and livestock workers (combined) at the 2020 AEWR rates, which were based on results from FLS wage data published in November 2019, and provided for those AEWRs to adjust annually, starting at the beginning of CY 2023, using the BLS Employment Cost Index (ECI), Wages and Salaries. For all other SOC codes, and for geographic areas not included in the FLS, the 2020 AEWR Final Rule set the 2021 AEWR at the statewide annual average hourly gross wage for the SOC code reported by the OEWS survey or, where a statewide average hourly gross wage is not reported, the national average hourly gross wage for the SOC code reported by the OEWS survey, to be adjusted annually based on the OEWS survey.

Litigation challenging USDA's cancellation of the October data collection and November publication of the FLS followed USDA's September 30, 2020, announcement. On October 28, 2020, in *United Farm Workers, et al.* v. *Perdue, et al.,* No. 20–cv–01452 (E.D. Cal. filed Oct. 13, 2020), the court preliminarily enjoined USDA from giving effect to its decision to cancel the October 2020 FLS data collection and cancel its November 2020 publication of the FLS.[21] The USDA National

FLS. Most recently updated on May 25, 2022, this document may be accessed at *https://www.nass.usda.gov/Publications/Methodology_and_Data_Quality/Farm_Labor/05_2022/fmlaqm22.pdf.*

[13] Range occupations are subject to a minimum monthly AEWR, as set forth in 20 CFR 655.211(c).

[14] *See* 84 FR 36168, 36171.

[15] For more information about the states and regions in the FLS survey, you may visit the following web page: *https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/#:~:text=The%20Farm%20Labor%20Survey%20provides%20the%20basis%20for,turn%2C%20provide%20the%20basis%20for%20annual%20average%20estimates.*

[16] *See* 84 FR 36168, 36180–36185.

[17] A detailed discussion of the public comments as well as further background on the 2019 NPRM, specifically related to the hourly AEWR determinations, was included in the Department's 2020 AEWR Final Rule and will not be restated here. *See* 85 FR 70445, 70447–70465 (Nov. 5, 2020). The public comments are accessible in the public docket in *regulations.gov*. See *https://www.regulations.gov/document/ETA-2019-0007-0002.*

[18] *Notice of Revision to the Agricultural Labor Survey and Farm Labor Reports by Suspending Data Collection for October 2020,* 85 FR 61719 (Sept. 30, 2020); USDA NASS, *Guide to NASS Surveys: Farm Labor Survey, https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor* (last modified Dec. 10, 2020); *see also* USDA NASS, *USDA NASS to Suspend the October Agricultural Labor Survey* (Sept. 30, 2020), *https://www.nass.usda.gov/Newsroom/Notices/2020/09-30-2020.php.*

[19] The Department's 2020 H–2A AEWR Final Rule revised the methodology by which the Department determines the hourly AEWR for non-range agricultural occupations, including the corresponding definition of the AEWR. The 2020 H–2A AEWR Final Rule addressed only that aspect of the 2019 NPRM, while the Department's Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 87 FR 61660 (Oct. 12, 2022) (2022 Final Rule) addressed the remaining aspects of the 2019 NPRM.

[20] 85 FR 70445, 70446.

[21] *United Farm Workers,* 2020 WL 6318432 (E.D. Cal. Oct. 28, 2020); *see also United Farm Workers*

Agricultural Statistics Service (NASS) therefore proceeded with its data collection, and the USDA published the FLS report on February 11, 2021.[22] Meanwhile, the Department's 2020 AEWR Final Rule was challenged in *United Farm Workers, et al.* v. *Dep't of Labor, et al.,* No. 20–cv–01690 (E.D. Cal. filed Nov. 30, 2020). On December 23, 2020—two days after that rule went into effect—the court issued an order preliminarily enjoining the Department from further implementing it.[23] Additionally, the court issued a supplemental order on January 12, 2021, requiring the Department to publish the AEWRs for 2021 in the **Federal Register** on or before February 25, 2021, using the methodology set forth in the 2010 Final Rule, and to make those AEWRs effective upon their publication.[24] Pursuant to the court's January 12, 2021, supplemental order, the Department published the 2021 AEWRs using the 2010 Final Rule methodology on February 23, 2021, with an immediate effective date.[25]

In its order preliminarily enjoining the Department from further implementing its 2020 AEWR Final Rule, the court recognized that the Department has broad discretion in determining the methodology for setting the AEWR so long as the Department's approach is sufficiently explained.[26] However, the court concluded that the plaintiffs were likely to succeed on their claims that the Department failed to justify freezing wages for two years, and failed to properly analyze the economic impact of the 2020 Final AEWR Rule on farmers.[27] [28] In addition, the court found that, although the Department recognized ''the importance of the AEWR reflecting the market rate'' throughout the 2020 AEWR Final Rule,[29] the plaintiffs were likely to succeed on their claim that the Department failed to adequately explain its departure from its longstanding use of the FLS—which plaintiffs had asserted better reflected such market rates—to determine AEWRs for the field and livestock workers (combined) category.[30]

In its decision granting plaintiffs' motion for summary judgment, the court adopted its rationale from its decision granting the requested preliminary injunction in holding that the 2020 Final Rule (1) did not protect against adverse effect as required by the INA, (2) did not adequately explain the 2-year wage freeze, and (3) failed to properly analyze the economic impact of the rule.[31] Accordingly, the court vacated the 2020 Final AEWR Rule, and remanded to the Department for further rulemaking consistent with the court's opinion.[32]

D. Implementation of This Final Rule

Any job order submitted to the OFLC National Processing Center (NPC) in connection with an *Application for Temporary Employment Certification* for H–2A workers and before the effective date of this final rule will be processed using the 2010 Final Rule methodology, under which the AEWR for all non-range H–2A job opportunities is equal to the annual average hourly gross wage rate for field and livestock workers (combined) in the State or region as reported by FLS.[33] In addition, if an updated AEWR is published by the OFLC Administrator in the **Federal Register** during the work contract period for a temporary agricultural labor certification processed using the 2010 Final Rule methodology, and the updated AEWR is higher than the highest of the previous AEWR, the prevailing wage, the agreed-upon collective bargaining wage, or the Federal or State minimum wage in effect at the time the work is performed, the employer must pay at least the updated AEWR upon the effective date published in the **Federal Register**, as required by 20 CFR 655.120.[34]

The methodology established by this final rule will apply to any job orders for non-range job opportunities submitted to the NPC in connection with an *Application for Temporary Employment Certification* for H–2A, as set forth in 20 CFR 655.121, on or after the effective date of this final rule, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under 20 CFR 655.134. In order for employers to understand their wage obligations upon the effective date of this final rule, the Department is listing the statewide AEWRs applicable to the field and livestock workers (combined) category pursuant to 20 CFR 655.120(b)(1)(i) of this final rule below and providing the URL that provides a search tool enabling interested parties to search by State and SOC code for the AEWR applicable to all other non-range job opportunities pursuant to 20 CFR 655.120(b)(1)(ii) of this final rule. In addition, the Department will post the AEWR applicable to each SOC code and geographic area contemporaneously with the publication of this final rule in the **Federal Register** on the OFLC website at *https://www.dol.gov/agencies/eta/foreign-labor/*. Employers will therefore have 30 days from the date of the publication of this final rule to understand their new wage obligations before they go into effect.

TABLE—HOURLY AEWRS DETERMINED UNDER § 655.120(b)(1)(i) EFFECTIVE ON OR AFTER MARCH 30, 2023

Alabama	$13.67
Alaska	17.21
Arizona	15.62
Arkansas	13.67
California	18.65
Colorado	16.34
Connecticut	16.95
Delaware	16.55
District of Columbia	20.33
Florida	14.33
Georgia	13.67
Guam	10.40
Hawaii	17.25
Idaho	15.68
Illinois	17.17
Indiana	17.17
Iowa	17.54
Kansas	17.33
Kentucky	14.26
Louisiana	13.67
Maine	16.95
Maryland	16.55

v. *Perdue,* 2020 WL 6939021 (E.D. Cal. Nov. 25, 2020) (denying USDA's motion to modify or dissolve the injunction).

[22] *See* USDA, Farm Labor Report (Feb. 11, 2021), *https://downloads.usda.library.cornell.edu/usda-esmis/files/x920fw89s/f7624565c/9k420769j/fmla0221.pdf; see also Notice of Reinstatement of the Agricultural Labor Survey Previously Scheduled for October 2020,* 85 FR 79463 (Dec. 10, 2020).

[23] *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* 509 F. Supp. 3d 1225 (E.D. Cal. 2020).

[24] Supplemental Order Regarding Preliminary Injunctive Relief, *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* No. 20–cv–1690 (E.D. Cal. Jan. 12, 2021), ECF No. 39.

[25] *See Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2021 Adverse Effect Wage Rates for Non-Range Occupations,* 86 FR 10996 (Feb. 23, 2021).

[26] *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* 509 F. Supp. 3d 1225, 1241 n.5 (E.D. Cal. 2020).

[27] *Id.* at 1241–42.

[28] *Id.* at 1243–45.

[29] *Id.* at 1241 (internal quotation and citation omitted).

[30] *Id.* at 1247–48.

[31] *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* No. 20–cv–01690–DAD–BAK, 2022 WL 1004855, at *6–7 (E.D. Cal. April 4, 2022).

[32] *Id.*

[33] Although a job order filed before the effective date of this rule is not subject to the AEWR methodology of this rule, it may be subject to the same AEWR as a job order for field and livestock workers filed on or after the effective date of this rule because an AEWR determined under the 2010 Final Rule's AEWR methodology is the same as an FLS-based AEWR determined under paragraph (b)(1)(i)(A) of this final rule.

[34] *See* 20 CFR 655.120(c) of the 2010 Final Rule (providing for AEWR adjustments ''at least once each calendar year'').

TABLE—HOURLY AEWRS DETERMINED UNDER § 655.120(b)(1)(i) EFFECTIVE ON OR AFTER MARCH 30, 2023—Continued

Massachusetts	16.95
Michigan	17.34
Minnesota	17.34
Mississippi	13.67
Missouri	17.54
Montana	15.68
Nebraska	17.33
Nevada	16.34
New Hampshire	16.95
New Jersey	16.55
New Mexico	15.62
New York	16.95
North Carolina	14.91
North Dakota	17.33
Ohio	17.17
Oklahoma	14.87
Oregon	17.97
Pennsylvania	16.55
Puerto Rico	9.17
Rhode Island	16.95
South Carolina	13.67
South Dakota	17.33
Tennessee	14.26
Texas	14.87
Utah	16.34
Vermont	16.95
Virgin Islands	13.24
Virginia	14.91
Washington	17.97
West Virginia	14.26
Wisconsin	17.34
Wyoming	15.68

Hourly AEWRs determined under § 655.120(b)(1)(ii) effective on or after March 30, 2023 are available for each SOC code and geographic area using the search tool or searchable spreadsheet that may be accessed here: *https://flag.dol.gov/.*

When the OFLC Administrator publishes subsequent updates to the AEWRs in the **Federal Register**, as required by 20 CFR 655.120(b)(2) of this final rule, the adjusted AEWRs will be effective on the date specified in the **Federal Register** notice.[35] As of the effective date of an AEWR adjustment, the updated AEWR applies to both H–2A applications in process (*e.g.,* filed, but no final determination made; or those with a final determination, but under appeal), and certified H–2A applications that remain in effect.[36] If the AEWR is adjusted during a work contract period, the employer must reassess its wage obligation(s) under 20 CFR 655.122(l). If the new AEWR applicable to the employer's certified job opportunity is higher than the highest of the previous AEWR, the current prevailing hourly wage rate, the current prevailing piece rate, the current agreed-upon collective bargaining wage, the current Federal minimum wage rate, or the current State minimum wage rate, the employer must pay that adjusted AEWR upon the effective date of the new rate. *See* 20 CFR 655.120(b)(3). For a job order subject to the 2022 Final Rule, if the adjusted AEWR is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order. *See* 20 CFR 655.120(b)(4).

II. Summary of Proposed Changes to the AEWR Methodology and the Changes Adopted in This Final Rule

On December 1, 2021, the Department issued the 2021 AEWR NPRM announcing its intent to amend the regulations governing the methodology by which it determines the hourly AEWRs for non-range H–2A occupations (*i.e.,* all H–2A occupations other than herding and production of livestock on the range). *See* 86 FR 68174 (Dec. 1, 2021). Specifically, the Department proposed to use a single FLS-based AEWR for most agricultural work performed in a given State (*i.e.,* work performed in the ''field and livestock workers (combined) occupational group'' reported by FLS). Only in the event FLS did not report a wage finding for the field and livestock workers (combined) occupational group (*e.g.,* in Alaska, where FLS does not survey) would the OEWS serve as a wage source for setting the single statewide AEWR applicable to H–2A job opportunities for field and livestock workers (combined) in that State or region, or equivalent district or territory. For each SOC code not included in the field and livestock workers (combined) occupational group reported by FLS, the Department proposed to use SOC-specific OEWS-based AEWRs in each State or equivalent district or territory. Additionally, for agricultural labor or services to be performed by H–2A workers that cannot be encompassed within a single SOC code, the Department proposed to determine the AEWR using the SOC code assigned to the employer's job opportunity with the highest applicable AEWR.

In addition, the Department proposed to continue to adjust the AEWRs for each State or region at least once in each calendar year. The Department explained that because the FLS is released in or around November and the OEWS is released in or around June, the Department intended to update the AEWRs through two separate annual announcements in the **Federal Register**. One **Federal Register** notice would announce annual adjustments to the AEWRs based on the FLS, effective on or about January 1, and a second **Federal Register** notice would announce annual adjustments to the AEWRs based on the OEWS survey, effective on or about July 1.

Finally, the Department proposed to revise the definition of AEWR. The proposed definition clarified that the Department uses a different methodology to establish AEWRs for range occupations (*i.e.,* job opportunities processed under the Department's herding and production of livestock regulations at 20 CFR 655.200 through 655.235) than it uses to establish AEWRs for non-range occupations. The Department explained that a different methodology is required to establish the national monthly AEWR for range occupations due to the nature of range occupations (*i.e.,* occupational requirements for workers to be on call 24 hours per day, 7 days a week, to perform herding and production of livestock duties on the range).

The Department invited interested parties to submit written comments on all aspects of this proposal. Because the 2020 AEWR Final Rule had been preliminarily enjoined before the NPRM for this Final Rule was published, there was uncertainty as to whether the 2020 AEWR Final Rule would be vacated prior to the issuance of this Final Rule. The Department therefore sought comment on all aspects of the NPRM for this Final Rule that mirrored provisions in the 2020 AEWR Final Rule. In addition, the Department requested comments on use of the FLS and OEWS surveys and the conditions under which each survey should be used to establish the AEWR. For example, the Department sought comments on the continued use of a single statewide hourly AEWR for the field and livestock worker (combined) category, rather than statewide AEWRs for each SOC code within the FLS field and livestock workers (combined) category. In addition, the Department requested comments on use of the OEWS survey to establish the AEWR for the field and livestock workers (combined) category in the absence of the FLS or where the FLS does not report a wage finding for these SOC codes in a particular State or region or equivalent district or territory, and also sought comments on use of the OEWS to establish AEWRs for all job opportunities that do not fall within the

[35] *See* 20 CFR 655.120(b)(3) of the 2022 Final Rule, 87 FR at 61796 (providing that ''the employer must pay at least the updated AEWR upon the effective date of the updated AEWR published in the **Federal Register**'').

[36] *See* 20 CFR 655.120(a) (requiring the employer to ''offer, advertise in its recruitment, and pay a wage that is at least the highest of'' the applicable wage sources) and 20 CFR 655.120(b)(3) and 655.122(l) (requiring the employer to increase a worker's pay due to an AEWR adjustment after certification, if applicable).

FLS field and livestock workers (combined) occupational group.

The Department specifically stated that it was not considering eliminating the AEWR or changing the AEWR's role in determinations of an employer's required minimum wage rate in the H–2A program, for reasons explained at length in prior rulemakings, including in the 2020 AEWR Final Rule and 2010 Final Rule.

The comment period closed on January 31, 2022.

A. General Overview of Comments

The Department received a total of 92 public comments in docket number ETA–2021–0006 in response to the 2021 AEWR NPRM prior to the comment submission deadline. The commenters represented a range of stakeholders from the public, private, and not-for-profit sectors. The Department received comments from a geographically diverse cross-section of stakeholders. These commenters included workers' rights advocacy organizations, farm owners, trade associations for agricultural products and services, not-for-profit organizations interested in agricultural issues, and other organizations with an interest in farming, ranching, and other agricultural activities. Public sector commenters included State agencies, while private sector commenters included business owners, employer representatives, workers' rights advocacy groups, public policy organizations, and trade associations interested in agricultural and immigration-related issues. The Department recognizes and appreciates the value of comments, ideas, and suggestions from all those who commented on the proposal, and this final rule was developed after review and consideration of all public comments timely received in response to the 2021 AEWR NPRM.

Among the comments received, the Department received 16 requests for an extension of the comment period for the 2021 AEWR NPRM.[37] While the Department appreciates the issues raised concerning the public's opportunity to examine the rule and comment, the Department decided not to extend the comment period and posted its response in the rule's electronic docket (ETA–2021–0006–0046) for public viewing. In that response, the Department explained that the proposed changes would have an economic impact on the regulated community, and the 60-day comment period provided was consistent with the comment periods provided in rules on similar subject matter that were more comprehensive and complex. For example, the Department published the 2019 NPRM, which proposed comprehensive revisions to the entire H–2A regulatory framework, including revisions to the AEWR methodology that were more complex than those proposed in the 2021 AEWR NPRM. The 2019 NPRM received extensive public review and comments within the 60-day comment period even though the Department declined at that time to extend the comment period.

Most commenters specifically addressed one or more of the Department's proposed changes to the methodology used to determine the AEWR in the H–2A program, such as the Department's proposed use of FLS and OEWS as the wage sources for setting AEWRs and conditions under which each source would be used to determine the AEWR for a particular job opportunity. These comments are discussed in the subject-by-subject analysis below.

Some commenters expressed support or opposition, generally, regarding the Department's rulemaking efforts to modify the AEWR methodology, regarding the AEWR, itself, or regarding the Department's balancing of employer and worker interests. For example, a variety of commenters asserted that there is no reason to change the methodology, or objected to the proposed changes by themselves without balancing them with other program changes or addressing the undocumented workforce. Some commenters expressed a preference for the current methodology (*i.e.,* the 2010 Final Rule methodology) if the only alternative is the proposed 2020 AEWR Final Rule methodology. Comments from employers, trade associations, a law firm, and a government agency objected to both the 2010 AEWR methodology and the AEWR methodology proposed in the 2021 AEWR NPRM. In general, these commenters asserted that both the 2010 and 2021 (proposed) AEWR methodologies were disconnected from agricultural industry realities, such as labor shortages despite wage increases; the impact of labor and program costs on agricultural operations' viability and competitiveness in interstate and international markets; whether employers are able to absorb labor costs; and the impact of such costs on job availability, downstream industry, and food cost and supply.

Other commenters expressed general concern about increases in required wage rates or asserted that the AEWR is too high, comparing it to the minimum wage rate or to general wage trends in the U.S. economy, using the ECI for comparison. Some commenters objected to the Department setting a wage floor, rather than permitting the employer to offer a wage based on work performance or experience, knowledge, loyalty, and contribution to the employer's operation. In contrast, a nonprofit public policy advocacy organization observed that farmworkers are not receiving unusually high wages or wages that are increasing at an unreasonable rate; rather, its review of wage data indicated that farmworkers are among the lowest-paid workers in the United States—lower than other comparable low-paid workers—and the rate of farmworker wage changes over time has been reasonable and consistent with labor market trends, with the impact on farmers offset by rising productivity and/or output prices.

Although the Department is sensitive to the commenters' general concerns, the Department notes the purpose of this rulemaking effort is to establish an AEWR methodology that guards against potential wage depression among similarly employed workers in areas where employers hire H–2A workers in accordance with H–2A program requirements. As stated above, the AEWR is a longstanding regulatory mechanism the Department uses to certify that the employment of H–2A workers will not adversely affect the wages of agricultural workers in the United States similarly employed. In addition, the Department's effort to improve the AEWR methodology through rulemaking is one part of the Department's larger efforts to update and improve the H–2A program within the scope of the Department's authority. Throughout the course of several rulemakings, the Department has articulated reasons for changing the AEWR methodology, including geographic limitations of the FLS survey and the need to address potential adverse effect on the wages of similarly employed workers in occupations outside the field and livestock workers (combined) occupations. The Department responds to specific comments about the proposed changes adopted by this final rule in the subject-by-subject analysis in Section II.B. Before beginning the subject-by-subject analysis, however, the Department here clarifies three significant

[37] The Department also received an *ex parte* communication during the comment period seeking clarification on one of the regulatory alternatives mentioned in the NPRM. The Department responded to the communication and posted the correspondence (ETA–2021–0006–0013) on the public docket associated with this rulemaking.

misconceptions about the 2021 AEWR NPRM reflected in the comments.

First, one commenter objected to the Department's inclusion of any aspect of the 2020 AEWR Final Rule, noting that the rule was enjoined in Federal court. As discussed above, although the Federal court's decision determined that specific aspects of the methodology adopted in the 2020 AEWR Final Rule were inconsistent with the Department's mandate to ensure employment of foreign workers does not adversely affect the wages and working conditions of workers in the United States similarly employed, the Department reevaluated the 2020 AEWR Final Rule's provisions, in conjunction with the Federal court's findings, and proposed only aspects of the 2020 AEWR Final Rule that are consistent with the Department's objectives and the court's opinion. The Department solicited public comment on the specific aspects of the 2020 AEWR Final Rule the Department proposed to retain, and these comments are addressed in subject-by-subject analysis in Section II.B.

Second, some commenters misunderstood, or requested clarification regarding, the Department's statement in the 2021 AEWR NPRM that the proposed AEWR methodology would not change labor costs or wage requirements for the ''vast majority'' of H–2A job opportunities. The Department appreciates the opportunity to clarify. The Department proposed to retain the 2010 Final Rule AEWR methodology for field and livestock workers (combined) job opportunities, whenever the FLS reports the average hourly gross wage rate for field and livestock workers (combined) in a State or region. Apart from three instances in the past three decades in which USDA suspended the survey, which are discussed above, the FLS has consistently collected and reported wage data for field and livestock workers (combined) in 49 States. Thus, the Department's proposal would not change the methodology by which the AEWRs are established for field and livestock workers (combined) job opportunities in most of the United States. In addition, the FLS field and livestock workers (combined) category reports aggregate wage data covering six SOC titles and codes: Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45–2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45–2093); Agricultural Equipment Operators (45–2091); Packers and Packagers, Hand (53–7064); Graders and Sorters, Agricultural Products (45–2041); and All Other Agricultural Workers (45–2099). Based on the Department's program estimates, 98 percent of H–2A job opportunities are classified within these six SOC titles and codes.[38] The Department acknowledges that some of the job opportunities within that 98 percent may involve some work that cannot be classified solely within the field and livestock workers (combined) occupational group and, instead, constitutes a combination of job duties covering multiple SOC codes subject to different AEWRs under the proposed methodology. However, as clarified in the subject-by-subject analysis in Section II.B, the Department anticipates the AEWRs established for the vast majority of H–2A job opportunities will not change under this final rule, and will impact H–2A wage requirements only for: (1) the small percentage of job opportunities that cannot be encompassed within the six SOC codes and titles in the FLS field and livestock workers (combined) reporting category, and (2) the small number of field and livestock workers (combined) job opportunities in States or regions, or equivalent districts or territories, for which the FLS does not report a wage (*e.g.,* Alaska and Puerto Rico).

Third, comments reflecting employers' interests asserted a variety of objections to the Department continuing to require employers to adjust wage offers and rates of pay due to annual AEWR adjustments. An employer and a trade association expressed concern with wage increases after growers calculate payroll and receive loans for their production year or crop loan cycle, while a law firm expressed concern with wage increases after agricultural construction companies negotiate multiyear contracts with growers. An agent stated that AEWR adjustments appeared to require wage increases after the State Workforce Agency (SWA) has accepted a job order. Trade associations and employers objected to wage increases due to AEWR adjustments as infringing on negotiated employment contract terms. The Department appreciates the opportunity to clarify that wage requirement adjustments based on annual AEWR adjustments are not new for employers who choose to use the H–2A program. The 2010 H–2A Final Rule specified the employer's obligation to pay the wage rate ''in effect at the time work is performed,'' which required wage offer and payroll adjustments if the Department provided notice of an updated AEWR or prevailing wage determination higher than an employer's current wage offer or pay rate.[39] In the 2022 Final Rule, the Department clarified and codified in 20 CFR 655.120(b)(3) and 655.120(c)(3) an employer's wage adjustment obligation in the event of an AEWR or prevailing wage determination update.

The Department appreciates all of the comments received, which reflect the importance and complexity of the Department's objective—to strike a reasonable balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed—and its responsibility to certify H–2A employment only where the Department determines such employment will not adversely affect the wages of workers in the United States similarly employed. The Department proposed changes to the AEWR methodology in the 2021 AEWR NPRM after reflection on recent rulemaking, related litigation, and the need to strengthen wage protections. Having now considered the public comments received on the proposed methodology, the Department continues to believe that the changes proposed in the 2021 NPRM best strike the balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages of workers in the United States similarly employed. Accordingly, the Department is adopting the methodology proposed in the 2021 AEWR NPRM without change.

B. Definition of AEWR

The Department proposed to define AEWR as ''[t]he wage rate published by the OFLC Administrator in the **Federal Register** for non-range occupations as set forth in § 655.120(b) and range occupations as set forth in § 655.211(c),'' mirroring the definition in the 2020 AEWR Final Rule.

One commenter opposed the use of any part of the 2020 AEWR Final Rule,

[38] Based on a review of H–2A applications certified during the 5-year period of October 1, 2017, through September 1, 2022, OFLC certified 76,547 H–2A applications covering 1,484,699 worker positions across all SOCs. Of the total worker positions certified, 1,459,792 (98.3%) worker positions were certified in the following six SOCs comprising the field and livestock workers (combined) category that the FLS reports: 3,056 worker positions as Graders and Sorters, Agricultural Products (45–2041); 86,157 worker positions as Agricultural Equipment Operators (45–2091); 1,302,604 worker positions as Farmworkers and Laborers, Crop, Nursery and Greenhouse (45–2092); 58,741 worker positions as Farmworkers, Farm, Ranch, and Aquacultural Animals (45–2093); 437 worker positions as Packers and Packagers, Hand (53–7064); and 8,797 worker positions as Agricultural Workers, All Other (45–2099). See *https://www.dol.gov/agencies/eta/foreign-labor/performance* (accessed September 12, 2022).

[39] *See* 75 FR at 6901.

including the definition of AEWR, because of the litigation history in Federal court. The commentor misinterpreted the impact of the litigation, as the court's decision vacating the 2020 rule was unrelated to the definition of AEWR, and the court's vacatur of the 2020 rule does not prevent the Department from proposing and subsequently adopting the same definition of AEWR in this rulemaking. The Department has reevaluated the definition of AEWR and determined that the definition adopted in the 2020 AEWR Final Rule and proposed in the 2021 AEWR NPRM remains consistent with the Department's objectives.

The same commenter suggested that the Department, instead, continue to use the AEWR definition provided in the 2010 Final Rule, and wait for the FLS to adjust its methodology, an endeavor the commentor asserted is underway. The Department declines to adopt this suggestion, as the 2010 Final Rule definition [40] is inconsistent with the methodology adopted in this final rule. In addition, the 2010 Final Rule definition failed to account for the distinct AEWR methodology applicable to H–2A range occupations, implemented in 2015.

C. AEWR Methodology

1. Wage Sources Used To Determine the AEWR

The Department proposed a contingency approach to calculate the AEWR in which the FLS is the primary data source for the overwhelming majority of workers with backup wage sources for each occupational classification grouping based on availability of wage source data. The Department recognizes that having contingencies in place when data are not available is a practical necessity in certain circumstances to determine an AEWR. Thus, the Department proposed to implement secondary and, in some instances, tertiary safeguards to determine the AEWR when data is not available using the primary wage source in a particular State or region.

For the field and livestock workers (combined) occupational group within a given State or region, or equivalent district or territory, the Department proposed to determine the AEWR using, as its primary wage source, the annual average combined hourly gross wage from the USDA's NASS quarterly FLS for the State or region. Hourly wage rates are calculated based on employers' reports of total wages paid and total hours worked for all hired workers during the survey reference week each quarter. In the event FLS data is not available to calculate the AEWR for field and livestock workers in a particular State or region, or equivalent district or territory, the Department proposed to determine the AEWR using, as its secondary wage source, the OEWS statewide annual average hourly gross wage for the field and livestock workers (combined) category. In the event that neither the FLS nor the OEWS report a wage for the field and livestock workers (combined) category for a State, or equivalent district or territory, the Department proposed to determine the AEWR for the field and livestock workers (combined) category using, as its tertiary wage source, the OEWS national annual average hourly gross wage for the field and livestock workers (combined) category.

For all SOC codes other than the six covering field and livestock workers (combined), the Department proposed to determine the AEWR using, as its primary wage source, the statewide annual average hourly gross wage for the SOC code for the State, or equivalent district or territory, as reported by the OEWS survey. In the event the OEWS survey does not report a statewide annual average hourly gross wage for the SOC code, the Department proposed to determine the AEWR for that State, or equivalent district or territory, using as its secondary wage source, the national annual average hourly gross wage for the SOC code, as reported by the OEWS survey. After considering public comments discussed in detail below, the Department has adopted these proposals without change.

a. The Department Will Use the FLS To Establish the AEWR for Field and Livestock Worker Job Opportunities in the Vast Majority of Cases

The Department received some comments in support of its proposal to continue using the FLS to determine the AEWR for H–2A job opportunities for field and livestock workers. Several comments noted that the FLS provides the most accurate and reliable source of wage data to represent the field and livestock workers (combined) category. A trade association stated that the FLS is the only wage survey that collects data directly from farm and ranch employers. Additional comments in support of using the FLS over other data sources noted that the FLS most accurately captures seasonal peaks in farmworker wages by measuring wages quarterly (January, April, July, and October), and provides the most up-to-date data on worker wages by using only single-year data. One of these commenters asserted that the Department's current proposal is not too burdensome or expensive to use and it provides consistency for employers and workers because—in most cases—the AEWR methodology proposed is the same methodology the Department has used for more than three decades.

The Department also received numerous comments opposing its proposal to continue using the FLS to determine the AEWR for H–2A applications for job opportunities in the field and livestock workers (combined) occupational group for various reasons. Several commenters asserted that the Department's use of the FLS to determine the AEWR is arbitrary and capricious and does not meet the Department's statutory obligations. A trade association stated that the proposal is ''likely to cost exponentially more than what the Department estimates to the users of the H–2A program and will most certainly drive some to shutter operations.'' Other commenters also expressed concern that using the FLS to determine the AEWR in the H–2A program would lead to curtailed operations, more automated processes, or closing farms. These commenters suggested that using the FLS would result in diminished job opportunities and an inadequate labor supply. Many of these commenters provided alternative suggestions, such as setting a static wage rate of 115 percent of the Federal or State minimum wage, or adopting the Canadian model of farmworker wage setting (without providing any information regarding that model), which are addressed in the discussion of alternative methodology suggestions in this preamble, below.

In response to commenters' concerns that the use of the FLS to determine the AEWR for H–2A job opportunities in the field and livestock workers (combined) occupational group will result in operational and labor supply issues for employers who choose to participate in the H–2A program, the Department reiterates that, with the exception of brief periods, it has used FLS data to establish the AEWR for such field and livestock job opportunities since 1987. While the Department is sensitive to the concerns raised, continuing to use FLS data will not introduce new operational or labor supply issues. In carrying out its statutory responsibility under the INA, the Department seeks to balance employers' and workers' interests by, among other things, using the best available actual wage data for workers in the United States similarly employed

[40] *See* 75 FR 6883, 6960 (defining AEWR as ''[t]he annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the USDA based on its quarterly wage survey'').

(when available) to determine the AEWR.

As discussed in the legal authority section above (Section I.A), the Department has discretion to determine the methodological approach that best allows it to meet its statutory mandate.[41] The Department continues to believe the FLS is the best available wage source for establishing AEWRs covering the vast majority of H–2A job opportunities (*i.e.,* the field and livestock workers (combined) category), whenever such data is available. The FLS is the most comprehensive survey of wages paid by farmers and ranchers.[42] The data collected in the FLS allows the Department to establish AEWRs using the most current wage rates, which protects workers in the United States similarly employed against adverse effects on their wages resulting from the employment of foreign workers willing to work for less.

In addition, the Department considers the broad geographic scope of the survey an advantage of the FLS. The FLS consistently collects sufficient data to generate a wage finding for the field and livestock workers (combined) category in each State or region surveyed, making it a reliable source of wage data year-to-year. As explained in the 2021 AEWR NPRM, the geographic scope of the FLS, covering California, Florida, and Hawaii, and 15 multi-State groupings for other States, and the statewide and regional wages issued ''provide[s] protection against wage depression that is most likely to occur in particular local areas where there is a significant influx of foreign workers.'' [43] The broad geographic scope of the FLS is also ''consistent with both the nature of agricultural employment and the statutory intent of the H–2A program,'' reflecting the migratory pattern of many workers providing agricultural labor or services across wide areas, and Congress's recognition of ''this unique characteristic of the agricultural labor market with its statutory requirement that employers recruit for labor in multi-State regions as part of their labor market before receiving a labor certification . . . .'' [44] The Department continues to believe that use of FLS data serves to prevent adverse effect on the wages of farmworkers in the United States by establishing a prevailing wage defined over a broader geographic area and over a broader occupational span (*i.e.,* the six SOC codes covering all field and livestock workers (combined), rather than a narrow crop or job description).[45] For similar reasons, the Department explained that the FLS-based AEWR may serve ''to mobilize domestic farm labor in neighboring counties and States to enter the subject labor market over the longer term and obviate the need to rely on . . . foreign labor on an ongoing basis.'' [46]

Several commenters expressed concerns related to the accuracy, reliability, and future availability of FLS data. One of these commenters suggested that the Department's use of the FLS is ''inconsistent, difficult to measure, and should be discontinued'' as a wage source to calculate the AEWR, without clearly explaining its characterization of the FLS as ''inconsistent'' and ''difficult to measure.'' In addition, this commenter asserted the FLS ''artificially inflates the reported wage'' both by not differentiating between the U.S. workforce and H–2A workforce—thereby creating an echo chamber of rising wages—and by including incentive pay such as piece rate, bonuses, and overtime. Noting that the FLS is used for various purposes other than determining AEWRs, two commenters suggested the Department should ''ensure it only uses the data that applies to its use . . .''. Another commenter suggested the Department should coordinate with the USDA to ensure that FLS data is accurate and does not result in creation of an artificial wage rate. To the extent the commenters suggested the Department change the FLS' methodology, those comments are beyond the scope of the present rule, as well as beyond the Department's authority. Regarding the comments directed toward the Department's continued reliance on the FLS to determine the AEWR and the value of the FLS for that purpose, the Department responds in this section.

The USDA has conducted the FLS since 1910, and has developed extensive expertise analyzing, measuring, and assessing the accuracy and reliability of its annual wage estimates.[47] USDA NASS publishes FLS data semiannually in May and November in the Farm Labor Report (FLR).[48] The May report includes employment and wage estimates based on January and April reference weeks, and the November report includes estimates based on July and October reference weeks. In each case, the reference week is the Sunday to Saturday period that includes the 12th day of the month. The November report also provides annual data based on quarterly estimates. The Department uses the annual data from the November report to determine AEWRs.

The scope, purpose, and statistical methodology for each FLR is extensively outlined in NASS's ''Methodologies and Quality Measures Report,'' which is published concurrently with each FLR publication. In the ''Methodologies and Quality Measures Report,'' the NASS states that ''the employment and wage estimates published support USDA and DOL programs'' and inform other ''government agencies, educational institutions, farm organizations, and private sector employers of farm labor.'' [49] Each FLR contains specific information about the types and purposes of the statistical methods used for analysis of the data collected in that round of the FLS. Additionally, each FLR outlines the quality metrics for that round of the FLS, including the sample size, response rate and outliers, calibration for survey nonresponses, and coefficient of variation for each survey. For the final step in the survey process, NASS convenes farm labor experts from its Agricultural Statistics Board (ASB), a panel of senior statisticians and program specialists, to perform a national review, reconcile the State-level evaluations to regional and national estimates, and prepare the official findings for release.

Some commenters stated that FLS data should not be used to determine AEWRs because average gross wage data is a byproduct of the survey instrument, and ''the survey is intended to identify the number of workers employed in the U.S.'' One commenter stated, ''the U.S. Department of Agriculture has indicated that using the FLS as a means to manufacture a wage rate is a misuse of its survey,'' based on a footnote citation to a ''Letter from Secretary Perdue.'' This commenter's assertion and the reference to a letter from former Secretary of Agriculture Sonny Perdue were echoed by several other commenters. The Department notes that; however, no commenter included a letter or statement from former Secretary Perdue and the Department has not identified such a statement in its research. In any event, even if such a

[41] *See AFL–CIO* v. *Dole,* 923 F.2d 182, 187 (D.C. Cir. 1991); *AFL–CIO* v. *Brock,* 835 F.2d 912, 915 (D.C. Cir. 1987).

[42] 85 FR 70445, 70458 (Nov. 5, 2020) (AEWR 2020 Final Rule); 75 FR 6883, 6898–6899 (Mar. 15, 2010) (AEWR 2010 Final Rule).

[43] 86 FR 68174, 68180 (Dec. 1, 2021).

[44] 75 FR 6883, 6899 (Mar. 15, 2010).

[45] *Id.*

[46] *Id.*

[47] 86 FR 40802 (July 29, 2021).

[48] *See* USDA NASS, *Surveys: Farm Labor, https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/.*

[49] *Farm Labor Methodology and Quality Measures (May 2022),* USDA, National Agricultural Statistics Service (May 25, 2022) *https://www.nass.usda.gov/Publications/Methodology_and_Data_Quality/Farm_Labor/05_2022/fmlaqm22.pdf* at 1.

statement had been made, it would not affect the Department's decision to utilize the FLS, particularly in light of other statements that contradict any such statement. For example, a 2019 Memorandum of Understanding (MOU) between USDA and the Department explicitly acknowledged the Department's ''continued and recurring bona fide need for the information provided by the [FLS], which will allow [DOL] to produce the official AEWRs.'' [50] In enjoining the Department of Agriculture from suspending the 2020 FLS, a Federal district court cited this MOU, observing that ''USDA has recognized that FLS data is used . . . 'by farm worker organizations to help set wage rates and negotiate labor contracts as well as determine the need for additional workers.' '' [51] Subsequently, the Department of Agriculture issued a court-ordered notice of reinstatement of the Agricultural Labor Survey.[52]

Additionally, NASS itself recognizes on its website that ''the employment and wage estimates published in the Farm Labor report are used by Federal, State, and local government agencies; educational institutions; farm organizations; and private sector employers of farm labor.'' [53] One of the listed current uses of FLS data includes the Department's use of the ''annual weighted average hourly wage rate for field and livestock workers combined'' to set the AEWR in the administration of the H–2A program.[54] As the Department explains at length below and in prior rulemakings, ''only the FLS directly surveys farmers and ranchers and the FLS is recognized by the BLS as the authoritative source for data on agricultural wages.'' [55] As the Department has noted, BLS refers the public to USDA and NASS for statistics on U.S. agriculture employment and wages.[56] Therefore, the Department disagrees with the assertions made by these commenters.

Other commenters noted that the Department decided against using the FLS to determine the AEWR for range occupations, noting that ''the Department determined utilization of the FLS would harm herding operations by causing them to downsize or close altogether.'' The Department, however, issued separate regulations governing the employment and wages of foreign workers in jobs related to the herding or production of livestock on the range (*i.e.,* range occupations) in 2015,[57] in recognition of the unique nature of such occupations, which made it necessary to use a different AEWR methodology.[58] Such occupations are located in remote areas, and have nontraditional work schedules that generally require workers to be on call 24 hours per day, 7 days per week. Additionally, even prior to the 2015 Herder Final Rule, the Department generally relied on wage surveys, historically conducted by the SWAs, for range occupations. The nature of these occupations and scarcity of U.S. workers employed in such occupations made it difficult to conduct statistically valid wage surveys for these occupations, and the lack of adequate survey data ultimately resulted in 20 years of wage stagnation for workers in these range occupations. Due to the unique nature of the occupations, challenges in producing valid wage surveys, and the inadequacy of wages produced by these circumstances, the Department established a new methodology to determine a monthly AEWR for all range occupations.[59] In contrast, non-range occupations do not present these unique circumstances that rendered use of the FLS for range occupations inadequate. Additionally, as discussed below, the Department declines to adopt an AEWR methodology that incorporates a broad index like the ECI as it did in the 2015 Herder Final Rule.

b. The Department Will Use OEWS Data for Field and Livestock Workers (Combined) Only if FLS Data Is Not Available

As set forth above, the Department's preference is to use the FLS, whenever possible, to determine the AEWR for all job opportunities that fall within the FLS field and livestock workers (combined) category. The Department recognizes, however, that there may be instances in which the FLS is unavailable to determine the AEWR for some or all such workers. In such circumstances, the Department believes that it is appropriate to determine the AEWR using the next best alternative data source (*i.e.,* the OEWS), as discussed below.

In the event the FLS cannot report the annual average hourly gross wage for the field and livestock workers (combined) category in a particular geographic area (*e.g.,* in Alaska, which is not covered in FLS data) or in the unanticipated circumstance that the FLS survey becomes unavailable (*e.g.,* suspension of the survey), the Department proposed to use the OEWS to determine a statewide AEWR for the field and livestock workers (combined) category. The Department also proposed a tertiary safeguard if neither the FLS nor the OEWS survey reports a statewide annual average hourly gross wage for the field and livestock workers (combined) category in a particular State, or equivalent district or territory. In these instances, the Department proposed to use the OEWS survey's national annual average hourly gross wage for the field and livestock workers (combined) category to determine the AEWR in that State. After consideration of comments, discussed below, the Department adopts this proposal without change.

The Department received several comments opposed to use of the OEWS as a wage source to establish the AEWR for the field and livestock workers (combined) category, when the FLS is not available to do so. Some of these commenters generally opposed use of the OEWS to establish the AEWR or set a wage floor for primarily agricultural operations, while others expressed concern that use of the OEWS in these cases may disconnect the AEWR from actual market wages paid to workers employed on farms because the OEWS does not survey farms and ranches.

The Department appreciates the concerns of the commenters, but maintains that the OEWS is the best available alternative source of wage data to use to determine the AEWR for the field and livestock worker (combined)

[50] *United Farm Workers* v. *Perdue,* No. 1:20–cv–01452–DAD–JLT, 17–18 (E.D. Cal. Oct. 28, 2020) (citing USDA–DOL MOU at 2–6).

[51] *United Farm Workers* v. *Perdue,* No. 1:20–cv–01452–DAD–JLT, 17–18 (E.D. Cal. Oct. 28, 2020) (citing USDA–DOL MOU at 2–6 and 83 FR at 50632).

[52] 85 FR 79463 (December 10, 2020).

[53] *https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/.*

[54] *https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/.*

[55] 84 FR 36168, 36243 (Jul. 26, 2019); *See also* 85 FR 70445, 70473 (Nov. 5, 2020).

[56] 84 FR at 36182 (citing OEWS Frequently Asked Questions, *https://www.bls.gov/oes/oes_ques.htm,* which states, ''[f]or statistics on the U.S. agricultural sector, please visit the United States Department of Agriculture's National Agricultural Statistics Service program website.'').

[57] 2015 H–2A Herder Final Rule, 80 FR 62958. The Department recently rescinded § 655.215(b)(2) in a separate rulemaking. Final Rule, *Adjudication of Temporary and Seasonal Need for Herding and Production of Livestock on the Range Applications Under the H–2A Program,* 86 FR 71373 (Dec. 16, 2021) (2021 H–2A Herder Final Rule).

[58] *See* 20 CFR 655.210(g) and 655.211(a).

[59] The Federal minimum wage serves as the basis for an initial national monthly wage rate (calculated based on a 48-hour workweek), and beginning in 2017, the Department adjusts the AEWR annually based on the ECI for wages and salaries. *See* 20 CFR 655.211(c).

category if the FLS is not available. Aside from the FLS, the OEWS survey is the only comprehensive and statistically valid source of wage data for agricultural occupations and geographic areas common in the H–2A program. The OEWS is also the wage source most consistent with the SOC-based wage collection of the FLS. Within the agricultural sector of the U.S. economy, the OEWS survey collects employment and hourly gross wage data from farm labor contractors that support fixed-site agricultural employers. Although the OEWS survey does not collect data from such fixed-site agricultural employers, the farm labor contractors surveyed by OEWS employ workers to provide agricultural labor or services similar to that of workers employed by fixed-site agricultural employers. In addition, farm labor contractors participate in the H–2A program and represent an increasing share of the H–2A worker positions certified by the Department.[60] Data reported by these types of employers, therefore, represent the best information available for purposes of establishing the AEWRs when FLS data is unavailable. BLS has the capability of providing a single annual average hourly gross wage for the six SOC codes that comprise the field and livestock workers (combined) category that mirrors the FLS, at both the statewide and national levels, based on the OEWS survey data.[61] The Department will make these OEWS-based AEWRs, both at the statewide and national levels, accessible to the public online.

One commenter suggested alternative AEWR determination methods would be unnecessary because, the commenter predicted, the FLS will always be available. On the contrary, there have been, currently are, and likely will be future instances where FLS data is unavailable to establish an AEWR for at least some workers. For example, FLS data has not been and currently is not available for AEWR determinations in certain locations such as Alaska and Puerto Rico. Additionally, the FLS may become unavailable in the future for reasons that cannot be anticipated. As previously noted, the Department does not have control over the FLS; the USDA does, and it could elect to suspend or even terminate the survey at some point in the future—as it has three times previously. In 2007 [62] and 2011,[63] the USDA did not conduct the survey due to budget constraints. In 2020, the USDA announced its intention to suspend data collection for the October 2020 survey,[64] but was ultimately forced to conduct the survey by a federal court. Thus, in order to ensure the Department's ability to determine AEWRs in any circumstances in which the FLS is, or becomes, unavailable, the Department has identified the OEWS as its alternative source of wage data for the reasons discussed in the proposed rule and here.

c. The Department Will Use the OEWS Survey To Establish SOC-Specific AEWRs for All Other Job Opportunities

For H–2A job opportunities that do not fall within the FLS field and livestock workers (combined) category, the Department proposed to use the OEWS survey to determine SOC-specific AEWRs. Under this methodology, the AEWR for all non-range SOC codes outside the field and livestock workers (combined) category would be the statewide annual average hourly gross wage for the SOC code, as reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly gross wage for the SOC code, the AEWR for that State would be the national annual average hourly gross wage for the SOC code, as reported by the OEWS survey. In this final rule, the Department is adopting the OEWS-based, SOC-specific AEWR methodology for these job opportunities for the reasons explained below and in the 2020 AEWR Final Rule (which was vacated on other grounds).[65]

The Department received several comments in support of using an OEWS-based AEWR determination for SOC codes outside of field and livestock workers (combined) category, as well as several comments in support of not using the FLS for SOC codes other than field and livestock workers. For example, two workers' rights advocacy organizations noted the FLS does not ''adequately or consistently survey'' farm employers about positions beyond the six field and livestock SOC codes, and many of the SOC codes outside the six field and livestock SOC codes are more often filled as contract positions than hired positions; thus, for positions outside the six field and livestock SOC codes, the advantages of FLS wage findings no longer apply. One of these two workers' rights organizations emphasized that the multisector reach of the OEWS survey does a better job of accurately reflecting market wage rates for positions such as truck drivers and construction workers whose work inherently includes work both in and outside the agricultural sector. The Department agrees with these commenters for the reasons outlined below.

As the Department stated in the NPRM, the OEWS survey is a reliable and comprehensive wage survey that consistently produces annual average hourly gross wages for nearly all SOC codes other than the six codes covering the field and livestock workers (combined) occupational category and is, therefore, a better wage source for those other SOC codes. The OEWS survey, which began collecting occupational employment and wage data from employer establishments in 1996, is among the largest ongoing statistical survey programs of the Federal government, producing wage estimates for more than 800 SOC codes, and is used as the primary wage source for prevailing wage determinations in the H–2B temporary non-agricultural labor certification program, and other nonimmigrant and immigrant programs.[66] The OEWS program surveys approximately 200,000 establishments every 6 months and over a 3-year period collects the full sample of 1.2 million establishments, accounting for approximately 57 percent of employers in the United States.[67] Every 6 months, the oldest data from the previous 3-year cycle is removed and new data is added. The wages previously reported are adjusted by the ECI, which is a BLS index that measures the change in labor costs for businesses. The OEWS survey is conducted primarily by mail, with telephone follow-ups to nonrespondents, or, if needed, to clarify written responses.[68] The OEWS

[60] For example, the proportion of all H–2A worker positions certified by DOL for employment in non-range occupations with employers qualifying as H–2A Labor Contractors (*i.e.,* farm labor contractors) has increased significantly from 33.1 percent in FY 2016 (54,787 positions out of 165,741 positions) to 42.6 percent in FY 2021 (135,314 positions out of 317,619 total positions) and 43.1 percent through August FY 2022 (151,439 positions out of 351,268 total positions).

[61] An overview of the OEWS survey methodology is available at *https://www.bls.gov/oes/current/oes_tec.htm.* An explanation of the survey standards and estimation procedures is available at *https://www.bls.gov/opub/hom/oews/pdf/oews.pdf.*

[62] *Notice of Intent to Suspend the Agricultural Labor Survey and Farm Labor Reports,* 72 FR 5675 (Feb. 7, 2007).

[63] *Notice of Intent to Suspend the Agricultural Labor Survey and Farm Labor Reports,* 76 FR 28730 (May 18, 2011).

[64] 85 FR 61719.

[65] 85 FR 70445, 70453, 70458–70459.

[66] *See, e.g.,* 20 CFR 655.731(a)(2)(ii)(A) (H–1B program, for specialty (professional) workers) and 20 CFR 656.40(b)(2) (Permanent Labor Certification program, for permanent employment of foreign workers).

[67] *See* BLS, *Occupational Employment and Wage Statistics Frequently Asked Questions, https://www.bls.gov/oes/oes_ques.htm* (last modified Aug. 13, 2021).

[68] *Id.*

average [69] hourly gross wage reported includes all gross pay, exclusive of premium pay, but including piece rate pay.

While the FLS is the most accurate and comprehensive wage source to determine the AEWRs for the field and livestock workers (combined) occupational group, the OEWS survey is a more accurate data source for other SOC codes common in agricultural operations, such as supervisors, that the FLS does not adequately or consistently survey, as noted above and in response to comments discussed below. In addition, the OEWS survey includes SOC codes that are more often contracted-for services (*e.g.,* construction supporting farm production) than farmer-employed positions, which makes the OEWS data collection from farm labor contractors a more direct, relevant data source for determining AEWRs for these SOC codes than the FLS.

The Department received several comments opposing the proposed use of the OEWS as a wage source because the OEWS does not survey fixed-site agricultural employers directly. For that reason, some commenters asserted that using the OEWS survey as a wage source would not reflect the intricacies of the agricultural industry and would further remove the wages paid using this wage source from actual market wages in agriculture. For example, a trade association and an employer alleged that the use of OEWS-based AEWRs for SOC codes outside the six field and livestock workers (combined) category would force employers to pay workers what the commenters considered to be ''private sector rates'' for certain positions, such as truck drivers, farm managers, and farm mechanics. These commenters also shared the perspective that the skill sets needed for each of these positions is ''materially different'' in the agricultural versus non-agricultural sectors, primarily based on factors such as the location, scale, or commodity involved, rather than the qualifications or requirements of the work to be performed, a perspective the Department disagrees with and addresses further in Section II.C.4, below. Another employer stated that ''wages based on surveys outside of agriculture will skew labor costs out of our ability to pay.'' Similarly, an agent asserted that if the Department classifies a job opportunity using an inappropriate SOC code, the Department's OEWS-based methodology would ''widen the gap . . . in the direction of higher AEWRs than market conditions dictate.'' [70] The Department is not persuaded for the reasons discussed below.

As noted in the 2020 AEWR Final Rule (vacated on other grounds) and the NPRM, the OEWS is more accurate than the FLS for SOC codes, such as supervisors, that the FLS does not adequately or consistently survey, and positions that are more often employed by farm labor contractors (*e.g.,* construction supporting farm production) than by fixed-site agricultural employers; therefore, use of the OEWS will better protect against adverse effects for those SOC codes. In contrast, an AEWR based solely on the field and livestock worker (combined) category wage may have the effect of depressing wages in these other, typically higher-paid SOC codes because the FLS field and livestock worker (combined) category does not reflect the wages in these SOC codes as accurately as the OEWS survey does. This aspect of the methodology under the 2010 Final Rule did not adequately prevent adverse effects on the wages of such workers in the United States similarly employed, contrary to the Department's statutory mandate, as discussed above. In addition, whereas in 2010 H–2A Labor Contractors (H–2ALCs) comprised a much smaller percentage of participants in the H–2A program, H–2ALC participation has grown in recent years, which supports using OEWS wage data collected from farm labor contractors who employ workers to perform duties not covered by the six field and livestock workers (combined) category SOC codes, as an appropriate source of actual market wages in agriculture to determine the AEWR for these SOC codes.[71]

The Department understands the common concern of several employers and trade associations that OEWS-based AEWRs would, in some cases, result in wage increases compared to the FLS-based AEWR applicable under the 2010 Final Rule AEWR methodology. For example, a trade association compared average wages for the three SOC codes covering Construction Laborers, Bus Drivers, and Light Truck Drivers, based on the 2020 OEWS and the 2021 FLS, which showed that the 2020 OEWS for each occupation resulted in a higher AEWR than when using the 2021 FLS for field and livestock workers (combined). Based on its independent research, which is a topic the Department addresses in the Administrative Information section below (Section III), another trade association expressed concern that OEWS-based AEWRs would be significantly higher than the national average 2010 H–2A Final Rule FLS-based AEWR. These comments reflect the Department's concerns about the continued use of FLS-based AEWRs for SOC codes outside the field and livestock workers (combined) category not adequately addressing the Department's statutory mandate regarding *all* H–2A job opportunities, concerns that resulted in this rulemaking. In addition, some commenters appeared to believe, without providing supporting evidence, that using the OEWS survey would always produce SOC-specific AEWRs higher than the FLS rate for the field and livestock workers (combined) category, which, if true, would bolster the Department's concerns regarding adverse effect of the 2010 AEWR methodology and the need for rulemaking.

As previously stated, the Department has discretion to determine the

[69] The OEWS uses the term ''mean.'' However, for purposes of this regulation the Department uses the term ''average'' because the two terms are synonymous, and the Department has traditionally used the term ''average'' in setting the AEWR from the FLS.

[70] Other commenters also addressed the potential for SOC code assignments that employers may view as inaccurate, including assignment of more than one SOC code to an employer's job opportunity; these comments are addressed in the Department's discussion of job opportunity evaluation and SOC code assignment in Sections II.C.3 and II.C.4, below.

[71] For example, based on a review of OFLC H–2A certification data covering 2010 through 2019, the USDA Economic Research Service (ERS) reported that H–2ALCs (also known as Farm Labor Contractors (FLC)) have become the dominant employer type in the vegetable and melon sector—among the most labor-intensive agricultural sectors in the United States. Specifically, USDA ERS noted that ''the number of certifications obtained by both individual employers and FLCs increased every year between 2011 and 2019; however, the number of certifications obtained by FLCs increased faster, which led contractors to overtake individual employers in 2016. The share of certifications obtained by FLCs steadily increased from 17 percent in 2011 to its maximum of 57 percent in 2018, decreasing slightly to 53 percent in both share and number in 2019.'' *See* USDA, Examining the Growth in Seasonal Agricultural H–2A Labor (August 2021), Economic Information Bulletin No. (EIB–226), *https://www.ers.usda.gov/webdocs/publications/102015/eib-226.pdf?v=8349.1* (accessed September 12, 2022). More recently and based on a review of H–2A applications covering all agricultural sectors certified by OFLC during the most recent 3 fiscal years covering October 1, 2019, through September 1, 2022, the proportion of H–2A worker positions certified for employers operating as H–2ALCs increased from 36 percent in FY 2020 to more than 43 percent in FY 2022. In FY 2020, of the 275,430 worker positions certified nationally, 99,505 (or 36.1 percent) were issued to H–2ALCs. From October 1, 2021, through September 1, 2022, for FY 2022, of the 352,103 worker positions certified nationally, 151,706 (or 43.1 percent) were issued to employers operating as H–2ALCs. *See https://www.dol.gov/agencies/eta/foreign-labor/performance* (accessed September 12, 2022).

methodological approach that best allows it to meet its statutory mandate.[72] The Department remains cognizant of the fact that the ''clear congressional intent was to make the H–2A program usable, not to make U.S. producers non-competitive'' and that ''[u]nreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile.'' [73] However, the Department is not required to set the AEWR at the highest conceivable point, nor at the lowest, so long as it serves its purpose, and the Department may also consider factors relating to the sound administration of the H–2A program in deciding how to set the AEWR. The approach adopted in this final rule is reasonable and strikes an appropriate balance under the INA. The Department recognizes that the revised methodology may result in some AEWR increases in those SOC codes for which the Department will use the OEWS survey, depending upon geographic location and the specific SOC code. These changes, however, would be the result of the Department's use of more accurate occupational data that better reflect the actual wage paid, and thus better protect against adverse effect. In the Department's policy judgement, any incremental burden placed on employers is outweighed by the benefits attendant to better protection against adverse effect on the wages of workers in the United States similarly employed.

With regards to commenter concerns about variation in OEWS-based AEWRs from year to year, the OEWS-based AEWRs generally would experience lower rates of change per year than the FLS AEWR variations to which employers are accustomed to adjusting. While the FLS calculates annual findings from quarterly estimates of data collected during a single year, ''each set of OE[W]S estimates is calculated from six panels of survey data collected over three years,'' an approach that moderates year-to-year fluctuation. However, as the AEWR methodology adopted in this final rule bases AEWR adjustments on changes in wages actually paid to similarly employed workers from year to year, annual variation in the AEWRs—both FLS-based AEWRs and OEWS-based AEWRs—are normal and provide the best available information on changing market conditions.

Several commenters were concerned that by factoring in wages in both non-metropolitan areas and metropolitan areas (where they assume wages are higher because of a higher cost of living), the use of a statewide OEWS wage would mean that employers in non-metropolitan areas would be required to pay inflated wages. Another commenter expressed a similar concern with respect to statewide or national AEWRs generally. Two additional commenters justified support for using OEWS wage data, rather than the FLS, for SOC codes outside of field and livestock workers (combined) category by noting that the OEWS produces available data at the local level, while the FLS does not capture data at this level of precision. While the OEWS can provide data at a smaller geographic level than statewide, such as by Metropolitan and Non-Metropolitan Statistical Areas, the Department is adopting the proposal to use statewide OEWS data to better protect against localized wage depression. As explained in prior rulemakings, the Department is concerned about localized wage depression in the H–2A program, particularly because of the economic vulnerability of agricultural workers and the fact that the H–2A program is not subject to a statutory cap, which allows an unlimited number of nonimmigrant workers to enter a given local area.[74] Thus, a statewide wage, which includes a broad variety of geographic areas, is more likely to protect against wage depression from a large influx of nonimmigrant agricultural workers that is most likely to occur at the local level.[75] In the Department's policy judgment, even if the commenter's assumptions were accurate (*e.g.,* that agricultural wage rates in metropolitan areas are higher than those in non-metropolitan areas; that metropolitan and non-metropolitan areas house distinct labor markets), protecting a vulnerable workforce from wage depression outweighs potential concerns regarding potential upward pressure on wages that may occur because of the inclusion of metropolitan areas. For these reasons, the Department believes it is important to use the statewide OEWS wage where one exists for the particular SOC code. In the limited circumstances in which there is no statewide wage, use of the national annual average gross hourly wage reported for the particular SOC code will ensure an AEWR determination can be made each year for each SOC code outside of the field and livestock workers (combined) category.

d. The Department's Decision Not To Use ECI-Adjusted AEWRs or Other Methodologies Suggested in Comments

The Department received comments from employers, trade associations, agents, and workers' rights advocacy organizations suggesting alternative methods of determining the AEWR, including use of the ECI; use of the wage source that produces the highest wage, regardless of geographical or occupational scope; use of the median wage rate, instead of the mean; implementation of a two-tiered wage system permitting employers to pay foreign workers less; and imposition of caps on AEWR growth. As discussed below, the Department declines to adopt the suggested alternatives because none of them provides an administratively feasible method of allowing the Department to carry out its statutory mandate of ensuring that the employment of foreign workers will not adversely affect the wages of workers in the United States similarly employed.

Several commenters suggested the Department reconsider use of a broad index like the ECI instead of using the FLS to determine the AEWR, and some specifically asserted these indices are less likely to be suspended than the FLS, and more likely to produce consistent, moderate wage increases. Such indices, the commenters asserted, would avoid wage stagnation among agricultural workers and ''provide wage stability [that] is critically important to the viability of the H–2A program.'' Three of these commenters also urged the Department to cap AEWR increases by setting a ''percentage-change 'floor' and 'ceiling' to further limit uncertainty.'' Some commenters suggested the Department should determine the AEWR based on ''one of the myriads of models passed in the U.S. House of Representatives,'' such as setting the AEWR at 115 percent of Federal or State minimum wage, or by using other similar models.

As in prior rulemakings, some commenters also asserted that the Department should or must determine the existence of adverse effect in particular areas or occupations before issuing any AEWR determination. For

[72] 2020 AEWR final rule at 70450, 2021 AEWR NPRM at 68176, and Section I.A above, which cite *AFL–CIO, et al.* v. *Dole,* 923 F.2d 182, 184 (D.C. Cir. 1991) (Congress did not ''define adverse effect and left it in the Department's discretion how to ensure that the [employment] of farmworkers met the statutory requirements.''); *United Farmworkers* v. *Solis,* 697 F. Supp. 2d 5, 8–11 (D.D.C. 2010) (the Department has discretion to determine the methodological approach that best allows it to meet its statutory mandate).

[73] 54 FR 28037, 28046 (July 5, 1989).

[74] See, *e.g.,* 75 FR 6883, 6895.

[75] Id. at 6899 (The Department ''consistently has set statewide AEWRs rather than substate [ ] AEWRs because of the absence of data from which to measure wage depression at the local level'' and use of surveys reporting data at a broader geographic level ''immunizes the survey from the effects of any localized wage depression that might exist.'')

example, one commenter noted recent efforts to address truck driver labor shortages in the United States and asserted the Department ''should provide additional analysis to determine if there is an adverse effect on U.S. workers given these current dynamics.'' However, as the Department and courts have long explained, the INA does not require DOL to prove or rely on the existence of past adverse effect but instead is focused on prevent[ing] future adverse effect.'' [76] Further, the AEWR is one of the primary regulatory controls to prevent—not compensate for—adverse effects.

In contrast, a nonprofit public policy advocacy organization and a workers' rights advocacy organization suggested the Department should use the wage sources that results in the highest wage rate, whether determined by either the FLS or OEWS, regardless of the SOC code or geographic level of specificity (*e.g.,* the Department should consider State, regional, and national FLS data; and local, State, and national OEWS data, when determining the AEWR). Similarly, two commenters urged the Department to require the employer to pay the FLS-based AEWR to workers performing duties outside the six SOC codes covering field and livestock workers (combined) category, such as construction labor and first-line supervisor, if this wage is higher than the OEWS-based AEWR for the SOC code(s).

The Department declines to adopt the use of the ECI or other broad indices to determine the AEWR, even if the use of such indices would provide greater wage continuity and predictability from year-to-year. Unlike the FLS and OEWS, which provide actual wage data in the States and regions where these workers are employed, the ECI provides a general measure of changes in the cost of labor across the private sector in the United States, but does not provide actual wage data for agricultural workers in particular geographic areas. In addition, the FLS—the Department's preferred wage source for establishing the AEWR for the field and livestock workers (combined) category—is again available, eliminating the Department's primary impetus for having elected to use the ECI to adjust AEWRs in future years under the since-vacated 2020 AEWR Final Rule. Where the FLS is not available, the Department believes that the OEWS survey is better suited to determining the AEWR for H–2A applications involving non-range job opportunities, and a better substitute to use to determine the AEWR when the FLS is not available than using the ECI for adjusting AEWRs, because the OEWS survey provides actual wage data specifically tailored to geographic areas and non-range occupations common in the H–2A program.[77] As the FLS and OEWS surveys both consistently report wage data annually, the Department declines to adopt an indexing mechanism, like the ECI, to determine the AEWR.

The Department also declines to adopt a methodology that would set the AEWR at a predetermined minimum wage, such as the State minimum wage, or some version of an enhanced local, State, or Federal minimum wage. Such predetermined wages would be untethered from data on wages employers pay to workers in the United States similarly employed. As explained in prior rulemakings, the Department establishes the AEWR for non-range job opportunities based on actual wages paid by agricultural employers to workers in the United States similarly employed. Establishing an AEWR for all H–2A job opportunities, based on either the Federal minimum wage or the applicable local or State minimum wage, would not meet that purpose, and would instead immediately and dramatically reduce the wages of many H–2A and similarly employed workers in the United States [78] and not be responsive to actual increases or decreases in wages paid in SOC codes common in the H–2A program. As the Department noted ''a single national AEWR applicable to all agricultural jobs in all geographic locations would prove to be below market rates in some areas and above market rates in other areas, resulting in all of the associated adverse effects'' discussed above.[79]

For similar reasons, the Department declines to impose an arbitrary cap on wage increases. As discussed above, the AEWR is based on surveys of actual wages paid or projected to be paid to workers in the United States similarly employed, and changes in the AEWR reflect changes in wages employers pay to these workers. Commenters did not provide a reasoned economic basis to impose an arbitrary cap on H–2A wages, and imposition of such a cap would produce wage stagnation, most significantly in years when the wages of agricultural workers are rising faster due to strong economic and labor market conditions. As with the other methods suggested by commenters, this disconnection between actual wages paid and a capped AEWR is contrary to the Department's statutory mandate.

The Department also declines to implement the workers' rights advocacy organization commenters' proposals to require employers to pay the highest of all wage sources in the proposed methodology, regardless of the applicable SOC code or geographic scope. As noted above and in prior rulemaking, the FLS is a ''superior wage source. . .'' for field and livestock worker job opportunities for many reasons, including the comparatively broad geographic scope and the fact that ''only the FLS directly surveys farmers and ranchers and the FLS is recognized by the BLS as the authoritative source for data on agricultural wages.'' [80] The workers' rights advocacy commenters did not state that the higher wage would be a more accurate wage, nor did they allege deficiencies in the FLS for particular States or regions or for specific field and livestock worker job opportunities. Because the FLS is the most accurate and best available wage information source for field and livestock workers, the Department has limited use of the OEWS to circumstances in which the FLS is not available to determine the AEWR for the field and livestock workers (combined) category and for those SOC codes not adequately surveyed or represented by the FLS. Requiring payment of the highest wage rate among all available

[76] 54 FR 28,037, 28,046–47 (Jul. 5, 1989); 75 FR 6884, 6895 (Feb. 12, 2010) (reiterating justification for protection against future adverse effect in 1989 rule); 73 FR 77110, 77167 (Dec. 18, 2008) (noting the D.C. Circuit observed there is no ''statutory requirement to adjust for past wage depression''); *see also* 75 FR 6884, 6891 (Feb. 12, 2010) (''By computing an AEWR to approximate the equilibrium wages that would result absent an influx of temporary foreign workers, the AEWR serves to put incumbent farm workers in the position they would have been in but for the H–2A program. In this sense, the AEWR avoids adverse effects . . .''); *Overdevest Nurseries* v. *Walsh,* 2 F.4th 977, 984 (D.C. Cir. 2021) (finding reasonable the Department's definition of ''corresponding employer'' based on prospective view of adverse effect, *i.e.,* intended to prevent future adverse effect).

[77] Since 2015, the Department has adjusted the AEWR applied to H–2A range occupations using the ECI. The nature of range occupations—located in remote areas, with non-traditional work schedules that generally require workers to be on call 24 hours per day, 7 days per week—required the Department to adopt a different AEWR methodology for range occupations than non-range occupations. *See* 80 FR 62958, 62986 (Oct. 16, 2015). The Department explained at length the reasoning for using a base minimum wage adjusted by the ECI for these occupations, rather than the FLS or OEWS. *See* 80 FR at 62991–62992.

[78] For example, the AEWR in Nebraska in 2022 was $16.47 per hour. Using the Nebraska State minimum wage of $9.00 per hour in 2022, or 115 percent of the Federal minimum wage (*i.e.,* $10.35 per hour) would significantly reduce the wages of H–2A workers and workers in the United States similarly employed.

[79] 73 FR 8537, 8550 (Feb. 13, 2008).

[80] 84 FR 36168, 36183–36184, 36243 (July 26, 2019).

sources at all levels of geographic specificity, regardless of the applicable SOC code(s), would, in many cases, require an employer to pay an enhanced wage untethered to the best available information on the actual wages paid to similarly employed workers. This result would not only unreasonably increase the labor costs of H–2A employers in those cases, but could reduce agricultural job opportunities and place unnecessary upward pressure on wages in order for employers to attract a sufficient number of available workers. The Department believes this approach does not reasonably ''balance the competing goals of the statute—providing an adequate labor supply and protecting the jobs of domestic workers.'' [81]

The proposed system of multiple potential wage sources for all H–2A job opportunities also would result in an exceedingly complex and confusing set of minimum wages. The use of sub-state level OEWS wages, for example, would introduce significant complexities in establishing the offered wage. Agricultural associations filing master applications that cover members and worksites across two States or other job opportunities involving work across multiple States according to a planned itinerary would have to keep pace with many dozens of different local wage sources and the potential adjustments to each of those during the course of a work contract period. The wage payment, recordkeeping, and compliance burden associated with that kind of AEWR methodology would be substantial and unjustifiable.

In addition to the comments discussed above, the Department received some comments requesting specific changes to aspects of existing wage data sources or the Department's use of them. One commenter objected to the Department's use of the mean wage rate to calculate the AEWR and suggested that the Department calculate the AEWR using the median wage rate, which the commenter asserted would produce a more representative wage because it would prevent ''outliers'' on both the low and high end of the wage distribution from unduly influencing the AEWR. In addition, the commenter suggested the Department consider only guaranteed hourly rates, not piece or incentive pay, when determining the AEWR to ''avoid a skewed wage floor.'' The commenter noted that the USDA considered modifying the FLS to capture only base pay data, but ''reverted back to reporting the gross rate of pay'' due to ''funding limitations . . .'' The commenter also suggested the Department consider data on wages paid to H–2A workers and corresponding workers when determining the AEWR in areas where ''more than ten percent of the agricultural workforce is composed of H–2A workers . . .'' The commenter asserted that in these areas, an AEWR based only on wages paid to U.S. workers would lead to disproportionate annual wage increases because non-H–2A employers set their wages above the AEWR each year to ensure retention of their U.S. workers.

Another commenter suggested the Department adopt a two-tiered wage system under which employers would pay the OEWS rate to U.S. workers performing duties like construction labor but would pay foreign workers performing the same or similar duties the AEWR based on FLS data for the field and livestock workers (combined) category. The commenter acknowledged this would provide employers an incentive to hire foreign workers over U.S. workers, but suggested the Department could counter this incentive by ''imposing additional penalties and scrutiny on U.S. employers [for] failing to hire domestic labor . . .''

As noted in prior rulemakings, the Department believes use of the mean wage best meets the Department's obligation to protect workers in the United States similarly employed against the adverse effects on their wages that could be caused by the employment of foreign workers.[82] The Department has a long-standing practice of using the average or mean wage to determine the AEWR in the H–2A program, and it uses the mean wage within the OEWS wage distributions to determine prevailing wages for other employment-based visa programs. The Department declines to use the median because it does not represent the most predominant wage across a distribution, but instead represents only a midpoint. The mean provides equal weight to the wage rate received by each worker in the SOC code across the wage spectrum and represents the average wage paid to workers to perform jobs in the SOC codes.[83] Setting the AEWR below the mean in the relatively less skilled agricultural SOC codes that predominate in the H–2A program may have a depressive effect on the wages of workers in the United States similarly employed. Use of the mean is also consistent with the Department's determination of prevailing wages for other foreign worker programs.

The Department also declines to exclude piece rate or incentive pay from FLS data or to request that USDA modify the FLS so that it reports a base pay that excludes piece rate and incentive pay. Comments suggesting the Department modify or seek modification of FLS methodology are beyond the scope of this rulemaking. As noted in prior rulemaking, the Department does not have control over the FLS, and the FLS is not conducted exclusively for the purpose of setting the AEWR. Similarly, the OEWS survey is not produced exclusively for temporary agricultural labor certification purposes, and it collects wage data for straight-time, gross pay, exclusive of premium pay, which includes incentive-based pay and production bonuses, for example. Moreover, as some agricultural jobs guarantee only the State or Federal minimum wage and otherwise pay based on a piece rate, advertising an hourly wage that does not include ''incentive pay'' is not a reasonable ''base rate'' for H–2A employers to advertise to U.S. workers.

With regard to the comment suggesting the wages of H–2A workers be ''considered'' when determining the AEWR using the FLS, the Department notes that FLS collects wage data for all workers, which necessarily includes wage data for H–2A workers. It is appropriate to base the AEWR on actual wages paid to all similarly employed workers since the AEWR, as the wage necessary to ensure the employment of foreign workers does not adversely affect the wages of workers similarly employed in the United States, should be based on market conditions. To the extent the commenter may be suggesting a methodological change to wage data collection through the FLS, the suggestion is beyond the scope of this rulemaking.

Finally, the Department declines to adopt a two-tiered system by which employers' wage obligations to U.S. workers are determined using an OEWS-based, SOC-specific wage rate, while their wage obligations to foreign workers are determined using the FLS without regard to the applicable SOC code. To do so would create a wage system that advantages H–2A employers over non-H–2A employers, bases skilled H–2A worker wages on wage data that does not cover similarly employed workers in the SOC code (*e.g.,* construction), and provides a disincentive to the hiring of U.S. workers that is contrary to the INA and cannot be justified through increased

[81] *Am. Fed'n. of Labor & Cong. of Indus. Organizations (AFL–CIO)* v. *Dole,* 923 F.2d 182, 187 (D.C. Cir. 1991).

[82] *See* 80 FR 24146, 24159–24160 (Apr. 29, 2015); *see also* 78 FR 24047, 24058 (Apr. 24, 2013).

[83] *See* 80 FR 24146, 24159 (Apr. 29, 2015).

enforcement or scrutiny of program users and the labor market test.

Having considered the concerns of commenters, including both employers and workers' rights advocacy organizations, the Department has determined that adoption of the methodology proposed in the NPRM will best allow the Department to fulfill its statutory mandate and balance the competing goals of the statute. The methodology in this final rule uses the OEWS to provide appropriate wage increases for many highly skilled workers in positions like construction labor and first-line supervisors, and will better protect the wages of workers in States or regions where the FLS does not provide wage data. The methodology continues to base the AEWR for the field and livestock workers (combined) category on the FLS, the most accurate and reliable source of wage information for most agricultural job opportunities in the H–2A program. Finally, the Department notes that prevailing wages for particular geographic areas and agricultural activities, determined using State-conducted prevailing wage surveys, will continue to serve as an important protection for workers in crop and agricultural activities that offer piece rate pay or higher hourly rates of pay than the AEWR.[84]

2. The Department Will Publish FLS-Based AEWRs and OEWS-Based AEWRs Coinciding With Those Surveys' Publication Schedules

The Department proposed to continue to require the OFLC Administrator to publish an AEWR update as a notice in the **Federal Register** at least once in each calendar year, on a date to be determined by the OFLC Administrator. The Department explained in the NPRM that the OFLC Administrator would apply this annual notification requirement to each of the AEWRs to be determined under the proposed methodology. Therefore, the OFLC Administrator would publish an announcement in the **Federal Register** to update the AEWRs based on the FLS, effective on or about January 1, and a separate announcement in the **Federal Register** to update the AEWRs based on the OEWS survey, effective on or about July 1. *See* 86 FR 68174, 68184 (Dec. 1, 2021). After considering the comments on this proposal, addressed in detail below, the Department adopts the proposal with technical conforming edits to 20 CFR 655.120(b)(2).[85]

Two workers' rights advocacy organizations expressed support for the Department's proposal to issue new AEWRs at two points in the year based on the separate release schedules of FLS and OEWS survey data. These commenters viewed the proposal as a method of ensuring that the AEWR reflects real-time changes to wages in the labor market. In addition, these commenters stated the approach would provide clarity and predictability to both employers and workers.

Comments from trade associations, an employer, and an agent opposed the proposal to use two different AEWR adjustment cycles, one for FLS-based AEWRs and one for OEWS-based AEWRs. These commenters expressed concern that the two cycles of AEWR adjustment could create conflict among employees and add complexity and confusion for employers. For example, two trade associations observed that the different AEWR adjustment cycles could result in some employees receiving a mid-season wage increase, while other employees, whose work is subject to the other AEWR adjustment cycle, would not. One of the same trade associations and a third trade association asserted that separate publications of the AEWRs, particularly with the OEWS-based AEWR adjustment occurring during the growing season, would cause budget, planning, and contracting challenges for farmers who use the H–2A program.

The Department appreciates the opportunity to clarify that the incidence of H–2A job opportunities that are assigned multiple SOC codes and subject to two different AEWR adjustment cycles is expected to be rare, and that the vast majority of H–2A job opportunities will continue to be subject only to FLS-based AEWR adjustment, effective on or about January 1. Based on program experience, discussed above, and the Department's approach to evaluating the SOC code(s) applicable to an employer's job opportunity, discussed below, the Department estimates that approximately 98 percent of H–2A job opportunities will experience no change in assigned SOC code, wage source, or AEWR adjustment cycle under this final rule. The OFLC Administrator will continue to announce the FLS-based AEWR adjustment—which potentially impacts all job opportunities classified in the field and livestock workers (combined) occupational group located in the 49 States covered by the FLS—with an effective date on or about January 1. For those job opportunities classified in the field and livestock workers (combined) occupational group that are not located in the 49 States covered in the FLS (*e.g.,* job opportunities in Alaska), the methodology adopted in this final rule will establish a single statewide AEWR, adjusted annually based on the OEWS survey wage data release, with an effective date on or about July 1. Similarly, an H–2A job opportunity classified with an SOC code outside the six SOC codes within the field and livestock workers (combined) category will be subject only to a single AEWR adjustment cycle, as the final rule will establish a single statewide AEWR for each SOC code outside the field and livestock workers (combined) category, adjusted annually based on the OEWS survey wage data release, with an effective date on or about July 1. Both annual AEWR adjustment notices will potentially impact an employer's wage obligation to workers under a temporary agricultural employment certification only in the rare circumstances in which a job opportunity requires workers under the job order or work contract to perform not only field and livestock workers (combined) category duties (*e.g.,* grading and sorting produce), but also duties from another SOC code (*e.g.,* transporting produce to storage or market using a heavy tractor trailer, transporting workers using vans) for which the OEWS-based AEWR may be higher. Also, where an employer files multiple H–2A applications, each for distinct job opportunities within the employer's agricultural operation, the employer's wage obligation to the workers hired under one certified application may be potentially impacted by one AEWR adjustment notice (*e.g.,* the FLS-based AEWR adjustment in January), and its wage obligation to the workers hired under the other certified application may be potentially impacted by another AEWR adjustment notice (*e.g.,* the OEWS-based AEWR adjustment in July). For example, if an employer submits an H–2A application for workers to grade and sort produce and a separate H–2A application for a first-line supervisor, the employer's

[84] *See* 84 FR 36168, 36179–36180 (July 26, 2019) (discussing the purpose and interaction of the AEWR and PWD and changes the Department recently proposed to modernize the PWD process and ''empower States to produce a greater number of reliable prevailing wage survey results.'').

[85] Technical changes to 20 CFR 655.120(b)(2) were necessary because of the vacatur of the 2020 AEWR Final Rule and the publication of the 2022 Final Rule. The 2022 Final Rule reinstated the 2010 Final Rule's AEWR methodology and therefore reinstated the 2010 Final Rule's language regarding OFLC's publication of the AEWRs, *i.e.,* referring to publication of the AEWRs ''for each State.'' 87 FR 61660, 61796 (Oct. 12, 2022); 75 FR 6884, 6962 (Feb. 12, 2010). The new methodology adopted in this AEWR Final Rule renders the reference to ''each State'' inapt, and therefore section 655.120(b)(2) in this rule refers simply to ''each AEWR.''

wage obligation for worker(s) engaged in grading and sorting produce would potentially be impacted by the FLS-based AEWR adjustment notice in January, and its wage obligation for the worker(s) engaged in first-line supervisory duties would potentially be impacted by the OEWS-based AEWR adjustment notice in July. Although some employers may be required to evaluate and implement payroll adjustments corresponding with both AEWR adjustment cycles, the Department anticipates the incidence of a single temporary agricultural employment certification being subject to both AEWR adjustment notices to be rare, primarily given the prevalence of H–2A job opportunities encompassed within the field and livestock workers (combined) category. In addition, the Department considers the likelihood of confusion or disruption among workers subject to different temporary agricultural employment certifications to be low.

Some employers and a trade association suggested the Department revise the proposed rule to limit the potential for change in the AEWR from year-to-year, such as by implementing an annual cap on AEWR adjustment increases. Two of these commenters expressed concern that unmoderated year-to-year AEWR increases could outpace wage growth in local economies, may not reflect current conditions in the agricultural economy, and would not allow the program to function properly. The Department understands the importance of stability and predictability for both growers and workers, but declines to adopt the commenters' suggestion to cap annual AEWR increases. As explained in the previous section, the AEWR serves its purpose best when it reflects actual wages paid to similarly employed workers from year to year.

3. AEWR Bifurcation and Disaggregation of SOC Codes

The Department proposed to bifurcate the determination of AEWRs for the field and livestock workers (combined) category, a group of six SOCs, from the determination of AEWRs for work performed in any other SOC codes that qualify for the H–2A program. For H–2A job opportunities represented by the six SOC codes comprising the field and livestock workers (combined) category that the FLS reports—which comprise approximately 98 percent of H–2A job opportunities—the Department proposed to continue to determine a single statewide AEWR, as proposed in paragraph (b)(1)(i). For any non-range occupations other than the six field and livestock workers (combined) SOC codes, the Department proposed to determine a distinct statewide AEWR for each SOC code (*i.e.,* disaggregate the AEWR by SOC code), as proposed in paragraph (b)(1)(ii). After considering comments, discussed in detail below, the Department adopts these proposals without change.

A variety of commenters, including workers' rights advocacy organizations, trade associations, a nonprofit public policy advocacy organization, and an employer, supported the proposed bifurcation. The consensus among commenters who supported the proposal was that a single statewide AEWR for the field and livestock workers (combined) category provides some stability and consistency for employers and workers.

Among commenters who expressed concern about the proposal to bifurcate AEWR determinations, a trade association opposed bifurcation as ''arbitrary and capricious,'' asserting that the Department did not substantiate the premise that continuing to use a single statewide AEWR for all workers in the H–2A program may adversely affect wages of workers who perform the duties of SOC codes outside the field and livestock workers (combined) category. Conversely, a workers' rights advocacy organization suggested the Department use occupation-specific AEWRs for all job opportunities, unless the Department would exclude SOC code 45–2091 (Agricultural Equipment Operators) and aquaculture work [86] from paragraph (b)(1)(i) (field and livestock workers (combined) category). This commenter asserted that agricultural equipment operator and aquaculture work is differently skilled and higher paying than the other work in the field and livestock workers (combined) category, making an AEWR determined using field and livestock workers (combined) category wage data inaccurate for this work. In contrast, another trade association asserted that the Department should expand the group of SOC codes subject to paragraph (b)(1)(i) to include SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers), alleging that such job opportunities involve skills that are readily learned in a short period of time and do not increase with long-term experience. Similarly, several other commenters, including trade associations and employers, advocated expanding the SOC codes subject to the single statewide AEWR determination under paragraph (b)(1)(ii) to include SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers) as well as, for example, SOC code 45–1011 (First-Line Supervisors of Farming, Fishing, and Forestry Workers) and SOC code 47–2061 (Construction Laborers),[87] asserting that field and livestock workers generally perform a variety of duties, some of which are included within one (or more) of these SOC codes.

Some commenters expressed concern regarding the potential impact of the proposal on employers whose H–2A job opportunities involve tasks not encompassed within the field and livestock workers (combined) category SOC codes, which would be subject to the AEWR determinations under paragraph (b)(1)(ii). Commenters, including trade associations, a government agency, a State government, and an employer, commented that the proposed methodology would have a greater impact on smaller operations, where a worker is more likely to be required to perform a wider variety of duties, than on a larger operation, which may be more likely to have specialized positions. A trade organization asserted that the proposals would price one part of the industry—presumably those hiring workers to perform duties outside the field and livestock workers (combined) occupational group—out of existence.

The Department declines to expand or contract the group of six SOC codes for which the Department will use the FLS to establish a single statewide AEWR, where available. The Department's objective in this rulemaking is to establish an administratively efficient method for producing AEWRs sufficiently tailored to protect workers in the United States similarly employed. By using the same group of six SOC codes as the FLS uses to report its single wage finding for its field and livestock workers (combined) category, the Department satisfies its objective of basing AEWR determinations on actual wage data for workers in the United States similarly employed, when such data is available. In addition, the broad, overlapping nature of tasks listed in the Occupational Information Network (O*NET) for the six field and livestock workers (combined) SOC codes is consistent with comments above providing anecdotal accounts of common tasks performed in agricultural

[86] Aquaculture is not a distinct SOC code within the SOC system. Rather, aquaculture tasks are encompassed in SOC code 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals).

[87] The commenters did not identify the occupations by SOC codes, although one capitalized the titles of the three occupations highlighted, which correspond to the SOC codes noted.

operations and the variety of duties employers may require of field and livestock workers during a typical workday or intermittently during the period of employment. Establishing a single statewide AEWR for this group of six SOC codes provides a reasonable amount of flexibility with respect to the type of duties a field and livestock worker may perform without added recordkeeping, administrative burden, or uncertainty regarding wage obligations. While the Department finds a single statewide AEWR for this group of SOC codes to be appropriate, applying that AEWR to other SOC codes would not satisfy the Department's objective to strikes a reasonable balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed. For other SOC codes, such an approach would not use actual wage data for workers similarly employed to determine the AEWR. Both employers and workers benefit from a clear process to ensure that work is correctly compensated.

Although the Department's experience indicates that the duties in most H–2A job opportunities fall within the field and livestock workers (combined) category, subject to the single statewide AEWR determination under paragraph (b)(1)(i), the Department recognizes that some H–2A job opportunities may include duties that fall both within and outside of that category. For example, some employers may submit H–2A applications for job opportunities that require workers to perform a variety of duties (*e.g.,* general crop tasks encompassed in SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and construction work encompassed in, *e.g.,* SOC code 47–2061 (Construction Laborers)). For these types of mixed job opportunities, discussed in Section II.C.4, the Department believes that using the AEWR for the higher paid SOC code is necessary to prevent adverse effects on the wages of workers in the United States similarly employed resulting from inaccurate SOC code assignment.

Given the significance of the SOC code in determining the applicable AEWR under the proposed rule, some commenters expressed concern or requested clarification regarding the SWA and Certifying Officer's evaluation of an employer's H–2A job opportunity to determine its occupational classification (*i.e.,* SOC code). Commenters expressed concern that SOC code determination would create processing delays and inefficiency, rather than simplifying the process for ensuring that workers are correctly compensated. Several trade associations anticipated that employers would file additional applications for each distinct SOC code, and that SWAs and the Department would therefore be required to process those additional applications, increasing the administrative burden. One of the trade associations and an agent expressed concern about uncertainty for employers who may not be able to anticipate the AEWR to be applied to their H–2A job orders. Comments expressed concern that it could be difficult and would be an administrative burden for the Department to determine SOC codes, that the Department's SOC code determinations would be based on infrequently performed tasks, and that, as a result, wage obligations could dramatically increase. Some commenters asserted the proposals would be unworkable because tracking a worker's time performing tasks subject to different pay rates would increase administrative burden, with one employer additionally expressing concern about increased compliance liability.

The Department shares the commenters' interest in methodological clarity, processing efficiency, and accurate determinations; and straightforward application of wage obligations during the employment period. The Department accounted for these interests in its proposal to apply a single statewide AEWR to all job opportunities within one of the six field and livestock workers (combined) SOC codes. As a group, the six field and livestock workers (combined) SOC codes encompass the tasks required in approximately 98 percent of H–2A job opportunities. Each of the six SOC codes encompasses a broad variety of tasks, some of which overlap (*i.e.,* the same or similar duties are included in more than one of the six SOC codes). Although an employer may not be certain whether the SWA and Certifying Officer (CO) will assign SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) or SOC code 45–2091 (Agricultural Equipment Operators) to a particular job opportunity, for example, the same statewide AEWR would apply to that job opportunity under either SOC code. All job opportunities that require workers to perform tasks fully encompassed in any one or more of the field and livestock workers (combined) SOC codes will be subject to the same statewide AEWR. Using this approach will provide a reasonable level of flexibility in a worker's agricultural duties and predictability in employer wage obligations, while ensuring that the wages of workers in the United States similarly employed are not adversely affected. This approach also provides continuity, a reasonable level of predictability, and wage protections to workers who may perform work encompassed within multiple SOC codes included in the field and livestock workers (combined) category, whether during a workday or a work contract period.

The Department reiterates that it has discretion to determine the methodological approach that it believes best allows it to meet its statutory mandate to ensure that the employment of H–2A foreign workers does not adversely affect the wages of workers in the United States similarly employed. In exercising that discretion, the Department considered issues relating to the sound administration of the H–2A program, such as uniformity in process and predictability in AEWR determinations, protecting workers, and providing efficient temporary agricultural labor certification determinations to employers, among other factors. In the Department's policy judgment, the benefits of a more tailored AEWR, based on actual wage data for similarly employed workers, outweigh the added complexity of the proposed methodology because it ensures work that is not encompassed within the six SOC codes applicable to the field and livestock workers (combined) category will be more accurate and better reflect market conditions for workers in those occupational classifications. In addition, the Department is not required to set the AEWR at the highest or lowest conceivable point. The Department is exercising its broad discretion in this rulemaking to revise the AEWR methodology in a way that more accurately yields an appropriate wage determination reflective of wages paid to workers in the United States similarly employed for each H–2A job opportunity. The Department has determined the AEWR methodology that best protects such workers and supports sound administration of the H–2A program is the bifurcated methodology in this final rule, under which the Department will continue to issue a single, statewide AEWR for job opportunities in the field and livestock workers (combined) category using the FLS, when available, and will issue an SOC-specific statewide AEWR based on the OEWS survey for all other non-range

job opportunities. The Department adopts the proposal in this final rule.

4. For Job Opportunities Involving a Combination of SOC Codes, the Highest AEWR for the Assigned SOC Codes Governs the Employer's Wage Obligation

The Department's H–2A regulations governing an H–2A employer's wage obligations at 20 CFR 655.120(a), 655.120(c)(3), and 655.122(l) refer to ''the AEWR'' in the singular. Similarly, 20 CFR 655.120(b)(3) refers to ''the updated AEWR'' in the singular. The Department recognizes that the AEWR methodology proposed in this rulemaking could result in more than one AEWR determination applicable to an employer's H–2A job opportunity; an employer's H–2A job opportunity may require skills and duties that are encompassed within more than one SOC code and the assigned SOC codes may be subject to different AEWR determinations. For example, if an employer chooses to file a single H–2A application requiring workers to perform a variety of duties covering multiple SOC codes, the H–2A job opportunity may be assigned one SOC code that is subject to the AEWR determined under paragraph (b)(1)(i) (*e.g.,* SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse)) and another SOC code subject to an AEWR determined under paragraph (b)(1)(ii) (*e.g.,* SOC code 45–1011 (First-Line Supervisors of Farming, Fishing, and Forestry Workers)), or an employer's H–2A job opportunity may be assigned more than one SOC code subject to more than one AEWR determined under paragraph (b)(1)(ii) (*e.g.,* SOC code 45–1011 (First-Line Supervisors of Farming, Fishing, and Forestry Workers) and SOC code 47–2061 (Construction Laborers)). To address potential confusion, and for conformity, the Department proposed paragraph (b)(5). Under proposed paragraph (b)(5), if an employer's H–2A job opportunity were assigned more than one SOC code, and the SOC codes assigned are subject to different AEWR determinations, the highest of the applicable AEWR determinations would be ''the AEWR'' and ''the updated AEWR'' for purposes of the employer's H–2A program wage obligations.[88] That is, the highest of the AEWRs applicable to the H–2A job opportunity would be ''the AEWR'' in 20 CFR 655.120(c)(3) and 655.122(l) and ''the updated AEWR'' in 20 CFR 655.120(b)(3), which is then compared to the other wage sources (*e.g.,* a prevailing wage determination or State minimum wage) in 20 CFR 655.120(a). The highest wage rate applicable to the H–2A job opportunity among those in 20 CFR 655.120(a) is the employer's minimum H–2A wage obligation. After considering public comments and providing clarification and examples of the provision's application to H–2A job opportunities, the Department adopts the proposal.

A trade association commented that the Department's proposal in paragraph (b)(5) is unnecessary because employers already voluntarily offer wages higher than the AEWR for job opportunities that require workers to perform the duties of multiple SOC codes due to market pressure. Although the Department recognizes that some employers offer and pay wages higher than the wage floor established through the AEWR, the Department continues to view paragraph (b)(5) as an important clarification regarding the AEWR determination to be used to evaluate an employer's wage obligations in the H–2A program and an essential component of the Department's responsibility to prevent adverse effect on the wages of workers in the United States.

While H–2A job opportunity assessment and SOC code assignment, discussed in more detail below, is both consistent with long standing practice in the H–2A program and OFLC's practice across the employment-based visa programs it administers (*e.g.,* H–2B and H–1B), the proposed AEWR methodology introduced the potential for an employer's H–2A job opportunity to have more than one applicable AEWR determination. Paragraph (b)(5) was intended to address the rare situation in which an employer chooses to file a single H–2A application requiring workers to perform a variety of duties covering multiple SOC codes by using an approach consistent with prevailing wage determinations in other employment-based programs OFLC administers (*e.g.,* H–2B and H–1B). Similarly, under paragraph (b)(5), the CO will use the highest AEWR among those applicable to the SOC codes assigned an employer's H–2A job opportunity as ''the AEWR'' used to evaluate the employer's wage obligations under 20 CFR 655.120(a), 655.120(b)(3), 655.120(c)(3), and 655.122(l). As previously discussed, SOC codes not included in the field and livestock worker (combined) data collection generally account for more specialized, higher paid job opportunities (*e.g.,* construction labor, logging workers, heavy truck and tractor-trailer drivers, first-line supervisors). However, in some cases, an SOC code not included in the field and livestock workers (combined) data collection may have a lower statewide OEWS survey result than the FLS survey result for field and livestock workers (combined) category. Where an employer's job opportunity involves a variety of duties, some of which are consistent with higher paid SOC codes in the State, territory, or equivalent area, the Department would not satisfy its statutory obligation if it were to establish the required wage floor for H–2A employers at a lower rate than the AEWR applicable to workers in the United States who perform work in the higher paid SOC code. An AEWR determined using the lower-paid SOC code does not adequately guard against adverse effect on the wages of workers in the United States similarly employed. In contrast to anecdotal concerns expressed in comments about a wage requirement based on duties performed for a minimal amount of time, which are discussed below, the Department generally finds that duties requiring particular skills are typically assigned to a subset of an employer's workforce—those workers who have qualifications or experience related to the duties—and, as a result, the amount of time spent performing those duties is not minimal. In addition, determining the AEWR applicable to an employer's job opportunity using the highest of the AEWRs applicable to all duties to be performed provides predictability, consistency, and administrative efficiency with regard to H–2A program wage requirements, which benefits both employers and workers.

Among comments that addressed this proposal, many expressed concern regarding how employers would adjust their operations (*e.g.,* division of labor, number of jobs offered, types of jobs offered) due to the perceived impact of paragraph (b)(5). Commenters asserted that the proposal would result in higher wage obligations for employers who include a variety of duties in the H–2A job order, which the employer considers to be routine farm work, but which the Department views as a combination of SOC codes subject to a higher AEWR determination. Commenters asserted that employers would have to reorganize operations in order to offer single-SOC code job opportunities in their H–2A applications, which would result in more H–2A applications per employer and operational disruptions, such as less flexibility in work assignments, more recordkeeping and

[88] The proposal in the 2021 AEWR NPRM is consistent with the Department's proposal in the 2019 AEWR NPRM, which was adopted in the now-vacated 2020 AEWR Final Rule.

worker oversight, and confusion or conflict among workers paid at different rates. In addition, these commenters asserted that some employers would have to hire more workers to perform the more limited spectrum of duties of each SOC-specific H–2A application, potentially for short periods, and some employers may not be able to offer a full-time job opportunity to perform only those duties. Another trade association asserted that employers would reduce operations or otherwise reduce job opportunities due to the impact of the AEWR methodology proposed. Expressing concern with burden and cost associated with filing H–2A applications, a State government, an employer association and its members, a trade association, and an agent asked the Department to clarify whether employers will be required to file multiple applications for different SOC codes and urged the Department to permit an employer to include several SOC codes in one job order.

The AEWR methodology adopted in this final rule does not dictate how many H–2A applications an employer may choose to file, the duties included in each H–2A application filed, or whether an employer chooses to address its labor needs through the H–2A program or through options other than the H–2A program. Rather, it provides a minimum wage rate threshold that an employer must offer and pay a worker for performing the H–2A job opportunity, including those H–2A job opportunities that require a worker to perform a combination of tasks that cannot reasonably be classified within a single SOC code. The Department understands that the AEWR determination applicable to an H–2A job opportunity—and the employer's resulting H–2A wage obligation—and the costs or benefits associated with filing multiple single-SOC code-specific H–2A applications or filing one H–2A application for a job opportunity encompassing a combination of duties from multiple SOC codes, subject to paragraph (b)(5), may be factors employers weigh when making business decisions regarding their agricultural operations. However, the Department maintains that the final rule does not require employers to file additional SOC-specific H–2A applications for job opportunities that require performing job duties encompassed by a combination of SOC codes. Employers may determine whether it is more cost effective—or beneficial to their business operation in other ways—to file one H–2A application for a job opportunity encompassing duties of more than one SOC code; to file more than one H–2A application, each focused on the duties of a single SOC code; or, to find avenues other than H–2A to address particular duties that are not regularly required, such as driving a semi tractor-trailer truck to market when crops are harvested. In any event, the Department has determined that requiring the payment of the highest applicable AEWR is necessary to protect against adverse effect, as discussed above.[89]

In lieu of requiring an employer to pay workers the highest of the AEWR determinations applicable to the SOC codes assigned to the employer's H–2A job opportunity, some commenters suggested the Department require the employer to compensate workers on a per-hour basis at the AEWR determination applicable to the particular duties performed during that hour. However, two commenters, who may have misunderstood the Department's proposal to use a single AEWR determination applicable to the job opportunity, regardless of when a worker would perform particular duties within the employment period, expressed concern regarding burdens associated with tracking duties, time, and pay rates, even under the Department's proposed methodology, which would not require extensive recordkeeping. The Department declines to adopt the commenters' suggestion to apply an applicable AEWR on a per-hour basis, which would increase complexity and confusion regarding pay obligations for both employers and workers.

SOC Code Assessment

Commenters expressed various concerns regarding the SWA's and CO's assessments of H–2A job opportunities and assignment of SOC code(s), which commenters understood could impact the AEWR applicable to an employer's job opportunity and, therefore, the employer's wage obligations under 20 CFR 655.120(a), 655.120(b)(3), 655.120(c)(3), and 655.122(l). Several commenters stated that the Department had not adequately explained how the SOC code assessment and related AEWR determination process would function. Two trade associations expressed concern about the potential for the SWA and CO to assess an H–2A job opportunity differently, resulting in conflicting SOC code assignments, including the assessment of whether a job opportunity involves duties covering multiple SOC codes. An agent expressed concern about the potential for misclassification of job opportunities under an inappropriate SOC code. A law firm expressed concern about the potential for inconsistencies in SOC code assignments (*e.g.,* between SWAs), the potential for increased use of general SOC codes, and the absence of a detailed administrative process, like the process used for prevailing wage determination requests in the H–2B program that includes requests for information, appeals, and requests for reconsideration. Similarly, trade associations asked for clarification regarding how an employer would challenge or appeal SOC code decisions.

The Department reiterates that the evaluation of tasks associated with an employer's job opportunity and SOC code assignment is not new in the H–2A program and declines to introduce a new, separate administrative process. Due to the time-sensitive nature of receiving and processing H–2A applications under the statute, the SWA will continue to evaluate an employer's job opportunity in the first instance—and determine the appropriate SOC code(s) for the job opportunity—when it reviews an employer's job order for compliance with 20 CFR part 653, subpart F, and 20 CFR part 655, subpart B. The SWA will continue to enter the SOC code assigned to the employer's job opportunity on the Form ETA–790, *Agricultural Clearance Order.* After the employer files its *H–2A Application for Temporary Employment Certification,* the OFLC CO will continue to perform a secondary evaluation of the employer's application and job order, including SOC coding. As is currently the case, the CO may determine whether a different SOC coding is necessary, for example, based on additional information received during processing.

In making a determination of the applicable SOC code(s), the CO will continue to compare the duties and requirements of the employer's job opportunity with SOC definitions, skill requirements, and tasks that are listed in O*NET. Where similar tasks appear in more than one SOC code (*i.e.,* overlapping tasks), such as transporting workers or agricultural commodities or maintaining and repairing farm equipment, the CO will continue to consider other factual information presented in the employer's application and job order (*e.g.,* special skill or license requirements) that provide context for determining which SOC code or codes best represent the employer's job opportunity.

Even where the CO evaluates the totality of circumstances presented in

[89] *See also* 86 FR 68174, 68183 (Dec. 1, 2021) (''The Department best protects against adverse effect by setting the AEWR applicable to the job opportunity at the highest of the applicable AEWRs.'').

the employer's job order and H–2A application and determines that more than one SOC code must be assigned to appropriately reflect the job offered, the job opportunity may or may not be subject to paragraph (b)(5). For example, an H–2A job opportunity that requires a worker to hand harvest field crops and operate light trucks to drive themselves along with other farmworkers from place to place around the farm property during the course of performing hand-harvest work, may be assigned SOC code 45–2091 (Agricultural Equipment Operators), which encompasses driving ''trucks to haul . . . farm workers,'' [90] in addition to SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse). As both SOC codes 45–2091 and 45–2092 are subject to the same AEWR determination (*i.e.,* the AEWR determination under paragraph (b)(1)(i)), this H–2A job opportunity is subject to a single AEWR determination, and paragraph (b)(5) would not apply. In contrast, an H–2A job opportunity that requires a worker to perform hand-harvest work and to pick-up farmworkers, according to a regular schedule, from employer-provided housing or a centralized pick-up point, in a van used only for passenger transport, on public roads (*e.g.,* from a motel to the farm), and drive them to the place(s) of employment to perform hand-harvest work, may be assigned SOC code 53–3053 (Shuttle Drivers and Chauffeurs), in addition to SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse). SOC codes 53–3053 and 45–2092 are subject to different AEWR determinations; SOC code 53–3053 is subject to the AEWR determination under paragraph (b)(1)(ii), while SOC code 45–2092 is subject to the AEWR determination under paragraph (b)(1)(i). Therefore, paragraph (b)(5) applies when determining the employer's H–2A wage obligation, and the higher of the two AWERs (*i.e.,* the AEWR applicable to SOC code 53–3053 and the AEWR applicable to SOC code 45–2092) is the single AEWR for evaluating the employer's wage obligations for all of the work performed for this job opportunity. Similarly, for an H–2A job opportunity that requires a worker to perform hand-harvest work and help the farm supervisor direct or monitor the work of other workers engaged in planting and harvesting activities in the field, the CO may assign only SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), as that SOC code encompasses ''direct[ing] and monitor[ing] the work of other seasonal help during . . . harvesting.'' However, if the duties identified in the job order include tasks such as training workers, monitoring compliance with safety regulations, or scheduling work crews, which are not encompassed in SOC code 45–2092, then the CO may also assign SOC code 45–1011 (First-Line Supervisors of Farm Workers) to the H–2A job opportunity. As SOC code 45–1011 is subject to the AEWR determination under paragraph (b)(1)(ii), while SOC code 45–2092 is subject to the AEWR determination under paragraph (b)(1)(i), paragraph (b)(5) applies when determining the employer's H–2A wage obligation, and the higher of the two AEWRs (*i.e.,* the AEWR applicable to SOC code 45–1011 and the AEWR applicable to SOC code 45–2092). If the AEWR applicable to SOC code 45–1011 is higher than the AEWR applicable to SOC code 45–2092, then the AEWR applicable to SOC code 45–4011 is the single AEWR for evaluating the employer's wage obligations for all of the work performed for this job opportunity, unless a subsequent adjustment to either of the applicable AEWRs changes which of the two AEWRs is highest. Similar to the highest of the wage sources governing an employer's wage obligations under 20 CFR 655.120(a), the highest of the applicable AEWRs governs which rate is ''the AEWR'' for evaluating an employer's wage obligations under 20 CFR 655.120(b)(3), 655.120(c)(3), and 655.122(l).

For job opportunities involving driving duties, as explained in the NPRM, the CO will continue to look at factors such as the type of equipment involved (*e.g.,* pickup trucks, custom combine machinery, or semi tractor-trailer trucks; makes and models of machines to be used), the location where the work will be performed (*e.g.,* on a farm or off), and any qualifications and requirements for the job opportunity in order to determine the appropriate SOC code to assign to the employer's job opportunity. Similarly, for job opportunities that involve driving farmworkers from place to place around the farm property during the course of performing hand-harvest work, the CO will consider factors such as the type of vehicle (*e.g.,* a farm truck or van or a hired van or bus, such as a Calvans vehicle), the location where the farmworker transport will be performed (*e.g.,* around the farm, including on private roads, or on public roads), and any qualifications and requirements for the transport (*e.g.,* type of driver's licensure, gross vehicle weight, vehicle maintenance responsibilities, paperwork requirements) to determine the appropriate SOC code to assign to the employer's job opportunity. Because each employer's need for labor or services is unique to its operational needs, the CO must evaluate each H–2A job opportunity on a case-by-case basis, considering the totality of the information in an H–2A application and job order, to determine the appropriate SOC code(s).

As in current practice, if the CO determines that the employer's wage offer is less than the wage rate that must be offered to satisfy H–2A program requirements (*e.g.,* the wage offer is less than the highest of the wage sources listed in 20 CFR 655.120(a), including the AEWR determination applicable to the H–2A job opportunity), the CO will issue a Notice of Deficiency alerting the employer to the issue and providing an opportunity for the employer to amend its wage offer. If the employer chooses not to amend its wage offer, the CO will deny the application for failure to satisfy criteria for certification, and the employer may appeal the final determination. If the SOC code assigned to the H–2A job opportunity is material to the CO's final determination, the employer may contest the SOC code assessment on appeal.

Many commenters expressed concern that the SWA and CO would assign multiple SOC codes, even though all of the duties may be encompassed within a single SOC code, because those duties appeared in multiple SOCs as overlapping tasks. The Department recognizes that its statement in the NPRM that multiple SOC codes would be assigned if duties ''can be classified in multiple SOCs'' could have been misinterpreted as allowing or encouraging the SWA or CO to search for and assign as many SOC codes as may be relevant to any of the duties, qualifications, or requirements included in the employer's job opportunity description.[91] This was not the Department's intent. Rather, the Department's intent was more clearly expressed where the Department explained in the NPRM that ''[g]enerally, a job opportunity corresponds with a single SOC code if all of the duties fall within a single occupation and the qualifications, requirements, and other factors are consistent with that occupation'' and the CO will assign more than one SOC code only if the job opportunity ''cannot be classified within a single SOC.'' As

[90] The tasks listed in O*NET are derived from surveys of workers, who may use terms like ''trucks'' to refer to a variety of vehicles (*e.g.,* vans or sports utility vehicles (SUV)).

[91] *See* 86 FR 68174, 68183 (Dec. 1, 2021).

demonstrated in examples provided in this section, multiple SOC codes will be assigned in situations where the employer's job opportunity includes duties that are not found within a single SOC code and, therefore, multiple SOC codes must be assigned in order to reflect all of the duties within the SOC system.

After reviewing comments received and scenarios raised in requests for clarification or expressing concern that employers will experience disruption in the assignment of the applicable AEWR to their job opportunities, the Department believes that the vast majority of job opportunities will continue to be covered by the six field and livestock workers (combined) SOC codes. Those codes are quite broad, both individually and as a grouping, and any H–2A job opportunity classified as any one or more SOC codes within this group of six SOC codes will not be impacted by this final rule, as only one AEWR determination will apply. For example, absent additional job details that might indicate otherwise, an H–2A job opportunity that requires a worker to care for livestock, including driving a truck loaded with supplemental feed to the locations where livestock are grazing and repairing fences, would be assigned only SOC code 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals), as the list of tasks for this SOC code in O*NET includes duties driving trucks to distribute feed and repairing fences and other enclosures. Likewise, an H–2A job opportunity that requires a worker to manually harvest crops in a field or orchard, perform other crop cultivation duties, and move the truck that holds the harvested crop from one place in the field or orchard to another and to storage or a pick-up point on the farm would be assigned only SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), as the list of tasks for this SOC code in O*NET includes duties driving trucks loaded with agricultural products on the farm. If, in the second example, the ''truck'' was a heavy or more specialized piece of agricultural equipment than the basic example suggests (*e.g.,* a harvesting machine that gathers and holds the crop during harvest), SOC code 45–2091 (Agricultural Equipment Operators) would be assigned in addition to SOC code 45–2092, because operating heavy agricultural machinery is not covered in SOC code 45–2092, but it is covered in SOC code 45–2091, while manual harvesting is covered in SOC code 45–2092, but is not covered in SOC code 45–2091. However, based on the description of the location, type of equipment involved, and purpose of the truck driving in this example (*i.e.,* driving trucks loaded with harvested crops from one location to another on the farm), neither SOC code 53–3033 (Light Truck Drivers) nor SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers) would be assigned to the job opportunity. Therefore, even if the SWA and CO assign a combination of SOC codes—45–2091 and 45–2092—paragraph (b)(5) would not impact the AEWR determination applicable to the employer's job opportunity, as both SOC codes are subject to the same AEWR determination under paragraph (b)(1)(i).

In addition, the Department reminds employers that H–2A job opportunities must include only qualifications and requirements that are bona fide and consistent with non-H–2A job opportunities in the same or comparable occupations and crops.[92] This also applies to H–2A job orders that include duties that fall under a combination of SOC codes. For example, an H–2A job order seeking workers to perform hand-harvest tasks, accounting tasks, and semi-truck driving tasks would present an unusual combination of duties, spanning multiple SOC codes, and either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of the combination of duties specified in the job offer.

Some commenters objected to the SWA and CO's consideration of all duties listed in an employer's H–2A job opportunity description when assessing SOC code assignment. Most of these commenters urged the Department to adopt some form of a primary or majority duties test or otherwise disregard duties an employer characterizes as minor, infrequent, or intermittent. A trade association asserted that using a ''primary duties'' test would reduce the risk of inconsistent SOC code assignments between the SWA and CO and simplify employer filings by not requiring separate applications for each SOC code.

Trade organizations, a government agency, and an employer offered various approaches for identifying duties that should be included or excluded from consideration during SOC code assessment. Among commenters suggesting the SOC code should be based on the principal or most important duty the worker performs, some suggested the Department only consider duties performed 51, 80, or 90 percent of the time, or that an SOC code should apply only if workers perform mostly the same duties as in the SOC code description. Other suggestions included disregarding any duty performed as less than 10 percent of a worker's day-to-day activities; a duty performed for 1 hour during an 8-hour workday; any duty performed less than 20 percent of the time, although without specifying whether ''time'' meant per day, per work week, or throughout the entire employment period; ''minor truck driving,'' without specifying the meaning of ''minor''; and construction labor performed intermittently during the employment period, without specifying the meaning of ''intermittently.'' Some employers and trade associations recommended that the Department require the employer to identify the percentage of time per duty on their H–2A application and attest that if the percentage changes for any of the workers such that a different duty becomes the primary duty, the employer will notify the Department and the SWA of the change and request an updated wage for that worker.

The Department declines to adopt commenters' suggestions. For one, the Department is concerned with how such suggestions would work in practice. Rather than resulting in more appropriate and consistent AEWR determinations, assigning an SOC code based on the ''primary duties'' or the percentage of time identified for each duty in an employer's job opportunity description could permit or encourage employers to combine work from various SOC codes, interspersing higher-skilled, higher-paying work among many workers so that the higher-paying work is never a duty performed by any one employee more than the specified percentage. Such an approach would undermine the Department's goals of providing predictability, consistency, and administrative efficiency in AEWR determinations, and of preventing inaccurate SOC code assignment. In addition, such an approach to assigning SOC codes could permit an employer to gain the benefit of work in a higher paid SOC code, while paying less than the AEWR applicable to that work. Ultimately, a ''primary duties''-type approach runs a risk of adversely affecting the wages of workers in the United States who are employed in the higher paid SOC code. In addition, implementing the ''percentage per duty'' disclosure requirement would increase administrative burden for employers (*e.g.,* substantial recordkeeping to ensure that the actual work each worker performed aligns with the percentages

[92] *See* 20 CFR 655.122(b).

disclosed), and potentially restrict fluid movement of workers among all the duties the employer requires in the job opportunity, which was a concern many commenters expressed. The Department believes that the CO's review of the totality of each H–2A job opportunity, as discussed above, addresses commenters' concerns regarding consistency and accuracy of SOC code assignment, without increasing administrative burden, complexity, or risk of inadequate AEWRs.

Similarly Employed by SOC Code, not Industry

Some commenters asserted that truck driving, mechanic, and construction duties performed in agriculture are categorically different than truck driving, mechanic, and construction duties performed in other industries and should not be classified using SOC codes outside the field and livestock workers (combined) occupational group, subject to the AEWR determinations based on OEWS, and potentially resulting in H–2A job opportunities assigned multiple SOC codes and subject to paragraph (b)(5). Commenters asserted that the truck driving conditions involved in H–2A applications are distinct from those that are classified as SOC code 53–3033 (Light Truck Drivers) or SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers), or that the nature of the commodity being hauled (*e.g.,* a harvested crop, rather than a nonagricultural commodity) should be dispositive in the SOC code assignment of an H–2A job opportunity involving truck driving. These commenters stated that farmers may require a worker to drive only short distances and only through rural areas (*e.g.,* between the farm and a nearby packing house), never hundreds of miles at a time, navigating urban areas, or delivering industrial goods. In addition, commenters asserted that SOC code 45–2091 alone should apply to drivers who haul a farmer's crop or commodity from the field, including drivers of semi-trucks hauling the crop or commodity off the farm and ''regardless of whether the driver is operating the semi-truck with a Class A CDL license or operating the semi-truck with a Standard Driver's License under the Farm-Related CDL Exemption.''

The Department acknowledges that some H–2A job opportunities involving truck driving would not appropriately be classified as SOC code 53–3033 (Light Truck Drivers) or SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers) based on the equipment, vehicle weight, location, and other factors involved, as discussed above. However, the Department disagrees that SOC code 45–2091 (Agricultural Equipment Operators) is the only SOC code appropriate for truck-driving duties listed on an H–2A application. As discussed in the NPRM, an H–2A job opportunity requiring a worker to operate semi-trucks with at least 26,001 pounds Gross Vehicle Weight (GVW), whether a commercial driver's license is required or not, over public roads (*e.g.,* hauling the crops away from the farm to market, to a packing facility, or to storage) would likely result in the CO assigning SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers). Thus, the Department views operating semi-trucks hauling commodities over public roads to generally involve the same or similar skills, qualifications, and tasks, whether the commodity is agricultural or nonagricultural in nature.

One commenter who addressed construction labor asserted that SOC code 47–2061 involves tasks that are too highly skilled to apply to construction on farms. The Department respectfully disagrees. The Department receives H–2A applications involving skilled construction labor or services, some requiring licensure, particularly where a grower contracts with an H–2ALC for a project requiring construction labor. For example, the Department receives H–2A applications for livestock confinement or grain bin elevator construction on farms that require workers to perform duties such as reading and following plans and measurements; aligning and sealing structural components (*e.g.,* walls and pipes), sometimes by welding; building frameworks (*e.g.,* walls, roofs, joists, studding, and window and door frames); installing metal siding, windows, ceiling tiles, and insulation; and pouring concrete. These construction duties are consistent with SOC code 47–2061, not with SOC code 45–2093. In addition, the location of the work—on a farm or off a farm—or type of structure to be constructed—a livestock confinement building or a retail building—does not alter the essential duties or skills required of the worker. Where an H–2A job opportunity's tasks, qualifications, and requirements indicate skilled construction work will be performed, then SOC code 47–2061 (Construction Laborers) may be assigned, or potentially a different SOC code if the construction work is even more specialized (*e.g.,* 47–2051 (Cement Masons and Concrete Finishers)).

Two trade associations and an employer asserted that on-farm mechanics perform very limited mechanic work that is very different from the duties mechanics outside the agricultural industry perform. One stated that on-farm mechanics perform routine maintenance on a farm's equipment to keep it operational, ''not reprogramming computer-based trucks or rebuilding engines.'' The Department acknowledges that some on-farm mechanics may perform only the type of routine maintenance consistent with SOC code 45–2091's (Agricultural Equipment Operators) listed tasks of ''[o]perate or tend equipment used in agricultural production, such as tractors, combines, and irrigation equipment'' or ''[a]djust, repair, and service farm machinery and notify supervisors when machinery malfunctions.''[93] However, the Department receives H–2A applications for mechanics that include duties such as the following: diagnose, repair, and overhaul engines, transmissions, components, electrical and fuel systems, etc. on tractors, irrigation systems, generators and/or other farm equipment; make major mechanical adjustments and repairs on farm machinery; repair defective parts using welding equipment, grinders, or saws; repair defective engines or engine components; replace motors; fabricate parts, components, or new metal parts using drill presses, engine lathes, welding torches, and other machine tools (grinders or grinding torches); test and replace electrical circuits, components, wiring, and mechanical equipment using test meters, soldering equipment, and hand tools; read inspection reports, work orders, or descriptions of problems to determine repairs or modifications needed; and maintain service and repair records. Duties of this type and scale are encompassed within 49–3041 (Farm Equipment Mechanics and Service Technicians), and not within the routine general maintenance or repair tasks associated with SOC code 45–2091. The Department notes that if, in addition to duties on the list above, an H–2A job opportunity included diagnosing, repairing, and overhauling engines, transmissions, components, electrical and fuel systems, etc. on cars, the H–2A job opportunity would be a combination of occupations: 49–3041 (Farm Equipment Mechanics and Service Technicians) and 49–3023 (Automotive Service Technicians and Mechanics), which encompasses duties that include diagnosing, adjusting, repairing, or overhauling automotive vehicles. Similarly, if the H–2A job opportunity included diagnosing, repairing, and overhauling engines, transmissions, components, electrical and fuel systems,

[93] *https://www.onetonline.org/link/summary/45-2091.00* (last accessed August 5, 2022).

etc. on trucks (including diesel trucks) or busses, the H–2A job opportunity would be a combination of SOC codes: 49–3041 (Farm Equipment Mechanics and Service Technicians) and 49–3031 (Bus and Truck Mechanics and Diesel Engine Specialists), which encompasses duties that include diagnosing, adjusting, repairing, or overhauling trucks and busses; or maintaining and repairing any type of diesel engines.

Corresponding Employment

Trade associations asked the Department to clarify how the AEWR determined under the proposed methodology would interact with the definition of ''corresponding employment'' at 20 CFR 655.103(b). Specifically, these commenters asked the Department to clarify whether where the H–2A job opportunity involves duties that span multiple SOC codes, non-H–2A workers who only perform the duties associated with one SOC code included in the job opportunity would be in ''corresponding employment'' with H–2A workers who perform any of the same duties as well as the duties associated with another SOC code.[94] As explained in *Overdevest Nurseries LP* v. *Walsh,* 2 F.4th 977 (D.C. Cir. 2021), a non-H–2A worker is in ''corresponding employment'' with an H–2A worker if the non-H–2A worker performs any duties included in the H–2A job order, or any other agricultural work performed by the H–2A worker(s), regardless of whether the non-H–2A worker performs all of the duties listed in the job order. Agreeing with the Secretary's reasoning behind the corresponding employment regulation, the D.C. Circuit explained that this requirement ''advances the statute's purpose . . . by requiring employers to pay non-H–2A workers the same amount that they pay the H–2A workers when they are doing the same work.'' *Id.* At 984 (internal citations omitted). The Court concluded that this is an ''eminently reasonable interpretation'' of the statute's mandate to prevent ''adverse effect'' on workers in the United States ''similarly employed.'' *Id.* Applying the AEWR methodology adopted in this final rule, a non-H–2A worker is engaged in corresponding employment when the worker performs any of the duties listed in the H–2A job order, regardless of whether the worker performs or does not perform all of the duties listed in the job order. The worker in corresponding employment must be paid at least the applicable H–2A wage rate for all time so spent. For example, consider an employer whose H–2A job opportunity includes hand-harvesting and driving a semi-truck to haul the harvested crop to delivery points away from the farm. Assuming the AEWR determination for SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers) is higher than the AEWR determination for SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse Workers) and all other potential wage sources (*e.g.,* any applicable State minimum wage), the employer must offer and pay all of its workers employed in the H–2A job opportunity the higher AEWR amount for all hours worked, *i.e.,* for hours spent performing the hand-harvesting duties and for hours spent performing the truck-driving duties. The employer also employs non-H–2A workers to perform only hand-harvesting work. These workers would be in ''corresponding employment'' when performing the hand-harvesting duties described in the job order, regardless of whether such workers do or do not also perform the truck-driving duties, and must receive the same pay as the H–2A workers receive for performing that same work. Accordingly, the employer must pay these workers in corresponding employment at least the H–2A wage rate (in this example, the AEWR determination for SOC code 53–3032) for time spent engaged in such corresponding employment. As discussed above, the Department anticipates that most H–2A job opportunities will fall within one or more of the SOC codes encompassed within the six field and livestock workers (combined) SOC codes, and, therefore, wage complexities related to ''corresponding employment'' are unlikely to occur.

Importance of Appropriate SOC Code Assignment

As explained in the NPRM, determining the appropriate SOC code is an important component of the Department's decision to move to SOC-specific wages. The H–2A program is not limited to job opportunities classifiable within the six field and livestock workers (combined) SOC codes. Based on the statutory and regulatory framework governing the definition of what constitutes agricultural labor or services, the Department's experience is that a wide range of jobs within the U.S. agricultural economy, depending on the nature and location of work performed, could be eligible under the H–2A visa classification. Though the vast majority of job opportunities will be classifiable within a relatively small number of SOC codes, the Department has issued H–2A certifications to employers covering jobs classified in dozens of SOC codes, including approximately three dozen in fiscal year 2021 alone. Use of the highest applicable wage in these cases reduces the potential for employers to offer and pay workers a wage rate that, while appropriate for the general duties to be performed, is not appropriate for other, more specialized duties the employer requires. In addition, use of the highest applicable wage imposes a lower recordkeeping burden than if the Department permitted employers to pay different AEWRs for job duties falling within different SOC codes on a single *Application for Temporary Employment Certification.* This policy is also consistent with the way the Department determines prevailing wage rates for jobs that cover multiple SOC codes in other employment-based visa programs.

Under this final rule, if the job duties on the H–2A application (including the job order) constitute a combination of SOC codes that do not all fall within the field and livestock worker (combined) occupational grouping, the Department will determine the applicable AEWR based on the highest AEWR among the SOCs assigned to the job opportunity. In the event an employer's job opportunity requires the performance of duties that are not encompassed in a single SOC code's description and tasks and the SOC codes that must be assigned to cover the entirety of the employer's job opportunity are subject to different AEWRs (*e.g.,* a field and livestock worker (combined) SOC code and an SOC code not encompassed in the field and livestock worker (combined) occupational group, or two SOC codes neither of which are encompassed in the field and livestock worker (combined) occupational group), the AEWR for the job opportunity is the highest AEWR for all applicable SOC codes to reduce the potential for inaccurate SOC code assignment and AEWR determination and effectuate the purpose of the AEWR (*i.e.,* protect against adverse effect on the wages of workers in the United States similarly employed).

The Department has considered all the comments it received and has decided to adopt the language of the NPRM as proposed. Under this final rule, if the job duties on the job order are not encompassed within a single SOC code, the CO will determine the applicable AEWR based on the highest

[94] *See* 20 CFR 655.103(b) (The employment of workers who are not H–2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H–2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof.'')

AEWR for all applicable SOC codes, as provided in paragraph (b)(5).

D. Out-of-Scope Comments on the Proposed Rule

The Department received comments on several issues that were unrelated to its proposal to revise the methodology it uses to determine the AEWR for non-range job opportunities in the H–2A program. Some comments requested regulatory action beyond the proposed changes that the Department presented for public comment in the NPRM or discussed potential Congressional action (*e.g.,* immigration reform). Some commenters noted general farm worker labor shortages and commented on the current administration's policies (*e.g.,* programs to address the trucking shortage) that the commenters asserted are exacerbating the shortage. A workers' rights advocacy organization noted the historical and current exclusion of agricultural workers from laws that protect workers in the United States (*e.g.,* National Labor Relations Act). Comments about policies or laws outside the parameters of the H–2A program are all out of scope. Other comments addressed topics unrelated to the H–2A program, such as requests for employment, matters at a U.S. Consulate, or related to COVID–19, all of which are beyond the scope of this rulemaking. Many commenters suggested that the Department abandon the AEWR altogether as a means of preventing the employment of H–2A workers from adversely affecting the domestic workforce. These comments were not within the scope of this rulemaking, which the NPRM expressly limited to revising the methodology for calculating the AEWR. 86 FR at 68185 (''[t]he Department is not considering eliminating the AEWR or changing the AEWR's role in determinations of an employer's required minimum wage rate in the H–2A program . . . .'') For example, some commenters objected to the Department's continued use of the AEWR as one of the primary means of preventing adverse effects of H–2Arkers on the domestic workforce, with some commenters characterizing the underlying assumptions of the AEWR (*e.g.,* regarding the existence of workers in the United States similarly employed who require protection) as outdated. These commenters noted the growth of the H–2A program and paucity of SWA referrals and a limited number of hires from those few referrals as an indicator of the lack of domestic labor. Some commenters asked the Department to hold hearings on whether to continue using the AEWR concept. Some asserted that the Department misuses the AEWR as a preventative measure and should instead use the AEWR only after a factual finding of adverse effect in particular areas or occupations. Others stated the Department should examine current dynamics in the labor market (*e.g.,* particular labor shortages), hold public hearings to ''examine the underlying tenants [*sic*] of the Department's mandate and test solutions'' obtained through testimony presenting agricultural industry realities, or otherwise engage in further evaluation of adverse effect with focus on the employers' perspective. One commenter stated the Department should, in consultation with USDA, assess the impact of the continued use of AEWR on the global competitive position of farmers in the United States and on U.S. workers, due to offshoring or innovations to reduce employers' dependence on labor (*e.g.,* mechanization and automation). The continued use of the AEWR was not the subject of this rulemaking, so these comments are out of scope.

Other comments outside the scope of this rulemaking addressed program issues unrelated to the methodology for setting the AEWR for non-range job opportunities, such as regulation of farm labor contractors, U.S. worker recruitment, employment eligibility of applicants referred for employment, prevailing wage survey methodology, the AEWR methodology for range occupations, logging, the definition of agricultural labor or services, and the length of H–2A certifications. For example, some commenters expressed concern about employers refusing to offer wages higher than the AEWR during recruitment of prospective workers. One of these commenters expressed concern about the failure of wage sources *other than* the AEWR to protect U.S. workers' wages. The commenter asserted that a Federal minimum wage rate that is lower than the AEWR and the absence of prevailing wage survey findings, collective bargaining agreements, and State minimum wage rates applicable to H–2A job opportunities undermine workers' efforts to demand higher wages. Two other commenters urged the Department to require that employers ''reasonably negotiate'' wages with applicants—both prospective H–2A workers and U.S. applicants—and to reconsider whether U.S. workers who demand wages above an employer's offer are considered ''available'' within the meaning of 8 U.S.C. 1188(a)(1)(A) for purposes of reducing the number of H–2A workers potentially certified. To the extent these comments object to the use or role of the AEWR in the H–2A program overall or suggest concerns with aspects of the H–2A program beyond the AEWR methodology (*e.g.,* recruitment and consideration of U.S. applicants; prevailing wage surveys), these comments address issues beyond the scope of this rulemaking, which is limited to proposed changes to the methodology the Department uses to determine the AEWR for non-range job opportunities in the H–2A program. However, as explained above and below, the Department continues to believe that the AEWR, functioning as a wage floor, is a critical measure to protect against adverse effect on the wages of agricultural workers in the United States, a particularly vulnerable workforce, and that the improvements made in this final rule to the AEWR methodology will serve to better protect against such adverse effect.

III. Administrative Information

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

Under Executive Order (E.O.) 12866, the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* OIRA reviewed this final rule and has determined that it is a significant regulatory action under E.O. 12866, but not an economically significant regulatory action within the scope of section 3(f)(1).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored

to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Public Comments

Multiple commenters stated the Department underestimated cost increases for employers and suggested the rule should be economically significant. The comments claimed this increased labor cost can put pressure on farms and reduce their advantage in the global marketplace and regional marketplaces, and potentially put them out of business. The Department recognizes that there will be some cost increases to some employers as described in the analysis of transfer payments section. The analysis in this final rule estimates the impacts of the rule based on actual wage records in Fiscal Year (FY) 2020 and FY 2021 to determine the most accurate impact of the revised AEWR structure in the final rule. Of the 25,150 certifications between FY 2020 and FY 2021, only 732 (2.91 percent) have wage impacts and the average certification would have an impact of $63,943 with an average per worker wage impact of $5,117. Based on the Department's analysis, the overall transfer payments imposed by the rule are less than $100 million and, therefore, not economically significant.

Multiple commenters asserted that the Department failed to use the most recent data available and suggested the Department has not taken into account the average 11 percent year-over-year increase in applications since 2017, resulting in an inaccurate estimate of wage impacts on farms affected by the AEWR. They also suggested that the OEWS does not accurately reflect farmworker wages. The proposed rule calculated wage impacts using the most recent data available at the time of publishing which consisted of data through Quarter 3 of FY 2021. In addition, the proposed rule calculated assumptions used in the analysis such as wage rates, growth rates, and impacted entities using the most recent full year of data available, 2020. In this final rule, the Department has updated the analysis to include the entirety of FY 2021 disclosure data to calculate wage impacts and updated data sources and growth rate calculations to include 2021 data now that there is a full year of disclosure data available. The growth rate calculations, as discussed in the analysis below, account for the increasing number of certifications that have occurred historically, resulting in an estimate of increased wage impacts over time.

One commenter asked the Department to compare existing FLS wage rates for field and livestock workers (combined) occupations with State or national OEWS data when the FLS is not available to facilitate evaluation of the impact of wages in the event the FLS were to become unavailable beyond the geographical limits discussed in this rule (*e.g.,* Alaska). In this final rule, the Department is adding a comparison of wage rates into the docket.

One commenter asserted the analysis in the proposed rule was incomplete because it does not consider how many employers and workers would be impacted by mid-season AEWR adjustments for OEWS updates that will be effective on or about July 1 annually. The Department has considered mid-season changes to wage rates from newly released OEWS data. As discussed in the section on transfer payments, the Department estimates wage impacts assuming that OEWS wages are released in June. The Department reiterates that 98 percent of the job opportunities subject to the AEWR methodology in this final rule will be subject to FLS-based AEWRs only—and related AEWR adjustments, if the employment period crosses the calendar year—and will not be impacted by OEWS adjustments. In addition, for the small percentage of job opportunities subject to an OEWS-based AEWR, wage adjustment would impact only those with an employment period crossing July 1. The Department's estimates of wage impacts due to OEWS-based adjustments during the employment period accounts for a potential impact on this small percentage. The Department's calculations of wage impacts assumes that worker wages would remain constant if the mid-season OEWS shows a decline in wage rates, while worker wages would increase if the mid-season OEWS release shows an increase in wage rates.

Multiple commenters asserted that the Department underestimates the impact of the revised AEWR structure because it does not consider impacts on specialty crops, specific industries, or occupations. Examples include nurseries and greenhouse farms, fruit and tree nut farms, and vegetable and melon operations. The commenter suggested that data used does not accurately represent these varying subsectors. The Department understands that impacts on each industry will be different depending on market dynamics, including local wage rates. The Department has taken the approach of estimating wage impacts using actual historical certification data that allows for detailed wage impacts to be calculated for each certification based on the industry and location of the certification.

Several commenters asserted that the Department underestimates the impact of the revised AEWR structure because it does not consider classifications of workers to new (higher wage) SOC codes as a result of the requirement to pay the highest of applicable SOC code AEWRs. One commenter asserted that all farm work overlaps and classifications should not be based on intermittent activities and others assert that workers should not receive higher wages if they only minimally perform the higher classification.

The Department understands that we may have underestimated the impact of the revised AEWR structure due to the final rule's new requirement to pay the highest of applicable SOC code AEWRs. However, the Department does not have any data readily available to estimate the number of workers that may have their SOC codes reclassified as a result of the final rule,[95] and commenters did not provide such data in their comments on the NPRM. In addition, the Department considers the impact of this potential underestimation to be *de minimis* for the reasons included in our discussion and clarification above regarding SOC assignment and assignment of the highest AEWR applicable, namely, that the Department anticipates low incidence of multiple SOCs assigned, resulting in job opportunities subject to the highest of multiple AEWRs.

Many comments asserted that the equity analysis in the proposed rule was insufficient and asserted that the Department was claiming that the transfers from employers to H–2A workers is good for diversity, equity, and inclusion. In addition, commenters

[95] The group of potentially reclassified SOCs fall into two groups: (1) jobs that were assigned an inappropriate SOC code; and (2) combination of SOC-code jobs that were assigned the field and livestock worker (combined) SOC. Commenters are correct that the specific incidences are case-specific and require detailed analysis to assign codes. To determine the number of potentially reclassified certifications would require review of each case in the certification dataset. As such, the number of workers who may have their SOC codes reclassified because of this final rule is not readily accessible to the Department.

stated that the equity analysis does not consider impacts on individuals in rural communities. The Department contends that the distributional impact analysis section does not make any claims about the positives or negatives of transfers from employers to H–2A workers. The distributional impact analysis only shows the distribution of U.S. workers within the SOC codes impacted by the H–2A program. E.O. 12866 does not require an analysis of impacts on rural communities or an analysis in general of underserved communities, as that term is defined by E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. However, the Department expects that the wage impacts estimated in this regulatory impact analysis (RIA) will predominantly occur in rural communities where farms are located.

Multiple commenters asserted the Department does not consider administrative costs including increased paperwork, filing fees to DOL and U.S. Citizenship and Immigration Service (USCIS), attorney costs, and costs to DOL to review increased applications. One of these commenters suggested that the number of applications could increase by three to four times. The Department does not have data to quantify administrative costs. As discussed in the unquantifiable cost section of the RIA below, the Department expects some administrative costs such as payroll changes to be *de minimis* because employers already need to update payrolls when AEWR wage rates are released annually. The Department acknowledges that there may be other administrative costs, but commenters did not provide specific data to quantify those costs.

Finally, one commenter asserted that the impacts of the proposed rule would increase food inflation. The Department does not have data to quantify impacts on food inflation from the estimated wage transfers. However, the Department reiterates that the analysis shows only 2.9 percent of certifications would have wage impacts under the AEWR methodology in this final rule and, as discussed in the Regulatory Flexibility Act of 1980 (RFA), the wage impacts are not significant for 98 percent of small employers. The Department does not expect this final rule alone will cause a general increase in food prices because there are many other factors such as an overall increase in the price level and an increase in the transportation and material costs that would have more substantive impacts on food prices.[96]

Outline of the Analysis

Section III.A.1 describes the need for the final rule, and Section III.A.2 describes the process used to estimate the costs of the rule and the general inputs used, such as wages and number of affected entities. Section III.A.3 explains how the provisions of the final rule will result in quantifiable costs and transfers and presents the calculations the Department used to estimate them. In addition, Section III.A.3 describes the unquantified costs of the final rule, a description of qualitative benefits, and presents an analysis of distributional impacts of the rule. Section III.A.4 summarizes the estimated first-year and 10-year total and annualized costs and transfers of the final rule. Finally, Section III.A.5 describes the regulatory alternatives that were considered during the development of the final rule.

Summary of the Analysis

The Department estimates that the final rule will result in costs and transfers. As shown in Exhibit 1, the final rule is expected to have an annualized cost of $0.073 million and a total 10-year quantifiable cost of $0.51 million at a discount rate of 7 percent.[97] The final rule is estimated to result in annual transfers from H–2A employers to H–2A employees of $38.22 million and total 10-year transfers of $268.47 million at a discount rate of 7 percent.[98]

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND TRANSFERS OF THE FINAL RULE

[2021 $millions]

	Costs	Transfers
Undiscounted 10-Year Total	$0.51	$375.07
10-Year Total with a Discount Rate of 3 percent	0.51	322.73
10-Year Total with a Discount Rate of 7 percent	0.51	268.47
10-Year Average	0.05	37.51
Annualized at a Discount Rate of 3 percent	0.06	37.83
Annualized with at a Discount Rate of 7 percent	0.07	38.22

The total cost of the final rule is associated with rule familiarization. Transfers are the results of changes to the AEWR methodology and, more specifically, in H–2A job opportunities where the FLS does not adequately collect or consistently report wage data at a State or regional level. See the costs and transfers subsections of Section III.A.3 (Subject-by-Subject Analysis) for a detailed explanation.

The Department was unable to quantify some costs and benefits of the final rule and describes them qualitatively in Section III.A.3 (Subject-by-Subject Analysis).

1. Need for Regulation

As discussed above, court-issued injunctions prevented USDA from suspending FLS data collection for CY 2020 and prevented the Department from further implementing the 2020 AEWR Final Rule on December 23, 2020, resulting in a return to the 2010 Final Rule AEWR methodology. Under

[96] The Department does not have data to estimate the impact of this rule on specific types of food. The Department believes that the impact of the rule will most likely affect Puerto Rico and Alaska, where no AEWRs currently exist because the FLS data does not collect wage data covering those geographic areas.

[97] The final rule will have an annualized cost of $0.06 million and a total 10-year cost of $0.51 million at a discount rate of 3 percent in 2021 dollars.

[98] The final rule will have annualized transfer payments from H–2A employers to H–2A employees of $37.83 million and a total 10-year transfer payments of $322.73 million at a discount rate of 3 percent in 2021 dollars.

the 2010 Final Rule, FLS wage data is used to determine the AEWRs for all H–2A non-range job opportunities. However, the Department remains concerned that the use of a single AEWR for all non-range job opportunities in the H–2A program may adversely affect the wages of workers in the United States similarly employed in certain jobs where the FLS does not adequately collect or consistently report wage data at a State or regional level. Therefore, the Department will use the bifurcated approach set forth in the 2020 AEWR Final Rule that set a single AEWR based on the FLS for the vast majority of job opportunities used by employers in the H–2A program—six SOC codes covering field workers and livestock workers—while shifting AEWR determinations to the OEWS survey for all other SOC codes for which the FLS does not adequately collect or consistently report wage data at a State or regional level (*e.g.,* tractor-trailer truck drivers, farm supervisors and managers, construction workers, logging workers, and many occupations in contract employment). As AEWR determinations become more SOC-specific, the Department believes it is appropriate to continue requiring that employers pay the highest applicable wage if the job opportunity cannot be classified within a single SOC code to reduce the potential for employers to misclassify workers, guard against adverse effect on the wages of similarly employed workers in the United States who are engaged in work encompassed in the higher-paid SOC code.

The Department has also determined that two major aspects of the 2020 AEWR Final Rule are inconsistent with the Department's statutory mandate to protect the wages of workers in the United States similarly employed against adverse effect: (1) the imposition of a 2-year wage freeze for field and livestock workers at a wage level based on the FLS published in November 2019, and (2) using the BLS ECI solely to adjust AEWRs annually thereafter. Accordingly, the Department has determined these policies must be reconsidered and will implement revisions in this final rule that better meet the statute's twin goals to ensure that employers can access legal agricultural labor while maintaining strong wage protection for workers in the United States similarly employed.

2. Analysis Considerations

The Department estimated the costs and transfers of the final rule relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the H–2A program as currently codified at 20 CFR part 655, subpart B). This existing baseline is consistent with the 2010 Final Rule because the 2020 AEWR Final Rule was preliminarily enjoined and subsequently vacated by a Federal district court, as explained above.

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the final rule (*i.e.,* costs and transfers that accrue to entities affected). The analysis covers 10 years (from 2023 through 2032) to ensure it captures major costs and transfers that accrue over time. The Department expresses all quantifiable impacts in 2021 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4.

Exhibit 2 presents the number of affected entities that are expected to be impacted by the final rule. The average number of affected entities is calculated using OFLC temporary agricultural labor certification data from 2017 through 2021. The Department provides this estimate and uses it to estimate the costs of the final rule.

EXHIBIT 2—NUMBER OF AFFECTED ENTITIES BY TYPE

[CY 2017–2021 average]

Entity type	Number
Annual Unique H–2A Applicants	8,856

Growth Rate

The Department's estimated growth rates for applications processed and certified H–2A workers based on FYs 2012 to 2021 H–2A program data, is presented in Exhibit 3.

EXHIBIT 3—HISTORICAL H–2A PROGRAM DATA

Fiscal year	Applications certified	Workers certified
2012	5,278	85,248
2013	5,706	98,814
2014	6,476	116,689
2015	7,194	139,725
2016	8,297	165,741
2017	9,797	199,924
2018	11,319	242,853
2019	12,626	258,446
2020	13,552	275,430
2021	15,619	317,619

The geometric growth rate for certified H–2A workers using the program data in Exhibit 3 is calculated as 17.9 percent. This growth rate, applied to the analysis timeframe of 2023 to 2032, would result in more H–2A certified workers than projected employment of workers in the relevant H–2A SOC codes by BLS.[99] Therefore, to estimate realistic growth rates for the analysis, the Department applied an autoregressive integrated moving average (ARIMA) model to the FY 2012–2021 H–2A program data to forecast workers and applications, and estimated geometric growth rates based on the forecasted data. The Department conducted multiple ARIMA models on each set of data and used common goodness of fit measures to determine how well each ARIMA model fit the data.[100] Multiple models yielded indistinctive measures of goodness of fit. Therefore, each model was used to

[99] Comparing BLS 2030 projections for combined agricultural workers (SOC 45–2000) with a 17.9 percent growth rate of H–2A workers yields estimated H–2A workers that are about 127 percent greater than BLS 2030 projections. The projected workers for the agricultural sector were obtained from BLS's Occupational Projections and Worker Characteristics, which may be accessed at *https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm.*

[100] The Department estimated models with different lags for autoregressive and moving averages, and orders of integration: ARIMA(0,2,0); (0,2,1); (0,2,2); (1,2,1); (1,2,2); (2,2,2). For each model we used the Akaike Information Criteria (AIC) goodness of fit measure.

project workers and applications through 2032. Then, a geometric growth rate was calculated using the forecasted data from each model and an average was taken across each model. This resulted in an estimated growth rate of 7.5 percent for H–2A applications and 6.3 percent for H–2A certified workers. The estimated growth rates for applications (7.5 percent) and workers (6.3 percent) were applied to the estimated costs and transfers of the final rule to forecast participation in the H–2A program.

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of applicants and the change in burden hours required for rule familiarization in Section III.A.3 (Subject-by-Subject Analysis).

Compensation Rates

In Section III.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the final rule. Exhibit 4 presents the hourly compensation rates for the SOC codes expected to experience a change in the number of hours necessary to comply with the final rule. The Department used the mean hourly wage rate for private sector Human Resources Specialists (SOC 13–1071).[101] Wage rates are adjusted to reflect total compensation, which includes nonwage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). We use an overhead rate of 17 percent [102] and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2021. For the private sector employees, we use a fringe benefits rate of 42 percent.[103] We then multiply the loaded wage factor by the wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Exhibit 4 throughout this analysis to estimate the labor costs for each provision.

EXHIBIT 4—COMPENSATION RATES

[2021 dollars] *

Position	Grade level	Base hourly wage rate	Loaded wage factor	Overhead costs	Hourly compensation rate
		(a)	(b)	(c)	d = a + b + c
Private Sector Employees					
HR Specialist	N/A	$34.00	$14.19 ($34.00 × 0.42)	$5.78 ($34.00 × 0.17)	$53.97

* Numbers do not add due to rounding.

3. Subject-By-Subject Analysis

The Department's analysis below covers the rule familiarization costs, unquantifiable costs, transfers, and qualitative benefits of the final rule. In accordance with Circular A–4, the Department considers transfers as payments from one group to another that do not affect total resources available to society. This analysis includes the cost of rule familiarization and transfers associated with the AEWR wage structure in this final rule. The Department also described efficiency impacts, payroll and other transition costs, and the distributional impacts that could result from this final rule.

Costs

The following section describes the costs of the final rule.

Quantifiable Costs

Rule Familiarization

When the final rule takes effect, H–2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year. To estimate the first-year cost of rule familiarization, the Department applied the growth rate of H–2A applications (7.5 percent) to the average number of annual unique H–2A applicants from 2017 to 2021 (8,856) to determine the number of unique recurring H–2A applicants impacted in the first year the rule is in effect. The number of unique H–2A applicants (9,520) was multiplied by the estimated amount of time required to review the rule (1 hour).[104] This number was then multiplied by the hourly compensation rate of Human Resources Specialists ($53.97 per hour), who the Department assumes will be responsible for rule familiarization as they are typically well versed in the wages and benefits structure of employment. This calculation results in a one-time undiscounted cost of $513,804 [105] in the first year after the final rule takes effect. The annualized cost over the 10-year period is $60,234 and $73,154 at discount rates of 3 and 7 percent, respectively.

Unquantifiable Costs

a. Efficiency Impacts

The final wage methodology is designed to achieve the statute's goals of providing employers with an adequate legal supply of agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed. The AEWR provides a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment. In the case relevant labor markets are perfectly competitive, if the final rule results in a wage floor above competitive market wages, it will produce some deadweight loss (DWL). In the case of when employers have some monopsony market power, if the final rule sets a wage floor below competitive market wages, it may produce some DWL if employers exercise market power, but otherwise will not. Setting minimum wage rates

[101] BLS, *May 2021 National Occupational Employment and Wage Estimates: 13–1071—Human Resources Specialist, https://www.bls.gov/oes/current/oes131071.htm* (last modified Mar. 31, 2022).

[102] *See* Cody Rice, U.S. Environmental Protection Agency, Wage Rates for Economic Analyses of the Toxics Release Inventory Program (June 10, 2002), *available at https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[103] *See Employer Costs for Employee Compensation, https://www.bls.gov/news.release/ecec.toc.htm* (last modified March 18, 2022). This shows the ratio of total compensation to wages and salaries for all private industry workers.

[104] This estimate reflects the nature of the final rule. As a rulemaking to amend parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

[105] Numbers do not add due to rounding.

has implications on economic efficiency that are complicated and difficult to assess because, in certain combinations of SOC codes and geographies, the gross average hourly wage rates used to determine the AEWRs annually for each State under this final rule may act as a wage floor that is above competitive market equilibrium wages for certain job opportunities, whereas in other job opportunities imperfect competition may suppress domestic labor markets at quantities below the competitive market equilibrium. In this case, if the rule raises the wage floor, resulting wages will be closer to what they would be in a competitive market, resulting in greater efficiency (and reduced DWL).

These two impacts are dependent on local labor market conditions, the nature of the agricultural work to be performed and wage payment structure (*i.e.,* fixed hourly pay versus combination of hourly and piece-rate pay), the relation of the AEWR to the regional OEWS wage, and the shape and components (*i.e.,* makeup of nonimmigrant foreign and domestic workers) of the combined temporary agricultural employment labor supply curve in the local or regional labor market.

The Department is unable to quantify these efficiency impacts because it does not have data on all local labor market conditions for all occupations, data on foreign labor supply curves, and how these interact with employer demand. The Department requested public comment on the DWL or other labor market inefficiencies resulting from the final rule and did not receive any. The efficiency impact of the final rule is limited only to the 2 percent of H–2A workers whose wages the final rule will affect, while there would be no change to the DWL for the other 98 percent of H–2A workers.[106] Therefore, the DWL resulting from the final rule is likely very small. Because the market equilibrium wages for construction workers, supervisors/managers of farmworkers, and logging workers are above current baseline AEWRs, the final rule may create some efficiency gain (or decrease in the DWL) for jobs within the 2 percent when it raises the wage floor from the current baseline AEWRs toward competitive equilibrium wages if employers currently exercise market power to prevent wages from being bid up to competitive equilibrium rates. On the other hand, there may be instances in which the new wage floor (depending on the job and geographic area) could be above the market equilibrium wage; this would result in efficiency loss (or increase in the DWL). A DWL occurs when a market operates at less than or more than the market equilibrium output. The AEWR sets compensation in some cases above the equilibrium level and in other cases may set wage levels that allow employers with market power to suppress wage rates below the competitive equilibrium, resulting in a labor shortage. When the AEWR is set above market equilibrium, the higher cost of labor can lead to a decrease in the total number of labor hours purchased in the local labor market. On the contrary, when the AEWR is set below competitive equilibrium and employers have market power, employers may pay below-competitive-equilibrium wage rates, decreasing the total number of worker labor hours purchased in the local labor market. DWL is a function of the difference between the compensation the employers are willing to pay for the hours lost and the compensation employees are willing to take for those hours. In short, DWL is the total loss in economic surplus resulting from a ''wedge'' between the employer's willingness to pay for, and the employees' willingness to accept work arising from the intervention (in this case the AEWR).

The Department is unable to quantify the DWL without data on the equilibrium wage arising from each locality and occupational code's labor demand and combined immigrant foreign worker and domestic U.S. worker labor supply curves. The following paragraphs qualitatively discuss changes in the AEWR wages that may result in some DWL. In the analysis of wage transfers, only 2 percent of workers would be employed in H–2A job opportunities where the AEWR will change under the final rule from the current baseline. For the 98 percent of workers employed in H–2A job opportunities under the six occupational classifications covering field workers and livestock workers reported by the FLS with no change to wages, the final rule does not change the DWL and existing labor market efficiencies or inefficiencies from the current baseline.

In some cases, the baseline AEWR creates a DWL by setting a minimum wage above the market equilibrium, because the hourly wage represents an annual weighted average across six occupational classifications covering a State or multi-State region. Under the final rule when the AEWR is annually adjusted, the DWL may increase when the AEWR covering the State or multi-State region also increases and remains above market equilibrium. Under the final rule this may occur for some, but not all, positions covering field and livestock workers where the AEWR is determined using the annual weighted statewide gross hourly wage based on the OEWS survey.[107] The OEWS survey does not collect wages for fixed-site farms and ranches but does include data for establishments that support farm production activities (*i.e.,* farm labor contractors) and are engaged in similar agricultural labor or services. Additionally, the types of agricultural establishments included in the OEWS survey, such as farm labor contractors, represent an increasing share of workers certified by the Department on H–2A applications. The OEWS wage for SOC codes associated with these establishments is unlikely to reflect any wage suppression created by nonimmigrant foreign workers' willingness to work at lower wages than domestic U.S. workers. Therefore, an AEWR determined based on OEWS domestic wage data would likely be higher than both the baseline AEWR (based on the FLS) and the market equilibrium wage for temporary agricultural employment. Furthermore, under the final rule, for workers with roles spanning multiple SOC codes, the highest wage would be used, which would be above the market equilibrium wage, on average. Therefore, for most SOC code and area combinations, the AEWRs under this final rule, set at the OEWS wage, would serve as a wage floor and may create DWL in the labor market, as illustrated by Figure 1.

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[106] Under this final rule the Department would use the AEWR methodology set forth in the 2010 Final Rule (*i.e.,* setting the annual AEWRs using the gross average hourly wage rate for field and livestock workers (combined)) for the SOC codes (45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099) which comprise 98 percent of H–2A workers. Of the 25,150 certifications between FY 2020 and FY 2021 only 732 (2.91%) have wage impacts from the final rule.

[107] Of the 25,150 certifications in 2020 and 2021, 24,430 were for field and livestock workers. Of those 24,430, only 28, or 0.1%, would have AEWR determined based on the OEWS survey.

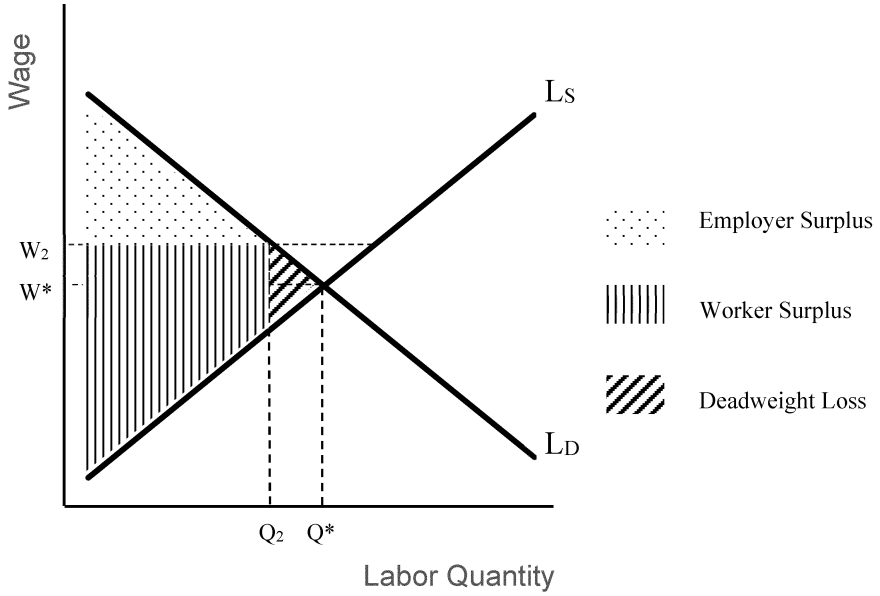

Figure 1: Given a combined nonimmigrant foreign worker and domestic U.S. worker supply curve (L_S) with equilibrium wage W* less than the AEWR set at the OEWS wage (W_2), there will be a DWL in the labor market for that SOC code and area combination.

When employers have market power in the labor market and the AEWR is set below the domestic competitive market equilibrium wage, then there may be a DWL in the associated U.S. labor market. In the H–2A program there are some combinations of SOC codes and geographic areas where this can occur. For example, workers in higher paid SOC codes and SOC codes that are typically performed off farm yet qualify under the H–2A program (*e.g.,* logging operations) have a baseline wage set by the FLS that is substantially below the U.S. market equilibrium according to OEWS data covering the State. Under the final rule the AEWR will be increased for these SOC codes to the State-level OEWS.[108] In addition, workers in SOC codes that continue to have an AEWR set by the FLS, but in areas where FLS data for a given year cannot be reported, will have the AEWR set by a weighted average OEWS wage for the field and livestock worker occupational category which may be below market wage rates for a specific SOC code and geographic area combination.[109] In these examples, some U.S. employers that do not compete with other employers for workers may set wage rates below competitive equilibrium at a wage level that balances the revenue gains from an additional worker against the cost of raising wages for all employees to attract that marginal worker. Some U.S. and foreign workers who would be willing to work at competitive equilibrium wages may not be willing to work at a lower wage. In these cases, a DWL is produced in the U.S. labor market, but under the final rule that DWL is reduced because of the higher AEWR (*see* Figure 2).

[108] For example, Mobile Heavy Equipment Mechanics, Except Engine (49–3042, in ME) has a 2021 AEWR of $14.99 and under the final rule would have an OEWS wage of $22.85.

[109] For example, Agricultural Workers, All Other (45–2099, in SOC) has a 2021 AEWR of $11.81. If FLS data was unavailable it would have a weighted average OEWS wage of $14.18 and the OEWS wage for that specific SOC codes is $16.51. Thus, the weighted average OEWS wage would be below the actual market wage for that SOC code.

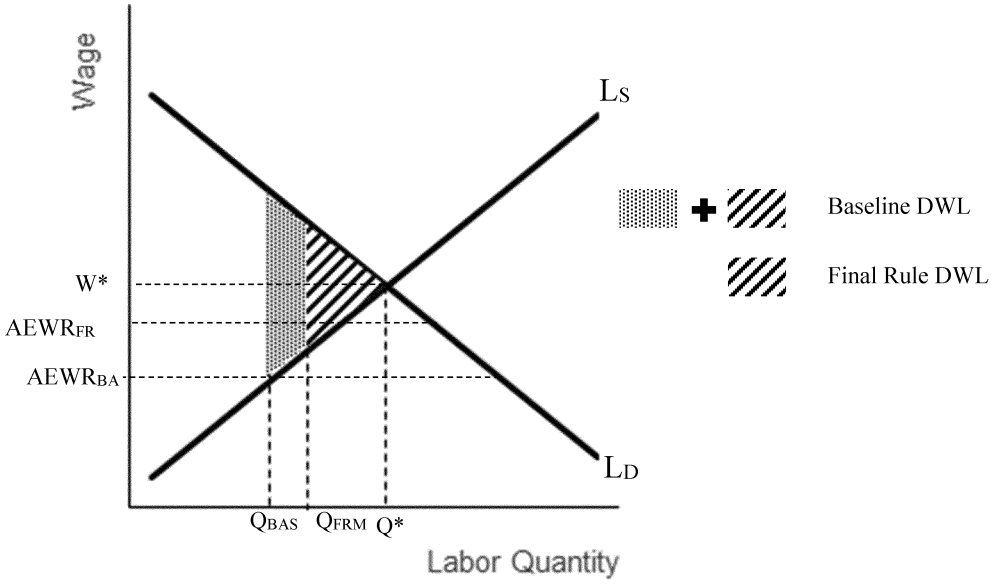

Figure 2: For some SOC code and area combinations the final rule may reduce DWL in the U.S. labor market. Under the baseline the wage set at $AEWR_{BA}$ allows for the legal hiring of foreign workers below the competitive labor market equilibrium wage rate (W*). In a competitive market, employers will bid up wages to W*. If employers do not compete with other employers for workers, they may be able to keep wages below W* even though it creates a labor shortage. With a large supply of workers who lack bargaining power willing to work at the $AEWR_{BASE}$ wage rate, but others unwilling, the total number of workers willing to work at that wage rate is $Q_{BAS,}$ which is below the competitive equilibrium quantity of workers Q*. This results in the Baseline DWL. Under the final rule the wage set at $AEWR_{NPRM}$ is increased, closer to the competitive labor market equilibrium wage rate (W*). More workers (Q_{FR} are willing to work at this rate and the DWL in the U.S. labor market decreases to the Final Rule DWL.

When labor markets are competitive, an AEWR set below the U.S.-only labor market equilibrium wage rate in absence of foreign labor, but above the market equilibrium, with both domestic and foreign labor, results in DWL for the United States because it reduces domestic employer surplus more than it increases domestic worker surplus. In a competitive labor market with no AEWR, there will be no DWL. Figure 3 illustrates this in a simplified case where domestic and foreign agricultural workers are perfect substitutes, and an infinite supply of foreign agricultural workers are willing to work at wage rate $W_{FOREIGN}$ below the U.S.-worker-only market equilibrium wage rate $W_{US\text{-}ONLY}$. The competitive market equilibrium will equal $W_{FOREIGN}$ and domestic employers will hire a combination of $Q_{EFFICIENT\_US}$ domestic workers and ($Q_{EFFICIENT\_TOTAL}$-$Q_{EFFICIENT\_US}$) foreign workers. U.S. DWL will be zero because U.S. total surplus (U.S. employer surplus + U.S. worker surplus) is maximized.

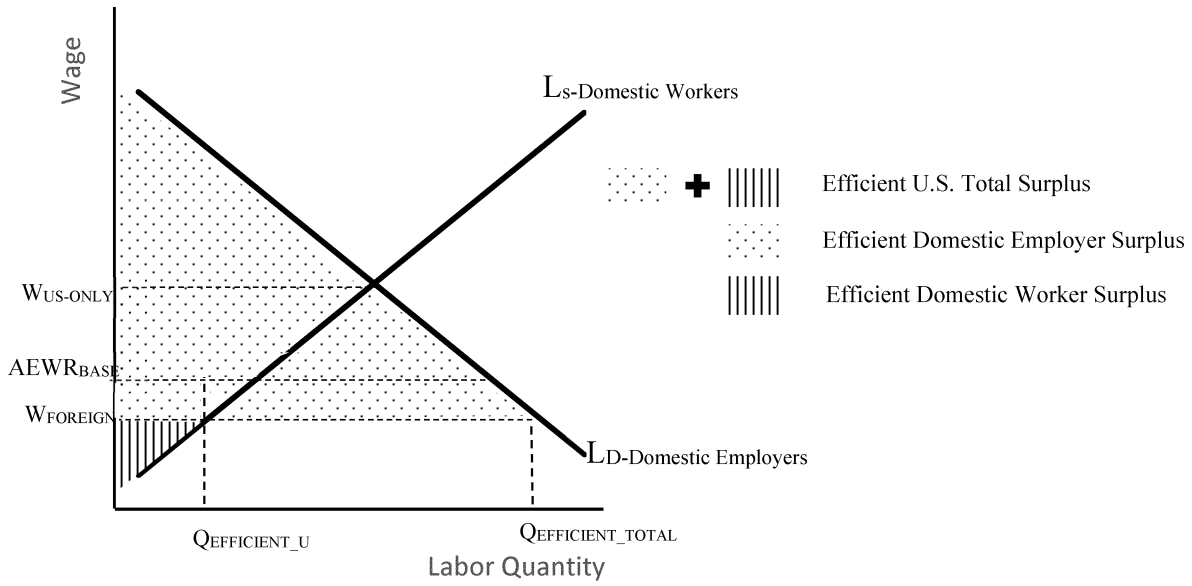

Figure 3: Under the efficient competitive equilibrium with no AEWR, assuming domestic and foreign labor are perfect substitutes and foreign labor is infinitely supplied at wage $W_{FOREIGN}$, U.S. employers will hire Q_{CE_TOTAL} number of workers at the labor market competitive equilibrium wage rate ($W_{FOREIGN}$) below the equilibrium wage rate $W_{US\text{-}ONLY}$ if no foreign workers were allowed. With a large supply of foreign workers willing to work at $W_{FOREIGN}$, U.S. employers will not need to raise the wage rate any further to attract more workers. The number of U.S. workers willing to work at that wage rate is $Q_{Efficient\_U}$. This results in the Efficient Domestic Worker Surplus, the Efficient Domestic Employer Surplus, and the Efficient U.S. Total Surplus. Because any change in quantity of labor would decrease total surplus, total surplus is maximized and DWL is zero.

Setting an AEWR above the competitive labor market equilibrium wage creates a DWL. Working from the same assumptions as Figure 3, Figure 4 illustrates that setting $AEWR_{BASE}$ above the competitive equilibrium wage $W_{FOREIGN}$ reduces the total number of workers employers are willing to hire from $Q_{EFFICIENT\_TOTAL}$ to Q_{AEWR_TOTAL}. Because employers now hire fewer workers at a higher wage rate, domestic employer surplus falls. At the higher wage, the number of domestic workers willing and hired to work increases from $Q_{EFFICIENT\_US}$ to Q_{AEWR_US}, possibly increasing domestic worker surplus. Total surplus falls, generating DWL, because the increase in domestic worker surplus is only a fraction of the decrease in domestic employer surplus. Figure 4 depicts U.S. DWL as the amount that the decrease in domestic employer surplus exceeds the increase in domestic worker surplus. Global DWL is smaller than this if we consider the welfare impacts on foreign workers from increasing their wages. Increasing the AEWR under the final rule will extend all these impacts; that is, increase DWL, decrease domestic employer surplus, and increase domestic worker surplus.

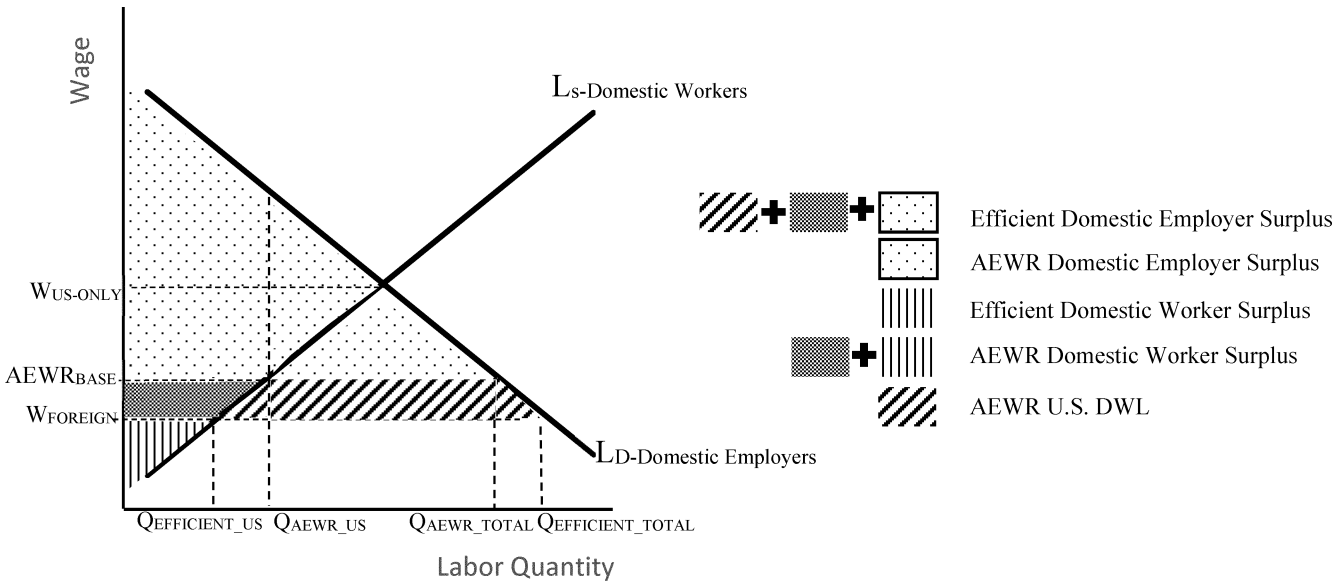

Figure 4: Under the baseline the wage set at $AEWR_{BASE}$ allows for the legal hiring of foreign workers below a U.S.-only labor market equilibrium wage rate ($W_{US-ONLY}$). With a large supply of foreign workers willing to work at the $AEWR_{BASE}$ wage rate the number of U.S. workers willing to work at that wage rate is Q_{AEWR_US}. This results in the AEWR Domestic Worker Surplus, the AEWR Domestic Employer Surplus, and the AEWR U.S. DWL.

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b. Payroll and Other Transition Costs

The final rule will result in new AEWR wage rates for some SOC code and geographic area combinations compared to the baseline. Companies employing H–2A workers will need to update payrolls to account for the new AEWR wage rates. The Department does not quantify this cost and expects it to be *de minimis* because employers already need to update payrolls when AEWR wage rates are released annually. Therefore, they already have the capabilities and processes to quickly, and at *de minimis* cost, update payrolls when AEWR wage rates change.

The final rule may also result in other transition costs to some employers for recruitment and training if they hire U.S. workers for the jobs that H–2A workers perform. The Department sought comment on these transition costs and did not receive any data from commenters allowing for quantification of the potential transition expenses such as recruitment and training.

Transfers

The following section describes the transfers of the final rule related to the revisions to the wage structure. The Department considers transfers as payments from one group to another that do not affect total resources available to society. The transfers measured in this analysis are wage transfers from U.S. employers to H–2A workers. H–2A workers are migrant workers who will spend some of their earnings on consumption goods in the U.S. economy but likely send a large fraction of their earnings to their home countries.[110] Therefore, the Department considers the wage transfers in the analysis as transfer payments within the global economic system.[111]

Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1), provides that an H–2A worker is admissible only if the Secretary of Labor determines that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring the employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. As discussed below, the Department's final rule maintains this general wage-setting structure but modifies the methodology by which it establishes the AEWRs.

Currently, pursuant to the 2010 Final Rule, the AEWR for each State or region is published annually as a single average hourly gross wage that is set using the field and livestock workers (combined) data from the FLS, which is conducted by the USDA's NASS. This methodology produces a single AEWR for all agricultural workers in a State or

[110] Walmsley, Winters, and Ahmed report the remittances to labor income for migrants from Mexico (the primary source of H–2A workers) at nearly 20%. The ratio ranges from close to 5% for migrants from China to close to 70% for migrants from India. These remittances can provide substantial financial assistance for migrant workers' families in their home countries. Terrie L. Walmsley et al., *Global Trade Analysis Project, Measuring the Impact of the Movement of Labor Using a Model of Bilateral Migration Flows* (Nov. 2007), *available at https://www.gtap.agecon.purdue.edu/resources/download/4635.pdf. See also* Dilip Ratha, *Remittances: Funds for the Folks Back Home, International Monetary Fund, https://www.imf.org/external/pubs/ft/fandd/basics/remitt.htm* (last updated Feb. 24, 2020); Daniel Costa & Philip Martin, *Economic Policy Institute, Temporary Labor Migration Programs* (Aug. 1, 2018), *available at https://www.epi.org/publication/temporary-labor-migration-programs-governance-migrant-worker-rights-and-recommendations-for-the-u-n-global-compact-for-migration/.*

[111] If, instead, the rule was analyzed from the perspective of the U.S. economy, these wages would be costs since they would be paid to individuals outside the economy.

region, without regard to SOC code, and no AEWR in geographic areas not surveyed by NASS (*e.g.,* Alaska). As discussed in depth in the preamble, the Department is concerned that this methodology may have an adverse effect on the wages of workers in higher paid SOC codes, such as supervisors of farmworkers, tractor-trailer truck drivers, logging workers, and construction laborers on farms, whose wages may be inappropriately lowered by an AEWR established from the wages of the FLS field and livestock workers (combined) occupational category, which does not include those workers.

Under this final rule the Department modifies the AEWR methodology so that it is based on data more specific to the agricultural occupation of workers in the United States similarly employed. Both the FLS and OEWS survey provide data tailored to U.S. agricultural workers and the States and regions where these workers are employed, making these sources effective in ensuring that the temporary employment of foreign workers in field and livestock job opportunities will not adversely affect the wages of workers in the United States similarly employed. In addition, OEWS data includes employment and gross hourly wage data from employer establishments that support farm production activities. Although they do not represent fixed-site farms and ranches, these establishments employ workers engaged in similar agricultural labor or services as those workers who are directly employed by farms and ranches.

As explained above, these types of employer establishments (*i.e.,* farm labor contractors) participate in the H–2A program and represent an increasing share of the worker positions certified by the Department on H–2A applications both in the predominant field and livestock workers (combined) occupational group and in SOC codes that are less common in the H–2A program. While labor demanded from H–2ALCs (*i.e.,* farm labor contractors) using the H–2A program in non-range occupations has significantly increased in recent years, they only represented approximately 16 percent of all certified H–2A applications in FY 2020.[112] Individual employers and agricultural associations filing for one or more individual association members, which generally hire workers directly for employment, constituted approximately 84 percent of all H–2A applications.[113] Using the FLS, which surveys directly hired agricultural workers, to set AEWRs therefore is more accurate and reasonable because, in addition to being a comprehensive source of farmworker wage data, it also surveys the agricultural employers who make up a significant majority of H–2A applications.

Under this final rule the Department uses the AEWR methodology set forth in the 2010 Final Rule, *i.e.,* setting the annual AEWRs using the gross average hourly wage rate for field and livestock workers (combined) in the State or region, as reported by the FLS, when that data is available, for the following SOC codes:

- 45–2041—Graders and Sorters, Agricultural Products
- 45–2091—Agricultural Equipment Operators
- 45–2092—Farmworkers and Laborers, Crop, Nursery, and Greenhouse
- 45–2093—Farmworkers, Farm, Ranch, and Aquacultural Animals
- 53–7064—Packers and Packagers, Hand
- 45–2099—Agricultural Workers, All Other

If the FLS does not report the annual gross average hourly wage in the State or region, the Department will set the annual AEWR for these SOC codes (45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099) using the statewide gross average hourly wage rate the OEWS survey reports. If the OEWS survey does not report the annual statewide gross average hourly wage, the Department will set the AEWR for these SOC codes by using the annual national gross average hourly wage the OEWS survey reports. To produce an equivalent AEWR for field and livestock worker job opportunities using the OEWS survey under the final rule, BLS will compute an annual weighted average hourly wage using the establishment data reported for these SOC codes at the State and national level.

For all other SOC codes, the Department will annually set the AEWR for agricultural services or labor based on the statewide annual average hourly wage reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly wage for the SOC code, the Department will set the AEWR based on the national annual average hourly wage reported by the OEWS survey.

To produce a combined field and livestock AEWR using the OEWS, BLS provided the Department with the weighted average hourly wage for 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, and 45–2099 SOC codes at the State and national level using the OEWS May 2020 survey. The OEWS May 2020 wages are applicable to work occurring between July 1, 2021, and June 30, 2022. The FY 2020 and FY 2021 certification data includes work occurring as early as October 2019. To determine the appropriate weighted average hourly wage for these six SOC codes between October 2019 and the start of the OEWS May 2020 period, July 1, 2021, the Department estimated the weighted average hourly wage for OEWS May 2018 and OEWS May 2019 data sets. Using public OEWS survey data, the Department calculated the average annual percent change for wages in these six SOC codes between OEWS May 2018 and OEWS May 2019 and between OEWS May 2019 and OEWS May 2020. To determine the weighted average hourly wage for the six SOC codes in OEWS May 2019, the Department used the percentage growth in the wages to adjust the BLS weighted average hourly wage.[114]

The Department calculated the impact on wages that would occur from the implementation of the revised AEWR methodology. For each H–2A certification in FY 2020 through FY 2021, the Department calculated total wages under the current AEWR baseline, *i.e.,* pursuant to the 2010 Final Rule, and total wages under the revised AEWR methodology. Then, the Department determined the annual wage impact in CY 2020 and CY 2021 by subtracting the AEWR baseline wage from the final rule wage. The Department summed the wage impacts in each calendar year, converted the wage impact to 2021 dollars using the ECI[115] and took the average impact of CY 2020 and CY 2021.[116] Wage impacts

[112] Based on an analysis of temporary agricultural labor certification data for FY 2020, the Department issued 12,491 temporary agricultural labor certifications covering 272,610 worker positions for non-range employment. Of this total, the Department certified 2,052 H–2A applications covering 116,479 worker positions submitted by, or on behalf of, H–2ALCs; 1,669 H–2A applications covering 34,236 worker positions submitted by agricultural associations by, or on behalf of, one of more individual association members; and 8,770 H–2A applications covering 121,895 worker positions submitted by individual employers (*i.e.,* fixed-site agricultural businesses). *See* ETA, *Performance Data, https://www.dol.gov/agencies/eta/foreign-labor/performance* (last visited Sept. 29, 2021).

[113] *Id.*

[114] The Department divided the BLS calculated weighed average hourly wage rate in OEWS May 2020 by 1 + the average percent change. Similarly, the OEWS May 2018 weighted average hourly wage was determined by dividing the OEWS May 2019 weighted average hourly wage by 1 + the average percent change. The Department completed these calculations at the State and national level.

[115] BLS, *Employment Cost Index Archived News Releases, https://www.bls.gov/bls/news-release/eci.htm* (last modified July 30, 2021).

[116] While there were working days and therefore wage impacts in CY 2019 and CY 2022 in the FY

for 2023 to 2032 were estimated by applying the H–2A workers growth rate (6.3 percent) to reflect that the number of H–2A workers affected (and the total wage impact) will grow annually at 6.3 percent. The Department assumed that the difference in wage rates between the baseline and the final rule wage will be the same over the 10-year analysis period. In addition, it is assumed that the geographic and SOC distribution of H–2A workers remain the same over the 10-year analysis period. Because the final rule wage-setting methodology would not retroactively impact workers and OEWS wages in the May 2022 OEWS will not apply until July 2023, the wage impact in 2023 is divided by 2 to account for the fact that only half the year of wages would be impacted.[117]

The Department provides two examples illustrating the above wage calculation methodology for H–2A certifications. Exhibits 5 and 6 illustrate how total wages are calculated for the baseline and the final rule. The number of workers certified is multiplied by the number of hours worked each day, the number of days in a year that the employees worked, and the AEWR baseline for the year(s) in which the work occurred (Exhibit 5 provides an example of the calculation of the AEWR baseline). In the example provided in Exhibit 5 for SOC code 45–2092, the AEWR baseline wage is not available in Alaska, so the baseline wage, for the purpose of this analysis, is set by the public OEWS State wage as a proxy for estimating wage transfers.

EXHIBIT 5—AEWR WAGE UNDER THE BASELINE (EXAMPLE CASE)

SOC code	Baseline wage source	Number of certified workers	Basic number of hours	Number of days worked in 2020	Number of days worked in 2021	Wage 2020	Wage 2021	Total AEWR wages 2020	Total AEWR wages 2021
		(a)	(b)	(c)	(d)	(e)	(f)	(a*(b/5)*c*e)	(a*(b/5)*d*f)
45–2092	FLS AEWR (unavailable); OEWS State.	14	40	152	10	$15.54	$15.72	$264,552.96	$17,606.40

For calculating the AEWR wage under the final rule, the Department multiplied the number of certified workers by the number of hours worked each day, the number of days in a year that the employees worked, and the annual average hourly gross State AEWR wage for SOC codes set by the AEWR. In the example provided in Exhibit 6, for farmworkers (SOC code 45–2092, Farmworkers and Laborers, Crop, Nursery, and Greenhouse) the FLS AEWR wage is not available in Alaska, so the AEWR is set by the weighted average OEWS wage. For SOC codes outside of 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, and 45–2099, the annual average hourly gross wage from the State-level OEWS-based wage for the appropriate SOC code and worksite State is used, or the national OEWS-based wage is used if the State-level wage is not available.

EXHIBIT 6—AEWR WAGE UNDER THE FINAL RULE (EXAMPLE CASE)

SOC code	Final rule wage source	Number of certified workers	Basic number of hours	Number of days worked in 2020	Number of days worked in 2021	Wage 2020	Wage 2021	Total AEWR wages 2020	Total AEWR wages 2021
		(a)	(b)	(c)	(d)	(e)	(f)	(a*(b/5)*c*e)	(a*(b/5)*d*f)
45–2092	FLS AEWR (unavailable); weighted average OEWS.	14	40	152	10	$15.15	$16.78	$257,913.60	$18,793.60
13–1074	OEWS	10	35	280	50	25.45	29.84	498,820.00	104,440.00

The changes in wages constitute a transfer from H–2A employers to H–2A employees for SOC codes set by the OEWS survey. For SOC codes set by the FLS AEWR there is no wage impact, unless the worksite location is in Alaska or Puerto Rico where no AEWR currently exists because the FLS does not collect wage data covering these geographic areas.[118] To account for the growth rate in H–2A workers the total transfers in each year are increased annually by the estimated growth rate of H–2A workers (6.3 percent).[119] The results are average annual undiscounted transfers of $37.5 million. The total transfer over the 10-year period is estimated at $375.07 million undiscounted, or $322.73 million and $268.47 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $37.83 million and $38.22 million at discount rates of 3 and 7 percent, respectively.

The estimated transfers are likely on the high end of potential transfers. The

2020 and FY 2021 certification data, the Department did not include wage impacts in CY 2019 and CY 2022 in the average annual impact calculations because a full CY of work is not captured in the FY 2020 and FY 2021 certification data for CY 2019 and CY 2022. At the time of publishing only one quarter of FY 2022 is available that would have work for CY 2022, therefore the Department maintains the use of FY 2020 and FY 2021 data.

[117] The Department assumes in the economic analysis of the final rule that the final rule will not become effective until the second half of the year 2023.

[118] There is no FLS wage available for Alaska or Puerto Rico. Because of that, wages under the baseline in this analysis are set by the public OEWS State data as a proxy for estimating wage transfers. The H–2A wage provisions are the highest of (1) AEWR, (2) SWA prevailing wage, (3) CBA wage, or (4) federal or state minimum wage. If an AEWR is not available for a geographic area, which has been the case for Alaska and Puerto Rico, then the current minimum wage shifts to one of the other 3 sources if they are available. If there is no SWA prevailing wage or CBA wage, for example, then the Federal or state minimum wage (whichever is highest) would be minimum wage. However, we cannot accurately identify the baseline wage and its source in the certification when the AEWR is not available and therefore, used the OEWS State wage as a proxy for the baseline wage in the economic analysis that represents a likely wage estimate within the range from the 4 wage sources.

Under the final rule, for SOC codes that have worksite locations in Alaska or Puerto Rico, the hourly wage would be set by the weighted average hourly wage rate calculated by BLS. Therefore, those certifications may have a wage impact under the final rule.

[119] Total transfers in each year are increased with the following formula to account for an annual increase in the underlying population of H–2A workers: Transfer*(1.056^(Current year − Base year)).

Department does not make any adjustment to account for H–2A certifications that are made but do not end up in jobs with realized wages. In FY 2020, according to State Department data, 213,394 H–2A visas were issued.[120] In FY 2020, 275,430 workers were associated with H–2A certifications. The Department is unable to verify the specific H–2A certifications that do not end up in materialized jobs and so cannot adjust wage transfers to account for differences in regional, and by SOC code, job materialization. Overall, the data on H–2A visas compared to workers associated with H–2A certifications indicates that about 80 percent of certified positions have associated H–2A visas. The remaining 20 percent could be jobs that did not materialize or that U.S. workers filled. As a result, our estimates for wage transfers are likely overstated. The Department is unable to identify the occupations associated with the 20 percent of workers that did not materialize. Therefore, the Department believes that our estimates for wage transfers are reasonable based on the available data and historical practice.

The increase (or decrease) in the wage rates for H–2A workers also represents a wage transfer from employers to corresponding workers performing similar work for the employer, not just the H–2A workers employed under the work contract. The higher (or lower) wages paid to H–2A workers associated with the final rule's methodology for determining the AEWRs will also result in wage changes to corresponding workers. However, the Department does not collect or possess sufficient information about the number of corresponding workers affected and their wage payment structures to reasonably measure the transfers to corresponding workers. Employers are not required to provide the Department, on any application or report, the estimated or actual total number of workers in corresponding employment. Although each employer, as a condition of being granted a temporary agricultural labor certification, must provide the Department with a report of its initial recruitment efforts for U.S. workers, including the name and contact information of each U.S. worker who applied or was referred to the job, such information typically reflects only a very small portion of the total recruitment period, which runs through 50 percent of the certified work contract period, and does not account for any other workers who may be considered in corresponding employment and already working for the employer. Because the report of initial recruitment efforts for U.S. workers only captures information from a limited portion of the recruitment period and does not account for workers already employed by the employer who may be in corresponding employment, the Department is not able to draw on this information to meaningfully assess the total number of corresponding workers affected or their wage payment structures, without which the Department is unable to reasonably measure the transfers to corresponding workers. The Department sought public comment on how these wage transfer impacts can be calculated but received no comments. Finally, the Department is not able to estimate how much of the wage transfer stays in the U.S. economy. Likely a substantial portion of the wage transfer is from U.S. employers to the home economy of H–2A workers. Nonimmigrant foreign H–2A workers may spend wages earned in the United States, spend the money outside the United States, send the money outside the United States, or some combination. The Department also invited comments regarding how these wage transfer impacts can be calculated but received no comments.

Qualitative Benefits

This final rule makes an important update to the AEWR to ensure that it protects workers in the United States in positions where the existing wage methodology may adversely affect wages because the FLS does not adequately collect or consistently report wage data at a State or regional level (*e.g.,* tractor-trailer truck drivers, farm supervisors and managers, logging workers, construction workers, and many occupations in contract employment). Workers in these positions would benefit from the protections afforded them by an AEWR determined using a more accurate data source.

The AEWR is the rate that the Department has determined is necessary to ensure the employment of H–2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed. A more accurate AEWR for workers in jobs where the FLS is inadequate will guard against the potential for the entry of H–2A foreign workers to adversely affect the wages and working conditions of workers in the United States similarly employed in these jobs. The potential for the employment of foreign workers to adversely affect the wages of similarly employed workers is heightened in the H–2A program because the H–2A program is not subject to a statutory cap on the number of foreign workers who may be admitted to work in agricultural jobs. Consequently, concerns about wage depression from the employment of foreign workers are particularly acute because access to an unlimited number of foreign workers in a particular labor market and occupation could cause the prevailing wage of workers in the United States similarly employed to stagnate or decrease.

Addressing the potential adverse effect that the employment of temporary foreign workers may have on the wages of agricultural workers in the United States similarly employed is particularly important because U.S. agricultural workers are, in many cases, especially susceptible to adverse effects caused by the employment of temporary foreign workers. As discussed in prior rulemakings, the Department continues to hold the view that ''U.S. agricultural workers need protection from potential adverse effects of the use of foreign temporary workers, because they generally comprise an especially vulnerable population whose low educational attainment, low skills, low rates of unionization and high rates of unemployment leave them with few alternatives in the non-farm labor market.'' [121] As a result, ''their ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited.'' [122] The AEWR is one way to prevent such adverse effect, as it provides ''a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment.'' [123]

Distributional Impact Analysis

E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, seeks to advance equity in agency actions and programs. The term equity is defined as consistent and systematic fair, just, and impartial treatment of individuals, including individuals who belong to underserved communities, such as Black, Latino, and

[120] U.S. Department of State, *Nonimmigrant Visas Issued by Classification, Fiscal Years 2016–2020, available at https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport-TableXVB.pdf.*

[121] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 74 FR 45905, 45911 (Sep. 4, 2009).

[122] *Id.*

[123] *Id.*

Indigenous and Native American persons; Asian Americans and Pacific Islanders; other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

In addition, OMB Circular A–4, which provides guidelines for preparing economic analyses of regulations, discusses various ways that the distributional effects of a regulatory action across the population and economy can be assessed (*e.g.,* income groups, race, sex, industry sector, and geography). Circular A–4 states the following:

''The regulatory analysis should provide a separate description of distributional effects (*i.e.,* how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency (*i.e.,* net benefits). Executive Order 13563 and Executive 12866 authorize this approach. Where distributive effects are thought to be important, the effects of various regulatory alternatives should be described quantitatively to the extent possible, including the magnitude, likelihood, and severity of impacts on particular groups.''

To assess the impact of the final rule on equity the Department used Current Population Survey (CPS) data from BLS [124] to determine the ethnic and racial makeup of the most common SOC codes in the H–2A program. CPS only included data for three races, White, Black or African American, and Asian, and one ethnicity, Hispanic or Latino. The results of this analysis for the top ten H–2A SOC codes that experience wage impacts (SOC codes other than 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099) are presented in Exhibit 7. These top 10 SOC codes [125] account for more than 90 percent of all the workers in the FY 2021 certification data that experience wage impacts (certifications with wages set by the OEWS).

EXHIBIT 7—RACIAL/ETHNIC DISTRIBUTION OF THE TOP 10 H–2A SOC CODES BY NUMBER OF WORKERS WITH WAGE IMPACTS

SOC Code	Description	Percent of employed people				# of FY 2021 Q1–Q3 H–2A workers
		White (%)	Black or African American (%)	Asian (%)	Hispanic or Latino (%)	
45–0000	Farming, fishing, and forestry occupations.	90	4	2	43	**
47–2061	Construction laborers	87	8	1	46	2,107
53–3032	Heavy and tractor-trailer truck drivers	77	17	3	23	526
45–1011	First-line supervisors of farming, fishing, and forestry workers.	90	5	3	28	328
47–3012	Helpers—carpenters	N/A	N/A	N/A	N/A	104
45–4022	Logging equipment operators	N/A	N/A	N/A	N/A	57
49–3041	Farm equipment mechanics and service technicians.	94	4	1	19	55
47–2031	Carpenters	88	7	2	36	30
47–3019	Helpers, construction trades, all other	N/A	N/A	N/A	N/A	18
47–2051	Cement masons and concrete finishers.	83	8	1	53	16

*N/A indicates that racial/ethnic data for that SOC code was not reported in the CPS data.
**45–2000 is included as a reference for the racial/ethnic distribution of agricultural workers generally.
Note: Estimates for the above race groups (White, Black or African American, and Asian) do not sum to totals because data are not presented for all races. Persons whose ethnicity is identified as Hispanic or Latino may be of any race.

4. Summary of the Analysis

Exhibit 8 summarizes the estimated total costs and transfers of the final rule over the 10-year analysis period. The Department estimates the annualized costs of the final rule at $0.07 million and the annualized transfers (from H–2A employers to employees) at $38.22 million, at a discount rate of 7 percent.

EXHIBIT 8—ESTIMATED MONETIZED COSTS AND TRANSFERS OF THE FINAL RULE

[2021 $millions]

Year	Costs	Transfers
2023	$0.51	$14.57
2024	0.00	30.98
2025	0.00	32.94
2026	0.00	35.01
2027	0.00	37.22
2028	0.00	39.56
2029	0.00	42.05
2030	0.00	44.70

[124] BLS, Labor Force Statistics from the Current Population Survey, *Employed persons by occupation, race, Hispanic or Latino ethnicity, and sex, https://www.bls.gov/cps/tables.htm* (last modified May 14, 2021).

[125] Farm Labor Contractors are within the Top 10 impacted H–2A SOC codes, but because Farm Labor Contractor are employers it is excluded from Exhibit 7.

EXHIBIT 8—ESTIMATED MONETIZED COSTS AND TRANSFERS OF THE FINAL RULE—Continued

[2021 $millions]

Year	Costs	Transfers
2031	0.00	47.52
2032	0.00	50.51
Undiscounted 10–Year Total	0.51	375.07
10–Year Total with a Discount Rate of 3%	0.51	322.73
10–Year Total with a Discount Rate of 7%	0.51	268.47
10–Year Average	0.05	37.51
Annualized with a Discount Rate of 3%	0.06	37.83
Annualized with a Discount Rate of 7%	0.07	38.22

5. Regulatory Alternatives

The Department maintains from the proposed rule the analysis of two alternatives to the final rule. The final rule requires the use of the FLS-based field and livestock worker (combined) average gross hourly wage, where USDA reports such as wage, as the sole source for establishing the AEWR in job opportunities classified under one of the following SOC codes:

- 45–2041—Graders and Sorters, Agricultural Products
- 45–2091—Agricultural Equipment Operators
- 45–2092—Farmworkers and Laborers, Crop, Nursery, and Greenhouse
- 45–2093—Farmworkers, Farm, Ranch, and Aquacultural Animals
- 53–7064—Packers and Packagers, Hand
- 45–2099—Agricultural Workers, All Other

For each alternative analyzed, job opportunities classified under any other SOC code will have the AEWR set using the same methodology in the final rule: the AEWR for each SOC code would be the statewide annual average hourly gross wage for that SOC code as reported by the OEWS survey. If the statewide wage is not available, the AEWR would be set by the national annual average hourly wage for that SOC code as reported by the OEWS survey.

Under the first regulatory alternative, the Department considered setting the AEWR for job opportunities classified under SOC codes 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, and 45–2099, using the *highest* of the annual average hourly gross wage reported by the FLS or the weighted average hourly gross wage provided by the OEWS for these same SOC codes for the State or region. If a statewide annual average hourly gross wage in the State is not reported in the FLS or the OEWS survey, the AEWR for the SOC code shall be determined using the national annual average hourly gross wage as reported by the FLS or the OEWS survey.

The total impact of the first regulatory alternative was calculated using the methodology described to calculate proposed wage impacts using FY 2020 to FY 2021 certification data. The Department estimated average annual undiscounted transfers of $117.03 million. The total transfer over the 10-year period was estimated at $1,170.34 million undiscounted, or $1,007.01 million and $837.71 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $118.05 million and $119.27 million at discount rates of 3 and 7 percent, respectively.

Under the second regulatory alternative, the Department would set the AEWR using *only* the OEWS average hourly wage for the SOC code and State (*i.e.,* use of FLS-based wages in establishing AEWRs under the H–2A program would be discontinued). When OEWS State data is not available, the Department would set the AEWR at the OEWS national average hourly wage for the SOC code under this alternative. This alternative reflects the transfers that would occur if, for example, the USDA survey was discontinued or suspended and, as a result, the Department would set the AEWRs for each State using the OEWS data. For SOC codes 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, and 45–2099, the weighted average hourly wage provided by BLS at the State and national level is applied. The Department again used the same method to calculate the total impact of the regulatory alternative and found that, unlike the proposed rule and first regulatory alternative, the second regulatory alternative would result in transfers from H–2A employees to employers. The Department estimated average annual undiscounted transfers of $75.0672.30 million. The total transfer over the 10-year period was estimated at $750.6523.03 million undiscounted, or $645.8923.03 million and $537.3019.28 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $75.713.04 million and $76.503.93 million at discount rates of 3 and 7 percent, respectively.

Exhibit 9 summarizes the estimated transfers associated with the three considered revised wage structures over the 10-year analysis period. Transfers under the proposal and the first regulatory alternative are transfers from H–2A employers to H–2A employees and transfers under the second alternative are transfers from H–2A employees to H–2A employers.

EXHIBIT 9—ESTIMATED MONETIZED TRANSFERS OF THE FINAL RULE

[2021 $millions]

	Final rule (transfers from employers to employees)	Regulatory alternative 1 (transfers from employers to employees)	Regulatory alternative 2 (transfers from employees to employers)
Total 10-Year Transfer	$375	$1,170	$751
Total with 3% Discount	323	1,007	646
Total with 7% Discount	268	838	537
Annualized Undiscounted Transfer	38	117	75
Annualized Transfer with 3% Discount	38	118	76

EXHIBIT 9—ESTIMATED MONETIZED TRANSFERS OF THE FINAL RULE—Continued

[2021 $millions]

	Final rule (transfers from employers to employees)	Regulatory alternative 1 (transfers from employers to employees)	Regulatory alternative 2 (transfers from employees to employers)
Annualized Transfer with 7% Discount	38	119	77

The Department prefers the chosen approach of the final rule because it allows specific OEWS wages for workers in higher paid SOC codes, such as supervisors of farmworkers, tractor-trailer truck drivers, logging workers, and construction laborers on farms while maintaining the use of FLS data for SOC codes with the majority of H–2A workers. As the Department has stated previously, the FLS, which surveys directly hired agricultural workers, is the best source of wage data to set AEWRs for the vast majority of H–2A positions. This is in part because the FLS is a more comprehensive source of farmworker wage date than the OEWS survey. The chosen approach also minimizes transfers compared to the two alternatives, and ensures greater stability in the wage obligations of employers by determining AEWRs, including annual adjustments, using the data source that best reflects the wages of workers in the United States similarly employed.

B. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

The RFA, 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), hereafter jointly referred to as the RFA, initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, requires Federal agencies engaged in rulemaking to assess the impact of regulations that will have a significant economic impact on a substantial number of small entities. The Department certifies that the final rule does not have a significant economic impact on a substantial number of small entities. The Department presents the basis for this conclusion in the analysis below.

Public Comments

Multiple commenters, including the Small Business Administration (SBA), asserted the Department underestimated the costs to small businesses. These costs include transition costs, filing fees, and wage increases that all lower profit margins for small businesses potentially leading to small business closures. One small farm owner stated they do not have enough division of labor to allocate separate workers for specific tasks resulting in the need to pay all workers the higher wage, which they are unable to afford. The Department acknowledges that some administrative costs to small businesses for recruitment and training if they hire U.S. workers for the jobs that H–2A workers perform were not quantified due to the lack of data, as this data would be typically known to small businesses, rather than in the possession of the Department. In the NPRM, the Department sought public comment on these administrative costs but did not receive any comments or information to allow for a quantification of these costs. In addition, the Department considers the impact of the inability to quantify these costs to be *de minimis* because of the limited overall impact of this final rule on small employers. Specifically, the analysis in this RFA section estimates the impacts of the rule based on actual wage records in FY 2020 and FY 2021 for the most accurate impact of the revised AEWR structure. Based on the Department's analysis, approximately 98 percent of all small employers will have impacts of the final rule amounting to less than 1 percent of their revenue.

Definition of Small Entity

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by the SBA, in effect as of August 19, 2019, to classify entities as small.[126] SBA establishes separate standards for individual 6-digit North American Industry Classification System (NAICS) industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and noncommercial banks) are classified by total assets (small is defined as less than $550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[127]

Number of Small Entities

The Department collected employment and annual revenue data from the business information provider Data Axle USA[128] and merged that data into the H–2A disclosure data for FY 2020 and FY 2021. This process allowed the Department to identify the number and type of small entities in the H–2A disclosure data as well as their annual revenues. The Department determined the number of unique employers in the FY 2020 and FY 2021 certification data based on the employer's name and city. The Department identified 9,927 unique employers (excluding labor contractors).[129] Of those 9,927 employers, the Department was able to obtain data matches of revenue and employees for 2,615 H–2A employers in the FY 2020 and FY 2021 certification data. Of those 2,615 employers, the Department determined that 2,105 were

[126] SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

[127] *See https://advocacy.sba.gov/resources/the-regulatory-flexibility-act* for details.

[128] Data Axle USA is a business database that provide information on business size by employment and revenue. *https://www.data-axle.com/.*

[129] Labor contractors are not included because wage impacts associated with this final rule is incurred by employers not by labor contractors. The Department believes that labor contractors will adjust their contracts to the new wage rates and thereby pass the costs of any new wage rates on to their clients.

small (80.5 percent).[130] These unique small entities had an average of 11 employees and average annual revenue of approximately $3.62 million. Of these small unique entities, 2,085 of them had revenue data available from Data Axle. The Department's analysis of the impact of this final rule on small entities is based on the number of small unique entities (2,085 with revenue data). Compared to the proposed rule, the final rule added Quarter 4 of FY 2021 certification data which contained 758 new unique employers that did not match employers in the Data Axle data and are, therefore, not included in this analysis. However, the Department expects the impacts for those 758 employers to follow the distribution of impacts analyzed in this RFA.

To provide clarity on the agricultural industries impacted by this regulation, Exhibit 10 shows the number of unique H–2A small entity employers with certifications in the FY 2020 and FY 2021 certification data within each NAICS code at the 6-digit level.

EXHIBIT 10—NUMBER OF H–2A SMALL EMPLOYERS BY NAICS CODE

6-Digit NAICS	Description	Number of employers	Percent
111998	All Other Miscellaneous Crop Farming	611	31
444220	Nursery, Garden Center, and Farm Supply Stores	162	8
561730	Landscaping Services	134	7
445230	Fruit and Vegetable Markets	127	6
424480	Fresh Fruit and Vegetable Merchant Wholesalers	84	4
111339	Other Noncitrus Fruit Farming	78	4
112990	All Other Animal Production	57	3
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers	51	3
424910	Farm Supplies Merchant Wholesalers	41	2
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	39	2

Projected Impacts to Affected Small Entities

The Department has estimated the incremental costs for small entities from the baseline (*i.e.,* the 2010 Final Rule: *Temporary Agricultural Employment of H–2A Aliens in the United States*) to this final rule. As discussed in previous sections, the Department estimates impacts using historical certification data and, therefore, simulates the impacts of the final rule to each actual employer in the H–2A program rather than using representative data for employers within a given sector. The Department estimated the costs of (1) time to read and review the final rule and (2) wage costs. The estimates included in this analysis are consistent with those presented in the E.O. 12866 section.

The Department estimates that small entities not classified as H–2ALCs, which consists of 2,085 unique small entities, would incur a one-time cost of $55.42 to familiarize themselves with the rule.[131]

In addition to the cost of rule familiarization, each small entity may have an increase in the wage costs due to the revisions to the wage structure. To estimate the wage impact for each small entity we followed the methodology presented in the E.O. 12866 section. For each certification of a small entity, the Department calculated total wage impacts of the final rule in CY 2020 and CY 2021. The Department estimates the wage impact on all small entities is $4,582 on average. Many of the small entities have no wage impact from the final rule because they typically do not hire H–2A workers in the occupations that are subject to wage changes in the final rule. Of small entities with wage impacts, their average wage impact is $149,541.

The Department calculated the proportion of each small entity's total revenue that would be impacted by the costs of the final rule to determine if the final rule would have a significant and substantial impact on small entities. The cost impacts included estimated first-year costs and the wage impact introduced by the proposed rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities.

A threshold of 3 percent of revenue has been used in prior rulemakings for the definition of significant economic impact.[132] This threshold is also consistent with that sometimes used by other agencies.[133]

Exhibit 11 provides a breakdown of small entities by the proportion of revenue affected by the costs of the final rule. Of the 2,085 unique small entities with revenue data in the FY 2020 and FY 2021 certification data, 1.3 percent of employers are estimated to have more than 3 percent of their total revenue impacted in the first year based on 2020 data and 1.8 percent of employers are estimated to have more than 3 percent of their total revenue impacted in the first year based on 2021 data. Based on the findings presented in Exhibit 11, the final rule does not have a significant economic impact on a substantial number of small H–2A employers.

[130] SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

[131] $34.00 + $34.00(0.46) + $34.00(0.17) = $55.42. Numbers do not add due to rounding.

[132] *See, e.g.,* NPRM, *Increasing the Minimum Wage for Federal Contractors,* 79 FR 60634 (Oct. 7, 2014) (establishing a minimum wage for contractors); Final Rule, *Discrimination on the Basis of Sex,* 81 FR 39108 (June 15, 2016).

[133] *See, e.g.,* Final Rule, *Medicare and Medicaid Programs; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction; Part II,* 79 FR 27106 (May 12, 2014) (Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than 3 percent annually are not economically significant).

EXHIBIT 11—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	2020, by NAICS code					
	111998 (%)	444220 (%)	561730 (%)	445230 (%)	All other (%)	Total (%)
<1%	601 (98.4)	162 (100.0)	132 (98.5)	126 (99.2)	1033 (98.3)	2054 (98.5)
1%–2%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	3 (0.3)	3 (0.1)
2%–3%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	1 (0.1)	1 (0.0)
3%–4%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	2 (0.2)	2 (0.1)
4%–5%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	1 (0.1)	1 (0.0)
>5%	10 (1.6)	0 (0.0)	2 (1.5)	1 (0.8)	11 (1.0)	24 (1.2)
Total >3%	10 (1.6)	0 (0.0)	2 (1.5)	1 (0.8)	14 (1.3)	27 (1.3)

Proportion of revenue impacted	2021, by NAICS code					
	111998 (%)	444220 (%)	561730 (%)	445230 (%)	All other (%)	Total (%)
<1%	599 (98.0)	162 (100.0)	131 (97.8)	126 (99.2)	1021 (97.1)	2039 (97.8)
1%–2%	4 (0.7)	0 (0.0)	1 (0.7)	0 (0.0)	2 (0.2)	7 (0.3)
2%–3%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	2 (0.2)	2 (0.1)
3%–4%	1 (0.2)	0 (0.0)	0 (0.0)	0 (0.0)	2 (0.2)	3 (0.1)
4%–5%	1 (0.2)	0 (0.0)	0 (0.0)	0 (0.0)	2 (0.2)	3 (0.1)
>5%	6 (1.0)	0 (0.0)	2 (1.5)	1 (0.8)	22 (2.1)	31 (1.5)
Total >3%	8 (1.3)	0 (0.0)	2 (1.5)	1 (0.8)	26 (2.5)	37 (1.8)

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons stated in the preamble, the DOL amends 20 CFR part 655 as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), (p), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

■ 2. Amend § 655.103(b) by revising the definition of ''*Adverse effect wage rate (AEWR)*'' to read as follows:

§ 655.103 Overview of this subpart and definition of terms.

* * * * *

(b) * * *

Adverse effect wage rate (AEWR). The wage rate published by the OFLC Administrator in the **Federal Register** for non-range occupations as set forth in § 655.120(b) and range occupations as set forth in § 655.211(c).

* * * * *

■ 3. Amend § 655.120 by adding paragraph (b)(1), revising paragraph (b)(2), and adding paragraph (b)(5) to read as follows:

§ 655.120 Offered wage rate.

* * * * *

(b) * * *

(1) Except for occupations governed by the procedures in §§ 655.200 through 655.235, the OFLC Administrator will determine the AEWRs as follows:

(i) For occupations included in the Department of Agriculture's (USDA) Farm Labor Survey (FLS) field and livestock workers (combined) category:

(A) If an annual average hourly gross wage in the State or region is reported by the FLS, that wage shall be the AEWR for the State; or

(B) If an annual average hourly gross wage in the State or region is not reported by the FLS, the AEWR for the occupations shall be the statewide annual average hourly gross wage in the State as reported by the Occupational Employment and Wage Statistics (OEWS) survey; or

(C) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEWR for the occupations shall be the national annual average hourly gross wage as reported by the OEWS survey.

(ii) For all other occupations:

(A) The AEWR for each occupation shall be the statewide annual average hourly gross wage for that occupation in the State as reported by the OEWS survey; or

(B) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEWR for each occupation shall be the national annual average hourly gross wage for that occupation as reported by the OEWS survey.

(iii) The AEWR methodologies described in paragraphs (b)(1)(i) and (ii) of this section shall apply to all job orders submitted, as set forth in § 655.121, on or after March 30, 2023, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under § 655.134. For purposes of paragraphs (b)(1)(i) and (ii) of this section, the term *State* and *statewide* include the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

(2) The OFLC Administrator will publish a notice in the **Federal Register**, at least once in each calendar year, on a date to be determined by the OFLC Administrator, establishing each AEWR.

* * * * *

(5) If the job duties on the job order cannot be encompassed within a single occupational classification, the applicable AEWR shall be the highest AEWR for all applicable occupations.

* * * * *

Brent Parton,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2023–03756 Filed 2–27–23; 8:45 am]

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