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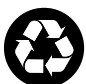

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Title 3—

The President

Proclamation 10576 of May 11, 2023

Military Spouse Appreciation Day, 2023

By the President of the United States of America

A Proclamation

The English poet John Milton wrote, ''They also serve who only stand and wait.'' Today, we honor the nearly one million military spouses who serve and strengthen our Nation alongside their loved ones in uniform. While navigating the many demands of life in a military family, they remain strong, caring, and resourceful—representing the very best of who we are as Americans.

Like our service members, military spouses know what it means to make sacrifices for our values and freedoms—stepping up every day to shoulder the unique burdens that come with military life. They selflessly care for others, often balancing their responsibilities at home and work while praying that their spouse returns home safely. They bring their diverse talents to all sectors to provide for their families and communities, even in the face of demanding and difficult circumstances. They strive to make birthdays and holidays special, even when there is an empty seat at the dinner table. And during some of life's toughest moments, military spouses are there for each other—forging lasting friendships grounded in support, service, and selflessness.

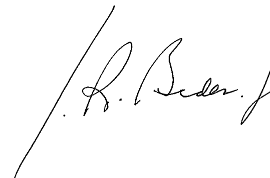
Our Nation has many obligations, but we have only one truly sacred obligation: to prepare those we send into harm's way and to care for them and their families while they are deployed and when they return home—including our military spouses. My Administration is working to ensure we meet this obligation, including through the First Lady's Joining Forces initiative, which is committed to supporting military and veteran families, caregivers, and survivors. We have broadened pathways to Federal careers for military spouses and started a new program to connect military spouses with private sector employers through paid fellowships. We have expanded scholarship opportunities for many military spouses so they can get professional licenses, certificates, or associate degrees and find good jobs. We are broadening parental leave for service members and increasing access to affordable and dependable child care—including making it easier to save for child care and working to make pre-kindergarten universal at all Department of Defense Education Activity Schools. And as we continue working to ensure military spouses have the resources they need to thrive in all aspects of life, we call upon more communities to hire and support military spouses, harnessing their unique skills, strengths, and experiences.

We have asked so much of our military spouses for so long. Yet every time Jill and I meet with spouses, we are struck by their extraordinary commitment and fortitude. They are the solid steel spine that bears up under every burden and the courageous heart that rises to every challenge, even while their service and sacrifice too often go unsung. Today we pause to lift up their stories, invest in their abilities, and ensure they have the support they need to achieve their aspirations. May God bless our military spouses and families, and may God protect our troops.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 12, 2023, as

Military Spouse Appreciation Day. I call upon the people of the United States to honor military spouses with appropriate ceremonies and activities.

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



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Rules and Regulations

Federal Register

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1301; Project Identifier MCAI–2021–01447–T; Amendment 39–22412; AD 2023–07–10]

RIN 2120–AA64

Airworthiness Directives; Viking Air Limited (Type Certificate Previously Held by Bombardier, Inc.; Canadair Limited) Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 96–12–11, which applied to all Canadair Model CL–215–1A10 airplanes. AD 96–12–11 required repetitive inspections to detect discrepancies of the microswitches fitted at the water door actuator; replacement of any discrepant microswitch; and modification of the water door actuator switches, which terminates the repetitive inspections. This AD continues to require the modification of the water door actuator switches. This AD also requires modification of the water door solenoid valve common grounds, adds airplanes to the applicability, and specifies a parts installation limitation for the water door solenoid valve. This AD was prompted by reports of uncommanded opening of the water doors during flight and water scooping. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 20, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 20, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2022–1301; 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 Viking Air Limited, 1959 de Havilland Way, Sidney, British Columbia V8L 5V5, Canada; telephone +1–250–656–7227; fax +1–250–656–0673; email *acs-technical.publications@vikingair.com;* website *vikingair.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–2022–1301.

FOR FURTHER INFORMATION CONTACT: Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; 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 to supersede AD 96–12–11, Amendment 39–9653 (61 FR 28734, June 6, 1996) (AD 96–12–11). AD 96–12–11 applied to all Canadair Model CL–215–1A10 airplanes. AD 96–12–11 required repetitive inspections to detect discrepancies of the microswitches fitted at the water door actuator, replacement of any discrepant microswitch, and a terminating action for the repetitive inspections. The FAA issued AD 96–12–11 to address a possible uncommanded opening of the water doors, especially at high speed during a takeoff run, a water pick-up run, or a landing run, which could cause serious damage to the airplane.

The NPRM published in the **Federal Register** on October 27, 2022 (87 FR 65016). The NPRM was prompted by AD CF–2021–51, dated December 21, 2021, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that mandating the modification of the water door actuator microswitches, in lieu of the previous repetitive inspections, will provide a more robust water door design that will better mitigate the risk of uncommanded water door opening. Also, it has been determined that modifying the water door solenoid valve common grounds will mitigate the risk of corroded or contaminated electrical contact leading to a sneak path and subsequent uncommanded opening of the water doors.

In the NPRM, the FAA proposed to continue to require the modification of the water door actuator switches. The FAA also proposed to require modification of the water door solenoid valve common grounds, add airplanes to the applicability, and prohibit the installation of certain water door solenoid valve selector assemblies. The FAA is issuing this AD to address the uncommanded opening of water doors, which, at high speed during the take-off run, water pick-up run, or landing run, could cause serious damage to the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1301.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from Bridger Aerospace. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Incorporate Global Alternative Method of Compliance (AMOC) and Remove Parts Installation Prohibition

Bridger Aerospace (Bridger) requested that the requirements in Global AMOC No. AARDG 2022/A33 issued by Transport Canada be incorporated into the proposed AD by mandating that design change Mod CL/0076, as specified in Viking Technical Bulletin

V215–3214, be incorporated if the part number (P/N) 362–0377 valve is to be used as a replacement. Bridger stated that the additional backup protection provided by this EMF kit is ''very conclusive in addressing the possibility of reoccurrence.'' In addition, Bridger Aerospace requested that the statement that P/N 362–0377 cannot be used as a replacement part specified in paragraph (i) of the proposed AD be removed. Bridger Aerospace stated that P/N 362–0377 can be used in other locations of the airplane (*e.g.,* main and auxiliary hydraulic system, landing gear extension/retraction, and nosewheel steering) that do not require backup EMF protection. Bridger Aerospace also stated that the replacement P/N 20P16–2 has an exorbitant cost and are unavailable for up to eight months.

The FAA agrees that P/N 362–0377 can be used in other locations of the airplane other than the water door and agrees to incorporate the intent of Transport Canada's approved Global AMOC No. AARDG 2022/A33 into this AD. This allows the water door solenoid valve selector assembly, P/N 362–0377, to be used as a replacement part if it has been modified in accordance with Viking Technical Bulletin V215/0713, Revision A, dated June 20, 2022; or Viking Technical Bulletin V215/3214, Revision A, dated June 20, 2022. Paragraph (i) of this AD has been changed to allow P/N 362–0377 to be used as a replacement part as long as it has been modified in accordance with Viking Technical Bulletin V215/0713, Revision A, dated June 20, 2022; or Viking Technical Bulletin V215/3214, Revision A, dated June 20, 2022.

In addition, paragraph (i)(2) of this AD further requires that airplanes installed with this modification must revise their existing maintenance or inspection program, as applicable, to incorporate the information specified in Viking Temporary Revision 25–27, dated April 13, 2022, for Chapter 25–70–00 of the Viking CL–215 Maintenance Manual, PSP 292. Paragraph (i) of this AD has also been changed to allow water door solenoid valve, 4-way selector valve, P/N 20P16–2, specification control drawing (SCD) 215T92392–2, or superseding part with internal back electro-motive force (EMF) protection on which the design change modification specified in Viking Technical Bulletin V215/0713, Revision A, dated June 20, 2022; or Viking Technical Bulletin V215/3214, Revision A, dated June 20, 2022; is incorporated as replacements parts.

In addition, paragraph (j)(2) of this AD has been added to provide credit if modifications were done prior to the effective date of this AD in accordance with Viking Technical Bulletin V215/0713, dated April 14, 2022; or Viking Technical Bulletin V215/3214, dated April 14, 2022.

Request To Require Modification of Existing Valves

Bridger requested that the proposed AD be changed to require P/N 362–0377 valves currently installed in the water door system to be modified within 24 months. Bridger stated this modification will assure the water door system has the maximum level of safety to not have any more uncommanded door openings.

The FAA does not agree with requiring a modification to the P/N 362–0377 valves currently installed in the water door system. The actions required by this AD address the identified unsafe condition. However, operators may elect to modify these parts in accordance with Viking Technical Bulletin V215/0713, Revision A, dated June 20, 2022; or Viking Technical Bulletin V215/3214, Revision A, dated June 20, 2022. This AD has not been changed with regard to this request.

Additional Changes Made to This Final Rule

The FAA reviewed Viking Service Bulletin 215–389, Revision 3, dated February 15, 2023, which limits the effectivity to Model CL–215–1A10 airplanes because Model CL–215–6B11 (CL–215T Variant) airplanes already have an equivalent modification incorporated. Viking Service Bulletin 215–389, Revision 3, dated February 15, 2023, does not revise the modification procedures. Therefore, the FAA revised paragraph (g) of this AD to specify that only Model CL–215–1A10 airplanes are affected. The FAA has also revised paragraph (g) of this AD to refer to Viking Service Bulletin 215–389, Revision 3, dated February 15, 2023. In addition, Viking Service Bulletin 215–389, Revision 2, dated September 21, 2021, was added as credit to paragraph (j) of this AD.

In addition, the FAA determined that the retained compliance time specified in paragraph (g) of this AD should not apply to airplanes on which the modification specified Canadair Service Bulletin 215–389, dated November 15, 1988, has been done because those airplanes would be immediately out of compliance with the requirements as specified in paragraph (g) of the proposed AD. Those airplanes were previously in compliance with AD 96–12–11 as specified in Note 2 to paragraph (d) of AD 96–12–11. However, Canadair Service Bulletin 215–389, dated November 15, 1988, is no longer acceptable for compliance for this AD. Therefore, those operators must accomplish additional actions using a later revision of Canadair Service Bulletin 215–389, dated November 15, 1988. The FAA has revised the compliance time in paragraph (g) of this AD to allow 2 years after the effective date of this AD to do the modification, which corresponds to the compliance time specified in Part I of Transport Canada AD CF–2021–51, dated December 21, 2021. The FAA has determined that the compliance time represents the maximum interval of time allowable for the affected airplanes to continue to safely operate before the modification is done.

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 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 this product. 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

Viking Air Limited has issued Viking Service Bulletin 215–389, Revision 3, dated February 15, 2023. This service information describes procedures for modifying the water door actuator switches, which includes replacing the water door actuator microswitches, installing a relay channel and relays, and modifying related wiring.

Bombardier has issued Alert Service Bulletin 215–A497, dated November 16, 1998. This service information describes procedures for installing two additional water door solenoid common grounds, as well as inspecting the existing ground studs for corrosion and cleaning if necessary.

Viking Air Limited has issued Viking Technical Bulletin V215/0713, Revision A, dated June 20, 2022. This service information provides instructions to install terminal rails and terminal modules with Zener-diodes to suppress back-electro-motive force (EMF) in Viking Air Limited Model CL–215–1A10 airplanes.

Viking Air Limited has issued Viking Technical Bulletin V215/3214, Revision A, dated June 20, 2022. This service information provides instructions to install terminal rails and terminal modules with Zener-diodes to suppress back-EMF in Viking Air Limited Model CL–215–6B11 (CL–215T Variant) airplanes.

Viking Air Limited has issued Viking Temporary Revision 25–27, dated April 13, 2022. This service information describes procedures in Chapter 25–70–00 for the Mod CL/0076, Water Drop System—Hydraulic Solenoid Electrical Back-EMF Protection.

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

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained actions from AD 96–12–11	40 work-hours × $85 per hour = $3,400	$10,038	$13,438	$26,876 (2 airplanes).
New actions	2 work-hours × $85 per hour = $170	108	278	1,668.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this 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:

■ a. Removing Airworthiness Directive (AD) 96–12–11, Amendment 39–9653 (61 FR 28734, June 6, 1996); and

■ b. Adding the following new AD:

2023–07–10 Viking Air Limited (Type Certificate Previously Held by Bombardier, Inc.; Canadair Limited): Amendment 39–22412; Docket No. FAA–2022–1301; Project Identifier MCAI–2021–01447–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 20, 2023.

(b) Affected ADs

This AD replaces AD 96–12–11, Amendment 39–9653 (61 FR 28734, June 6, 1996) (AD 96–12–11).

(c) Applicability

This AD applies to all Viking Air Limited (Type Certificate previously held by Bombardier, Inc.; Canadair Limited) Model CL–215–1A10 and CL–215–6B11 (CL–215T Variant) airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/furnishings.

(e) Reason

This AD was prompted by reports of uncommanded opening of the water doors during flight and water scooping. The FAA is issuing this AD to address the uncommanded opening of water doors, which, at high speed during the take-off run, water pick-up run, or landing run, could cause serious damage to the airplane.

(f) Compliance

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

(g) Modification of Microswitches, with Revised Service Information and a New Compliance Time

This paragraph restates the requirements of paragraph (d) of AD 96–12–11, with revised service information and a new compliance time. For Model CL–215–1A10 airplanes: Within 24 months after the effective date of this AD, modify the water door microswitches in accordance with Viking Service Bulletin 215–389, Revision 3, dated February 15, 2023.

(h) New Requirement of This AD: Installation of Common Grounds

Within 24 months after the effective date of this AD, install two new water door solenoid valve common grounds in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A497, dated November 16, 1998.

(i) Parts Installation Limitation

(1) As of the effective date of this AD, only the parts identified in paragraphs (i)(1)(i) through (iii) of this AD are allowed for use as a replacement part for the water door solenoid valve.

(i) Water door solenoid valve, selector assembly, part number (P/N) 362–0377, on which the design change modification specified in Viking Technical Bulletin V215/0713, Revision A, dated June 20, 2022; or Viking Technical Bulletin V215/3214, Revision A, dated June 20, 2022; is incorporated.

(ii) Water door solenoid valve, 4-way selector valve, P/N 20P16–2, specification control drawing (SCD) 215T92392–2, or

superseding part with internal back electromotive force (EMF) protection.

(iii) Water door solenoid valve, 4-way selector valve, P/N 20P16–2, SCD 215T92392–2, or superseding part with internal back EMF protection on which the design change modification specified in Viking Technical Bulletin V215/0713, Revision A, dated June 20, 2022; or Viking Technical Bulletin V215/3214, Revision A, dated June 20, 2022; is incorporated.

(2) For airplanes on which a part identified in paragraph (i)(1)(i) or (iii) of this AD is installed: Before further flight after installation, revise the exiting maintenance or inspection program to incorporate the information for Chapter 25–70–00 specified in Viking Temporary Revision 25–27, dated April 13, 2022, into the Viking CL–215 Maintenance Manual, PSP 292.

(j) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Canadair Service Bulletin 215–389, Revision 1, dated September 30, 1991, including the retrospective action for aircraft modified in accordance with Canadair Service Bulletin 215–389, dated November 15, 1988; or Viking Service Bulletin 215–389 Revision 2, dated September 21, 2021.

(2) This paragraph provides credit for actions required by paragraphs (i)(1)(i) and (iii) of this AD, if those actions were performed before the effective date of this AD using Viking Technical Bulletin V215/0713, dated April 14, 2022; or Viking Technical Bulletin V215/3214, dated April 14, 2022.

(k) Other FAA AD Provisions

(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 certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. 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 Civil Aviation (Transport Canada); or Viking Air Limited's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(l) Additional Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Transport Canada AD CF–2021–51, dated December 21, 2021, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2022–1301.

(2) For more information about this AD, contact Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; email *9-avs-nyaco-cos@faa.gov.*

(m) 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) Bombardier Alert Service Bulletin 215–A497, dated November 16, 1998.

(ii) Viking Service Bulletin 215–389, Revision 3, dated February 15, 2023.

(iii) Viking Technical Bulletin V215/0713, Revision A, dated June 20, 2022.

(iv) Viking Technical Bulletin V215/3214, Revision A, dated June 20, 2022.

(v) Viking CL–215 Maintenance Manual, PSP 292, Temporary Revision 25–27, dated April 13, 2022.

(3) For service information identified in this AD, contact Viking Air Limited, 1959 de Havilland Way, Sidney, British Columbia V8L 5V5, Canada; telephone +1–250–656–7227; fax +1–250–656–0673; email *acs-technical.publications@vikingair.com;* website *vikingair.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 April 8, 2023.

Christina Underwood,

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

[FR Doc. 2023–10332 Filed 5–15–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1403; Project Identifier MCAI–2022–00122–T; Amendment 39–22408; AD 2023–07–06]

RIN 2120–AA64

Airworthiness Directives; De Havilland Aircraft of Canada Limited (Type Certificate Previously Held by Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes. This AD was prompted by reports of corrosion on the horizontal stabilizer lower center skin panel, including a finding of corrosion where the skin thickness had been substantially reduced, which affected design margins. This AD requires inspecting the horizontal stabilizer lower center skin panel for corrosion, and reworking, repairing, or replacing the lower center skin panel if necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 20, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 20, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1403; 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 De Havilland Aircraft of Canada Limited, Dash 8 Series Customer Response Centre, 5800 Explorer Drive, Mississauga, Ontario, L4W 5K9, Canada; telephone 855–310–1013 or 647–277–5820; email *thd@dehavilland.com;* website *dehavilland.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–2022–1403.

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; telephone 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 De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes. The NPRM published in the **Federal Register** on November 4, 2022 (87 FR 66619). The NPRM was prompted by AD CF–2022–02, dated January 28, 2022, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that there have been reports of corrosion on the horizontal stabilizer lower center skin panel, including a finding of corrosion where the skin thickness had been substantially reduced, affecting design margins. The root cause was found to be inconsistent chemical processing of the lower center skin panel, with missing anodizing layer and primer on some areas of the skin panel surface. A substantial reduction of skin panel thickness due to the effects of corrosion will compromise the structural integrity of the horizontal stabilizer.

In the NPRM, the FAA proposed to require inspecting the horizontal stabilizer lower center skin panel for corrosion, and reworking, repairing, or replacing the lower center skin panel if necessary.

The FAA is issuing this AD to address possible reduction of skin panel thickness due to the effects of corrosion, which could compromise the structural integrity of the horizontal stabilizer. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1403.

Discussion of Final Airworthiness Directive

Comments

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

The FAA received additional comments from Horizon Air. The following presents the comment received on the NPRM and the FAA's response to the comment.

Request To Limit Certain Requirements

Horizon Air requested that paragraph (g)(3)(i) of the proposed AD require only Section 3.B. (Procedure) of the Accomplishment Instructions of De Havilland Aircraft of Canada Limited Service Bulletin 84–55–11, dated February 16, 2021. Horizon Air stated that requiring the job set-up and close out sections restricts an operator's ability to perform other maintenance in conjunction with the incorporation of the service information. Horizon Air added that the job set-up and close out sections do not directly correct the unsafe conditions.

The FAA agrees with the request to limit the requirements to simplify the procedure and allow the performance of other maintenance in conjunction with the required actions of this AD. Paragraph (g)(3)(i) of this AD has been changed to limit the requirements as requested.

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 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 this product. 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

De Havilland Aircraft of Canada Limited has issued Service Bulletin 84–55–05, Revision C, dated August 19, 2021. This service information describes procedures for inspecting the horizontal stabilizer lower center skin panel for corrosion, and, depending on the level of corrosion, reworking or repairing the horizontal stabilizer lower center skin panel.

De Havilland Aircraft of Canada Limited has also issued Service Bulletin 84–55–11, dated February 16, 2021. This service information describes procedures for replacing the horizontal stabilizer lower center skin panel.

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 56 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
108 work-hours × $85 per hour = $9,180	$0	$9,180	$514,080

The FAA estimates the following costs to do any necessary on-condition replacements 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 this on-condition replacement:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
108 work-hours × $85 per hour = $9,180	$21,449	$30,629

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

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:

2023–07–06 De Havilland Aircraft of Canada Limited (Type Certificate Previously Held by Bombardier, Inc.): Amendment 39–22408; Docket No. FAA–2022–1403; Project Identifier MCAI–2022–00122–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 20, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes, certificated in any category, having serial numbers 4001 and 4003 through 4549 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 55, Stabilizers.

(e) Unsafe Condition

This AD was prompted by reports of corrosion on the horizontal stabilizer lower center skin panel, including a finding of corrosion where the skin thickness had been substantially reduced, which affected design margins. The FAA is issuing this AD to address possible substantial reduction of skin panel thickness due to the effects of corrosion, which could compromise the structural integrity of the horizontal stabilizer.

(f) Compliance

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

(g) Inspection and Corrective Actions

(1) Within 8,000 flight hours or 48 months, whichever occurs first, after the effective date of this AD: Inspect the horizontal stabilizer lower center skin panel for corrosion in accordance with Section 3.B. Part A of the Accomplishment Instructions of De Havilland Aircraft of Canada Limited Service Bulletin 84–55–05 Revision C, dated August 19, 2021. If any corrosion is found, before further flight, do the applicable actions specified in paragraph (g)(2) or (3) of this AD.

(2) If the corrosion is within the allowable repair limits as specified in Figure 5 Detail C of De Havilland Aircraft of Canada Limited Service Bulletin 84–55–05 Revision C, dated August 19, 2021, perform the corrosion rework in accordance with Section 3.B. Part B of the Accomplishment Instructions of De Havilland Aircraft of Canada Limited Service Bulletin 84–55–05 Revision C, dated August 19, 2021.

(3) If the corrosion is beyond the allowable repair limits as specified in Figure 5 Detail C of De Havilland Aircraft of Canada Limited Service Bulletin 84–55–05 Revision C, dated August 19, 2021, accomplish the action specified in paragraph (g)(3)(i) or (ii) of this AD.

(i) Replace the existing horizontal stabilizer lower center skin panel in accordance with Section 3.B. Procedure of the Accomplishment Instructions of De Havilland Aircraft of Canada Limited Service Bulletin 84–55–11, dated February 16, 2021.

(ii) Obtain and follow repair instructions using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada; or De Havilland Aircraft of Canada Limited's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(h) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraphs (g)(1) and (2) of this AD, if those actions were performed before the effective date of this AD using De Havilland Aircraft of Canada Limited Service Bulletin 84–55–05, Initial Issue, dated January 12, 2016; De Havilland Aircraft of Canada Limited Service Bulletin 84–55–05, Revision A, dated June 3, 2016; or De Havilland Aircraft of Canada Limited Service Bulletin 84–55–05, Revision B, dated February 26, 2021.

(2) This paragraph provides credit for the actions required by paragraph (g)(2) or (3) of this AD, if those actions were performed before the effective date of this AD using any of the repair drawings (RDs) specified in figure 1 to paragraph (h) of this AD.

Figure 1 to Paragraph (h)—Repair Drawings

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RD Number	Issue	Date
8/4-55-1061	3	October 7, 2014
8/4-55-1064	2	October 27, 2014
8/4-55-1107	3	March 11, 2016
8/4-55-1110	2	March 11, 2016
8/4-55-1124	3	April 13, 2021
8/4-55-1138	1	June 3, 2015
8/4-55-1144	2	May 17, 2016
8/4-55-1166	2	June 29, 2016
8/4-55-1178	2	June 29, 2016
8/4-55-1200	2	June 29, 2016
8/4-55-1219	2	June 29, 2016
8/4-55-1363	1	October 28, 2016
8/4-55-1450	1	March 2, 2017
8/4-55-1484	1	April 11, 2017
8/4-55-1705	2	September 20, 2018
8/4-55-1837	1	October 4, 2019
8/4-55-1876	1	January 17, 2020
8/4-55-1967	1	November 15, 2020
8/4-55-1978	1	January 14, 2021
8/4-55-2009	1	June 10, 2021

BILLING CODE 4910–13–C

(i) 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 certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300. 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 De Havilland Aircraft of Canada Limited's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Additional Information

(1) Refer to Transport Canada AD CF–2022–02, dated January 28, 2022, for related information. This Transport Canada AD may be found in the AD docket at regulations.gov under Docket No. FAA–2022–1403.

(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; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.*

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) and (4) of this AD.

(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) De Havilland Aircraft of Canada Limited Service Bulletin 84–55–05, Revision C, dated August 19, 2021.

(ii) De Havilland Aircraft of Canada Limited Service Bulletin 84–55–11, dated February 16, 2021.

(3) For service information identified in this AD, contact De Havilland Aircraft of Canada Limited, Dash 8 Series Customer Response Centre, 5800 Explorer Drive, Mississauga, Ontario, L4W 5K9, Canada; telephone 855–310–1013 or 647–277–5820; email *thd@dehavilland.com;* website *dehavilland.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 April 8, 2023.

Christina Underwood,

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

[FR Doc. 2023–10333 Filed 5–15–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1486; Project Identifier AD–2022–01026–T; Amendment 39–22418; AD 2023–08–03]

RIN 2120–AA64

Airworthiness Directives; Gulfstream Aerospace Corporation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Gulfstream Aerospace Corporation Model G–1159A and G–1159B airplanes and all Model G–IV and GIV–X airplanes. This AD was prompted by a report that the ground spoiler actuator installation does not preclude improper hydraulic line connections that could result in unintended asymmetrical spoiler deployment. This AD requires incorporating corrective actions that physically prevent improper connection of the hydraulic lines to the ground spoiler actuator. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 20, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 20, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1486; 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 Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, GA 31402–2206; telephone 800–810–4853; email *pubs@gulfstream.com;* website *gulfstream.com/en/customer-support/.*
- 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–2022–1486.

FOR FURTHER INFORMATION CONTACT: Samuel Belete, Aerospace Engineer, Systems and Equipment Section, FAA, Atlanta ACO Branch, 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5580; email: *9-ASO-ATLACO-ADs@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 Gulfstream Aerospace Corporation Model G–1159A and G–1159B airplanes and all Model G–IV and GIV–X airplanes. The NPRM published in the **Federal Register** on November 25, 2022 (87 FR 72422). The NPRM was prompted by a report, following a fatal accident involving a Gulfstream Model G–IV, that the ground spoiler actuator configuration does not preclude improper hydraulic line connections that could result in unintended asymmetrical spoiler deployment. In the NPRM, the FAA proposed incorporating corrective actions that physically prevent improper connection of the hydraulic lines to the ground spoiler actuator. The FAA is issuing this AD to address improper connection of the ground spoiler hydraulic lines, which, if not addressed, could result in unintended asymmetrical spoiler deployment leading to loss of control of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from the National Transportation Safety Board (NTSB). The NTSB supported the NPRM without change.

The FAA received comments from Gulfstream Aerospace Corporation. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Clarify Information in the Preamble

Gulfstream requested that the FAA revise the description of the incident that prompted the NPRM. Gulfstream requested aligning the **SUMMARY** with the Background details in the NPRM to state that the proposed AD was prompted by a report that the ground spoiler actuator installation ''does not preclude'' improper hydraulic line connections, instead of stating that the installation ''allows'' such improper connections.

The FAA agrees with the suggested revision and has revised the **SUMMARY** of this final rule accordingly.

Request To Clarify the Total Affected Airplanes (Cost of Compliance)

Gulfstream requested that the FAA revise the Cost of Compliance section of the NPRM to reflect a total population of affected airplanes of 1,045. This includes airplanes of all registries. The ''Cost of Compliance'' section in the NPRM identified a total of 550 airplanes of U.S. Registry as affected.

The FAA does not agree because the ''Cost of Compliance'' section accounts for the cost of AD compliance only for affected airplanes that are certificated by the FAA and included on the U.S. Registry. Airplanes registered in other countries are regulated by their civil aviation authorities, who may or may not adopt similar rulemaking. The FAA has not changed this final rule as a result of this comment.

Request To Change Compliance Time

Gulfstream requested that the FAA change the compliance time for Model G–1159A, G–1159B, and G–IV airplanes from 18 months after the effective date of this AD to 18 months from March 3, 2023. Gulfstream stated that if the AD becomes effective prior to March 3, 2023, it will shorten the FAA and Gulfstream agreed-on corrective action timelines, and would increase an already challenging compliance window.

The FAA finds it unnecessary to change the compliance time. The effective date of this AD is after the requested reference date of March 3, 2023, so this AD will provide the full 18 months for compliance for those airplanes.

Additional Change to This Final Rule

Gulfstream has developed and published service information that will address the unsafe condition for certain airplanes identified in this final rule. This service information is described under ''Related Service Information under 1 CFR part 51'' in this final rule. After reviewing this service information, the FAA determined that it is acceptable to use for compliance with the requirements of this AD for the identified airplanes. The FAA has

revised the proposed AD to present the requirements for Model G–1159A, G–1159B, and G–IV airplanes in paragraph (g) of this AD, which also identifies this service information as acceptable for compliance with the requirements of the AD for those airplanes. The requirements for Model GIV–X airplanes have not changed, and are restated in new paragraph (h) of this AD. In addition, the Costs of Compliance section has been updated to reflect costs specified in this service information.

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 the following service information:

- Gulfstream G300 Customer Bulletin No. 250, dated November 9, 2022
- Gulfstream G400 Customer Bulletin No. 250, dated November 9, 2022
- Gulfstream GII–GIIB Customer Bulletin No. 471, dated November 9, 2022
- Gulfstream GIII Customer Bulletin No. 189, dated November 9, 2022
- Gulfstream GIV Customer Bulletin No. 250, dated November 9, 2022

This service information specifies procedures for replacing the left and right ground spoiler actuator hydraulic hoses and associated fittings. These documents are distinct since they apply to different Model G–1159A, G–1159B, and G–IV airplanes. 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 550 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
20 work-hours × $85 per hour = $1,700	$500	$2,200	$1,210,000

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:

2023–08–03 Gulfstream Aerospace Corporation: Amendment 39–22418; Docket No. FAA–2022–1486; Project Identifier AD–2022–01026–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 20, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Gulfstream Aerospace Corporation airplanes identified in paragraphs (c)(1) through (4) of this AD, certificated in any category.

(1) Model G–1159A airplanes having serial numbers (S/Ns) 385, 387, 388, and 390 through 498 inclusive.

(2) Model G–1159B airplanes having S/Ns 009, 016, 042, 048, 054, 064, 086, 088, 095, 098, 102, 119, 123, 125, 131, 140, 151, 154, 155, 156, 165, 166, 189, 198, 199, 207, 219, 237, 245, 254, 255, and 257.

(3) Model G–IV airplanes, all serial numbers.

(4) Model GIV–X airplanes, all serial numbers.

Note 1 to paragraph (c): Some Model G–IV airplanes are also referred to by the marketing designations G300, G400, and GIV–SP.

Note 2 to paragraph (c): Some Model GIV–X airplanes are also referred to by the marketing designations G350 and G450.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Controls.

(e) Unsafe Condition

This AD was prompted by a report that a Gulfstream Model G–IV airplane was involved in a fatal accident on December 15, 2021, after spoilers deployed in an asymmetrical manner. The asymmetrical spoiler deployment resulted in in-flight loss of control of the airplane. The fatal flight was

the first flight after maintenance actions where the spoiler hydraulic lines were improperly connected (reversed) to the ground spoiler actuator. The ground spoiler actuator configuration does not preclude improper hydraulic line connections that could result in unintended asymmetrical spoiler deployment. The FAA is issuing this AD to prevent incorrect connection of the hydraulic lines to the ground spoiler actuator. The unsafe condition, if not addressed, could result in unintended asymmetrical spoiler deployment leading to loss of control of the airplane.

(f) Compliance

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

(g) Required Actions: Model G–1159A, G–1159B, G–IV

For Model G–1159A, G–1159B, and G–IV airplanes: Within 18 months after the effective date of this AD, incorporate corrective actions (includes replacing a ground spoiler actuator hydraulic hose and associated fittings) that physically prevent improper connection of the hydraulic lines to the ground spoiler actuator, in accordance with a method approved by the Manager, Atlanta ACO Branch, FAA. Accomplishment of the actions specified in the applicable service information in paragraphs (g)(1) through (5) of this AD is acceptable for compliance with the requirements of this paragraph.

(1) Gulfstream G300 Customer Bulletin No. 250, dated November 9, 2022.

(2) Gulfstream G400 Customer Bulletin No. 250, dated November 9, 2022.

(3) Gulfstream GII–GIIB Customer Bulletin No. 471, dated November 9, 2022.

(4) Gulfstream GIII Customer Bulletin No. 189, dated November 9, 2022.

(5) Gulfstream GIV Customer Bulletin No. 250, dated November 9, 2022.

(h) Required Actions: Model GIV–X

For Model GIV–X airplanes: Within 60 months after the effective date of this AD, incorporate corrective actions (includes replacing a ground spoiler actuator hydraulic hose and associated fittings) that physically prevent improper connection of the hydraulic lines to the ground spoiler actuator, in accordance with a method approved by the Manager, Atlanta ACO Branch, FAA.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or 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 (j) of this AD.

(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) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (i)(3)(i) and (ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(j) Related Information

For more information about this AD, contact Samuel Belete, Aerospace Engineer, Systems and Equipment Section, FAA, Atlanta ACO Branch, 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5580; email: *9-ASO-ATLACO-ADs@faa.gov.*

(k) 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) Gulfstream G300 Customer Bulletin No. 250, dated November 9, 2022.

(ii) Gulfstream G400 Customer Bulletin No. 250, dated November 9, 2022.

(iii) Gulfstream GII–GIIB Customer Bulletin No. 471, dated November 9, 2022.

(iv) Gulfstream GIII Customer Bulletin No. 189, dated November 9, 2022.

(v) Gulfstream GIV Customer Bulletin No. 250, dated November 9, 2022.

(3) For service information identified in this AD, contact Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, GA 31402–2206; telephone 800–810–4853; email *pubs@gulfstream.com;* website *gulfstream.com/en/customer-support/.*

(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 April 14, 2023.

Christina Underwood,

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

[FR Doc. 2023–10328 Filed 5–15–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1474; Project Identifier MCAI–2022–00888–T; Amendment 39–22409; AD 2023–07–07]

RIN 2120–AA64

Airworthiness Directives; MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.) 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 MHI RJ Aviation ULC Model CL–600–2B19 (Regional Jet Series 100 & 440), CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2C11 (Regional Jet Series 550), CL–600–2D15 (Regional Jet Series 705), CL–600–2D24 (Regional Jet Series 900), and CL–600–2E25 (Regional Jet Series 1000) airplanes. This AD was prompted by reports from the supplier that sensing elements of the bleed air leak detection system were manufactured with insufficient salt fill, which can result in an inability to detect hot bleed air leaks. This AD requires testing of all affected overheat detection sensing elements of the bleed air leak detection system, and replacement if necessary. This AD also prohibits the installation of affected parts. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 20, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 20, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2022–1474; 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 MHI RJ

Aviation Group, Customer Response Center, 3655 Ave. des Grandes-Tourelles, Suite 110, Boisbriand, Québec J7H 0E2 Canada; North America toll-free telephone 833–990–7272 or direct-dial telephone 450–990–7272; fax 514–855–8501; email *thd.crj@mhirj.com;* website *mhirj.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–2022–1474.

FOR FURTHER INFORMATION CONTACT:
Thomas Niczky, Aerospace Engineer, Avionics & Electrical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; 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 MHI RJ Aviation ULC Model CL–600–2B19 (Regional Jet Series 100 & 440), CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2C11 (Regional Jet Series 550), CL–600–2D15 (Regional Jet Series 705), CL–600–2D24 (Regional Jet Series 900), and CL–600–2E25 (Regional Jet Series 1000) airplanes. The NPRM published in the **Federal Register** on November 18, 2022 (87 FR 69210). The NPRM was prompted by AD CF–2022–16R1, dated July 5, 2022, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that MHI RJ Aviation ULC received reports from the supplier of the overheat detection sensing elements of a manufacturing quality escape. Some of the sensing elements of the bleed air leak detection system were manufactured with insufficient salt fill, which can result in an inability to detect hot bleed air leaks and cause damage to surrounding structures and systems that can prevent continued safe flight and landing.

In the NPRM, the FAA proposed to require testing of all affected overheat detection sensing elements of the bleed air leak detection system, and replacement if necessary. The NPRM also proposed to prohibit the installation of affected parts. 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–2022–1474.

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 two commenters, including Endeavor Air and MHI RJ Aviation ULC. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Not Require Recording of Serial Number and Date Code

Endeavor Air requested that paragraph (h) of the proposed AD be revised to not require recording of the sensing element serial number and date code if not visible, unless the sensing element has failed. Endeavor Air noted that the service information specifies to fill out a data sheet for each sensing element and include it with each failed sensing element, and the data sheet specifies to include the serial number and date code of the sensing element. Endeavor Air noted that obtaining the serial number and date code sometimes requires disassembly of adjacent structure or components, which takes up to two labor hours per sensing element. The commenter asserted that the cost of two additional labor hours for the sole purpose of recording information on a serviceable sensing element constitutes an undue burden on the operator.

The FAA agrees to remove the requirement to record the sensing element serial number and date code if they are not visible without additional disassembly, provided that the part has not failed. However, the Sensing Element Name must be recorded on the Test Data Sheet, so it is clear exactly the sensing element that was tested. Paragraph (h) of this AD has been revised to provide an exception to this requirement.

Request To Allow Alternative Installation of Placard

Endeavor Air requested that paragraphs (j)(1)(iii) and (j)(2)(iii) of the proposed AD be revised to allow the placard on the BLEED AIR control panel to be installed as specified in the FAA-approved operator Minimum Equipment List (MEL) procedure, rather than just in accordance with MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022. Endeavor Air stated that its current MEL procedure for an inoperative LOOP already requires installation of a placard on the BLEED Air control panel, though the wording is not identical to that in MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022. Endeavor Air stated that this change would help prevent worker confusion and possible unnecessary work.

The FAA has reviewed Endeavor Air's MEL procedure and agrees that it provides the same level of safety as that specified in MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022. The FAA has revised paragraphs (j)(1)(iii) and (j)(2)(iii) of this AD to allow installing the placard in accordance with the referenced service information or the operator's FAA-approved MEL procedure.

Request To Revise Labor Costs

MHI RJ requested to revise the labor costs in the cost of compliance section from $85 to $79 per hour. MHI RJ stated that settlement agreements signed with Liebherr and Kidde are for no more than $79 per hour, and that operators will be reimbursed for parts and labor costs by Kidde. Therefore, MH IRJ requested the labor cost be based on $79 per hour.

The FAA acknowledges that labor costs may be higher or lower than the standard rate of $85 per hour used when estimating the labor costs for complying with AD requirements. However, as stated in this AD, these costs are merely FAA estimates. Further, the FAA does not control any settlement agreement or warranty coverage and cannot guarantee that any given labor rate will be available to operators. This AD has not been changed with respect to this request.

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 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 this product. 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 MHI RJ Service Bulletin 601R–36–021, Revision D, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022; and MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022. This service information specifies procedures for testing affected bleed air leak detection system sensing elements (*i.e.,* those marked with a date code before ''A2105'' (which corresponds to January 31, 2021), with a part number defined in this service information) to determine if they are serviceable, and replacing failed sensing elements with serviceable ones. This service information also allows deferring the replacement of an affected part under certain conditions and allows operating the airplane with certain deactivated defective sensing elements. These documents are distinct since they apply to different airplane models. 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 1,126 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Model	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Model CL-600-2B19 (526 airplanes)	29 work hours × $85 per hour = $2,465	$0	$2,465	$1,296,590
Model CL-600-2C10 and CL-600-2C11, CL-600-2D15 and CL-600-2D24, and CL-600-2E25 (600 airplanes).	82 work hours × $85 per hour = $6,970	0	6,970	4,182,000

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

Model/serial No.s (S/Ns)	Labor cost	Parts cost	Cost per product
CL-600-2B19, S/Ns 7002–7323	Up to 26 work-hours × $85 per hour = $2,210	Up to $113,200	Up to $115,410.
CL–600–2B19, S/Ns 7324–8113	Up to 24 work-hours × $85 per hour = $2,040	Up to $100,598	Up to $102,638.
CL-600-2C10 and CL-600-2C11, S/Ns 10002–10347.	Up to 54 work-hours × $85 per hour = $4,590	Up to $70,758	Up to $75,348.
CL-600-2D15 and CL-600-2D24, S/Ns 15001–15494.	Up to 58 work-hours × $85 per hour = $4,930	Up to $74,598	Up to $79,528.
CL-600-2E25, S/Ns 19001–19064	Up to 62 work-hours times; $85 per hour = $5,270.	Up to $81,478	Up to $86,748.

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:

2023–07–07 MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.): Amendment 39–22409; Docket No. FAA–2022–1474; Project Identifier MCAI–2022–00888–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 20, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to MHI RJ Aviation ULC airplanes, certificated in any category, and identified in paragraphs (c)(1) through (4) of this AD.

(1) Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7002 through 7990 inclusive, and 8000 through 8113 inclusive.

(2) Model CL–600–2C10 (Regional Jet Series 700, 701 & 702) and CL–600–2C11 (Regional Jet Series 550) airplanes, serial numbers 10002 through 10347 inclusive.

(3) Model CL–600–2D15 (Regional Jet Series 705) and Model CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 through 15494 inclusive.

(4) Model CL–600–2E25 (Regional Jet Series 1000), serial numbers 19001 through 19064 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 36, Pneumatic.

(e) Unsafe Condition

This AD was prompted by reports that sensing elements of the bleed air leak detection system were manufactured with insufficient salt fill. The FAA is issuing this AD to address insufficient salt fill, which can result in an inability to detect hot bleed air leaks, which can cause damage to surrounding structures and systems that can prevent continued safe flight and landing.

(f) Compliance

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

(g) Definitions

For the purposes of this AD, the definitions specified in paragraphs (g)(1) through (4) of this AD apply.

(1) *Group 1 airplanes:* The airplanes identified in paragraph (c)(1) of this AD.

(2) *Group 2 airplanes:* The airplanes identified in paragraphs (c)(2) through (4) of this AD.

(3) Affected part: A sensing element marked with a date code before A2105 and having a part number as defined in Section 1, Paragraph G(1), of MHI RJ Service Bulletin 601R–36–021, Revision D, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, for Group 1 airplanes; and in Appendix B, dated October 21, 2021, of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, and Appendix C, dated March 14, 2022, for Group 2 airplanes; unless the sensing element has been tested and found to be serviceable in accordance with paragraphs (g)(3)(i) and (ii) or paragraph (h) of this AD.

(i) Has been tested as specified in Section 3 of the Accomplishment Instructions of Kidde Aerospace and Defense Service Bulletin CFD–26–5 and found to be serviceable; and

(ii) Has been marked on one face of its connector hex nut and is packaged as specified in Section 3.C. of the Accomplishment Instructions—Identification Procedure of the Kidde Aerospace and Defense Service Bulletin CFD–26–5.

(4) Serviceable part: A sensing element that is not an affected part.

(h) Testing

Perform a test of the bleed air leak detection system sensing elements to determine if they are serviceable, in accordance with Section 2, Part A through Part F, of the Accomplishment Instructions of MHI RJ Service Bulletin 601R–36–021, Revision D, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, for Group 1 airplanes; and Section 2, Part A through Part M, of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022, for Group 2 airplanes; within the applicable compliance time indicated in figure 1 to paragraph (h) of this AD. This AD does not require filling out the serial number or date code of the sensing element in Appendix A, Revision B, dated March 14, 2022; of MHI RJ Service Bulletin 601R–36–021, Revision D, dated May 25, 2022; or MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022; as applicable, if the serial number or date code is not visible without additional disassembly and the part has not failed. However, the Sensing Element Name must be recorded on the Test Data Sheet, so it is clear exactly the sensing element that was tested.

Figure 1 to Paragraph (h)—Compliance Time

Airplanes	Applicable Service Bulletin Accomplishment Instructions	Compliance Time
Group 1	Part D of the Accomplishment Instructions of MHI RJ Service Bulletin 601R-36-021, Revision D, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022	Within 4,400 flight hours or 24 months, whichever occurs first, after the effective date of this AD
	Part A, Part B, Part C, Part E, and Part F of the Accomplishment Instructions of MHI RJ Service Bulletin 601R-36-021, Revision D, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022	Within 6,600 flight hours or 36 months, whichever occurs first, after the effective date of this AD
Group 2	Part K of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA-36-025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022	Within 8,400 flight hours or 48 months, whichever occurs first, after the effective date of this AD
	Part A, Part B, Part C, Part D, Part E, Part F, Part G, Part H, Part I, Part J, Part L, and Part M of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA-36-025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022	Within 2,200 flight hours or 18 months, whichever occurs first, after the effective date of this AD

(i) Replacement

(1) *For Group 1 airplanes:* If any sensing element is found not serviceable during the tests required by paragraph (h) of this AD, before further flight, replace the sensing element with a serviceable part in accordance with Section 2, Part A through Part F, as applicable, of the Accomplishment Instructions of MHI RJ Service Bulletin 601R–36–021, Revision D, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022.

(2) *For Group 2 airplanes:* If any sensing element is found not serviceable during the tests required by paragraph (h) of this AD, before further flight, unless deferred in accordance with paragraph (j) of this AD, replace the sensing element with a serviceable part in accordance with Section 2, Part A through Part M, as applicable, of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022.

(j) Deferred Replacement for Group 2 Airplanes

The replacement of an affected part with a serviceable part for Group 2 airplanes, as required by paragraph (i)(2) of this AD, may be deferred up to a maximum of 10 days under the conditions specified in paragraphs (j)(1) or (2) of this AD.

(1) A single bleed air leak detection loop (loop A or loop B) sensing element for a given Part (Part A through Part M of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022) is found not serviceable, provided that the conditions specified in paragraphs (j)(1)(i) through (iv) of this AD have been satisfied.

(i) The remaining operative bleed air leak detection loop (loop A or loop B) sensing elements have been tested and found to be serviceable in accordance with paragraph (h) of this AD.

(ii) The applicable maintenance procedures of Appendix C, dated March 14, 2022, of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, and Appendix B, dated October 21, 2021, to deactivate the defective sensing element are accomplished prior to operation of the airplane with the defective sensing element inoperative.

(iii) A placard has been installed on the BLEED AIR control panel in accordance with Section 2, Part A through Part M, as applicable, of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022; or in accordance with the operator's FAA-approved Minimum Equipment List (MEL) procedure.

(iv) All flightcrew have been advised that the airplane is dispatched with one out of two bleed air leak detection loops inoperative.

(2) Both bleed air leak detection loop A and loop B sensing elements for a given part (Part A through Part M of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022) are found not

serviceable, provided that the conditions specified in paragraphs (j)(2)(i) through (iv) of this AD have been satisfied.

(i) The applicable maintenance procedures of Appendix C, dated March 14, 2022, of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, and Appendix B, dated October 21, 2021, to deactivate the defective sensing elements are accomplished prior to operation of the airplane with the defective sensing elements inoperative.

(ii) The applicable instructions and limitations of the operator's existing FAA-approved Minimum Equipment List (MEL) item 36–21–06, sub-item 1, 2, or 3, as applicable, in accordance with Section 2, Part A through Part M, of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022, are accomplished prior to operation of the airplane with the defective sensing elements inoperative.

(iii) A placard has been installed on the BLEED AIR control panel in accordance with Section 2, Part A through Part M, as applicable, of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022; or in accordance with the operator's FAA-approved MEL procedure.

(iv) All flightcrew have been advised that the airplane is dispatched with both bleed air leak detection loops inoperative.

(k) Parts Installation Prohibition

As of the effective date of this AD, no person may install an affected part on any airplane.

(l) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (h), (i), and (j) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (l)(1) and (2) of this AD. For performing the actions specified in the service information for the Group 1 airplanes: If the sensing element was found not serviceable, replacement is required before further flight; deferred replacement of an affected part is prohibited. For performing the actions specified in the service information for the Group 2 airplanes: If the sensing element was found not serviceable, deferred replacement of the affected part is acceptable, as specified in paragraph (j) of this AD.

(1) For Group 1 airplanes the applicable service information specified in paragraphs (l)(1)(i) through (iv) of this AD:

(i) MHI RJ Service Bulletin 601R–36–021, including Appendix A, dated July 5, 2021.

(ii) MHI RJ Service Bulletin 601R–36–021, including Appendix A, Revision A, dated October 21, 2021.

(iii) MHI RJ Service Bulletin 601R–36–021, Revision B, dated December 2, 2021, including Appendix A, Revision A, dated October 21, 2021.

(iv) MHI RJ Service Bulletin 601R–36–021, Revision C, dated March 14, 2022, including Appendix A, Revision B, dated March 14, 2022.

(2) For Group 2 airplanes the applicable service information specified in paragraphs (l)(2)(i) through (iii) of this AD:

(i) MHI RJ Service Bulletin 670BA–36–025, including Appendix A, dated July 5, 2021.

(ii) MHI RJ Service Bulletin 670BA–36–025, Revision A, dated October 21, 2021, including Appendix A, Revision A, dated October 21, 2021, and Appendix B, dated October 21, 2021.

(iii) MHI RJ Service Bulletin 670BA–36–025, Revision B, dated March 14, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022.

(m) 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 (n)(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 MHI RJ Aviation ULC's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(n) Additional Information

(1) Refer to Transport Canada AD CF–2022–16R1, dated July 5, 2022, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2022–1474.

(2) For more information about this AD, contact Thomas Niczky, Aerospace Engineer, Avionics & Electrical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; email *9-avs-nyaco-cos@faa.gov.*

(o) 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) MHI RJ Service Bulletin 601R–36–021, Revision D, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022.

(ii) MHI RJ Service Bulletin 670BA–36–025, Revision C, dated May 25, 2022, including Appendix A, Revision B, dated March 14, 2022, Appendix B, dated October 21, 2021, and Appendix C, dated March 14, 2022.

(3) For service information identified in this AD, contact MHI RJ Aviation Group, Customer Response Center, 3655 Ave. des Grandes-Tourelles, Suite 110, Boisbriand, Québec J7H 0E2 Canada; North America toll-free telephone 833–990–7272 or direct-dial telephone 450–990–7272; fax 514–855–8501; email *thd.crj@mhirj.com;* website *mhirj.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 April 8, 2023.

Christina Underwood,

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

[FR Doc. 2023–10334 Filed 5–15–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1044; Project Identifier AD–2023–00593–T; Amendment 39–22436; AD 2023–09–13]

RIN 2120–AA64

Airworthiness Directives; Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2019–18–09, which applied to all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model 382, 382B, 382E, 382F, and 382G airplanes; and Model C–130A, HP–C–130A, EC–130Q, C–130B, and C–130H airplanes. AD 2019–18–09 required a visual inspection of the center wing upper and lower rainbow fittings for cracks, an eddy current inspection of the center wing

lower rainbow fittings for cracks, and replacement if necessary. This AD was prompted by an analysis of reported cracks showing repetitive inspections are needed to adequately address cracked inner tangs of the center wing lower rainbow fittings. This AD requires repetitive inspections of the center wing upper and lower rainbow fittings for cracks and replacement if necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 31, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 31, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of October 11, 2019 (84 FR 50730, September 26, 2019).

The FAA must receive comments on this AD by June 30, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–1044; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Lockheed Martin Corporation/Lockheed Martin Aeronautics Company, Airworthiness Office, Dept. 6A0M, Zone 0252, Column P–58, 86 S Cobb Drive, Marietta, GA 30063; telephone 770–494–5444; fax 770–494–5445; email *ams.portal@lmco.com.*
- You may view this referenced 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* by searching for and locating Docket No. FAA–2023–1044.

FOR FURTHER INFORMATION CONTACT: Fred Caplan, Aerospace Engineer, Airframe Section, East Certification Branch, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5507; email: *9-ASO-ATLACO-ADs@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued AD 2019–18–09, Amendment 39–19736 (84 FR 50730, September 26, 2019) (AD 2019–18–09), for all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company (Lockheed) Model 382, 382B, 382E, 382F, and 382G airplanes; and Model C–130A, HP–C–130A, EC–130Q, and C–130B airplanes. AD 2019–18–09 required a visual inspection of the center wing upper and lower rainbow fittings for cracks, an eddy current inspection of the center wing lower rainbow fittings for cracks, and replacement if necessary. AD 2019–18–09 was prompted by reports of cracked inner tangs of the center wing lower rainbow fittings. The FAA issued AD 2019–18–09 to address such cracks, which could result in failure of the center wing lower rainbow fittings, wing separation, and loss of the airplane.

Actions Since AD 2019–18–09 Was Issued

Since the FAA issued AD 2019–18–09, Lockheed Martin Corporation/Lockheed Martin Aeronautics Company has notified the FAA of cracks found on military airplanes of similar type design to the affected airplanes of AD 2019–18–09. The FAA reviewed Lockheed's analysis of these reported cracks and concurs with Lockheed's finding that repetitive inspections are needed for the airplanes identified in AD 2019–18–09 in order to adequately address cracked inner tangs of the center wing lower rainbow fittings. Each tang (node) contains a single attachment bolt to the outer wing. If tangs fail, the rainbow fitting may not be able to carry limit load and the rainbow fitting may fail. This condition, if not addressed, could result in failure of the center wing lower rainbow fittings, wing separation, and loss of the airplane.

Also, since the FAA issued AD 2019–18–09, the FAA has determined that Model C–130H airplanes are also affected by this unsafe condition. Therefore, that airplane model has been added to applicability in paragraph (c)(2)(viii) of this AD.

FAA's Determination

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 2, dated February 14, 2023. This service information specifies procedures for repetitive visual inspections of the left and right center wing upper and lower rainbow fittings for cracks, repetitive eddy current inspections of the center wing lower rainbow fittings for cracks, and replacement if necessary.

This AD also requires Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 1, dated August 16, 2019, which the Director of the Federal Register approved for incorporation by reference as of October 11, 2019 (84 FR 50730, September 26, 2019).

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.

AD Requirements

This AD requires accomplishing the actions specified in the service information already described, except as discussed under ''Differences Between this AD and the Service Information.''

Explanation of Change To Type Certificate Holder Name

The FAA has revised the reference to the type certificate holder's name specified in paragraph (c)(2)(vi) of this AD to identify the type certificate holder's name as published in the most recent type certificate data sheet for the affected models.

Impact on Intrastate Aviation in Alaska

In light of the heavy reliance on aviation for intrastate transportation in Alaska, the FAA fully considered the effects of this AD (including costs to be borne by affected operators) from the earliest possible stages of AD development. This AD is based on those considerations, and was developed with regard to minimizing the economic impact on operators to the extent possible, consistent with the safety objectives of this AD. In any event, the Federal Aviation Regulations require operators to correct an unsafe condition identified on an airplane to ensure operation of that airplane in an airworthy condition. The FAA has

determined in this case that the requirements are necessary and the indirect costs would be outweighed by the safety benefits of the AD.

Differences Between This AD and the Service Information

Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 1, dated August 16, 2019; and Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 2, dated February 14, 2023; specify that, for certain airplanes, Service Bulletin 382–57–97, or the results of a Lockheed Martin Operational Usage Evaluation (OUE) should be used to determine the number of flight hours on the center wing lower rainbow fittings. This AD does not allow the use of Service Bulletin 382–57–97 or the OUE to determine the number of flight hours because they have not been approved by the FAA. If operators are unable to determine the number of flight hours on the center wing lower rainbow fittings, they must do the actions required by this AD within 30 days as specified in paragraphs (h) and (j) of this AD.

Justification for Immediate Adoption and Determination of the Effective Date

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

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because cracked inner tangs of the center wing lower rainbow fittings could result in failure of the center wing lower rainbow fittings, wing separation, and loss of the airplane. Further, based upon the age of the fleet, it is likely that some airplanes may be beyond the thresholds specified in paragraph (i) of this AD. Thus, the compliance time for the required action is shorter than the time necessary for the public to comment and for publication of the final rule. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

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

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA–2023–1044 and Project Identifier AD–2023–00593–T" at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Fred Caplan, Aerospace Engineer, Airframe Section, East Certification Branch, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5507; email: *9-ASO-ATLACO-ADs@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

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

Costs of Compliance

The FAA estimates that this AD affects 36 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
Inspections (retained actions from AD 2019–18–09).	16 work-hours × $85 per hour = $1,360 per inspection cycle.	$0	$1,360 per inspection cycle.	$48,960 per inspection cycle.
Repetitive Inspections (new proposed action).	16 work-hours × $85 per hour = $1,360 per inspection cycle.	0	1,360 per inspection cycle.	48,960 per inspection cycle.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement	740 work-hours × $85 per hour = $62,900	$15,000	$77,900

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2019–18–09, Amendment 39–19736 (84 FR 50730, September 26, 2019); and

■ b. Adding the following new AD:

2023–09–13 Lockheed Martin Corporation/ Lockheed Martin Aeronautics Company: Amendment 39–22436; Docket No. FAA–2023–1044; Project Identifier AD–2023–00593–T.

(a) Effective Date

This airworthiness directive (AD) is effective May 31, 2023.

(b) Affected ADs

This AD replaces AD 2019–18–09, Amendment 39–19736 (84 FR 50730, September 26, 2019) (AD 2019–18–09).

(c) Applicability

This AD applies to all airplanes specified in paragraphs (c)(1) and (2) of this AD, certificated in any category.

(1) Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model 382, 382B, 382E, 382F, and 382G airplanes.

(2) The airplanes specified in paragraphs (c)(2)(i) through (x) of this AD, type certificated in the restricted category.

(i) LeSEA Model C–130A airplanes, Type Certificate Data Sheet (TCDS) A34SO, Revision 1.

(ii) T.B.M., Inc., (transferred from Central Air Services, Inc.) Model C–130A airplanes, TCDS A39CE, Revision 3.

(iii) Western International Aviation, Inc., Model C–130A airplanes, TCDS A33NM.

(iv) USDA Forest Service Model C–130A airplanes, TCDS A15NM, Revision 4.

(v) Snow Aviation International, Inc., Model C–130A airplanes, TCDS TQ3CH, Revision 1.

(vi) International Air Response (transferred from Rogers Helicopters, Inc., and Heavylift Helicopters, Inc.) Model C–130A airplanes, TCDS A31NM, Revision 3.

(vii) Hawkins & Powers Aviation, Inc., Model HP–C–130A airplanes, TCDS A30NM, Revision 1.

(viii) Coulson Aviation (USA), Inc., Model EC–130Q airplanes and Model C–130H airplanes, TCDS T00019LA, Revision 4.

(ix) Lockheed-Georgia Company Model 282–44A–05 (C–130B) airplanes, TCDS A5SO.

(x) Surplus Model C–130A airplanes.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by an analysis of reported cracks showing repetitive inspections are needed to adequately address cracked inner tangs of the center wing lower rainbow fittings. The FAA is issuing this AD to address such cracks. The unsafe condition, if not addressed, could result in failure of the center wing lower rainbow fittings, wing separation, and loss of the airplane.

(f) Compliance

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

(g) Retained Inspections With Revised Service Information

This paragraph restates the requirements of paragraph (g) of AD 2019–18–09, with revised service information. Except as specified in paragraph (h) of this AD: Before the accumulation of 15,000 flight hours on the lower center wing rainbow fitting, or within 30 days after October 11, 2019 (the effective date of AD 2019–18–09), whichever occurs later, do the inspections required by paragraphs (g)(1) and (2) of this AD, in accordance with the Accomplishment Instructions of Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 1, dated August 16, 2019; or Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 2, dated February 14, 2023. If any cracks are found during any inspection required by paragraphs (g)(1) and (2) of this AD, replace the rainbow fitting before further flight.

(1) Do a visual inspection of the center wing upper and lower rainbow fittings for any cracks.

(2) Do an eddy current inspection of the center wing lower rainbow fittings for any cracks.

(h) Retained Compliance Time Exception for Paragraph (g) of This AD With No Changes

This paragraph restates the exception specified in paragraph (h) of AD 2019–18–09, with no changes. For any airplane on which the number of flight hours on the lower rainbow fitting cannot be determined for paragraph (g) of this AD: Do the inspections required by paragraphs (g)(1) and (2) of this AD within 30 days after October 11, 2019 (the effective date of AD 2019–18–09).

(i) New Repetitive Inspections

Except as specified in paragraph (j) of this AD: Within 5,000 flight hours after accomplishing the inspections required by paragraph (g) of this AD, or within 30 days after the effective date of this AD, whichever occurs later, do the inspections specified in paragraphs (i)(1) and (2) of this AD, in

accordance with the Accomplishment Instructions of Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 2, dated February 14, 2023. Repeat the inspections thereafter at intervals not to exceed 5,000 flight hours. If any crack is found during any inspection required by paragraph (i)(1) or (2) of this AD, replace the rainbow fitting before further flight.

(1) Do a visual inspection of the left and right center wing upper and lower rainbow fittings for any crack.

(2) Do an eddy current inspection of the left and right center wing lower rainbow fittings for any crack.

(j) Compliance Time Exception for Paragraph (i) of This AD

For any airplane on which the number of flight hours on the lower rainbow fitting cannot be determined for paragraph (i) of this AD: Do the inspections required by paragraphs (i)(1) and (2) of this AD within 30 days after the effective date of this AD.

(k) No Report

Although Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 1, dated August 16, 2019; and Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 2, dated February 14, 2023; specify to report inspection findings, this AD does not require any report.

(l) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before October 11, 2019 (the effective date of AD 2019–18–09) using Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, dated August 9, 2019.

(m) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the airplane to a location where the airplane can be modified, provided no more than two tangs (nodes) are found cracked during any inspection required by paragraph (g) or (i) of this AD.

(n) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or 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 (o)(1) of this AD.

(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 a Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Designated Engineering Representative (DER) that has been authorized by the Manager, Atlanta ACO Branch, FAA, to make those findings. To be approved, the repair, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) *Required for Compliance (RC):* Except as required by paragraph (k) of this AD, if any service information contains steps that are identified as RC, those steps, including substeps under an RC step and any figures identified in an RC step, must be done to comply with this AD; any steps that are not identified as RC are recommended. Those steps that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the steps and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to steps, including substeps under an RC step and any figures identified in an RC step, identified as RC require approval of an AMOC.

(o) Related Information

(1) For more information about this AD, contact Fred Caplan, Aerospace Engineer, Airframe Section, East Certification Branch, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5507; email: *9-ASO-ATLACO-ADs@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (p)(5) and (6) of this AD.

(p) 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 this AD specifies otherwise.

(3) The following service information was approved for IBR on May 31, 2023.

(i) Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 2, dated February 14, 2023.

(ii) [Reserved]

(4) The following service information was approved for IBR on October 11, 2019 (84 FR 50730, September 26, 2019).

(i) Lockheed Martin Aeronautics Company Alert Service Bulletin A382–57–98, Revision 1, dated August 16, 2019.

(ii) [Reserved]

(5) For service information identified in this AD, contact Lockheed Martin Corporation/Lockheed Martin Aeronautics Company, Airworthiness Office, Dept. 6A0M, Zone 0252, Column P–58, 86 S Cobb Drive, Marietta, GA 30063; telephone 770–494–5444; fax 770–494–5445; email *ams.portal@lmco.com.*

(6) 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.

(7) 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 May 9, 2023.

Ross Landes,

Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–10526 Filed 5–12–23; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0164; Project Identifier MCAI–2022–01357–T; Amendment 39–22416; AD 2023–08–01]

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–700–1A10 and BD–700–1A11 airplanes. This AD was prompted by a report that certain airplane flight manuals (AFMs) contain figures with incorrect performance charts for landing on contaminated runways. This AD requires revising the existing AFM to correct the affected performance charts. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 20, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 20, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0164; 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, Inc., Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* internet *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–2023–0164.

FOR FURTHER INFORMATION CONTACT: Gabriel Kim, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 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–700–1A10 and BD–700–1A11 airplanes. The NPRM published in the **Federal Register** on February 13, 2023 (88 FR 9215). The NPRM was prompted by AD CF–2022–49, dated August 23, 2022, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that it was discovered that the thrust reverser correction factors presented in certain AFM performance charts for landing on contaminated runways do not provide sufficient margin for stopping distances in certain conditions. If not corrected, use of the affected performance charts could lead to longitudinal runway excursions. To address the unsafe condition, Transport Canada issued Transport Canada AD CF–2021–35, dated October 26, 2021 (Transport Canada AD CF–2021–35) mandating certain AFM revisions that incorporate changes to the wet and contaminated runway stopping distance data. Transport Canada AD CF–2021–35 corresponds to FAA AD 2022–24–01, Amendment 39–22241 (88 FR 6976, February 2, 2023) (AD 2022–24–01).

Since Transport Canada AD CF–2021–35 was issued, the MCAI states that it was discovered that the mandated AFM changes to Figures 07–35–2 and 07–35–4 are incorrect in certain later revisions of two of the AFMs.

In the NPRM, the FAA proposed to require revising the existing AFM to correct the affected performance charts. 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–2023–0164.

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

The FAA reviewed the following service information, which specifies revised AFM corrections to the performance charts for landing on contaminated runways. These documents are distinct since they apply to different airplane models and configurations.

• Figure 07–35–2 and Figure 07–35–4 of paragraph A., Take-off on Wet Grooved or Wet PFC Runways, of Section 6—Performance, of Supplement 35—Operation on Wet Grooved or Wet Porous Friction Course Runways, of Chapter 7—Supplements of Bombardier Global 6000 Airplane Flight Manual—Publication No. CSP 700–1V, Revision 42, dated May 19, 2022. (For obtaining this section of the Bombardier Global 6000 Airplane Flight Manual—Publication No. CSP 700–1V, use Document Identification No. GL 6000 AFM.)

• Figure 07–35–2 and Figure 07–35–4 of paragraph A., Take-off on Wet Grooved or Wet PFC Runways, of Section 6—Performance, of Supplement 35—Operation on Wet Grooved or Wet Porous Friction Course Runways, of Chapter 7—Supplements of Bombardier Global 5000 Featuring Global Vision Flight Deck Airplane Flight Manual—Publication No. CSP 700–5000–1V, Revision 42, dated May 19, 2022. (For obtaining this section of the Bombardier Global 5000 Featuring Global Vision Flight Deck Airplane Flight Manual—Publication No. CSP 700–5000–1V, use Document Identification No. GL 5000 GVFD AFM.)

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 204 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	$17,340

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:

2023–08–01 Bombardier, Inc.: Amendment 39–22416; Docket No. FAA–2023–0164; Project Identifier MCAI–2022–01357–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 20, 2023.

(b) Affected ADs

This AD affects AD 2022–24–01, Amendment 39–22241 (88 FR 6976, February 2, 2023) (AD 2022–24–01).

(c) Applicability

This AD applies to Bombardier, Inc., airplanes identified in paragraphs (c)(1) and (2) of this AD, certificated in any category.

(1) Model BD–700–1A10 airplanes, serial numbers 9381, 9432 through 9860 inclusive, 9863 through 9867 inclusive, 9869 through 9871 inclusive, 9873, 9875 through 9878 inclusive, 60005, 60024, 60030, 60032, 60037, 60043, 60045, 60049, 60056, 60057, 60061, 60068 and 60072.

(2) Model BD–700–1A11 airplanes, serial numbers 9386, 9401, and 9445 through 9997 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight controls.

(e) Unsafe Condition

This AD was prompted by a report that certain airplane flight manuals (AFMs) contain figures with incorrect performance charts for landing on contaminated runways. The FAA is issuing this AD to address incorrect AFM performance charts, which if not corrected, could lead to longitudinal runway excursions.

(f) Compliance

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

(g) AFM Revision

Within 30 days after the effective date of this AD: Do the applicable actions specified in paragraphs (g)(1) and (2) of this AD.

(1) For Model BD–700–1A10 airplanes with a Global 6000 marketing designation: Revise the existing AFM to incorporate the information specified in Figure 07–35–2 and Figure 07–35–4 of paragraph A., Take-off on Wet Grooved or Wet PFC Runways, of Section 6—Performance, of Supplement 35—Operation on Wet Grooved or Wet Porous Friction Course Runways, of Chapter 7—Supplements of Bombardier Global 6000 Airplane Flight Manual—Publication No. CSP 700–1V, Revision 42, dated May 19, 2022.

Note 1 to paragraph (g)(1): For obtaining this section of the Bombardier Global 6000 Airplane Flight Manual—Publication No. CSP 700–1V, use Document Identification No. GL 6000 AFM.

(2) For Model BD–700–1A11 airplanes with a Global 5000 featuring Global Vision Flight Deck (GVFD) marketing designation: Revise the existing AFM to incorporate the information specified in Figure 07–35–2 and Figure 07–35–4 of paragraph A., Take-off on Wet Grooved or Wet PFC Runways, of Section 6—Performance, of Supplement 35—Operation on Wet Grooved or Wet Porous Friction Course Runways, of Chapter 7—Supplements of Bombardier Global 5000 Featuring Global Vision Flight Deck Airplane Flight Manual—Publication No. CSP 700–5000–1V, Revision 42, dated May 19, 2022.

Note 2 to paragraph (g)(2): For obtaining this section of the Bombardier Global 5000 Featuring Global Vision Flight Deck Airplane Flight Manual—Publication No. CSP 700–5000–1V, use Document Identification No. GL 5000 GVFD AFM.

(h) Terminating Action for Certain Requirements of AD 2022–24–01

Accomplishing the AFM revision required by paragraph (g) of this AD terminates the requirement in AD 2022–24–01 to incorporate Figure 07–35–2 and Figure 07–35–4 as part of the procedures specified in paragraphs (g)(3)(viii) and (g)(5)(viii) of AD 2022–24–01.

(i) Additional FAA 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 certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300. 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 Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Additional Information

(1) Refer to Transport Canada AD CF–2022–49, dated August 23, 2022, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–0164.

(2) For more information about this AD, contact Gabriel Kim, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@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) Figure 07–35–2 and Figure 07–35–4 of paragraph A., Take-off on Wet Grooved or Wet PFC Runways, of Section 6—Performance, of Supplement 35—Operation on Wet Grooved or Wet Porous Friction Course Runways, of Chapter 7—Supplements of Bombardier Global 6000 Airplane Flight Manual—Publication No. CSP 700–1V, Revision 42, dated May 19, 2022.

Note 3 to paragraph (k)(2)(i): For obtaining this section of the Bombardier Global 6000 Airplane Flight Manual—Publication No. CSP 700–1V, use Document Identification No. GL 6000 AFM.

(ii) Figure 07–35–2 and Figure 07–35–4 of paragraph A., Take-off on Wet Grooved or Wet PFC Runways, of Section 6—Performance, of Supplement 35—Operation

on Wet Grooved or Wet Porous Friction Course Runways, of Chapter 7—Supplements of Bombardier Global 5000 Featuring Global Vision Flight Deck Airplane Flight Manual—Publication No. CSP 700–5000–1V, Revision 42, dated May 19, 2022.

Note 4 to paragraph (k)(2)(ii): For obtaining this section of the Bombardier Global 5000 Featuring Global Vision Flight Deck Airplane Flight Manual—Publication No. CSP 700–5000–1V, use Document Identification No. GL 5000 GVFD AFM.

(3) For service information identified in this AD, contact Bombardier, Inc., Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* internet *bombardier.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-dregister/cfr/ibr-locations.html.*

Issued on April 11, 2023.

Christina Underwood,

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

[FR Doc. 2023–10329 Filed 5–15–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1171; Project Identifier AD–2022–00852–T; Amendment 39–22417; AD 2023–08–02]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2018–05–06 and AD 2021–08–19, which both applied to certain The Boeing Company Model 787–8, –9, and –10 airplanes. AD 2018–05–06 required repetitive inspections of the bilge barriers located in the forward and aft cargo compartments for disengaged decompression panels, and reinstalling any disengaged panels; and required replacing the existing decompression panels with new panels and straps, which terminated the repetitive inspections. AD 2021–08–19 required repetitive general visual inspections for disengaged or damaged decompression panels of the bilge barriers located in the forward and aft cargo compartments, reinstallation of disengaged but undamaged panels, and replacement of damaged panels. This AD was prompted by reports of multiple incidents of torn decompression panels found in the bilge area, and the development of new procedures for changing or replacing the bilge barrier assembly in the forward and aft cargo compartments. This AD retains the requirements of AD 2021–08–19 and requires changing or replacing the bilge barrier assembly in the forward and aft cargo compartments, which terminates the repetitive inspections. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 20, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 20, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1171; 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–2022–1171.

FOR FURTHER INFORMATION CONTACT: Brandon Lucero, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3569; email: *brandon.lucero@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2021–08–19, Amendment 39–21513 (86 FR 20440, April 20, 2021) (AD 2021–08–19). AD 2021–08–19 applied to all The Boeing Company Model 787–8, –9, and –10 airplanes. The NPRM published in the **Federal Register** on December 6, 2022 (87 FR 74524). The NPRM was prompted by reports of multiple incidents of torn decompression panels being found in the bilge area, and the development of new procedures for changing or replacing the bilge barrier assembly in the forward cargo compartment. In the NPRM, the FAA proposed to retain the requirements of AD 2021–08–19 and require changing or replacing the bilge barrier assembly in the forward and aft cargo compartments, which would terminate the repetitive inspections. The FAA is issuing this AD to address the possibility of leakage in the bilge area, which could, in the event of a cargo fire, result in insufficient Halon concentrations to adequately control the fire. This condition, if not addressed, could result in the loss of continued safe flight and landing of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from Air Line Pilots Association, International (ALPA) and United Airlines (UAL), who supported the NPRM without change.

The FAA received additional comments from three commenters, including American Airlines (AAL), Boeing, and JAL Engineering Co., Ltd. (JAL). The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Change Applicability

AAL, Boeing, and JAL requested that the applicability be limited to airplanes identified in Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022. The commenters stated that the required actions had already been accomplished in-production via Boeing Change Notice (CN) AA85484 Part A for the airplanes not identified in Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022. JAL added that CN AA85484 Part A was approved as an alternative method of compliance (AMOC) to the

repetitive inspections required by paragraph (g) of AD 2021–08–19.

The FAA agrees to the requested change for the reasons provided. Paragraph (c) of this AD has been changed accordingly.

Request To Correct Certain Preamble Wording

AAL and Boeing requested that two sentences in the proposed AD specifying ''procedures for changing or replacing the bilge barrier assembly in the forward cargo compartment'' be revised to specify the ''forward and aft cargo compartments.'' Boeing requested the wording be changed in the **SUMMARY**, while AAL requested the wording be changed in the ''Actions Since AD 2021–08–19'' paragraph of the proposed AD. Both commenters pointed out that the modification referenced in the paragraph also applies to the aft cargo compartment.

The FAA agrees to change the wording as requested in the **SUMMARY**, but notes that this final rule does not contain the ''Actions Since AD 2021–08–19'' paragraph.

Request To Supersede Additional AD

AAL and Boeing requested that the proposed AD replace (supersede) AD 2018–05–06, Amendment 39–19215 (83 FR 9688, March 7, 2018)(AD 2018–05–06) as well as AD 2021–08–19. AAL stated that Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022, refers to both AD 2018–05–06 and AD 2021–08–19. Boeing added that Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022, states that it is an alternative method of compliance (AMOC) to AD 2018–05–06.

The FAA agrees that AD 2018–05–06 should also be superseded by this AD, and notes that AD 2018–05–06 required replacing decompression panels with panels having part numbers that are now obsolete. This AD has been revised to specify that it also supersedes AD 2018–05–06.

Request To Allow Certain AMOCs

AAL requested that the AMOCs approved for AD 2018–05–06 be approved as AMOCs for the proposed AD. AAL stated that it understands that paragraph D., ''Approval'' of Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022, contains a global AMOC for AD 2018–05–06 and AD 2021–08–19.

The FAA agrees to clarify. The FAA acknowledges that the AMOC in FAA approval letter 785–22–5682 grants approval of Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022, as an AMOC to the requirements of paragraph (i) of AD 2018–05–06. However, that AMOC does not apply to this AD because this AD requires accomplishing the actions in Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022. The only other AMOC for AD 2018–05–06 (FAA approval letter 785–21–4492a) allows installing now obsolete part numbers for the decompression panels, and would therefore not be appropriate to apply to this AD. Also, as previously discussed, this AD has been revised to specify that it now supersedes AD 2018–05–06. The FAA has not changed this AD regarding this issue.

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 Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022. This service information specifies procedures for changing or replacing the bilge barrier assembly in the forward cargo compartments at stations (STA) 345 and 825 and aft cargo compartment at STA 1304. 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 135 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
Repetitive inspections (retained actions).	3 work-hours × $85 per hour = $255 per inspection cycle.	$0	$255 per inspection cycle.	$34,425 per inspection cycle.
Change or replace bilge barrier (new proposed action).	Up to 7 work-hours × $85 per hour = $595.	Up to $12,100	Up to $12,695	Up to $1,713,825.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement (retained requirement)	1 work-hour × $85 per hour = $85	(*)	$85

* The FAA has received no definitive data on which to base the parts costs estimates for the replacements.

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:

■ a. Removing Airworthiness Directive (AD) 2018–05–06, Amendment 39–19215 (83 FR 9688, March 7, 2018); and AD 2021–08–19, Amendment 39–21513 (86 FR 20440, April 20, 2021); and

■ b. Adding the following new AD:

2023–08–02 The Boeing Company: Amendment 39–22417; Docket No. FAA–2022–1171; Project Identifier AD–2022–00852–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 20, 2023.

(b) Affected ADs

This AD replaces AD 2018–05–06, Amendment 39–19215 (83 FR 9688, March 7, 2018) (AD 2018–05–06); and AD 2021–08–19, Amendment 39–21513 (86 FR 20440, April 20, 2021) (AD 2021–08–19).

(c) Applicability

This AD applies to The Boeing Company Model 787–8, –9, and –10 airplanes, certificated in any category, as identified in Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022.

(d) Subject

Air Transport Association (ATA) of America Code 50, Cargo and accessory compartments.

(e) Unsafe Condition

This AD was prompted by reports of multiple incidents of torn decompression panels being found in the bilge area, and the development of new procedures for changing or replacing the bilge barrier assembly in the forward cargo compartment. The FAA is issuing this AD to address the possibility of leakage in the bilge area, which could, in the event of a cargo fire, result in insufficient Halon concentrations to adequately control the fire. This condition, if not addressed, could result in the loss of continued safe flight and landing of the airplane.

(f) Compliance

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

(g) Retained Repetitive Inspections and Corrective Action With No Changes

This paragraph restates the requirements of paragraph (g) of AD 2021–08–19 with no changes. At the applicable times specified in paragraph (g)(1) or (2) of this AD: Do a general visual inspection for disengaged or damaged (torn) decompression panels of the bilge barriers located in the forward and aft cargo compartments. If any disengaged but undamaged panel is found: Before further flight, reinstall the panel. If any damaged panel is found: Before further flight, replace the panel with a new or serviceable panel. Reinstallations and replacements must be done in accordance with the operator's maintenance or inspection program, as applicable.

(1) If a general visual inspection for disengaged or damaged (torn) decompression panels of the bilge barriers was done before May 5, 2021 (the effective date of AD 2021–08–19): Do the next inspection within 4 calendar months after the most recent inspection. Repeat the inspection thereafter at intervals not to exceed 4 calendar months.

(2) If a general visual inspection for disengaged or damaged (torn) decompression panels of the bilge barriers was not done before May 5, 2021 (the effective date of AD 2021–08–19): Do the initial inspection within 30 days after May 5, 2021. Repeat the inspection thereafter at intervals not to exceed 4 calendar months.

(h) Retained MEL Provisions With No Changes

This paragraph restates the provisions of paragraph (h) of AD 2021–08–19 with no changes. If any decompression panel inspected as required by this AD is disengaged or damaged, the airplane may be operated as specified in the operator's existing FAA-approved minimum equipment list (MEL), provided provisions that address the disengaged or damaged decompression panels are included in the MEL.

(i) New Required Actions

Except as specified by paragraph (j) of this AD: At the applicable times specified in the ''Compliance,'' paragraph of Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022. Accomplishing the actions required by this paragraph terminates the repetitive inspections required by paragraph (g) of this AD.

Note 1 to paragraph (i): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin B787–81205–SB500011–00, Issue 001, dated May 10, 2022, which is referred to in Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022.

(j) Exceptions to Service Information Specifications

Where the Compliance Time column of the table in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022, uses the phrase ''the Issue 001 date of Requirements Bulletin B787–81205–SB500011–00 RB,'' this AD requires using ''the effective date of this AD.''

(k) 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 (l)(1) 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.

(4) AMOCs approved for AD 2021–08–19 are approved as AMOCs for the corresponding provisions of Boeing Alert Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022, that are required by paragraph (i) of this AD.

(l) Related Information

(1) For more information about this AD, contact Brandon Lucero, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3569; email: *brandon.lucero@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(3) and (4) of this AD.

(m) 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 Requirements Bulletin B787–81205–SB500011–00 RB, Issue 001, dated May 10, 2022.

(ii) [Reserved]

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

Issued on April 11, 2023.

Christina Underwood,

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

[FR Doc. 2023–10330 Filed 5–15–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1659; Project Identifier MCAI–2022–01254–T; Amendment 39–22415; AD 2023–07–13]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A350–941 and –1041 airplanes. This AD was prompted by reports of broken lower attachment studs on the AFT galley complex. This AD requires repetitive detailed inspections of the lower attachment studs and, depending on findings, replacement of the lower attachment studs, 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 June 20, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 20, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2022–1659; 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 St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2022–1659.

FOR FURTHER INFORMATION CONTACT: Dat Le, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 516–228–7317; email *Dat.V.Le@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 Airbus SAS Model A350–941 and –1041 airplanes. The NPRM published in the **Federal Register** on January 12, 2023 (88 FR 2032). The NPRM was prompted by AD 2022–0196, dated September 20, 2022, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2022–0196) (also referred to as the MCAI). The MCAI states that the manufacturer has received reports of broken lower attachment studs on the AFT galley complex. The manufacturer's investigation indicates that the broken lower attachment studs resulted from a hydrogen-induced failure. This condition, if not addressed, could lead to galley detachment, resulting in injury to airplane occupants and reduced capacity for emergency evacuation of the airplane.

In the NPRM, the FAA proposed to require repetitive detailed inspections of the lower attachment studs and, depending on findings, replacement of the lower attachment studs, as specified in EASA AD 2022–0196. 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–2022–1659.

Discussion of Final Airworthiness Directive

Comments

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

The FAA received an additional comment from Delta Air Lines (DAL). The following presents the comment received on the NPRM and the FAA's response.

Request for Clarification of Reporting Requirements

DAL requested clarification of the reporting requirements in the NPRM. DAL noted that the Airbus Alert

Operators Transmission (AOT) referenced by EASA AD 2022–0196 addresses reporting of inspection results (with or without finding) to Airbus Customer Services. DAL proposed that the FAA AD verify that this reporting requirement is not mandated.

The FAA agrees to clarify. As specified in paragraph (i)(3) of this AD, if any service information contains paragraphs that are identified as RC (required for compliance), those paragraphs must be done to comply with this AD; any paragraphs that are not identified as RC are recommended. The reporting paragraph in the Airbus AOT referenced in EASA AD 2022–0196 is not labeled as RC; therefore, reporting is not required for compliance in this AD. The FAA has not changed this AD as a result of this comment.

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 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 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 2022–0196 specifies procedures for repetitive detailed inspections for broken lower attachment studs and, depending on findings, replacement of the lower attachment studs on the AFT galley complex. The MCAI specifies that replacement of the lower attachment studs on the AFT galley complex constitutes a terminating action for the repetitive detailed inspections. The MCAI also prohibits the installation of affected parts on any airplane. 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 ADDRESSES.

Interim Action

The FAA considers that this AD is an interim action. If final action is later identified, the FAA may consider further rulemaking.

Costs of Compliance

The FAA estimates that this AD affects 8 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	$1,360

The FAA estimates the following costs to do any necessary on-condition action 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 this on-condition action:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
7 work-hours × $85 per hour = $595	$95	$690

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:

2023–07–13 Airbus SAS: Amendment 39–22415; Docket No. FAA–2022–1659; Project Identifier MCAI–2022–01254–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 20, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus SAS Model A350–941 and –1041 airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2022–0196, dated September 20, 2022 (EASA AD 2022–0196).

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/furnishings.

(e) Unsafe Condition

This AD was prompted by reports of broken lower attachment studs on the AFT galley complex. The FAA is issuing this AD to address broken lower attachment studs on the AFT galley complex. The unsafe condition, if not addressed, could lead to galley module detachment, resulting in injury to airplane occupants and reduced capacity for emergency evacuation of the airplane.

(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 2022–0196.

(h) Exceptions to EASA AD 2022–0196

(1) Where EASA AD 2022–0196 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where paragraph (3) of EASA AD 2022–0196 specifies terminating action, for this AD, replacing all affected parts of all affected galleys terminates the repetitive inspections for that airplane.

(3) This AD does not adopt the ''Remarks'' section of EASA AD 2022–0196.

(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 Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraph (i)(2) of this AD, if any service information referenced in EASA AD 2022–0196 contains paragraphs that are labeled as RC, the instructions in RC paragraphs, including subparagraphs under an RC paragraph, must be done to comply with this AD; any paragraphs, including subparagraphs under those paragraphs, that are not identified as RC are recommended. The instructions in paragraphs, including subparagraphs under those paragraphs, not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the instructions identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to instructions identified as RC require approval of an AMOC.

(j) Additional Information

For more information about this AD, contact Dat Le, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 516–228–7317; email *Dat.V.Le@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 2022–0196, dated September 20, 2022.

(ii) [Reserved]

(3) For EASA AD 2022–0196, 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 St., 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 April 8, 2023.

Christina Underwood,

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

[FR Doc. 2023–10331 Filed 5–15–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1039; Project Identifier MCAI–2023–00580–T; Amendment 39–22433; AD 2023–09–10]

RIN 2120–AA64

Airworthiness Directives; Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Saab AB, Support and Services Model 340A (SAAB/SF340A) and SAAB 340B airplanes. This AD was prompted by reports of excessive wear on certain starter generator brushes installed in the starter generator. This AD requires repetitive general visual inspections of the starter generator brushes installed in the starter generator and, depending on findings, replacement of the starter generator, and limits installation of affected generators, 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 May 31, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 31, 2023.

The FAA must receive comments on this AD by June 30, 2023.

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

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2023–1039; 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 street address for Docket Operations is listed above.

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 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–2023–1039.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3220; email *Shahram.Daneshmandi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ‘‘Docket No. FAA–2023–1039; Project Identifier MCAI–2023–00580–T’’ at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ‘‘PROPIN.’’ The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3220; email *Shahram.Daneshmandi@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0073, dated April 5, 2023 (EASA AD 2023–0073) (also referred to as the MCAI), to correct an unsafe condition for all Saab AB, Support and Services Model 340A (SAAB/SF340A) and SAAB 340B airplanes. The MCAI states that reports of finding excessive wear on certain starter generator brushes part number (P/N) 23080–2017 installed in DC starter generator P/N 23080–031 MOD M. The starter generator brushes produced in the years 2021 and later in particular have shown less than expected brush life (in some cases less than 200 flight hours). The root cause of excessive wear on these starter generator brushes remains under investigation. EASA considers its AD to be an interim action, and further AD action may follow. See EASA AD 2023–0073 for additional background information.

The FAA is issuing this AD to address excessive wear on the starter generator brushes. This condition, if not detected and corrected, could lead to starter generator failure(s), possibly resulting in total loss of generated electrical power with consequent reduced functional capability of the airplane.

You may examine the MCAI in the AD docket at regulations.gov under Docket No. FAA–2023–1039.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0073 specifies procedures for repetitive general visual inspections to measure the wear of the starter generator brushes P/N 23080–2017 installed in the starter generators P/N 23080–031 MOD M and 23080–032 MOD M, calculation of the projected hours of brush life remaining for the generator; and replacement of the starter generator if there is insufficient brush life remaining. EASA AD 2023–0073 also specifies that installation of affected generators is allowed provided certain conditions are met.

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

FAA's Determination

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

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2023–0073 described previously, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, EASA AD 2023–0073 is incorporated by reference in this AD. This AD requires compliance with EASA AD 2023–0073 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0073 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ‘‘all required actions and compliance times,’’

compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0073. Service information required by EASA AD 2023–0073 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–1039 after this AD is published.

Interim Action

The FAA considers this AD to be an interim action. If final action is later identified, the FAA might consider further rulemaking then.

FAA's Justification for Immediate Adoption and Determination of the Effective Date

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

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because excessive wear on the starter generator brushes and the unusual conditions at the brush attachment location could lead to starter generator failure(s), possibly resulting in total loss of generated electrical power with consequent reduced functional capability of the airplane. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

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

Regulatory Flexibility Act (RFA)

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

Costs of Compliance

The FAA estimates that this AD affects 79 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	1 work-hour × $85 per hour = $85 per inspection cycle	$0	$85 per inspection cycle	$6,715 per inspection cycle

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Action	Labor cost	Parts cost	Cost per product
Replace the starter generator	2 work-hours × $85 per hour = $170	$1,271	$1,441

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to take approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on

the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–09–10 Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics): Amendment 39–22433; Docket No. FAA–2023–1039; Project Identifier MCAI–2023–00580–T.

(a) Effective Date

This airworthiness directive (AD) is effective May 31, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Model 340A (SAAB/SF340A) and SAAB 340B airplanes, certificated in any category.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by the reports of excessive wear on certain starter generator brushes installed in the starter generator. The FAA is issuing this AD to address the problem associated with excessive wear on the starter generator brushes and the unusual conditions at the brush attachment location. This condition, if not detected and corrected, could lead to starter generator failure(s), possibly resulting in total loss of generated electrical power with consequent reduced functional capability of the airplane.

(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 2023–0073, dated April 5, 2023 (EASA AD 2023–0073).

(h) Exceptions to EASA AD 2023–0073

(1) Where EASA AD 2023–0073 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0073.

(3) Paragraph (5) of EASA AD 2023–0073 specifies to report inspection results to SAAB AB within a certain compliance time. For this AD, report inspection results at the applicable time specified in paragraph (h)(3)(i) or (ii) of this AD.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of 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 Saab AB, Support and Services' EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraph (i)(2) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Additional Information

For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3220; email *Shahram.Daneshmandi@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 2023–0073, dated April 5, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0073, 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 St., 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 May 8, 2023.

Gaetano A. Sciortino,

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

[FR Doc. 2023–10528 Filed 5–12–23; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0320]

Safety Zone; Providence Fireworks, Providence, RI

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone for the Providence Fireworks on July 2, 2023, to provide for the safety of life on navigable waterways. Our regulations for safety

zones for annually recurring marine events held in Coast Guard Southeastern New England Captain of the Port Zone identify the regulated area for this event. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

DATES: The regulations in 33 CFR 165.173 will be enforced from 9 p.m. until 9:30 p.m. on July 2, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email MST2 Christopher Matthews, Waterways Management Division, Sector Southeastern New England, U.S. Coast Guard; telephone 401–435–2348, email *Christopher.S.Matthews@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone listed in 33 CFR 165.173 for the Providence Fireworks regulated area from 9 p.m. to 9:30 p.m. on July 2, 2023. This action is being taken to provide for the safety of life on navigable waterways during this one-day event, which will feature live fireworks. The regulation for marine events within the First Coast Guard District, § 165.173, specifies the location of the regulated area for the Providence Fireworks which encompasses portions of the Providence River. During the enforcement period, vessels in the regulated area must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

In addition to this notification of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners and marine information broadcasts.

Dated: May 11, 2023.

C.J. Prindle,

Captain, U.S. Coast Guard, Captain of the Port Sector Southeastern New England.

[FR Doc. 2023–10429 Filed 5–15–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0202]

RIN 1625–AA00

Safety Zone; East Passage Narragansett Bay, RI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing two temporary safety zones but will only enforce one, based on the local weather conditions the day of the event for navigable waters of the East Passage, Narragansett Bay, RI during The Ocean Race marine event on May 20, 2023. The safety zone is needed to safeguard mariners from the hazards associated with high-speed, high-performance sailing vessels competing in inshore races on the waters of the East Passage, Narragansett Bay, RI. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Sector Southeastern New England, or a designated representative.

DATES: This rule is effective from noon through 5 p.m. on May 20, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0202 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MST2 Christopher Matthews, Waterways Management Division, Sector Southeastern New England, U.S. Coast Guard; telephone 401–435–2348, email *Christopher.S.Matthews@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector Southeastern New England
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On March 3, 2023, the Ocean Race committee notified the Coast Guard that they would be conducting a sailboat race from noon through 5 p.m. on May 20, 2023. The sailboat race will take place in the vicinity of the East Passage in Narragansett Bay, RI, near the Newport Pell Bridge.

The Captain of the Port Sector Southeastern New England (COTP) has determined that potential hazards associated with the sailboat race would be a safety concern for anyone attempting to transit within East Passage in Narragansett Bay, RI. The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable and contrary to the public interest.

The details of this event were not known to the Coast Guard in sufficient time to publish an NPRM. Delaying the effective date of this rule to wait for a comment period to run would be impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect the public and vessels from the hazards associated with the sailing event. The expeditious implementation of this rule is in the public interest because it will help ensure the safety of event participants, spectators, waterway users, and surrounding vessels.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with this world-wide sailing event.

III. Legal Authority and Need for Rule

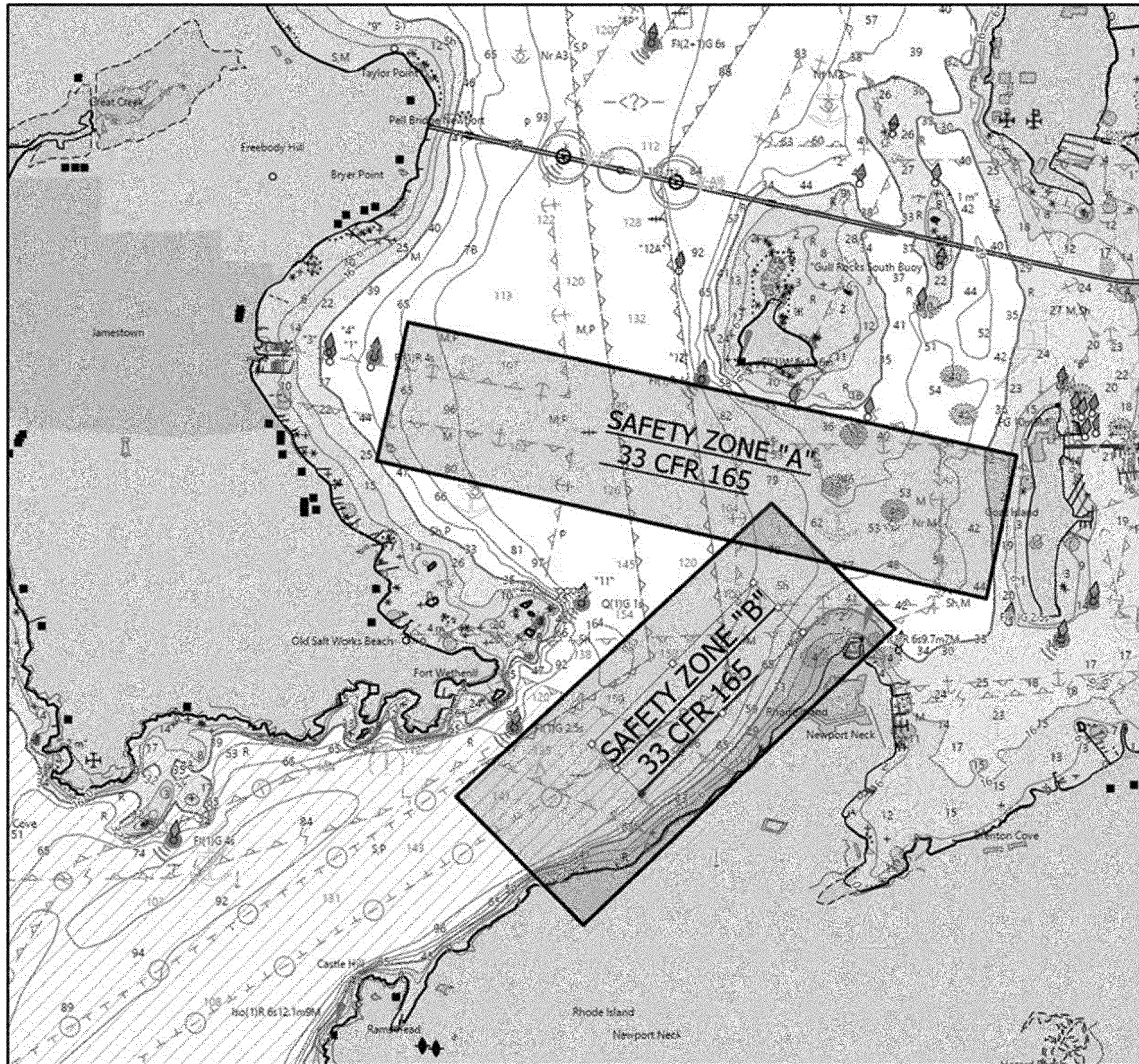
The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The COTP has determined that The Ocean Race presents a potential safety concern to vessels, people, and the navigable waters of the East Passage of Narragansett Bay in the vicinity of Newport, R.I. This event is part of a world-wide race, and it is expected to generate national and international media coverage, in addition to spectators on a number of recreational and excursion vessels. As a result, this rule is needed to ensure the safety of vessels and the navigable waters in the East Passage before, during, and after the scheduled event.

IV. Discussion of the Rule

The Coast Guard is establishing two temporary safety zones, in conjunction with The Ocean Race, to ensure the protection of the maritime public and event participants from the hazards

associated with large-scale marine events. Although we are establishing two temporary safety zones, Safety Zone ''A'' and Safety Zone ''B'', only one safety zone will be enforced based on the local weather conditions the day of the race. We will make notice of exactly what safety zone will be enforced via broadcast notice to mariners. The safety zone, either Safety Zone ''A'' or Safety Zone ''B'', will be enforced on May 20, 2023, from 12:00 until 5:00 p.m. Safety Zone ''A'' encompasses all navigable waters located within the following latitude and longitude points, 41.497N, 071.359W; 41.490N, 071.361W; 41.483N, 071.330W; 41.490N, 071.329W. Safety Zone ''B'' encompasses all navigable waters located within the following latitude and longitude points, 41.473N, 071.356W; 41.467N, 071.350W; 41.482N, 071.335W; 41.488N, 071.341W.

BILLING CODE 9110–04–P



(Charlet showing Safety Zone "A" and Safety Zone "B", East Passage, Narragansett Bay, RI.)

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V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders related to rulemaking. A summary of our analyses based on these statutes and Executive Orders follows.

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 rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule 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. We expect the adverse economic impact of this rule to be minimal. Although this regulation may have some adverse impact on the public, the potential impact will be minimized for the following reasons: the safety zone will be in effect for a maximum of five hours for one day; vessels will only be restricted from the zone in the East Passage of Narragansett Bay during those limited periods when the races are actually ongoing; during periods when there is no actual racing (*e.g.,* racing vessels transiting from the pier to the racing site, downtime between races, etc.) vessels may be allowed to transit

through the safety zone with the permission of the COTP or the COTP's representative.

Notification of The Ocean Race and the associated safety zone will be made to mariners through the Local Notice to Mariners. The morning of the race the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 regarding which zone will be enforced.

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 rule will 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 V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

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 rule. If the 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.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will 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 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 rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does 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.

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 rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this 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 determined 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 rule involves a temporary safety zone lasting only 5 hours over a one-day period that will prohibit entry into a portion of the East Passage of Narragansett Bay. There are two potential areas, Safety Zone ''A'' and Safety Zone ''B''. Safety Zone ''A'' encompasses all navigable waters located within the following latitude and longitude points, 41.486 N, 071.343 W; 41.482 N, 071.335 W; 41.469 N, 071.350 W; 41.475 N, 071.358 W. Safety Zone ''B'' encompasses all navigable waters located within the following latitude and longitude points, 41.498 N, 071.361 W; 41.492 N, 071.362 W; 41.483 N, 071.334 W; 41.491 N, 071.330 W. It is 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 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.

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.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 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.T01–0202 to read as follows:

§ 165.T01–0202 Safety Zone; The Ocean Race, East Passage, Narragansett Bay, RI.

(a) *Location.* The following areas are a safety zone, Safety Zone ''A'' and Safety Zone ''B''. Safety Zone ''A'' encompasses all navigable waters located within the following latitude and longitude points, 41.486 N, 071.343 W; 41.482 N, 071.335 W; 41.469 N, 071.350 W; 41.475 N, 071.358 W. Safety Zone ''B'' encompasses all navigable waters located within the following latitude and longitude points, 41.498 N, 071.361 W; 41.492 N, 071.362 W; 41.483 N, 071.334 W; 41.491 N, 071.330 W. Only one safety zone will be enforced based on the local weather conditions the day of the race. We will make notice of exactly what safety zone will be enforced via Broadcast Notice to

Mariners via marine channel 16 (VHF–FM).

(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 Sector Southeastern New England (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 radio channel 16 or phone at 508–457–3211. 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 on May 20, 2023, from noon until 5 p.m.

Dated: May 11, 2023.

C.J. Prindle,

Captain, U.S. Coast Guard, Captain of the Port Sector Southeastern New England.

[FR Doc. 2023–10430 Filed 5–15–23; 8:45 am]

BILLING CODE 9110–04–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Part 2556

RIN 3045–AA70; 3045–AA79

Volunteers in Service to America

AGENCY: Corporation for National and Community Service.

ACTION: Final rule.

SUMMARY: The Corporation for National and Community Service (operating as AmeriCorps) is finalizing updates to its regulations to reflect current position titles and roles, define the statutory phrase ''direct cost of supporting volunteers,'' revise provisions that no longer reflect AmeriCorps' practice, and make technical changes. The position titles must be updated because VISTA now operates through Regional Administrators, rather than State Program Directors. The statutory phrase interpretation is necessary because under its authorizing statute, AmeriCorps may not provide a non-competitive grant for the ''direct cost of supporting volunteers'' to projects less than one year old. This final rule defines the phrase to include those funds paid directly for the support of individuals serving in the VISTA program, such as living allowances, travel reimbursements, and end-of-service benefits, but not funds paid for the support of the VISTA sponsor organization. This change would make VISTA projects more accessible to organizations in underserved communities that may not have otherwise been able to secure the resources to devote a supervisor or certain administrative costs to a new project.

DATES: Effective June 15, 2023.

FOR FURTHER INFORMATION CONTACT: Carly Bruder, Acting Director, AmeriCorps VISTA, at *cbruder@cns.gov,* (202) 606–6871, or by mail to AmeriCorps, 250 E Street SW, Washington, DC 20525.

SUPPLEMENTARY INFORMATION:

I. Background

AmeriCorps VISTA is a national service program designed to provide needed resources to nonprofit organizations and public agencies to strengthen and supplement efforts to address poverty and poverty-related problems in the United States and certain U.S. territories. The VISTA program provides opportunities for individuals to join as volunteers (''members'') who perform, on a full-time basis, service with an organization (''sponsor'') to create, strengthen, or expand initiatives designed to assist individuals and communities in addressing poverty. Each year, the AmeriCorps VISTA program awards non-grant (*i.e.,* VISTA member, leader, or summer associate positions) and grant resources to sponsors. A sponsor is responsible for designing and implementing the VISTA project and recruiting, supervising, and providing necessary administrative support (*e.g.,* supplies and equipment, in-service training and development, mileage reimbursement) to VISTA members to complete the goals of the project. Among its grants, AmeriCorps VISTA offers non-competitive grants to fund sponsor organizations' costs to supply, among other items, supervision for a VISTA project.

II. Overview of Final Rule

The Domestic Volunteer Service Act of 1973 (DVSA) states that AmeriCorps may not provide a grant for the ''direct cost of supporting volunteers'' to any project that is less than one year old unless that grant is awarded competitively. *See* 42 U.S.C. 4960(b). Under this statutory provision, AmeriCorps may provide non-competitive support grants only to projects that have been operating for a year or more, or to projects less than one year old if the grant is for something other than the ''direct cost of supporting volunteers.''

This final rule defines ''direct cost of supporting volunteers'' to include only the funds paid directly for the support of VISTA members, such as living allowances, travel reimbursements, and end-of-service benefits. With this definition, the final rule makes clear that AmeriCorps can provide non-competitive grants to support a VISTA sponsor organization, including funds to support the sponsor organization's supervisor, for a VISTA project that is less than one year old. Over the past few years, sponsors with projects less than a year old have not been able to access noncompetitive support grants because of AmeriCorps' previous broad interpretation of the phrase ''direct cost of supporting volunteers'' to include not only the costs of supporting members but also the costs of supporting the sponsor's supervisor. The final rule makes VISTA projects more accessible to sponsor organizations in underserved communities who may not have otherwise been able to secure the resources to devote a supervisor or certain administrative costs to a new project. The limitations on VISTA sponsors receiving funding for the direct cost of supporting volunteers are set out in § 2556.180 of this final rule.

This final rule also updates position titles and roles to reflect current agency organization, revise provisions that no longer reflect current practice, and make technical changes. Specifically, the rule:

- In the definitions section, at § 2556.5:
  - Deletes the definitions of ''Area Manager'' and ''State Program Director''
  - Adds definitions for ''Deputy Regional Administrator,'' ''Portfolio Manager,'' Regional Administrator,'' ''Senior Portfolio Manager,'' ''VISTA Case Manager,'' and ''VMSU Director.''
  - Replaces the definition of ''CNCS'' with a definition of ''AmeriCorps'' to reflect that the Agency operates as AmeriCorps.
- In § 2556.200, clarifies that both the age and citizenship status of the individual entering VISTA service are determined at the time they take their oath or affirmation of service, and deletes ''lawful permanent resident'' as an example of individuals legally residing in a State because there may be additional categories of individuals legally residing in a State that are not technically ''lawful permanent

residents'' (*e.g.,* refugees prior to obtaining a green card).

• In § 2556.305(c) and § 2556.625(c), deletes the requirement for VISTA members and leaders, respectively, to actively seek opportunities to engage with the low-income community because the nature of modern service requirements may not provide for those opportunities, and in § 2556.305(c) deletes ''without regard to regular working hours'' because paragraph (a) already addresses that point.

• In § 2556.320(d) and § 2556.505(b)(2), replaces reference to a ''baggage allowance'' benefit to transport personal effects to the project site with reference to a ''relocation travel allowance'' to offset the cost of relocating from the home of record to the project site, to more accurately describe what the allowance is provided for.

• In § 2556.350(b)(3), adds ''the content of'' to clarify that matters excluded from the VISTA program grievance procedures include those related to the content of any law, published rule, regulation, policy or procedure.

• In § 2556.500, deletes paragraph (a), which provides that the State Program Director invites sponsors in the State to apply for positions for individuals to serve as summer associates at the sponsor's VISTA project, because the current process does not include a separate invitation outside of the annual award-making process.

• In § 2556.610, removes the list of specific components of a sponsor recommendation, to allow sponsors greater flexibility in drafting their recommendations, and instead clarifies the criteria that AmeriCorps relies upon when selecting leaders as including consideration of the individual's experience, special skills, and leadership.

• Makes the following updates to position titles and agency organization:

○ In § 2556.320(i), changes ''State Program Director'' to ''VISTA Case Manager'' for the role of determining if a VISTA did not successfully complete a full term of service because of a compelling personal circumstance;

○ In § 2556.360(a), changes ''State Program Director'' to ''Deputy Regional Administrator'' for the role of receiving and issuing a determination on a grievance brought by a VISTA;

○ In § 2556.365, changes ''Area Manager'' to ''Regional Administrator'' as the official who will receive an appeal of a VISTA grievance, and changes ''State Program Director'' to ''Deputy Regional Administrator'';

○ In § 2556.410, changes ''State Program Director'' to ''Case Manager'' for handling requests of sponsoring organizations to remove a VISTA member from its project;

○ In § 2556.420(a), (b), and (d), changes ''State Program Director'' and ''State Program Director or other CNCS State Office Staff'' to ''AmeriCorps'' generally, to allow the agency to determine and address in policy the appropriate personnel to handle termination for cause proceedings. In paragraphs (c) and (d), changes ''State Program Director'' to ''VISTA Case Manager'' to specify that the VISTA Case Manager will be the person who sends a VISTA member a proposal to terminate, and to whom the member addresses any answer to the proposal;

○ In § 2556.425(a), changes ''State Program Director'' to ''AmeriCorps'' as the issuer of a termination decision and changes ''appropriate Area Manager'' to ''VMSU Director'' as the official to whom a VISTA may submit an appeal of the termination decision, and in paragraph (d) changes ''Area Manager'' to ''VMSU Director'' as the official issuing a written appeal determination.

○ In § 2556.625(k), changes ''State Office'' to ''Region Office.''

• Throughout the CFR part, this rule:

○ Changes ''CNCS'' to ''AmeriCorps'' to reflect that the Agency operates as AmeriCorps;

○ Changes ''he or she'' and ''his or her'' to gender-neutral ''they'' and ''their'';

○ Changes ''shall'' to ''will'' or ''must'' or other language as appropriate to more clearly convey in plain language what is required and allowed, and changes ''shall not'' to ''may not'' in accordance with plain language guidelines in §§ 2556.105(b), 2556.120(a)–(b), 2556.125(b), 2556.130(a)–(e), 2556.135(b)–(e), 2556.140(c)–(f), 2556.145, 2556.150(f), 2556.155(d)–(e), 2556.160(a)–(b), 2556.165, 2556.170(d)(2), 2556.175(a), 2556.305(c), 2556.320(i)–(j), 2556.345(b)–(c), 2556.360(a)(3) and (b)(3), 2556.365(e), 2556.410(c), 2556.420(c)–(d), 2556.425(b) and (d), 2556.610(c), 2556.625(b), 2556.760(a)–(b), 2556.770(b), and 2556.780(a)–(b).

Other non-substantive changes were made to the text throughout to improve readability. Together, these changes are easiest to see in their context, with a reprinting of the entire part 2556.

III. Development of Final Rule and Public Comments on Proposed Rule

AmeriCorps published a proposed rule seeking public comment on these changes on January 26, 2023, at 88 FR 4945. The public comment period closed on March 27, 2023. AmeriCorps received three public comments on the proposed rule.

One commenter expressed support for the proposed rule and stated that allowing for a clear understanding that AmeriCorps can provide non-competitive grants for projects less than a year old is ''a significant step forward.'' This commenter also expressed support for updating the position titles and the deletion of ''lawful permanent resident,'' among other aspects of the rule.

Response: The final rule includes all the proposed revisions of which this commenter expressed support.

A State service commission commenter suggested an additional revision to broaden the definition of who is eligible to apply to serve as a leader to include those who have obtained experience, skills, and leadership through pathways other than having served full-time in AmeriCorps or Peace Corps.

Response: This suggested revision was not included in the proposed rule, but AmeriCorps appreciates the suggestion and will take it under advisement.

The third commenter, an association representing State and territorial service commissions, expressed support for seeking avenues to expand the availability of VISTA support grants to first-year projects. The commenter also expressed additional comments and suggestions outside the scope of this rulemaking.

Response: This rule codifies AmeriCorps' interpretation of the ''direct cost of supporting volunteers'' to ensure consistency in future interpretation of this phrase as allowing for availability of VISTA support grants to first-year projects. AmeriCorps appreciates this comment, as well as the commenter's additional comments and suggestions that AmeriCorps will take under advisement.

IV. Regulatory Analyses

A. Executive Orders 12866 and 13563

Executive Orders (E.O.) 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. The Office of Information

and Regulatory Affairs in the Office of Management and Budget has determined that this is not a significant regulatory action.

B. Congressional Review Act (Small Business Regulatory Enforcement Fairness Act of 1996, Title II, Subtitle E)

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, AmeriCorps will submit for an interim or final rule a report to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs in the Office of Management and Budget anticipates that this will not be a major rule under 5 U.S.C. 804 because this rule will not result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

C. Regulatory Flexibility Act

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), AmeriCorps certifies that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, AmeriCorps has not performed the initial regulatory flexibility analysis that is required under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) for rules that are expected to have such results.

D. Unfunded Mandates Reform Act of 1995

For purposes of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, as well as Executive Order 12875, this regulatory action does not contain any Federal mandate that may result in increased expenditures in either Federal, State, local, or Tribal Governments in the aggregate, or impose an annual burden exceeding $100 million on the private sector.

E. Paperwork Reduction Act

Under the PRA, an agency may not conduct or sponsor a collection of information unless the collections of information display valid control numbers. This rule does not affect any information collections.

F. Executive Order 13132, Federalism

Executive Order 13132, Federalism, prohibits an agency from publishing any rule that has federalism implications if the rule imposes substantial direct compliance costs on State and local Governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rulemaking does not have any federalism implications, as described above.

G. Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rule does not affect individual property rights protected by the Fifth Amendment or involve a compensable ''taking.'' A takings implication assessment is not required.

H. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rulemaking: (a) meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

I. Consultation With Indian Tribes (E.O. 13175)

AmeriCorps recognizes the inherent sovereignty of Indian Tribes and their right to self-governance. We have evaluated this rulemaking under our consultation policy and the criteria in E.O. 13175 and determined that this rule does not impose substantial direct effects on federally recognized Tribes.

List of Subjects in 45 CFR Part 2556

Grant programs—social programs, Volunteers.

■ For the reasons stated in the preamble, the Corporation for National and Community Service amends chapter XXV of title 45 of the Code of Federal Regulations by revising part 2556 to read as follows:

PART 2556—VOLUNTEERS IN SERVICE TO AMERICA

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Authority: 42 U.S.C. 4951–4953; 5 CFR part 734, 42 U.S.C. 4953(a), (f), 4954(b), (e), 4955(b), 4956, 5043(a)–(c), 5044(a)–(c), (e), 5046, 5052, 5056, and 5057; 42 U.S.C. 12651b (g)(10); 42 U.S.C. 12651c(c); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 2156, 42 U.S.C. 4954(a), (b), (d), 4955, 5044(e), 5055, and 5059; 42 U.S.C. 12602(c), 42 U.S.C. 4953(b), (c), (f), and 5044(e).

Subpart A—General Information

§ 2556.1 What is the purpose of the VISTA program?

(a) The purpose of the VISTA program is to strengthen and supplement efforts to eliminate and alleviate poverty and poverty-related problems throughout the United States and certain U.S. territories. To effect this purpose, the VISTA program encourages and enables individuals from all walks of life to join VISTA to perform, on a full-time basis, meaningful and constructive service to assist in the solution of poverty and poverty-related problems and secure opportunities for self-advancement of persons afflicted by such problems.

(b) The VISTA program objectives are to:

(1) Generate private sector resources;

(2) Encourage volunteer service at the local level;

(3) Support efforts by local agencies and community organizations to achieve long-term sustainability of projects; and

(4) Strengthen local agencies and community organizations to carry out the purpose of the VISTA program.

§ 2556.3 Who should read this part?

This part may be of interest to:

(a) Private nonprofit organizations, public nonprofit organizations, State government agencies, local government agencies, Federal agencies, and Tribal government agencies who are participating in the VISTA program as sponsors, or who are interested in participating in the VISTA program as sponsors.

(b) Individuals 18 and older who are serving as a VISTA, or who are interested in serving as a VISTA.

§ 2556.5 What definitions apply in this part?

Act or *DVSA* means the Domestic Volunteer Service Act of 1973, as amended, Public Law 93–113 (42 U.S.C. 4951 *et seq.*).

Alternative oath or *affirmation* means a pledge of VISTA service taken by an individual who legally resides within a State, but who is not a citizen or national of the United States, upon that individual's enrollment into the VISTA program.

AmeriCorps means the Corporation for National and Community Service, established pursuant to section 191 of the National and Community Service Act of 1990, as amended, 42 U.S.C. 12651, which operates as AmeriCorps.

Applicant for VISTA service means an individual who is in the process of completing, or has completed, an application for VISTA service as prescribed by AmeriCorps, but who has been not been approved by AmeriCorps to be a candidate.

Application for VISTA service means the materials prescribed by AmeriCorps to determine an individual's eligibility and suitability for VISTA service.

Assistance means VISTAs, leaders, or summer associates. ''Assistance'' also means technical assistance or training of VISTAs, leaders, summer associates, candidates, sponsors, or supervisors that are provided from funds appropriated by Congress for the purpose of supporting activities under the DVSA. ''Assistance'' also means grant funds.

Candidate, when used in the context of an individual who has applied for VISTA service, means an individual whose application for VISTA service has been approved by AmeriCorps, but who has not taken an oath, alternative oath, or affirmation to serve in the VISTA program. Candidates may include those who were enrolled in the VISTA program at a prior time.

Cost share means when an entity, such as a VISTA sponsor, reimburses

AmeriCorps part or all of the expenses associated with the operation of a VISTA project, such as the costs for one or more VISTAs, leaders, or summer associates placed in a VISTA project.

Deputy Regional Administrator means an AmeriCorps official who reports directly to the Regional Administrator and oversees the day-to-day regional operations to ensure the quality of program design and delivery.

Education award or *Segal AmeriCorps Education Award* means an end-of-service monetary benefit from AmeriCorps' National Service Trust that is directed to designated educational institutions and is awarded to certain qualifying VISTAs who successfully complete an established term of VISTA service.

Enroll, enrolled, or *enrollment,* when used in the context of VISTA service, refers to the status of an individual admitted to serve in the VISTA program. The enrollment period commences when the candidate takes the Oath to serve in the VISTA program and ends upon their termination from a term of service in the VISTA program. The enrollment period may begin on a date earlier than the first day of a service assignment of an enrolled VISTA member.

Full-time, when used in the context of VISTA service, means service in which a VISTA, leader, or summer associate remains available for service without regard to regular working hours.

Leader, a leader, or *a VISTA leader* means a VISTA member who is enrolled for full-time VISTA service and who is also subject to the terms of subpart G of this part.

Living allowance or *living allowance payment* means a monetary benefit paid for subsistence purposes to a VISTA member during VISTA service.

Memorandum of Agreement means a written agreement between AmeriCorps and a sponsor regarding the terms of the sponsor's involvement and responsibilities in the VISTA program.

Nonpartisan election means:

(1) An election in which none of the candidates for nomination or election represents a political party for which candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected; or

(2) An election involving a question or issue which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance, or any question or issue of a similar character.

Oath means an avowal to VISTA service, taken in accordance with 5 U.S.C. 3331, by an individual who is a U.S. citizen or national. The taking of the Oath effects an individual's enrollment into the VISTA program.

On-duty or *during service time* means when a VISTA is either performing VISTA service or scheduled to do so.

Portfolio Manager means an AmeriCorps official who reports to a Senior Portfolio Manager and serves as a technical advisor to current and prospective grantees and sponsors for effective, timely, and compliant administration of grant awards.

Project or *VISTA project* means a set of VISTA activities operated and overseen by, and the responsibility of, a sponsor, and assisted under this part to realize the goals of title I of the DVSA.

Project applicant or *VISTA project applicant* means an entity that submits an application to AmeriCorps to operate, oversee, and be responsible for a VISTA project.

Project application or *VISTA project application* means the application materials prescribed by AmeriCorps to determine an applying entity's eligibility and suitability to operate, oversee, and be responsible for, a VISTA project.

Project director or *VISTA project director* means a staff person, of legal age, of the sponsor, who has been assigned by the sponsor the overall responsibility for management of the VISTA project.

Regional Administrator means an AmeriCorps official who is the head of a designated region for AmeriCorps and responsible for driving, managing, and overseeing the strategic direction and operations of the Region Office.

Senior Portfolio Manager means an AmeriCorps official who reports to a Deputy Regional Administrator and supervises a team of portfolio managers and manages an advanced portfolio of grants and program development.

Sponsor, VISTA sponsor, or *VISTA project sponsor* means a public agency or private non-profit organization that receives assistance under title I of the DVSA and is responsible for operating and overseeing a VISTA project. A public agency may be a Federal, State, local or Tribal Government.

State, when used as a noun, means one of the several States in the United States of America, District of Columbia, Virgin Islands, Puerto Rico, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Stipend or *end-of-service stipend* means an end-of-service lump-sum monetary benefit from AmeriCorps that is awarded to certain qualifying VISTAs who successfully complete an established term of VISTA service.

Subrecipient means a public agency or private non-profit organization that enters into an agreement with a VISTA sponsor to receive one or more VISTAs, and to carry out a set of activities, assisted under this part, to realize the goals of title I of the DVSA. A public agency may be a Federal, State, local or Tribal Government.

Summer associate means a VISTA member who is enrolled for VISTA service, during a period between May 1 and September 15, and who is also subject to the terms of subpart H of this part. A summer associate must be available to provide continuous full-time service for a period of at least eight weeks and a maximum of ten weeks.

Supervisor or *VISTA Supervisor* means a staff member, of legal age, of the sponsor or a subrecipient, who has been assigned by the sponsor or the subrecipient the responsibility for day-to-day oversight of one or more VISTAs.

Tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaskan native village or regional village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized by the United States or the State in which it resides as eligible for special programs and services provided to Indians because of their status as Indians.

VISTA Case Manager means an AmeriCorps official who reports to the VMSU Director and manages service status changes of VISTA members (*e.g.,* removals, terminations, and transfers).

VISTA member, a VISTA, or *the VISTA* means an individual enrolled full-time in the VISTA program, as authorized under title I of the DVSA.

VISTA program means the Federal Government program named Volunteers in Service to America and authorized under title I of the Domestic Volunteer Service Act of 1973, as amended, 42 U.S.C. 4950 *et seq.*

VISTA service means VISTA service activities performed by a VISTA member while enrolled in the VISTA program.

VMSU Director means the AmeriCorps official who is Director of the VISTA Member Support Unit and manages daily operations of the VMSU to provide services to potential, current, and former VISTA members.

§ 2556.7 Are waivers of the regulations in this part allowed?

Upon a determination of good cause, the Chief Executive Officer of AmeriCorps may, subject to statutory

limitations, waive any provisions of this part.

Subpart B—VISTA Sponsors

§ 2556.100 Which entities are eligible to apply to become VISTA sponsors?

The following types of entities are eligible to apply to become VISTA sponsors and thereby undertake projects in the U.S. and certain U.S. territories:

(a) Private nonprofit organizations.

(b) Public nonprofit organizations.

(c) State government or state government agencies.

(d) Local government or local government agencies.

(e) Tribal government or tribal government agencies.

§ 2556.105 Which entities are prohibited from being VISTA sponsors?

(a) An entity is prohibited from being a VISTA sponsor or from otherwise receiving VISTA assistance if a principal purpose or activity of the entity includes any of the following:

(1) *Electoral activities.* Any activity designed to influence the outcome of elections to any public office, such as actively campaigning for or against, or supporting, candidates for public office; raising, soliciting, or collecting funds for candidates for public office; or preparing, distributing, providing funds for campaign literature for candidates, including leaflets, pamphlets, and material designed for print or electronic media.

(2) *Voter registration activities.* Any voter registration activity, such as providing transportation of individuals to voter registration sites; providing assistance to individuals in the process of registering to vote, including determinations of eligibility; or disseminating official voter registration material.

(3) *Transportation to the polls.* Providing voters or prospective voters with transportation to the polls or raising, soliciting, or collecting funds for such activities.

(b) Any organization that, subsequent to the receipt of VISTA assistance, makes as one of its principal purposes or activities any of the activities described in paragraph (a) of this section is subject to the procedures in §§ 2556.125 through 2556.145.

§ 2556.110 What VISTA assistance is available to a sponsor?

(a) A sponsor may be approved for one or more VISTA positions.

(b) A sponsor, upon review and approval by AmeriCorps to establish a leader position or positions, and in accordance with criteria set forth at subpart G of this part, may be approved for one or more leader positions.

(c) A sponsor, upon approval by AmeriCorps to establish a summer associate position or positions, and in accordance with criteria set forth at subpart F of this part, may be approved for one or more summer associate positions.

(d) A sponsor may be eligible to receive certain grant assistance under the terms determined and prescribed by AmeriCorps.

(e) A sponsor may receive training and technical assistance related to carrying out the purposes of title I of the DVSA.

§ 2556.115 Is a VISTA sponsor required to provide a cash or in-kind match?

(a) A sponsor is not required to provide a cash match for any of the assistance listed in § 2556.110.

(b) A sponsor must provide supervision, workspace, service-related transportation, and any other materials necessary to operate and complete the VISTA project and support the VISTA.

§ 2556.120 How does a VISTA sponsor ensure the participation of people in the communities to be served?

(a) To the maximum extent practicable, the people of the communities to be served by VISTA members must participate in planning, developing, and implementing programs.

(b) The sponsor must articulate in its project application how it will engage or continue to engage relevant communities in the development and implementation of programs.

§ 2556.125 May AmeriCorps deny or reduce VISTA assistance to an existing VISTA project?

(a) AmeriCorps may deny or reduce VISTA assistance where a denial or reduction is based on:

(1) Legislative requirement;

(2) Availability of funding;

(3) Failure to comply with applicable term(s) or condition(s) of a contract, grant agreement, or an applicable Memorandum of Agreement;

(4) Ineffective management of AmeriCorps resources;

(5) Substantial failure to comply with AmeriCorps policy and overall objectives under a contract, grant agreement, or applicable Memorandum of Agreement; or

(6) General policy.

(b) In instances where the basis for denial or reduction of VISTA assistance may also be the basis for the suspension or termination of a VISTA project under this subpart, AmeriCorps is not limited to the use of this section to the exclusion of the procedures for suspension or termination in this subpart.

§ 2556.130 What is the procedure for denial or reduction of VISTA assistance to an existing VISTA project?

(a) AmeriCorps will notify the sponsor in writing, at least 75 calendar days before the anticipated denial or reduction of VISTA assistance, that AmeriCorps proposes to deny or reduce VISTA assistance. AmeriCorps' written notice will state the reasons for the decision to deny or reduce assistance and will provide an opportunity period for the sponsor to respond to the merits of the proposed decision. AmeriCorps retains sole authority to make the final determination as to whether the VISTA assistance at issue will be denied or reduced, as appropriate.

(b) Where AmeriCorps' notice of proposed decision is based upon a specific charge of the sponsor's failure to comply with the applicable term(s) or condition(s) of a contract, grant agreement, or an applicable Memorandum of Agreement, the notice will offer the sponsor an opportunity period to respond in writing to the notice, with any affidavits or other supporting documentation, and to request an informal hearing before a mutually agreed-upon impartial hearing officer. The authority of such a hearing officer will be limited to conducting the hearing and offering recommendations to AmeriCorps. Regardless of whether or not an informal hearing takes place, AmeriCorps will retain full authority to make the final determination as to whether the VISTA assistance is denied or reduced, as appropriate.

(c) If the recipient requests an informal hearing, in accordance with paragraph (b) of this section, such hearing will be held on a date specified by AmeriCorps and held at a location convenient to the sponsor.

(d) If AmeriCorps' proposed decision is based on ineffective management of resources, or on the substantial failure to comply with AmeriCorps policy and overall objectives under a contract, grant agreement, or an applicable Memorandum of Agreement, AmeriCorps will inform the sponsor in the notice of proposed decision of the opportunity to show cause why VISTA assistance should not be denied or reduced, as appropriate. AmeriCorps retains full authority to make the final determination whether the VISTA assistance at issue will be denied or reduced, as appropriate.

(e) The recipient will be informed of AmeriCorps' final determination on whether the VISTA assistance at issue is

denied or reduced, and the basis for the determination.

(f) The procedure in this section does not apply to a denial or reduction of VISTA assistance based on legislative requirements, availability of funding, or on general policy.

§ 2556.135 What is suspension and when may AmeriCorps suspend a VISTA project?

(a) Suspension is any action by AmeriCorps that temporarily suspends or curtails assistance, in whole or in part, to all or any part of a VISTA project, prior to the time that the project term is concluded. Suspension does not include the denial or reduction of new or additional VISTA assistance.

(b) In an emergency situation for up to 30 consecutive days, AmeriCorps may suspend assistance to a sponsor, in whole or in part, for the sponsor's material failure or threatened material failure to comply with an applicable term(s) or condition(s) of the DVSA, the regulations in this part, VISTA program policy, or an applicable Memorandum of Agreement. Such suspension in an emergency situation will be pursuant to notice and opportunity to show cause why assistance should not be suspended.

(c) To initiate suspension proceedings, AmeriCorps will notify the sponsor in writing that AmeriCorps is suspending assistance in whole or in part. The written notice will contain the following:

(1) The grounds for the suspension and the effective date of the suspension;

(2) The sponsor's right to submit written material in response to the suspension to show why the VISTA assistance should not be suspended, or should be reinstated, as appropriate; and

(3) The opportunity to adequately correct the deficiency, or deficiencies, which led to AmeriCorps' notice of suspension.

(d) In deciding whether to continue or lift the suspension, as appropriate, AmeriCorps will consider any timely material presented in writing, any material presented during the course of any informal meeting, as well as any showing that the sponsor has adequately corrected the deficiency which led to the initiation of suspension.

(e) During the period of suspension of a sponsor, no new expenditures, if applicable, may be made by the sponsor's VISTA project at issue and no new obligations may be incurred in connection with the VISTA project at issue except as specifically authorized in writing by AmeriCorps.

(f) AmeriCorps may, at its discretion, modify the terms, conditions, and nature of the suspension or rescind the suspension action at any time, on its own initiative or upon a showing that the sponsor has adequately corrected the deficiency or deficiencies which led to the suspension and that repetition is not foreseeable.

§ 2556.140 What is termination and when may AmeriCorps terminate a VISTA project?

(a) Termination means any action by AmeriCorps that permanently terminates or curtails assistance to all or any part of a sponsor's VISTA project prior to the time that the project term is concluded.

(b) AmeriCorps may terminate assistance to a sponsor in whole or in part for the sponsor's material failure to comply with an applicable term(s) or condition(s) of the DVSA, the regulations in this part, VISTA program policy, or an applicable Memorandum of Agreement.

(c) To initiate termination proceedings, AmeriCorps will notify the sponsor in writing that AmeriCorps is proposing to terminate assistance in whole or in part. The written notice will contain the following:

(1) A description of the VISTA assistance proposed for termination, the grounds that warrant such proposed termination, and the proposed date of effective termination;

(2) Instructions regarding the sponsor's opportunity, within 21 calendar days from the date the notice is issued, to respond in writing to the merits of the proposed termination and their right to request a full and fair hearing before a mutually agreed-upon impartial hearing officer; and

(3) Invitation of voluntary action by the sponsor to adequately correct the deficiency or deficiencies which led to AmeriCorps' notice of proposed termination.

(d) In deciding whether to effect termination of VISTA assistance, AmeriCorps will consider any relevant, timely material presented in writing; any relevant material presented during the course of any full and fair hearing; and any showing that the sponsor has adequately corrected the deficiency which led to the initiation of termination proceedings.

(e) Regardless of whether or not a full and fair hearing takes place, AmeriCorps retains all authority to make the final determination as to whether termination of VISTA assistance is appropriate.

(f) The sponsor will be informed of AmeriCorps' final determination on the proposed termination of VISTA assistance, and the basis or bases for the determination.

(g) AmeriCorps may, at its discretion, modify the terms, conditions, and nature of a termination action or rescind a termination action at any time on its own initiative, or upon a showing that the sponsor has adequately corrected the deficiency which led to the termination or the initiation of termination proceedings, and that repetition is not threatened.

§ 2556.145 May AmeriCorps pursue other remedies against a VISTA project for a sponsor's material failure to comply with any other requirement not set forth in this subpart?

The procedures established by this subpart do not preclude AmeriCorps from pursuing any other remedies authorized by law.

§ 2556.150 What activities are VISTA members not permitted to perform as part of service?

(a) A VISTA may not perform any activities in the project application that do not correspond with the purpose of the VISTA program, as described in § 2556.1, or that the Director has otherwise prohibited.

(b) A VISTA may not perform services or duties as a VISTA member that would otherwise be performed by employed workers or other volunteers (not including participants under the DVSA and the National and Community Service Act of 1990, as amended).

(c) A VISTA may not perform any services or duties, or engage in activities as a VISTA member, that supplant the hiring of or result in the displacement of employed workers or other volunteers (not including participants under the DVSA or the National and Community Service Act of 1990, as amended).

(d) A VISTA may not perform any services or duties, or engage in activities as a VISTA member, which impair existing contracts for service.

(e) The requirements of paragraphs (b) through (d) of this section do not apply when the sponsor requires the service in order to avoid or relieve suffering threatened by, or resulting from, a disaster, civil disturbance, terrorism, or war.

(f) A sponsor or subrecipient may not request or receive any compensation from a VISTA, from a beneficiary of VISTA project services, or any other source for services of a VISTA.

§ 2556.155 May a sponsor manage a VISTA project through a subrecipient?

(a) A sponsor may carry out a VISTA project through one or more subrecipients that meet the eligibility criteria of § 2556.100.

(b) The sponsor must enter into a subrecipient agreement with each subrecipient. A subrecipient agreement must have at least the following elements:

(1) A project plan to be implemented by the subrecipient;

(2) Records to be kept and reports to be submitted;

(3) Responsibilities of the parties and other program requirements; and

(4) Suspension and termination policies and procedures.

(c) The sponsor retains the responsibility for compliance with a Memorandum of Agreement; the applicable regulations in this Part; and all applicable policies, procedures, and guidance issued by AmeriCorps regarding the VISTA program.

(d) A sponsor may not request or receive any compensation from a subrecipient for services performed by a VISTA.

(e) A sponsor may not receive payment from, or on behalf of, the subrecipient for costs of the VISTA assistance, except in two limited circumstances:

(1) For reasonable and actual costs incurred by the sponsor directly related to the subrecipient's participation in a VISTA project; and

(2) For any cost share related to a VISTA placed with the subrecipient in the VISTA project.

§ 2556.160 What are the sponsor's requirements for cost share projects?

(a) A sponsor must enter into a written agreement for cost share as prescribed by AmeriCorps.

(b) A sponsor must make timely cost share payments as prescribed by AmeriCorps and applicable Federal law and regulations.

(c) In addition to other sources of funds, a sponsor may use funds from Federal, State, or local Government agencies, provided the requirements of those agencies and their programs are met.

(d) Subject to review and approval by AmeriCorps, AmeriCorps may enter into an agreement with another entity to receive and use funds to make cost share payments on behalf of the sponsor.

§ 2556.165 What Fair Labor Standards apply to VISTA sponsors and subrecipients?

All sponsors and subrecipients that employ laborers and mechanics for construction, alteration, or repair of facilities must pay wages at prevailing rates as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended, 40 U.S.C. 276a.

§ 2556.170 What nondiscrimination requirements apply to sponsors and subrecipients?

(a) An individual with responsibility for the operation of a project that receives AmeriCorps assistance must not discriminate against a participant in, or member of the staff of, such project on the basis of the participant or staff member's race, color, national origin, sex, age, or political affiliation, or on the basis of disability, if the participant or staff member is a qualified individual with a disability.

(b) Any AmeriCorps assistance constitutes Federal financial assistance for purposes of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), and constitutes Federal financial assistance to an education program or activity for purposes of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*).

(c) An individual with responsibility for the operation of a project that receives AmeriCorps assistance may not discriminate on the basis of religion against a participant in such project or a member of the staff of such project who is paid with AmeriCorps funds. This provision does not apply to the employment (with AmeriCorps assistance) of any staff member of an AmeriCorps-supported project who was employed with the organization operating the project on the date the AmeriCorps assistance was awarded.

(d) Sponsors must notify all program participants, staff, applicants, and beneficiaries of:

(1) Their rights under applicable Federal nondiscrimination laws, including relevant provisions of the national service legislation and implementing regulations; and

(2) The procedure for filing a discrimination complaint. No sponsor or subrecipient, or sponsor or subrecipient employee, or individual with responsibility for the implementation or operation of a sponsor or a subrecipient, may discriminate against a VISTA on the basis of race, color, national origin, gender, age, religion, or political affiliation. No sponsor or subrecipient, or sponsor or subrecipient employee, or individual with responsibility for the implementation or operation of a sponsor or a subrecipient, may discriminate against a VISTA on the basis of disability, if the VISTA is a qualified individual with a disability.

§ 2556.175 What limitations are VISTA sponsors subject to regarding religious activities?

(a) A VISTA may not give religious instruction, conduct worship services, or engage in any form of proselytizing as part of their duties.

(b) A sponsor or subrecipient may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use any AmeriCorps assistance, including the services of any VISTA or VISTA assistance, to support any inherently religious activities, such as worship, religious instruction, or proselytizing, as part of the programs or services assisted by the VISTA program. If a VISTA sponsor or subrecipient conducts such inherently religious activities, the activities must be offered separately, in time or location, from the programs or services assisted under this Part by the VISTA program.

§ 2556.180 What are the limitations on VISTA sponsors receiving funding for the direct cost of supporting volunteers?

(a) AmeriCorps will not obligate funding for the direct cost of supporting volunteers that is:

(1) More than 30 percent of VISTA funds appropriated in any fiscal year; or

(2) For a new project that was not selected through a competitive process.

(b) The ''direct cost of supporting volunteers'' includes only those funds that are paid directly to VISTA members, leaders, or summer associates, such as: living allowance; travel reimbursements, including the Settling In Allowance; End of Service Benefits, including the cash stipend; and other expenses paid directly to the member, leader, or summer associate, as determined by the VISTA Director.

Subpart C—VISTA Members

§ 2556.200 Who may serve as a VISTA?

An individual may serve as a VISTA if all the following requirements are met as of the date the individual takes the oath or affirmation, as appropriate, to enter VISTA service:

(a) The individual is at least eighteen years of age. There is no upper age limit.

(b) The individual is a United States citizen or national, or is legally residing within a State.

§ 2556.205 What commitments and agreements must an individual make to serve in the VISTA program?

(a) To the maximum extent practicable, the individual must make a full-time commitment to remain available for service without regard to

regular working hours, at all times during their period of service, except for authorized periods of leave.

(b) To the maximum extent practicable, the individual must make a full-time personal commitment to alleviate poverty and poverty-related problems, and to live among and at the economic level of the low-income people served by the project.

(c) The individual's service cannot be used to satisfy service requirements of parole, probation, or community service prescribed by the criminal justice system.

(d) A VISTA candidate or member agrees to undergo an investigation into their criminal history or background as a condition of enrollment, or continued enrollment, in the VISTA program.

§ 2556.210 Who reviews and approves an application for VISTA service?

AmeriCorps has the final authority to approve or deny applications for VISTA service.

Subpart D—Terms, Protections, and Benefits of VISTA Members

§ 2556.300 Is a VISTA considered a Federal employee and is a VISTA considered an employee of the sponsor?

(a) Except for the purposes listed here, a VISTA is not considered an employee of the Federal Government. A VISTA is considered a Federal employee only for the following purposes:

(1) Federal Tort Claims Act—28 U.S.C. 1346(b); 28 U.S.C. 2671–2680;

(2) Federal Employees' Compensation Act—5 U.S.C. chapter 81, subchapter 1;

(3) Hatch Act—5 U.S.C. chapter 73, subchapter III;

(4) Internal Revenue Service Code—26 U.S.C. 1 *et seq.;* and

(5) Title II of the Social Security Act—42 U.S.C. 401 *et seq.*

(b) A VISTA is not considered a Federal employee for any purposes other than those set forth in paragraph (a) of this section.

(c) A VISTA is not covered by Federal or State unemployment compensation related to their enrollment or service in the VISTA program. A VISTA's service is not considered employment for purposes of eligibility for, or receipt of, Federal, State, or any other unemployment compensation.

(d) Monetary allowances, such as living allowances that VISTAs receive during VISTA service, are not considered wages. Monetary allowances, such as living allowances, that VISTAs receive during VISTA service are considered income for such purposes as Federal income tax and Social Security.

(e) A VISTA is not, under any circumstances, considered an employee of the sponsor or subrecipient to which they are assigned to serve. No VISTA is in an employment relationship with the sponsor or subrecipient to which they are assigned. The sponsor is not authorized to make contributions to any State unemployment compensation fund on a VISTA's behalf.

§ 2556.305 What is the duration and scope of service for a VISTA?

(a) To serve as a VISTA, an individual makes a full-time commitment for a minimum of one year, without regard to regular working hours.

(b) A VISTA carries out activities in accordance with the purpose of the VISTA program, as described in § 2556.1.

(c) To the maximum extent practicable, the VISTA must live among and at the economic level of the low-income community served by the project.

(d) A VISTA carries out service activities in conformance with the sponsor's approved project application, including any description of a VISTA assignment as contained in the project application; and in conformance with the purpose of title I of the DVSA. In any case where there is a conflict between the project application and the DVSA, the DVSA takes precedence.

(e) Under no circumstances may an individual be enrolled to serve as a VISTA beyond five years.

§ 2556.310 What are a VISTA sponsor's and AmeriCorps' supervisory responsibilities during a VISTA's term of service?

(a) The VISTA sponsor is responsible for the day-to-day supervision and oversight of the VISTA.

(b) AmeriCorps is responsible for ongoing monitoring and oversight of the VISTA sponsor's project where the VISTA is assigned. AmeriCorps is responsible for selecting the VISTA, assigning the VISTA to a project, removal of a VISTA from a project, and VISTA separation actions such as termination from the VISTA program.

§ 2556.315 What are terms and conditions for official travel for a VISTA?

(a) AmeriCorps may provide official travel for a VISTA candidate or a VISTA, as appropriate, to attend AmeriCorps-directed activities such as pre-service training, placement at the project site, in-service training events, and return from the project site to the VISTA's or VISTA candidate's home of record.

(b) AmeriCorps must approve all official travel of a VISTA candidate or a VISTA, including the mode of travel.

(c) AmeriCorps may provide for official emergency travel for a VISTA in case of a natural disaster or the critical illness or death of an immediate family member.

§ 2556.320 What benefits may a VISTA receive during VISTA service?

(a) A VISTA receives a living allowance computed on a daily rate. Living allowances vary according to the local cost of living in the project area where the VISTA is assigned.

(b) Subject to a maximum amount, and at the discretion and upon approval of AmeriCorps, a VISTA may receive payment for settling-in expenses, as determined by AmeriCorps.

(c) Subject to a maximum amount, and at the discretion of AmeriCorps, in the event of an emergency (such as theft, fire loss, or special clothing necessitated by severe climate), a VISTA may receive an emergency expense payment in order to resume VISTA service activities, as determined and approved by AmeriCorps.

(d) Subject to a maximum amount, and at the discretion of AmeriCorps, a VISTA may receive a relocation travel allowance to offset the cost of relocating from the home of record to the project site, as determined by AmeriCorps.

(e) To the extent eligible, a VISTA may receive health care through a health benefits program provided by AmeriCorps.

(f) To the extent eligible, a VISTA may receive childcare support through a childcare program provided by AmeriCorps.

(g) To the extent eligible, a VISTA may elect to receive a Segal AmeriCorps Education Award, and upon successful completion of service, receive that award in an amount prescribed by AmeriCorps, in accordance with the applicable provisions of 45 CFR parts 2526, 2527, and 25285.

(1) A VISTA is eligible to elect to receive an education award if they are a citizen, national, or lawful permanent resident alien of the United States.

(2) A VISTA who elects an education award is eligible to request forbearance of a student loan from their loan-holder. A VISTA who elects an education award may, upon successful completion of service, be eligible to receive up to 100 percent of the interest accrued on a qualified student loan, consistent with the applicable provisions of 45 CFR part 2529.

(3) A VISTA is not eligible to receive more than an amount equal to the

aggregate value of two full-time education awards in their lifetime.

(4) Other than for a summer associate, the amount of an education award for the successful completion of a VISTA term of service is equal to the maximum amount of a Federal Pell Grant under Section 401 of the Higher Education Act of 1965 (20 U.S.C. 1070a) that a student eligible for such grant may receive in the aggregate for the fiscal year in which the VISTA has enrolled in the VISTA program.

(h) A VISTA who does not elect to receive a Segal AmeriCorps Education Award upon successful completion of service receives an end-of-service stipend in an amount prescribed by AmeriCorps.

(i) In the event that a VISTA does not successfully complete a full term of service, they may not receive a pro-rated Segal AmeriCorps Education Award or a pro-rated end-of-service stipend, except in cases where the appropriate VISTA Case Manager determines the VISTA did not successfully complete a full term of service because of a compelling personal circumstance. Examples of a compelling personal circumstance are: Serious medical condition or disability of a VISTA during VISTA service; critical illness or disability of a VISTA's immediate family member (spouse, domestic partner, parent, sibling, child, or guardian) if this event makes completing a term of service unreasonably difficult; or unusual conditions not attributable to the VISTA, such as natural disaster, strike, or premature closing of a project, that make completing a term of service unreasonably difficult or infeasible.

(j) In the event of a VISTA's death during service, their family or others that they named as beneficiary in accordance with section 5582 of title 5, United States Code will be paid a pro-rated end-of-service stipend for the period during which the VISTA served. If the VISTA had elected to receive the Segal AmeriCorps Education Award for successful completion of a full term of VISTA service, AmeriCorps will, prior to payment to the named beneficiary, convert that election to an end-of-service stipend and pay the VISTA's family, or others that they named as beneficiary, a pro-rated end-of-service stipend accordingly.

§ 2556.325 May a VISTA be provided coverage for legal defense expenses related to VISTA service?

Under certain circumstances, as set forth in §§ 2556.330 through 2556.335, AmeriCorps may pay reasonable legal defense expenses incurred in judicial or administrative proceedings for the defense of a VISTA serving in the VISTA program. Such covered legal expenses consist of counsel fees, court costs, bail, and other expenses incidental to a VISTA's legal defense.

§ 2556.330 When may a VISTA be provided coverage for legal defense expenses related to criminal proceedings?

(a) For the legal defense of a VISTA member who is charged with a criminal offense related to the VISTA member's service, up to and including arraignment in Federal, State, and local criminal proceedings, AmeriCorps may pay actual and reasonable legal expenses. AmeriCorps is not required to pay any expenses for the legal defense of a VISTA member where they are charged with a criminal offense arising from alleged activity or action that is unrelated to that VISTA's service.

(b) A VISTA member's service is clearly unrelated to a charged offense when:

(1) The activity or action is alleged to have occurred prior to the VISTA member's VISTA service.

(2) The VISTA member is not at their assigned project location, such as during periods of approved leave, medical leave, emergency leave, or in administrative hold status in the VISTA program.

(3) The activity or action is alleged to have occurred at or near their assigned project, but is clearly not part of, or required by, the VISTA member's service assignment.

(c) For the legal defense, beyond arraignment in Federal, State, and local criminal proceedings, of a VISTA member who is charged with a criminal offense, AmeriCorps may also pay actual and reasonable legal expenses when:

(1) The charged offense against the VISTA member relates exclusively to their VISTA assignment or status as a VISTA member;

(2) The charged offense against the VISTA member arises from an alleged activity or action that is a part of, or required by, the VISTA member's VISTA assignment;

(3) The VISTA member has not admitted a willful or knowing violation of law; or

(4) The charged offense against the VISTA member is not a minor offense or misdemeanor, such as a minor vehicle violation.

(d) Notwithstanding paragraphs (a) through (c) of this section, there may be situations in which the criminal proceedings at issue arise from a matter that also gives rise to a civil claim under the Federal Tort Claims Act. In such a situation, the U.S. Department of Justice may, on behalf of the United States, agree to defend the VISTA. If the U.S. Department of Justice agrees to defend the VISTA member, unless there is a conflict between the VISTA member's interest and that of the United States, AmeriCorps will not pay for expenses associated with any additional legal representation (such as counsel fees for private counsel) for the VISTA member.

§ 2556.335 When may a VISTA be provided coverage for legal defense expenses related to civil or administrative proceedings?

For the legal defense in Federal, State, and local civil judicial and administrative proceedings of a VISTA member, AmeriCorps may also pay actual and reasonable legal expenses when:

(a) The complaint or charge is against the VISTA, and is directly related to their VISTA service and not to their personal activities or obligations;

(b) The VISTA has not admitted to willfully or knowingly pursuing a course of conduct that would result in the plaintiff or complainant initiating such a proceeding; and

(c) The judgment sought involves a monetary award that exceeds $1,000.

§ 2556.340 What is non-competitive eligibility and who is eligible for it?

(a) Non-competitive eligibility is a status that means a person is eligible for appointment, by a Federal agency in the Executive branch, into a civil service position in the Federal competitive service, in accordance with 5 CFR 315.605.

(b) An individual who successfully completes at least a year-long term of service as a VISTA, and who has not been terminated for cause from the VISTA program at any time, has non-competitive eligibility status for one year following the end of the term of service as a VISTA.

(c) In addition to the year of non-competitive eligibility status as provided in paragraph (b) of this section, an individual's non-competitive eligibility status may extend for two more years, to a total of three years, if the individual is:

(1) In the military service;

(2) Studying at a recognized institution of higher learning; or

(3) In another activity which, in the view of the Federal agency referenced in paragraph (a) of this section, warrants extension.

§ 2556.345 Who may present a grievance?

(a) Under the VISTA program grievance procedure, a grievance may be presented by any individual who is currently enrolled in the VISTA

program or who was enrolled in the VISTA program within the past 30 calendar days.

(b) A VISTA's grievance may not be construed as reflecting on the VISTA's standing, performance, or desirability as a VISTA.

(c) A VISTA who presents a grievance may not be subjected to restraint, interference, coercion, discrimination, or reprisal because of presentation of views.

§ 2556.350 What matters are considered grievances?

(a) Under the VISTA program grievance procedure, grievances are matters of concern, brought by a VISTA, that arise out of, and directly affect, the VISTA's service situation or that arise out of a violation of a policy, practice, or regulation governing the terms or conditions of the VISTA's service, that result in the denial or infringement of a right or benefit to the VISTA member.

(b) Matters not within the definition of a grievance as defined in paragraph (a) of this section are not grievable, and therefore, are excluded from the VISTA program grievance procedure. Though not exhaustive, examples of matters excluded from the VISTA program grievance procedure are:

(1) Matters related to a sponsor's or project's continuance or discontinuance; the number of VISTAs assigned to a VISTA project; the increases or decreases in the level of support provided to a VISTA project; the suspension or termination of a VISTA project; or the selection or retention of VISTA project staff;

(2) Matters for which a separate administrative procedure or complaint process is provided, such as early termination for cause, claims of discrimination during service, and Federal worker's compensation claims filed for illness or injury sustained in the course of carrying out VISTA activities;

(3) Matters related to the content of any law, published rule, regulation, policy, or procedure;

(4) Matters related to housing during a VISTA member's service;

(5) Matters which are, by law, subject to final administrative review outside AmeriCorps;

(6) Matters related to actions taken, or not taken, by a VISTA sponsor or subrecipient, or AmeriCorps, in compliance with or in order to fulfill the terms of a contract, grant, or other agreement related to the VISTA program; or

(7) Matters related to the internal management of AmeriCorps, unless such matters are shown to specifically and directly affect the VISTA's service situation or terms or conditions of their VISTA service.

§ 2556.355 May a VISTA have access to records as part of the VISTA grievance procedure?

(a) A VISTA is entitled to review any material in their official VISTA file and any relevant AmeriCorps records to the extent permitted by the Freedom of Information Act and the Privacy Act, 5 U.S.C. 552, 552a. Examples of materials that may be withheld include references obtained under pledge of confidentiality, official VISTA files of other VISTAs, and privileged intra-agency documents.

(b) A VISTA may review relevant materials in the possession of a sponsor to the extent such materials are disclosable by the sponsor under applicable Freedom of Information Act and privacy laws.

§ 2556.360 How may a VISTA bring a grievance?

(a) *Bringing a grievance—Step 1.* (1) If a VISTA is currently enrolled in the VISTA program or was enrolled in the VISTA program within the past 30 calendar days, they may, within 15 calendar days of an event giving rise to a grievance or within 15 calendar days after becoming aware of such an event, bring a grievance to the sponsor or subrecipient where they are assigned to serve. If the grievance arises out of a continuing condition or practice that individually affects a VISTA, the VISTA may bring it at any time during their enrollment that they are affected by the continuing condition or practice.

(2) A VISTA brings a grievance by presenting it in writing to the executive director, or comparable individual, of the sponsoring organization where the VISTA is assigned or to the sponsor's representative who is designated to receive grievances from a VISTA.

(3) The sponsor must review and respond in writing to the VISTA's grievance within 10 calendar days of receipt of the written grievance. The sponsor may not fail to respond to a complaint raised by a VISTA on the basis that it is not an actual grievance, or that it is excluded from coverage as a grievance, but may, in the written response, dismiss the complaint and refuse on either of those grounds to grant the requested relief.

(4) If the grievance brought by a VISTA involves a matter over which the sponsor has no substantial control or if the sponsor's representative is the supervisor of the VISTA, the VISTA may pass over the procedure set forth in paragraphs (a)(1) through (3) of this section and present the grievance in writing directly to the Deputy Regional Administrator, as described in paragraph (b) of this section.

(b) *Bringing a grievance—Step 2.* (1) If, after a VISTA brings a grievance as set forth in paragraphs (a)(1) and (2) of this section, the matter is not resolved, they may submit the grievance in writing to the appropriate Deputy Regional Administrator. The VISTA must submit the grievance to the Deputy Regional Administrator either:

(i) Within seven calendar days of receipt of the sponsor's response; or,

(ii) In the event the sponsor does not issue a response to the VISTA within 10 calendar days of its receipt of the written grievance, within 17 calendar days of the sponsor's receipt of the written grievance.

(2) If the grievance involves a matter over which either the sponsor or subrecipient has no substantial control, or if the sponsor's representative is the supervisor of the VISTA, as described in paragraph (a)(4) of this section, the VISTA may pass over the procedure set forth in paragraphs (a)(1) through (3) of this section, and submit the grievance in writing directly to the Deputy Regional Administrator. In such a case, the VISTA must submit the grievance to the Deputy Regional Administrator within 15 calendar days of the event giving rise to the grievance occurs, or within 15 calendar days after becoming aware of the event.

(3) Within ten working days of receipt of the grievance, the Deputy Regional Administrator will respond in writing, regardless of whether or not the matter constitutes a grievance as defined under this grievance procedure and/or is timely submitted. In the response, the Deputy Regional Administrator may determine that the matter submitted as a grievance is not grievable, is not considered a grievance, or fails to meet the time limit for response. If the Deputy Regional Administrator makes any such determination, they may dismiss the complaint, setting forth the reason(s) for the dismissal. In such a case, the Deputy Regional Administrator need not address the complaint on the merits, nor make a determination of the complaint on the merits.

§ 2556.365 May a VISTA appeal a grievance?

(a) A VISTA may appeal the Deputy Regional Administrator's response to the grievance under § 2556.360(b)(3) by submitting a written appeal to the appropriate Regional Administrator. To be eligible to appeal a grievance response to the Regional Administrator, the VISTA must first have exhausted all

appropriate actions as set forth in § 2556.360.

(b) A VISTA's grievance appeal must be in writing, contain sufficient detail to identify the subject matter of the grievance, specify the relief requested, and be signed by the VISTA.

(c) A VISTA must submit a grievance appeal to the appropriate Regional Administrator no later than 10 calendar days after the Deputy Regional Administrator issues their response to the grievance.

(d) Certain matters contained in a grievance appeal may be rejected, rather than denied on the merits, by the Regional Administrator. A grievance appeal may be rejected, in whole or in part, for any of the following reasons:

(1) The grievance appeal was not submitted to the appropriate Regional Administrator within the time limit specified in paragraph (c) of this section;

(2) The grievance appeal consists of matters not contained within the definition of a grievance, as specified in section § 2556.350(a);

(3) The grievance appeal consists of matters excluded from the VISTA program grievance procedure, as specified in § 2556.350(b); or

(4) The grievance appeal contains matters that are moot, or for which relief has otherwise been granted.

(e) Within 14 calendar days of receipt of the grievance, the appropriate Regional Administrator will decide the grievance appeal on the merits, or reject the grievance appeal in whole or in part, or both, as appropriate. The Regional Administrator shall notify the VISTA in writing of the decision and specify the grounds for the appeal decision. The appeal decision will include a statement of the basis for the decision and is a final decision of AmeriCorps.

Subpart E—Termination for Cause Procedures

§ 2556.400 What is termination for cause and what are the criteria for termination for cause?

(a) Termination for cause is discharge of a VISTA from the VISTA program due to a deficiency, or deficiencies, in conduct or performance.

(b) AmeriCorps may terminate a VISTA for cause for any of the following reasons:

(1) Conviction of any criminal offense under Federal, State, or local statute or ordinance;

(2) Violation of any provision of the Domestic Service Volunteer Act of 1973, as amended, or any AmeriCorps or VISTA program policy, regulation, or instruction;

(3) Failure, refusal, or inability to perform prescribed project duties as outlined in the project plan, assignment description, or as directed by the sponsor to which the VISTA is assigned;

(4) Involvement in activities which substantially interfere with the VISTA's performance of project duties;

(5) Intentional false statement, misrepresentation, omission, fraud, or deception in seeking to obtain selection as a VISTA in the VISTA program;

(6) Any conduct on the part of the VISTA which substantially diminishes their effectiveness as a VISTA; or

(7) Unsatisfactory performance of an assignment.

§ 2556.405 Who has sole authority to remove a VISTA from a VISTA project and who has sole authority to terminate a VISTA from a VISTA project or the VISTA program?

(a) AmeriCorps has the sole authority to remove a VISTA from a project where they have been assigned.

(b) AmeriCorps has the sole authority to terminate for cause or otherwise terminate a VISTA from the VISTA program.

(c) Neither the sponsoring organization nor any of its subrecipients has the authority to remove a VISTA from a project or to terminate a VISTA for cause, or for any other basis, from the VISTA program.

§ 2556.410 May a sponsor request that a VISTA be removed from its project?

(a) The head of a sponsoring organization, or their designee, may request that AmeriCorps remove a VISTA assigned to its project. Any such request must be submitted in writing to the appropriate Portfolio Manager and should state the reasons for the request.

(b) The Portfolio Manager may, at their discretion, attempt to resolve the situation with the sponsor so that a solution other than removal of the VISTA from the project assignment is reached.

(c) When an alternative solution, as referenced in paragraph (b) of this section, is not sought, or is not reached within a reasonable time period, the VISTA Case Manager will remove the VISTA from the project.

§ 2556.415 May AmeriCorps remove a VISTA from a project without the sponsor's request for removal?

Of its own accord, AmeriCorps may remove a VISTA from a project assignment without the sponsor's request for removal.

§ 2556.420 What are termination for cause proceedings?

(a) Termination for cause proceedings remove a VISTA from a project assignment due to an alleged deficiency, or alleged deficiencies, in conduct or performance, and are initiated by AmeriCorps.

(b) AmeriCorps, to the extent practicable, communicates the matter, and the administrative procedures as set forth in paragraphs (c) through (e) of this section, with the VISTA who is removed from a VISTA project.

(c) The VISTA Case Manager will notify the VISTA in writing of AmeriCorps' proposal to terminate for cause. The written proposal to terminate the VISTA for cause must give them the reason(s) for the proposed termination, and notify them that they have 10 calendar days within which to submit a written answer to the proposal to terminate them cause and to furnish any accompanying statements or written material. The VISTA must submit their answer to the VISTA Case Manager by the deadline identified in the written proposal to terminate for cause.

(d) Within 10 calendar days of the expiration of the VISTA's deadline to answer the proposal to terminate for cause, AmeriCorps will issue a written decision regarding the proposal to terminate for cause.

(1) If AmeriCorps decides to terminate the VISTA for cause, its written decision will set forth the reasons for the determination and the effective date of termination (which may be on or after the date of the decision).

(2) If AmeriCorps decides not to terminate the VISTA for cause, the written decision will indicate that the proposal to terminate for cause is rescinded.

(e) A VISTA who does not submit a timely answer to the appropriate VISTA Case Manager, as set forth in paragraph (c) of this section, is not entitled to appeal the decision regarding the proposal to terminate for cause. In such cases, AmeriCorps may terminate the VISTA for cause, on the date identified in the decision, and the termination action is final.

§ 2556.425 May a VISTA appeal their termination for cause?

(a) Within 10 calendar days of AmeriCorps' issuance of the decision to terminate the VISTA for cause, as set forth in § 2556.420(d), the VISTA may appeal the decision to the VMSU Director. The appeal must be in writing and specify the reasons for the VISTA's disagreement with the decision.

(b) AmeriCorps will not incur any expenses or travel allowances for the VISTA in connection with the preparation or presentation of the appeal.

(c) The VISTA may have access to records as follows:

(1) The VISTA may review any material in the VISTA's official AmeriCorps file and any relevant AmeriCorps records to the extent permitted by the Freedom of Information Act and the Privacy Act, 5 U.S.C. 552, 552a. Examples of documents that may be withheld include references obtained under pledge of confidentiality, official files of other program participants, and privileged intra-agency documents.

(2) The VISTA may review relevant records in the possession of a sponsor to the extent such documents are disclosable by the sponsor under applicable freedom of information act and privacy laws.

(d) Within 14 calendar days of receipt of any appeal by the VISTA, the VMSU Director or equivalent AmeriCorps official will issue a written appeal determination indicating the reasons for the appeal determination. The appeal determination will be final.

§ 2556.430 Is a VISTA who is terminated early from the VISTA program for other than cause entitled to appeal under these procedures?

(a) Only a VISTA whose early termination from the VISTA program is for cause, and who has answered the proposal to terminate them for cause in a timely manner, as set forth in § 2556.420(c), is entitled to appeal the early termination action, as referenced in § 2556.425. A termination for cause is based on a deficiency, or deficiencies, in the performance or conduct of a VISTA.

(b) The following types of early terminations from the VISTA program are not terminations for cause, and are not entitled to appeal under the early termination appeal procedure set forth in §§ 2556.420 and 2556.425:

(1) Resignation from the VISTA program prior to the issuance of a decision to terminate for cause, as set forth in § 2556.420(d);

(2) Early termination from the VISTA program because a VISTA did not secure a suitable reassignment to another project; and

(3) Medical termination from the VISTA program.

Subpart F—Summer Associates

§ 2556.500 How is a position for a summer associate established in a project?

Subject to VISTA assistance availability, AmeriCorps approves the establishment of summer associate positions based on the following factors:

(a) The need in the community, as demonstrated by the sponsor, for the performance of project activities by a summer associate(s);

(b) The content and quality of summer associate project plans;

(c) The capacity of the sponsor to implement the summer associate project activities; and

(d) The sponsor's compliance with all applicable parts of the DVSA, VISTA program policy, and the sponsor's Memorandum of Agreement, which incorporates their project application.

§ 2556.505 How do summer associates differ from other VISTAs?

Summer associates differ from other VISTAs in the following ways:

(a) Summer associates are not eligible to receive:

(1) Health care through a health benefits program provided by AmeriCorps;

(2) Childcare support through a childcare program provided by AmeriCorps;

(3) Payment for settling-in expenses; or

(4) Non-competitive eligibility in accordance with 5 CFR 315.605.

(b) Absent extraordinary circumstances, summer associates are not eligible to receive:

(1) Payment for travel expenses incurred for travel to or from the project site to which the summer associate is assigned; or

(2) A relocation travel allowance to offset the cost of relocating from the summer associate's home of record to the project site to which they are assigned to serve.

(c) AmeriCorps may discharge a summer associate due to a deficiency, or deficiencies, in conduct or performance. Summer associates are not subject to subpart E of this part, or to the grievance procedures provided to VISTAs set forth in §§ 2556.345 through 2556.365.

Subpart G—VISTA Leaders

§ 2556.600 How is a position for a leader established in a project, or in multiple projects within a contiguous geographic region?

(a) At its discretion, AmeriCorps may approve the establishment of a leader position based on the following factors:

(1) The need for a leader in a project of a substantial size and with multiple VISTAs assigned to serve at that project, or the need for leader for multiple projects located within a contiguous geographic region.

(2) The need for a leader to assist with the communication of VISTA policies and administrative procedures to VISTAs within a project, or throughout the multiple projects within a contiguous geographic region, as applicable.

(3) The need for a leader to assist with the professional development of VISTAs within a project, or throughout the multiple projects within a contiguous geographic region, as applicable.

(4) The need for a leader to assist with the recruitment and preparation for the arrival of VISTAs within a project, or throughout the multiple projects within a contiguous geographic region, as applicable.

(5) The capacity of the VISTA supervisor to support and guide the leader.

(b) A sponsor may request, in its project application, that AmeriCorps establish a leader position in its project.

§ 2556.605 Who is eligible to apply to serve as a leader?

An individual is eligible to apply to serve as a leader if they have successfully completed any of the following:

(a) At least one year of service as a VISTA;

(b) At least one full term of service as a full-time AmeriCorps State and National member;

(c) At least one full term of service as a member of the AmeriCorps National Civilian Community Corps (NCCC); or

(d) At least one traditional term of service as a Peace Corps Volunteer.

§ 2556.610 What is the application process to apply to become a leader?

(a) *Application package.* An eligible individual must apply in writing to AmeriCorps to become a leader. The sponsor's recommendation must be included with the individual's application to become a leader.

(b) *Sponsor recommendation.* A sponsor with which an individual is seeking to serve as a leader must recommend the individual to become a leader, in writing, to AmeriCorps.

(c) *Selection.* AmeriCorps has sole authority to select a leader. The criteria considered for selection include the individual's experience, special skills, and leadership, as demonstrated in the application and the sponsor's recommendation.

§ 2556.615 Who reviews a leader application and who approves or disapproves a leader application?

AmeriCorps reviews the application package for the leader position, considers the recommendation of the sponsor, and approves or disapproves the individual to serve as a leader.

§ 2556.620 How does a leader differ from other VISTAs?

(a) The application process to become a leader, as described in § 2556.610, is separate and distinct from the

application process to enroll as a VISTA in the VISTA program.

(b) A leader may receive a living allowance computed at a higher daily rate than other VISTAs, as authorized under section 105(a)(1)(B) of the DVSA.

(c) A leader is subject to all the terms and conditions of service described in § 2556.625.

§ 2556.625 What are terms and conditions of service for a leader?

Though not exhaustive, terms and conditions of service as a leader include:

(a) A leader makes a full-time commitment to serve as a leader, without regard to regular working hours, for a minimum of one year.

(b) To the maximum extent practicable, a leader must live among and at the economic level of the low-income community served by the project.

(c) A leader aids the communication of VISTA policies and administrative procedures to VISTAs.

(d) A leader assists with the leadership development of VISTAs.

(e) A leader is a resource in the development and delivery of training for VISTAs.

(f) A leader may assist the sponsor with recruitment and preparation for the arrival of VISTAs.

(g) A leader may advise a supervisor on potential problem areas and needs of VISTAs.

(h) A leader aids VISTAs in the development of effective working relationships and understanding of VISTA program concepts.

(i) A leader may aid the supervisor and sponsor in directing or focusing the VISTA project to best address the community's needs.

(j) A leader may serve as a collector of data for performance measures of the project and the VISTAs.

(k) A leader is prohibited from supervising VISTAs. A leader is also prohibited from handling or managing, on behalf of the project, personnel-related matters affecting VISTAs. Personnel-related matters affecting VISTAs must be managed and handled by the project and in coordination with the appropriate AmeriCorps Region Office.

Subpart H—Restrictions and Prohibitions on Political Activities and Lobbying

§ 2556.700 Who is covered by this subpart?

(a) All VISTAs, including leaders and summer associates, are subject to this subpart.

(b) All employees of VISTA sponsors and subrecipients whose salaries or other compensation are paid, in whole or in part, with VISTA grant assistance are subject to this subpart.

(c) All VISTA sponsors and subrecipients are subject to this subpart.

§ 2556.705 What is prohibited political activity?

For purposes of the regulations in this subpart, ''prohibited political activity'' means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.

§ 2556.710 What political activities are VISTAs prohibited from engaging in?

(a) A VISTA may not use their official authority or influence to interfere with or affect the result of an election.

(b) A VISTA may not use their official authority or influence to coerce any individual to participate in political activity.

(c) A VISTA may not use their official VISTA program title while participating in prohibited political activity.

(d) A VISTA may not participate in prohibited political activities in the following circumstances:

(1) While they are on duty;

(2) While they are wearing an article of clothing, logo, insignia, or other similar item that identifies AmeriCorps, the VISTA program, or one of AmeriCorps' other national service programs;

(3) While they are in any room or building occupied in the discharge of VISTA duties by an individual employed by the sponsor; and

(4) While using a vehicle owned or leased by a sponsor or subrecipient, or while using a privately-owned vehicle in the discharge of VISTA duties.

§ 2556.715 What political activities may a VISTA participate in?

(a) Provided that paragraph (b) of this section is fully adhered to, a VISTA may:

(1) Express their opinion privately and publicly on political subjects;

(2) Be politically active in connection with a question that is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance, or any other question or issue of similar character;

(3) Participate in the nonpartisan activities of a civic, community, social, labor, professional, or similar organization; and

(4) Participate fully in public affairs, except as prohibited by other Federal law, in a manner that does not compromise their efficiency or integrity as a VISTA, or compromise the neutrality, efficiency, or integrity of AmeriCorps or the VISTA program.

(b) A VISTA may participate in political activities set forth in paragraph (a) of this section as long as such participation:

(1) Does not interfere with the performance of, or availability to perform, their assigned VISTA project duties;

(2) Does not interfere with their provision of service in the VISTA program;

(3) Does not involve any use of VISTA assistance, resources or funds;

(4) Would not result in the identification of the VISTA as being a participant in or otherwise associated with the VISTA program;

(5) Is not conducted during scheduled VISTA service hours; and

(6) Does not interfere with the full-time commitment to remain available for VISTA service without regard to regular working hours, at all times during periods of service, except for authorized periods of leave.

§ 2556.720 May VISTAs participate in political organizations?

(a) Provided that paragraph (b) of this section is fully adhered to, and in accordance with the prohibitions set forth in § 2556.710, a VISTA may:

(1) Be a member of a political party or other political group and participate in its activities;

(2) Serve as an officer of a political party or other political group, a member of a national, State, or local committee of a political party, an officer or member of a committee of a political group, or be a candidate for any of these positions;

(3) Attend and participate fully in the business of nominating caucuses of political parties;

(4) Organize or reorganize a political party organization or political group;

(5) Participate in a political convention, rally, or other political gathering; and

(6) Serve as a delegate, alternate, or proxy to a political party convention.

(b) A VISTA may participate in a political organization as long as such participation complies with the restrictions set out in paragraphs (b)(1) through (6) of § 2556.715.

(1) Does not interfere with the performance of, or availability to perform, their assigned VISTA project duties;

(2) Does not interfere with the provision of service in the VISTA program;

(3) Does not involve any use of VISTA assistance, resources or funds;

(4) Would not result in the identification of the VISTA as being a participant in or otherwise associated with the VISTA program;

(5) Is not conducted during scheduled VISTA service hours; and

(6) Does not interfere with the full-time commitment to remain available for VISTA service without regard to regular working hours, at all times during periods of service, except for authorized periods of leave.

§ 2556.725 May VISTAs participate in political campaigns?

(a) Provided that paragraph (b) of this section is fully adhered to, and in accordance with the prohibitions set forth in § 2556.710, a VISTA may:

(1) Display pictures, signs, stickers, badges, or buttons associated with political parties, candidates for partisan political office, or partisan political groups, as long as these items are displayed in accordance with the prohibitions set forth in § 2556.710;

(2) Initiate or circulate a nominating petition for a candidate for partisan political office;

(3) Canvass for votes in support of or in opposition to a partisan political candidate or a candidate for political party office;

(4) Endorse or oppose a partisan political candidate or a candidate for political party office in a political advertisement, broadcast, campaign literature, or similar material; and

(5) Address a convention caucus, rally, or similar gathering of a political party or political group in support of or in opposition to a partisan political candidate or a candidate for political party office.

(b) A VISTA may participate in a political campaign as long as such participation:

(1) Does not interfere with the performance of, or availability to perform, their assigned VISTA project duties;

(2) Does not interfere with the provision of service in the VISTA program;

(3) Does not involve any use of VISTA assistance, resources or funds;

(4) Would not result in the identification of the VISTA as being a participant in or otherwise associated with the VISTA program;

(5) Is not conducted during scheduled VISTA service hours; and

(6) Does not interfere with the full-time commitment to remain available for VISTA service without regard to regular working hours, at all times during periods of service, except for authorized periods of leave.

§ 2556.730 May VISTAs participate in elections?

(a) Provided that paragraph (b) of this section is fully adhered to, and in accordance with the prohibitions set forth in § 2556.710, a VISTA may:

(1) Register and vote in any election;

(2) Act as recorder, watcher, challenger, or similar officer at polling places;

(3) Serve as an election judge or clerk, or in a similar position; and

(4) Drive voters to polling places for a partisan political candidate, partisan political group, or political party.

(5) Participate in voter registration activities.

(b) A VISTA may participate in elections as long as such participation:

(1) Does not interfere with the performance of, or availability to perform, their assigned VISTA project duties;

(2) Does not interfere with the provision of service in the VISTA program;

(3) Does not involve any use of VISTA assistance, resources or funds;

(4) Would not result in the identification of the VISTA as being a participant in or otherwise associated with the VISTA program;

(5) Is not conducted during scheduled VISTA service hours; and

(6) Does not interfere with the full-time commitment to remain available for VISTA service without regard to regular working hours, at all times during periods of service, except for authorized periods of leave.

§ 2556.735 May a VISTA be a candidate for public office?

(a) Except as provided in paragraph (c) of this section, no VISTA may run for the nomination to, or as a candidate for election to, partisan political office.

(b) In accordance with the prohibitions set forth in § 2556.710, a VISTA may participate in elections as long as such participation:

(1) Does not interfere with the performance of, or availability to perform, their assigned VISTA project duties;

(2) Does not interference with the provision of service in the VISTA program;

(3) Does not involve any use of VISTA assistance, resources or funds;

(4) Would not result in the identification of the VISTA as being a participant in or otherwise associated with the VISTA program;

(5) Is not conducted during scheduled VISTA service hours; and

(6) Does not interfere with the full-time commitment to remain available for VISTA service without regard to regular working hours, at all times during periods of service, except for authorized periods of leave.

(c) Provided that paragraphs (a) and (b) of this section are adhered to, and in accordance with the prohibitions set forth in § 2556.710, a VISTA may:

(1) Run as an independent candidate in a partisan election in designated U.S. municipalities and political subdivisions as set forth at 5 CFR part 733; and

(2) Run as a candidate in a non-partisan election.

§ 2556.740 May VISTAs participate in political fundraising activities?

(a) Provided that paragraphs (b) through (d) of this section are fully adhered to, and in accordance with the prohibitions set forth in § 2556.710, a VISTA may:

(1) Make a political contribution to a political party, political group, campaign committee of a candidate for public office in a partisan election;

(2) Attend a political fundraiser; and

(3) Solicit, accept, or receive uncompensated volunteer services for a political campaign from any individual.

(b) A VISTA may participate in fundraising activities as long as such participation:

(1) Does not interfere with the performance of, or availability to perform, their assigned VISTA project duties;

(2) Does not interfere with the provision of service in the VISTA program;

(3) Does not involve any use of VISTA assistance, resources or funds;

(4) Would not result in the identification of the VISTA as being a participant in or otherwise associated with the VISTA program;

(5) Is not conducted during scheduled VISTA service hours; and

(6) Does not interfere with the full-time commitment to remain available for VISTA service without regard to regular working hours, at all times during periods of service, except for authorized periods of leave.

(c) A VISTA may not knowingly:

(1) Personally solicit, accept, or receive a political contribution from another individual;

(2) Personally solicit political contributions in a speech or keynote address given at a fundraiser;

(3) Allow their perceived or actual affiliation with the VISTA program, or their official title as a VISTA, to be used in connection with fundraising activities; or

(4) Solicit, accept, or receive uncompensated individual volunteer services from a subordinate (*e.g.,* a

leader may not solicit, accept or receive a political contribution from a VISTA).

(d) Except for VISTAs who reside in municipalities or political subdivisions designated under 5 CFR part 733, no VISTA may accept or receive a political contribution on behalf of an individual who is a candidate for local partisan political office and who represents a political party.

§ 2556.745 Are VISTAs prohibited from soliciting or discouraging the political participation of certain individuals?

(a) A VISTA may not knowingly solicit or discourage the participation in any political activity of any individual who has an application for any compensation, grant, contract, ruling, license, permit, or certificate pending before AmeriCorps or the VISTA program.

(b) A VISTA may not knowingly solicit or discourage the participation in any political activity of any individual who is the subject of, or a participant in, an ongoing audit, investigation, or enforcement action being carried out by or through AmeriCorps or the VISTA program.

§ 2556.750 What restrictions and prohibitions are VISTAs who campaign for a spouse or family member subject to?

A VISTA who is the spouse or family member of a candidate for partisan political office, candidate for political party office, or candidate for public office in a nonpartisan election is subject to the same restrictions and prohibitions as other VISTAs, as set forth in § 2556.725.

§ 2556.755 May VISTAs participate in lawful demonstrations?

In accordance with the prohibitions set forth in § 2556.710, VISTAs may participate in lawful demonstrations, political rallies, and other political meetings, so long as such participation is in conformance with all of the following:

(a) Occurs only while on authorized leave or while otherwise off duty;

(b) Does not include attempting to represent, or representing, the views of VISTAs or the VISTA program on any public issue;

(c) Could not be reasonably understood by the community as being identified with the VISTA program, the project, or other elements of VISTA service; and

(d) Does not interfere with the discharge of VISTA duties.

§ 2556.760 May a sponsor or subrecipient approve the participation of a VISTA in a demonstration or other political meeting?

(a) No VISTA sponsor or subrecipient may approve a VISTA to be involved in planning, initiating, participating in, or otherwise aiding or assisting in any demonstration or other political meeting.

(b) If a VISTA sponsor or subrecipient, subsequent to the receipt of any AmeriCorps financial assistance, including the assignment of VISTAs, approves the participation of a VISTA in a demonstration or other political meeting, that VISTA sponsor or subrecipient is subject to procedures related to the suspension or termination of such assistance, as provided in subpart B of this part, §§ 2556.135 through 2556.140.

§ 2556.765 What disciplinary actions are VISTAs subject to for violating restrictions or prohibitions on political activities?

Violations by a VISTA of any of the prohibitions or restrictions set forth in this subpart may warrant termination for cause, in accordance with proceedings set forth at §§ 2556.420, 2556.425, and 2556.430.

§ 2556.770 What are the requirements of VISTA sponsors and subrecipients regarding political activities?

(a) All sponsors and subrecipients are required to:

(1) Understand the restrictions and prohibitions on the political activities of VISTAs, as set forth in this subpart;

(2) Provide training to VISTAs on all applicable restrictions and prohibitions on political activities, as set forth in this subpart, and use training materials that are consistent with these restrictions and prohibitions;

(3) Monitor on a continuing basis the activity of VISTAs for compliance with this subpart; and

(4) Report all violations or questionable situations immediately to the appropriate AmeriCorps Region Office.

(b) Failure of a sponsor to comply with the requirements of this subpart, or a violation of the requirements contained in this subpart by the sponsor or subrecipient, sponsor or subrecipient's covered employees, agents, or VISTAs, may be deemed a material failure to comply with terms or conditions of the VISTA program. In such a case, the sponsor is subject to procedures related to the denial or reduction, or suspension or termination, of such assistance, as provided in §§ 2556.125, 2556.130, and 2556.140.

§ 2556.775 What prohibitions and restrictions on political activity apply to employees of VISTA sponsors and subrecipients?

All employees of VISTA sponsors and subrecipients, whose salaries or other compensation are paid, in whole or in part, with VISTA funds are subject to all applicable prohibitions and restrictions described in this subpart in the following circumstances:

(a) Whenever they are engaged in an activity that is supported by AmeriCorps or VISTA funds or assistance; and

(b) Whenever they identify themselves as acting in their capacity as an official of a VISTA project that receives AmeriCorps or VISTA funds or assistance, or could reasonably be perceived by others as acting in such a capacity.

§ 2556.780 What prohibitions on lobbying activities apply to VISTA sponsors and subrecipients?

(a) No VISTA sponsor or subrecipient may assign a VISTA to perform service or engage in activities related to influencing the passage or defeat of legislation or proposals by initiative petition.

(b) No VISTA sponsor or subrecipient may use any AmeriCorps financial assistance, such as VISTA funds or the services of a VISTA, for any activity related to influencing the passage or defeat of legislation or proposals by initiative petition.

Fernando Laguarda,

General Counsel.

[FR Doc. 2023–10027 Filed 5–15–23; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 230316–0077; RTID 0648–XD015]

Fisheries of the Northeastern United States; Atlantic Herring Fishery; 2023 Management Area 3 Possession Limit Adjustment

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

ACTION: Temporary rule; possession limit adjustment.

SUMMARY: NMFS is implementing a 2,000-lb (907.2-kg) possession limit for Atlantic herring for Management Area 3. This is required because NMFS projects that herring catch from Area 3 will reach 98 percent of the Area's sub-annual catch limit before the end of the fishing year. This action is intended to prevent overharvest of herring in Area 3,

which would result in additional catch limit reductions in a subsequent year.

DATES: Effective 00:01 hr local time on May 14, 2023, through December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Maria Fenton, Fishery Management Specialist, (978) 281–9196.

SUPPLEMENTARY INFORMATION: The Regional Administrator of the Greater Atlantic Regional Office monitors herring fishery catch in each Management Area based on vessel and dealer reports, state data, and other available information. Regulations at 50 CFR 648.201(a)(1)(i)(B)(*2*) require that NMFS implement a 2,000-lb (907.2-kg) possession limit for herring for Area 3 beginning on the date that catch is projected to reach 98 percent of the sub-annual catch limit (ACL) for that area.

Based on vessel trip reports, vessel monitoring system catch reports, dealer reports, and other available information, the Regional Administrator projects that the herring fleet will catch 98 percent of the Area 3 sub-ACL by May 14, 2023. Therefore, effective 00:01 hr local time May 14, 2023, through 24:00 hr local time December 31, 2023, a person may not attempt or do any of the following: Fish for; possess; transfer; purchase; receive; land; or sell more than 2,000 lb (907.2 kg) of herring per trip or more than once per calendar day in or from Area 3.

Vessels that enter port before 00:01 local time on May 14, 2023, may land and sell more than 2,000 lb (907.2 kg) of herring from Area 3 from that trip, provided that catch is landed in accordance with state management measures. Vessels may transit or land in Area 3 with more than 2,000 lb (907.2 kg) of herring on board, provided that: The herring were caught in an area not subject to a 2,000-lb (907.2-kg) limit; all fishing gear is stowed and not available for immediate use; and the vessel is issued a permit appropriate to the amount of herring on board and the area where the herring was harvested.

Also effective 00:01 hr local time, May 14, 2023, through 24:00 hr local time, December 31, federally permitted dealers may not attempt or do any of the following: Purchase; receive; possess; have custody or control of; sell; barter; trade; or transfer more than 2,000 lb (907.2 kg) of herring per trip or calendar day from Area 3, unless it is from a vessel that enters port before 00:01 local time on May 14, 2023, and catch is landed in accordance with state management measures.

This 2,000-lb (907.2 kg) possession limit bypasses the 40,000-lb (18,143.7-kg) possession limit that is required when NMFS projects that 90 percent of the sub-ACL will be caught. Regulations at § 648.201(a)(1)(i)(B)(*1*) require NMFS to implement a 40,000-lb (18,143.7-kg) possession limit for herring for Area 3 beginning on the date that catch is projected to reach 90 percent of the herring sub-ACL for that area. Based on vessel trip reports, vessel monitoring system catch reports, dealer reports, and other available information, we estimate that 90 percent of the Area 3 sub-ACL was harvested by May 8, 2023. However, due to the low 2023 sub-ACLs, the high volume nature of this fishery, and the progress of catch this fishing year, we project that 98 percent of the sub-ACL in Area 3 will be harvested by May 14, 2023. Implementing the 40,000-lb (18,143.7-kg) limit before the 2,000-lb (907.2 kg) limit is impracticable due to the small amount of time between the 90 percent and 98 percent catch projection dates and substantially increases the risk of exceeding the sub-ACL due to the low amount of available catch remaining under the sub-ACL. The limited time for the two different notices is logistically difficult and could result in substantial confusion. The limited time between projected dates and the relatively low available catch could also encourage significantly increased fishing effort if we first implemented the 40,000-lb (18,143.7-kg) limit in Area 3. This increase could require a quicker implementation of the 2,000-lb (907.2 kg) limit than possible. To minimize the chance of a potential sub-ACL overage occurring and to avoid incentivizing potential changes in fishing behavior that could contribute to an overage, NMFS is bypassing the 40,000-lb (18,143.7-kg) possession limit and implementing the 2,000-lb (907.2-kg) possession limit in Area 3.

The herring fishery began operating under default 2023 fishery specifications on January 1, 2023. On January 13, 2023, we implemented a 2,000-lb (907.2 kg) possession limit for herring in Area 3 because we estimated the fleet had caught 98 percent of the default Area 3 sub-ACL. On March 23, 2023, we published an interim final rule that replaced the default 2023 herring fishery specifications with updated 2023 specifications. This action also removed the 2,000-lb (907.2 kg) possession limit that was previously implemented in Area 3 because, relative to the updated Area 3 sub-ACL, catch from Area 3 no longer hit the threshold required to implement this possession limit adjustment. This inseason action implements a new 2,000-lb (907.2 kg) possession limit in Area 3 because catch relative to the updated 2023 Area 3 sub-ACL now hits the threshold required to implement this possession limit adjustment.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

NMFS finds good cause pursuant to 5 U.S.C. 553(b)(3)(B) to waive prior notice and the opportunity for public comment because it is unnecessary, contrary to the public interest, and impracticable. Ample prior notice and opportunity for public comment on this action has been provided for the required implementation of this action. The requirement to implement this possession limit was developed by the New England Fishery Management Council using public meetings that invited public comment on the measures when they were developed and considered along with alternatives. Further, the regulations requiring NMFS to implement this possession limit also were subject to public notice and opportunity to comment when they were first adopted in 2021. Herring fishing industry participants monitor catch closely and anticipate potential possession limit adjustments as catch totals approach Area sub-ACLs. The regulation provides NMFS with no discretion and is designed for implementation as quickly as possible to prevent catch from exceeding limits designed to prevent overfishing while allowing the fishery to achieve optimum yield.

Updated 2023 herring fishery specifications were implemented on March 23, 2023. Data indicating that the herring fleet will have landed at least 98 percent of the 2023 sub-ACL allocated to Area 3 only recently became available. High-volume catch and landings in this fishery can increase total catch relative to the sub-ACL

quickly, especially in this fishing year where annual catch limits are unusually low. If implementation of this possession limit adjustment is delayed to solicit prior public comment, the 2023 sub-ACL for Area 3 will likely be exceeded; thereby undermining the conservation objectives of the Herring FMP. If sub-ACLs are exceeded, the excess must be deducted from a future sub-ACL and would reduce future fishing opportunities. The public expects these actions to occur in a timely way consistent with the FMP's objectives. For the reasons stated above, NMFS also finds good cause to waive the 30-day delayed effectiveness in accordance with 5 U.S.C 553(d)(3).

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

Dated: May 11, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–10425 Filed 5–11–23; 4:15 pm]

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Proposed Rules

Federal Register
Vol. 88, No. 94
Tuesday, May 16, 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 EDUCATION

34 CFR Chapter II

[Docket ID ED–2023–OCTAE–0048]

Proposed Priorities, Requirements, Definitions, and Selection Criteria—Perkins Innovation and Modernization Grant Program

AGENCY: Office of Career, Technical, and Adult Education, Department of Education.

ACTION: Proposed priorities, requirements, definitions, and selection criteria.

SUMMARY: The Department of Education (Department) proposes priorities, requirements, definitions, and selection criteria for the Perkins Innovation and Modernization Grant Program, Assistance Listing Number 84.051F. The Department may use the priorities, requirements, definitions, and selection criteria for competitions in fiscal year (FY) 2023 and later years. We take this action to support the identification of strong and well-designed projects that will incorporate evidence-based and innovative strategies and activities to improve student success in secondary education, postsecondary education, and careers.

DATES: We must receive your comments on or before June 15, 2023.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at *regulations.gov*. However, if you require an accommodation or cannot otherwise submit your comments via *regulations.gov*, please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments by fax or by email, or comments submitted after the comment period closes. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Please go to *www.regulations.gov* to submit your comments electronically. Information on using *regulations.gov*, including instructions for finding a rule on the site and submitting comments, is available on the site under ''FAQ.''

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing on the Federal eRulemaking Portal at *www.regulations.gov*. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Corinne Sauri, U.S. Department of Education, 400 Maryland Avenue SW, Room 10–362, PCP, Washington, DC 20202–7241. Telephone: (202) 245–6412. Email: *PIMGrants@ed.gov*.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final priorities, requirements, definitions, and selection criteria, we urge you to identify clearly the specific proposed priority, requirement, definition, or selection criterion your comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 (as modified by Executive Order 14094) and 13563 and their overall requirement of reducing regulatory burden that might result from the proposed priorities, requirements, definitions, and selection criteria. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about the proposed priorities, requirements, definitions, and selection criteria by accessing *regulations.gov*. To inspect comments in person, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Purpose of Program: The purpose of the Perkins Innovation and Modernization Grant Program (PIM) is to identify, support, and independently evaluate evidence-based and innovative strategies and activities to improve and modernize career and technical education (CTE). The Department anticipates using the PIM authority beginning in FY 2023 to award competitive grants to support Career Connected High Schools (CCHS) that will transform public high schools by expanding existing and implementing new strategies and supports to help their students identify and navigate pathways to postsecondary education and career preparation, accrue college credit, pursue in-demand and high-value industry-recognized credentials, and gain direct experience in the workplace through work-based learning.

Program Authority: Section 114(e) of the Carl D. Perkins Career and Technical Education Act of 2006, as amended by the Strengthening Career and Technical Education for the 21st Century Act (Perkins V) (20 U.S.C. 2324).

Proposed Priorities

This notice contains five proposed priorities. We may apply one or more of these priorities for a PIM competition in FY 2023 or in subsequent years.

Proposed Priorities:

Proposed Priority 1—Career-Connected High Schools

Background:

The misalignment of the secondary and postsecondary education systems in the United States (U.S.), along with an inadequately funded workforce development system, contributes to inequities for young people to pursue postsecondary education and launch careers that support economic and social mobility in our nation.[1] As a

[1] Hoffman, N., Vargas, J. et al. (2021), The Big Blur: An Argument for Erasing the Boundaries Between High School, College, and Careers—and Creating One New System That Works for Everyone. Boston, MA: Jobs for the Future. Retrieved from: *https://www.jff.org/resources/the-big-blur-an-*

result, too many young people leave high school unprepared for postsecondary education or careers. An estimated 4.8 million youth ages 16 to 24 are disconnected, neither working nor in school, comprising more than one in 10 (12.6 percent) of U.S. youth in this age group.[2] These young people are disproportionately from communities of color. Nearly one in four (23.4 percent) Native American teenagers and young adults are neither working nor in school, the highest rate of disconnection of the five major racial and ethnic groups for which data were collected, followed by Black teenagers and young adults, who have the second-highest rate of disconnection from school and work (19.6 percent), or nearly 1 million young people.[3] Another 1.3 million disconnected youth are Hispanic, comprising 14.0 percent of Hispanic teenagers and young adults.[4]

The road to and through postsecondary education or training is also particularly difficult to navigate for youth from low-income communities. For example, among students attending the nearly 9,000 high schools participating in the National Student Clearinghouse's StudentTracker for High Schools service during the 2020–21 school year, 46 percent of students who graduated from high-poverty high schools (where at least 75 percent of the student population was eligible for a free or reduced-price lunch) enrolled in postsecondary education immediately following high school graduation. In contrast, the immediate postsecondary education enrollment rate was 72 percent for students attending low-poverty high schools (where fewer than 25 percent of students were eligible for a free or reduced-price lunch). The difference in postsecondary degree completion rates between students attending high- and low-poverty high schools was even more stark: only 25 percent of graduates from high-poverty high schools earned a postsecondary degree within 6 years of finishing high school, compared to 61 percent of students from low-poverty high schools.[5]

Addressing the difficulties young people from high-poverty communities experience as they try to access, navigate, and complete postsecondary education is a national priority because postsecondary educational attainment has become a passport to economic independence and success. The Georgetown University Center on Education and the Workforce (Georgetown CEW) estimates that a postsecondary credential is now required to access 80 percent of what it describes as ''good jobs''—that is, according to Georgetown CEW, jobs paying a minimum of $35,000 for workers between the ages of 25 and 44 and at least $45,000 for workers between the ages of 45 and 64.[6] Moreover, many ''good jobs'' that Georgetown CEW identified as accessible to individuals with a high school credential also require some form of technical training that extends beyond what is often available in high school. Carpentry and solar photovoltaic installer jobs typically require formal on-the-job training, for example.[7] Earning a high school diploma is an important achievement, but young people need further learning to succeed in our economy.

Increasing postsecondary educational attainment can strengthen and expand local economies by attracting new industry and taking advantage of new job opportunities like those created by the Infrastructure Investment and Jobs Act (Pub. L. 117–58),[8] CHIPS and Science Act (Pub. L. 117–167),[9] and the Inflation Reduction Act (Pub. L. 117–169),[10] and can increase the wages of workers who do not have postsecondary credentials by increasing productivity.[11] Eliminating equity gaps in postsecondary educational attainment will also promote inclusive national economic prosperity. For example, in an analysis prepared for the Postsecondary Value Commission, Georgetown CEW estimated that closing gaps in postsecondary educational attainment by income level, race, and ethnicity could increase the Gross Domestic Product of the U.S. by $542 billion annually.[12]

To prepare all young people more equitably and effectively for further learning and economic advancement, our high schools require new solutions and tools to scale up strategies that have benefitted all students. Proposed Priority 1 identifies the following four pillars for transformed, career-connected high schools that, if implemented and integrated effectively and equitably, will better prepare all young people for postsecondary education and rewarding careers:

- Participation in a comprehensive postsecondary education and career navigation system that supports career exploration and education planning, provides information and assistance in pursuing further learning after high school, and includes the development and regular updating of a personalized postsecondary education and career plan (as defined in this notice) throughout high school;
- Acquisition of postsecondary credit through dual or concurrent enrollment programs (as defined in section 3 of Perkins V) to promote success in postsecondary coursework and give students a head start in earning a postsecondary credential;
- Participation in work-based learning opportunities (as defined in section 3 of Perkins V) for which students receive wages or academic credit, or both; and
- Attainment of an in-demand and high-value industry-recognized credential (as defined in this notice) so that every young person can earn a living wage or more after high school, be able to pursue further education, and thrive and live independently.

argument-for-erasing-the-boundaries-between-high-school-college-and-careers-and-creating-one-new-system-that-works-for-everyone/.

[2] Lewis, Kristen (2022), A Disrupted Year: How the Arrival of COVID–19 Affected Youth Disconnection. New York: Measure of America, Social Science Research Council. Retrieved from: *https://measureofamerica.org/youth-disconnection-2022/.*

[3] Ibid.

[4] Ibid.

[5] National Student Clearinghouse Research Center (2022). National College Progression Rates. Retrieved from: *https://nscresearchcenter.org/high-school-benchmarks/.*

[6] Carnevale, A.P., Strohl, J. et al. (2018), Three Educational Pathways to Good Jobs. Washington, DC: Georgetown University Center on Education and the Workforce. Retrieved from: *https://cew.georgetown.edu/cew-reports/3pathways/.*

[7] National Center for O*NET Development, (n.d.), O*NET OnLine. Retrieved from: *https://www.onetonline.org/.*

[8] Office of the President (Aug. 3, 2021), Fact Sheet: The Bipartisan Infrastructure Investment and Jobs Act Creates Good-Paying Jobs and Supports Workers. Retrieved from: *https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/03/fact-sheet-the-bipartisan-infrastructure-investment-and-jobs-act-creates-good-paying-jobs-and-supports-workers/.*

[9] Office of the President (Aug. 9, 2022), Fact Sheet: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China. Retrieved from: *https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/.*

[10] Office of the President (Aug. 19, 2022), Fact Sheet: The Inflation Reduction Act Supports Workers and Families. Retrieved from: *https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/19/fact-sheet-the-inflation-reduction-act-supports-workers-and-families/.*

[11] Moretti, E. (2004), Estimating the social return to higher education: Evidence from longitudinal and repeated cross-sectional data. Journal of Econometrics, vol.121, 175–212. Retrieved from: *https://eml.berkeley.edu/~moretti/socret.pdf.*

[12] Carnevale, A.P., Campbell, K.P. et al. (2021), The monetary value of economic and racial justice in postsecondary education: Quantifying the potential for public good. Postsecondary Value Commission. Retrieved from: *https://www.postsecondaryvalue.org/wp-content/uploads/2021/05/PVC-GUCEW-FINAL.pdf.*

Postsecondary Education and Career Navigation System

The systematic delivery of career advisement, academic counseling, and postsecondary education navigation throughout high school can lay a strong foundation for student success during and following high school. Assistance navigating the complexities of pursuing different types of postsecondary learning, such as a high-value industry-recognized credential program, Registered Apprenticeship program, and 2- and 4-year degree programs, is especially important. There is promising evidence that meeting with a school counselor to discuss college plans can increase students' postsecondary enrollment, particularly for students from more underserved backgrounds.[13] Evidence also indicates that informing students about financial aid opportunities and helping them to complete financial aid applications significantly increases postsecondary enrollment.[14] Advice and support provided outside school by nonprofit organizations also can have a positive influence on student enrollment in higher education.[15]

Personalized postsecondary education and career plans (as defined in this notice) can be a valuable part of providing systematic advising and navigation supports to students. Twenty-nine states and the District of Columbia and many local educational agencies (LEAs) require students to prepare personalized postsecondary education and career plans in middle or high school to chart their path through high school into young adulthood.[16] An analysis of the most recent National Center for Education Statistics (NCES) high school longitudinal study found that about 62 percent of public high school students reported developing such a plan by the fall of grade 9. However, fewer students reported receiving support from an adult to complete this plan (44 percent) and fewer still (22 percent) reported reviewing their plan at least once a year with an adult in school. Attention from adults in reviewing and annually updating their plans may be a promising strategy as the activity was positively associated with applying to and enrolling in postsecondary education after high school.[17] Analyzing the same data using a quasi-experimental research design, researchers found that students from low-income backgrounds who had a personalized learning plan, compared to peers from low-income backgrounds who did not complete a plan, were more likely to enroll in bachelor's degree or associate degree programs and to complete the Free Application for Federal Student Aid (FAFSA®), as well as more likely to borrow smaller amounts in student loans.[18] Another study using the same data found that students who completed a personalized learning plan in ninth grade were more engaged in school in grade 11 and less likely to report behaviors like skipping classes and not completing homework than peers who did not have a plan.[19]

Dual or Concurrent Enrollment. Dual or concurrent enrollment is a proven, evidence-based strategy to increase high school achievement and completion and to increase and accelerate postsecondary enrollment and credential attainment.[20] These opportunities can be most beneficial to students when they include core academic courses—such as first-year college English and mathematics courses[21]—as well as courses aligned to careers.[22] Research also suggests that the benefits of dual enrollment can increase with every postsecondary credit earned, at least up to 10 to 12 credits.[23] To gain these benefits, however, students need credits earned through dual or concurrent enrollment to transfer to the institution of higher education (IHE) in which they enroll and within the degree program they pursue after high school. To promote the portability of credits earned through dual or concurrent enrollment, some States have established policies and programs to facilitate credit transfer, such as the Indiana College Core (ICC), which is a block of 30 credit hours of general education, college-level coursework that can be transferred among all Indiana public colleges and universities. ICC dual credit courses are available at 140 high schools in the State.[24] Some States[25] and community and technical colleges also have developed crosswalks for students, their

[13] Belasco, A. S. (2013), ''Creating college opportunity: School counselors and their influence on postsecondary outcomes.'' Research in Higher Education, 54(7), 781–804. Retrieved from: *https://link.springer.com/article/10.1007/s11162-013-9297-4.* See also Surr, W. (2019), Student Advising: An Evidence-Based Practice. Midwest Comprehensive Center at the American Institutes for Research. Retrieved from: *https://eric.ed.gov/?id=ED599037.*

[14] Tierney, W. G., Bailey, T., Constantine, J., Finkelstein, N., & Hurd, N. F. (2009), Helping students navigate the path to college: What high schools can do: A practice guide (NCEE #2009–4066). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education. Retrieved from *http://ies.ed.gov/ncee/wwc/publications/practiceguides/.*

[15] What Works Clearinghouse, Institute of Education Sciences, U.S. Department of Education. (2018, December). Transition to College intervention report: Facilitating Long-Term Improvements in Graduation and Higher Education for Tomorrow (FLIGHT)/Take Stock in Children (TSIC)®. Retrieved from *https://whatworks.ed.gov.* See also What Works Clearinghouse, Institute of Education Sciences, U.S. Department of Education. (2021, April). Bottom Line. Retrieved from *https://whatworks.ed.gov.*

[16] Solberg, V. S. H., Donnelly, H. K., Kroyer-Kubicek, R., Basha, R., Curtis, G., Jaques, E., Schreiber, K. (2022), Condition of Career Readiness in the United States. Alexandria, VA: Coalition for Career Development Center and the BU Center for Future Readiness. Retrieved from: *https://www.ccd-center.org/post/condition-of-career-readiness-report.*

[17] Torre Gibney, T., & Rauner, M. (2021), Education and career planning in high school: A national study of school and student characteristics and college-going behaviors (REL 2022–127). U.S. Department of Education, Institute of Edu-cation Sciences, National Center for Education Evaluation and Regional Assistance, Regional Educational Laboratory West. Retrieved from: *https://ies.ed.gov/ncee/edlabs/regions/west/pdf/REL_2022127.pdf.*

[18] Britton, T. and Spencer, G. (2020), ''Do Students Who Fail to Plan, Plan to Fail? Effects of Individualized Learning Plans on Postsecondary Transitioning.'' Teachers College Record. Volume 122, 050309, May 2020, Teachers College, Columbia University. Retrieved from: *https://journals.sagepub.com/doi/abs/10.1177/016146812012200509.*

[19] Plasman, J.S. (2018), ''Career/Education Plans and Student Engagement in Secondary School,'' American Journal of Education 124 (February 2018). Chicago, IL: The University of Chicago. Retrieved from: *https://www.journals.uchicago.edu/doi/full/10.1086/695608.*

[20] What Works Clearinghouse, Institute of Education Sciences, U.S. Department of Education (2017), *Dual Enrollment Programs: WWC Intervention Report.* Retrieved from: *https://ies.ed.gov/ncee/wwc/Docs/InterventionReports/wwc_dual_enrollment_022817.pdf.*

[21] Villarreal, M. U. (2017), The effects of dual-credit on postsecondary student outcomes. University of Texas at Austin, Education Research Center. Retrieved from: *https://texaserc.utexas.edu/wp-content/uploads/2017/12/65-Brief-Villarreal-HB18-PB-11.16.17.pdf.* See also Giani, M. S., Alexander, C., & Reyes, P. (2014). Exploring the variation in the impact of dual-credit coursework on postsecondary outcomes: A quasi-experimental analysis of Texas students. The High School Journal, 97(4), 200–218. Retrieved from: *https://doi.org/10.1353/hsj.2014.0007.*

[22] Community College Research Center (2012), What We Know About Dual Enrollment Report. Retrieved From: *https://ccrc.tc.columbia.edu/publications/what-we-know-about-dual-enrollment.html.* See also Rodriguez, O., Hughes, K. L., & Belfield, C. (2012), Bridging college and careers: Using dual enrollment to enhance Career and Technical Education pathways. (National Center for Postsecondary Research Working Paper). Retrieved from: *https://files.eric.ed.gov/fulltext/ED533873.pdf.*

[23] Taylor, J. L., Allen, T. O., An, B. P., Denecker, C., Edmunds, J. A., Fink, J., Giani, M. S., Hodara, M., Hu, X., Tobolowsky, B. F., & Chen, W. (2022), Research priorities for advancing equitable dual enrollment policy and practice. Salt Lake City, UT: University of Utah. Retrieved from: *https://cherp.utah.edu/_resources/documents/publications/research_priorities_for_advancing_equitable_dual_enrollment_policy_and_practice.pdf*

[24] Indiana College Core and Dual Credit, Learn More Indiana. Retrieved from: *https://learnmore indiana.org/college/dual-credit.*

[25] Indiana Commission for Higher Education. (2021). Indiana early college credit report. Retrieved from: *https://www.in.gov/che/files/2021_Early_College_Credit_Report_01_28_2021.pdf.*

families, and their advisors to map course equivalencies between institutions, and ''guided pathways'' that show how courses lead to specific degrees and careers, so students can take courses that align with their plans after high school.[26]

Unfortunately, the opportunity to participate in dual or concurrent enrollment has been limited to a small group of students, leaving too many students unable to access the benefits dual or concurrent enrollment has to offer. Among the high school class of 2019, only about one-third of white students, about one-quarter of Asian, Native American, and Hispanic students, and less than a fifth of Black students took one or more dual enrollment courses during their time in high school.[27] Other research has documented that students from low-income backgrounds are significantly underrepresented among dual enrollment course takers.[28]

Work-Based Learning. Work-based learning reinforces academic instruction by giving students opportunities to apply knowledge and skills in real-world situations and to learn how to be professionals at work. Work-based learning can also help young people generate income, establish future earning potential, connect with professionals and mentors in the labor market, and build professional networks.[29] Well-designed internships, pre-apprenticeships, and Registered Apprenticeships in which young people also receive one-to-one coaching support from a caring adult and support for planning life after high school can have a positive influence on their futures. For example, a random assignment evaluation of the Urban Alliance internship program that chiefly served students from low-income backgrounds and whose overall average cumulative junior year GPA was 2.7 found strong and enduring impacts on the educational attainment of young men. The internship increased their likelihood of on-time high school graduation, enrollment in postsecondary education, and their attainment of an associate degree or persistence into the third year of college.[30] Other research suggests that the benefits of work-based learning during adolescence can continue well into adulthood. Using data from the National Longitudinal Survey of Youth of 1997 and a quasi-experimental research design, researchers found that, for young people from low-income backgrounds, participation in work-based learning—such as cooperative education, an internship, or Registered Apprenticeship—or in an employer mentorship program in high school was associated with holding a high-quality job at age 29, as measured by wages, benefits, hours, and job satisfaction.[31]

Industry-Recognized Credential. Education programs that incorporate the opportunity to earn an in-demand and high-value industry-recognized credential can give young people a leg up in the labor market when they graduate from high school, particularly if schools are discerning and only offer programs that lead to credentials that are in high demand and for which there is a significant earnings premium. This is particularly important for young people who choose not to pursue further learning immediately after high school[32] or those who choose to work and learn simultaneously. Earning an industry-recognized credential also may be valuable in promoting postsecondary enrollment and advancement; several studies have found a positive association between earning an industry-recognized credential while in high school and enrollment in postsecondary education, as well as completion of an associate degree.[33] Scrutinizing the value added by particular industry-recognized credentials also is important, because many in the universe of more than 7,500 occupational certifications[34] are not sought by employers. One study that examined 16 million job postings from employers found that 1.4 million postings asked for at least one of nearly 2,500 distinct certifications. Employer demand was concentrated on a small subset of these credentials, with 4 percent of the employer-requested credentials accounting for 75 percent of the total demand.[35]

Another study that examined the industry-recognized credentials earned by secondary students in 30 states found that just 18 percent of credentials were aligned with employer demand.[36] A recent study that examined the relationship between industry-recognized credentials earned by Texas

[26] Mehl, G., Wyner, J., Barnett, E. A., Fink, J., & Jenkins, D. (2020), The dual enrollment playbook: A guide to equitable acceleration for students. Aspen Institute and Community College Research Center. Retrieved from: *https://ccrc.tc.columbia.edu/publications/dual-enrollment-playbook-.*

[27] U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress (2022), 2019 NAEP High School Transcript Study (HSTS) Results: A Closer Look, Retrieved from: *https://www.nationsreportcard.gov/hstsreport/#closerlook_3_0_el. Dual credit course-taking by Native American students tabulated using the Data Explorer for the High School Transcript Study at: https://www.nationsreportcard.gov/ndecore/xplore/hsts.*

[28] See, for example, Lochmiller, C. R., et al. (2016), Dual enrollment courses in Kentucky: High school students' participation and completion rates (REL 2016–137). Washington, DC: U.S. Department of Education, Institute of Education Sciences. Retrieved from *http://ies.ed.gov/ncee/edlabs/regions/appalachia/pdf/REL_2016137.pdf.* Also see Miller, Trey, et al. (2017), Dual Credit Education in Texas: Interim Report, RAND Corporation. Retrieved from: *https://www.rand.org/pubs/research_reports/RR2043.html.*

[29] See, for example, National Academy Foundation (2017). Guide to Work-Based Learning: A Continuum of Activities and Experience. New York, NY: National Academy Foundation. Retrieved from: *http://ioer.ilsharedlearning.org/ContentDocs/bc2cc184-41bf-464b-a363-11a554da4126/303/Guide_to_Work-Based_Learning.pdf;* and Ross, M., Kazis, R., Bateman, N., and Stateler, L. (2020). Work-Based Learning Can Advance Equity and Opportunity for America's Young People. Washington, DC: Brookings Institution. Retrieved from: *https://www.brookings.edu/research/work-based-learning-can-advance-equity-and-opportunity-for-americas-young-people/.*

[30] Theodos, B., Pergamit, M.R. et al. (2017), Pathways after High School: Evaluation of the Urban Alliance High School Internship Program. Washington, DC: Urban Institute. Retrieved from: *https://www.urban.org/research/publication/pathways-after-high-school-evaluation-urban-alliance-high-school-internship-program.*

[31] Ross, M., Anderson Moore, K., et al. (2018), Pathway to High Quality Jobs for Young Adults. Washington, DC; Metropolitan Policy Program at Brookings and Child Trends. Retrieved from: *http://www.brookings.edu/research/pathways-to-high-quality-jobs-for-young-adults/.*

[32] For example, the labor force participation rate of high school graduates with a certification or professional license, but no further education, is 35 percent higher than the participation rate of high school graduates who lack one of these credentials, and their median weekly earnings are 17 percent higher. See Cunningham, Eva (2019), ''Professional certifications and occupational licenses: evidence from the Current Population Survey,'' Monthly Labor Review, June 2019, Bureau of Labor Statistics, U.S. Department of Labor. Retrieved from: *https://www.bls.gov/opub/mlr/2019/article/professional-certifications-and-occupational-licenses.htm.*

[33] Walsh, M., O'Kane, L. et al. (2019), Where Credentials Meet the Market: State Case Studies on the Effect of High School Industry Credentials on Educational and Labor Market Outcomes. ExcelinEd and Burning Glass Technologies. Retrieved from: *https://excelined.org/wp-content/uploads/2019/05/ExcelinEdBurningGlassTechnologies.CredentialsMatter.WhereCredentialsMeetTheMarket.June2019.pdf;* Glennie, E.J., Ottem, R., and Lauff, E. (2020), ''The Influence of Earning an Industry Certification in High School on Going to College: The Florida CAPE Act,'' Journal of Career and Technical Education 2020, Vol. 35, No. 1. Retrieved from: *https://files.eric.ed.gov/fulltext/EJ1310506.pdf.*

[34] Credential Engine (2022), Counting U.S. Postsecondary and Secondary Credentials. Retrieved from: *https://credentialengine.org/wp-content/uploads/2023/01/Final-CountingCredentials_2022.pdf.*

[35] Burning Glass Technologies (2017), The Narrow Ladder: The Value of Industry Certifications in the Job Market. Retrieved from: *https://www.burning-glass.com/wp-content/uploads/BurningGlass_certifications_2017.pdf.*

[36] Burning Glass Technologies and ExcelinEd (2020), Credentials Matter Phase 2: A 2020 Update on Credential Attainment and Workforce Demand in America. Retrieved from: *https://www.excelined.org/wp-content/uploads/2020/09/ExcelinEd.CredentialsMatter.Phase2_.Report.2020Update.pdf.*

students and their post-high school education and labor market outcomes found that the universe of credentials related to success after high school, defined by the study as enrolling in postsecondary education or earning at least 200 percent of the poverty level for a single adult, was small and limited to credentials awarded within four career clusters: arts, audiovisual technology, and communications; business; health science; and information technology.[37] Due diligence by educators in investigating the value of different industry-recognized credentials can ensure that students focus their attention on earning only those that are in-demand and high-value.

The Department is committed to advancing equity and to examining and addressing the sources of inequities in educational opportunities. Perkins V emphasizes supports for students who are members of special populations (as defined in section 3(48) of Perkins V). The populations of students described in the Perkins V definition align with many of the populations included in the definition of underserved students in the Secretary's Supplemental Priorities and Definitions for Discretionary Grants Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612)(Supplemental Priorities). In a future competition, the Department may choose to include one or more of the Supplemental Priorities that focus resources on underserved students.

We note that there is one related proposed program requirement to address implementation of one or more of the four pillars described in this proposed priority. It would require that each grantee's project plan include a timeline for implementation of one or more of the four pillars of career-connected learning for students served by the project, by no later than the end of the fifth year of the project. The requirement would also require each grantee to submit an annual report documenting progress on the implementation plan and the timeline. We recognize that grantees are likely to be in different stages of developing and implementing one or more of the four pillars described in the proposed priority at the onset of the grant period, and that some grantees will need more time to focus on one or more of the pillars; however, we also emphasize that implementing a cohesive and integrated plan for transforming high schools is more likely to be sustainable and effective in preparing all students equitably for their futures.

Finally, while we propose to include all four pillars of career-connected learning in this priority, in future competitions we may focus on all or a subset of the pillars.

Proposed Priority:

To meet this priority, an applicant must submit a detailed 5-year planning and implementation plan to increase the alignment of the last 2 years of high school and the first 2 years of postsecondary education in one or more high schools that describes the extent to which the applicant is currently implementing career-connected learning, with supporting data if available; and describes how the applicant will substantially increase the proportion of students who graduate from high school with one or more of the following four pillars of career connected learning:

(a) Education and career goals documented in a personalized postsecondary education and career plan (as defined in this notice) that was updated in each year of high school through a system of career guidance and academic counseling (as defined in section 3(7) of Perkins V) and postsecondary education navigation supports;

(b) Postsecondary credits earned from dual or concurrent enrollment programs (as defined in section 3 of Perkins V);

(c) Work experience gained through participation in one or more work-based learning opportunities (as defined in section 3 of Perkins V) for which they received wages or academic credit or both; or

(d) An in-demand and high-value industry-recognized credential (as defined in this notice).

Proposed Priority 2—Partnership Applications

Background:

Projects that seek to transform high schools and equip students with the knowledge and skills they will need to succeed in further learning and the labor market are likely to be more cohesive if they are carried out through a partnership that includes an LEA, a community or technical college or another IHE, and, to ensure the project prepares students for careers in demand, employers. Other relevant community stakeholders, such as local workforce development boards, labor-management partnerships, youth-serving organizations, and nonprofit organizations, may also be engaged. For this reason, the Department proposes a priority for applications submitted by an eligible applicant that includes these types of partners in implementing successful projects.

Applicants would also be required to provide a preliminary memorandum of understanding (MOU) or partnership agreement among all partner entities identified at the time of the application, that describes the roles and responsibilities of each partner in carrying out the proposed project. Understanding that some decisions about implementation may take more time and additional partners, we propose maintaining flexibility in the partnership agreement. Separately in this notice, the Department proposes to establish a requirement that PIM partnership grantees submit a formal MOU that includes all members of the partnership 120 days after the grant is awarded.

Proposed Priority:

To meet this priority, an application—

(1) Must be submitted by an applicant that includes one or more partners in each of the following categories:

(A) A local educational agency (including a public charter school local educational agency), an area career and technical education school, an educational service agency serving secondary school students, an Indian Tribe, Tribal organization, or Tribal educational agency, eligible to receive assistance under section 131 of Perkins V;

(B) A community or technical college or other institution of higher education (IHE) eligible to receive assistance under section 132 of Perkins V; and

(C) A business or industry representative partner, which may include representatives of local or regional businesses or industries;

(2) May include any other relevant community stakeholders, such as local workforce development boards, labor-management partnerships, youth-serving organizations, and nonprofit organizations; and

(3) Must include a partnership agreement or proposed memorandum of understanding (MOU) among all members of the application, identified at the time of the application, that describes the role of each partner in carrying out the proposed project and the process for a formal MOU to be established.

Proposed Priority 3—State and Regional Partnerships

Background:

To strengthen projects funded under PIM and to expand the reach of PIM funding, the Department is interested in proposed projects that would either include the participation of one or more

[37] Giani, M. (2022), How Industry-Recognized Credentials in High School Shape Students' Education and Employment Outcomes. Washington DC: Thomas B. Fordham Institute (August 2022). Retrieved from: *https://fordhaminstitute.org/national/research/industry-recognized-credentials.*

State agencies or that would bring together multiple LEAs within a geographic region.

State agencies can play a powerful role in transforming public high schools and strengthening the alignment of secondary and postsecondary education to careers through both policymaking and the provision and use of State expertise, funding, and assets. The State higher education agency, for example, establishes minimum admissions criteria and policies to determine placement in credit-bearing coursework, while State educational agencies (SEAs) typically establish minimum high school graduation requirements. State agencies, such as an eligible agency (as defined in section 3 of Perkins V), also may connect data between elementary and secondary, postsecondary education, and workforce systems that would be helpful to projects in understanding student progression and outcomes reporting. Other examples include—

- The SEA and the State workforce development agency partnering to provide tools and training to school counselors and others involved in supporting students in creating and updating personalized postsecondary education and career plans to help them identify in-demand jobs in the State or region that pay a living wage.
- The State higher education agency establishing statewide articulation and credit transfer agreements that ensure that the postsecondary credits earned by students through dual or concurrent enrollment are accepted at all public IHEs in the State.
- The SEA waiving or altering the State's definition of instructional time so that the proposed project could consider time spent in work-based learning programs as instructional time.
- The State agency that oversees the State's longitudinal data system analyzing educational and labor market data to assist projects in identifying in-demand and high-value industry-recognized credentials.

Regional partnerships can facilitate and strengthen project implementation. For example, identifying and coordinating work-based learning opportunities may be more effective and achieve certain economies of scale if it is undertaken by a consortium that includes all of the LEAs within a particular labor market area, rather than implemented by each LEA independently. Similarly, a community or technical college that serves a geographic area that includes multiple LEAs may find it beneficial and less costly to implement new dual or concurrent policies universally within its service area, rather than limiting these policies to students enrolled at one LEA.

For these reasons, the Department proposes to establish a priority for applications submitted by State and regional partnerships.

Proposed Priority:

To meet this priority—

(a) State Partnership—A State partnership application—

(1) must be submitted by an applicant that includes one or more partners in each of the following categories:

(A) A State agency, such as an SEA, State higher education agency or system, State workforce development agency, Governor's office, or a State economic development agency; and

(B) An LEA (including a public charter school local educational agency), an area career and technical education school, an educational service agency, an Indian Tribe, Tribal organization, or Tribal educational agency, eligible to receive assistance under section 131 of Perkins V;

(C) A community or technical college or another IHE eligible to receive assistance under section 132 of Perkins V;

(D) A business or industry representative partner, which may include representatives of local or regional businesses or industries; and

(2) May include any other relevant community stakeholders, such as local workforce development boards, labor-management partnerships, youth-serving organizations, and nonprofit organizations; and

(3) Must include a description of how the project will be coordinated among partners and will leverage State resources in the achievement of program outcomes and the partnership's scope of activities that will support development or implementation of one or more of the pillars of career-connected learning, which may include setting up a governance structure to support implementation, reviewing or changing State policies, setting goals, using data to inform decisions, and convening stakeholders; and

(4) Must include a partnership agreement or proposed memorandum of understanding (MOU) among all partner entities, identified at the time of the application, that describes the role of each member of the partnership in carrying out the proposed project and the process for a formal MOU to be established.

(b) Regional Partnership—A regional partnership application—

(1) Must be submitted by a partnership that includes one or more members from each of the following categories:

(A) An LEA (including a public charter school that operates as an LEA), an area career and technical education school, an educational service agency, an Indian Tribe, Tribal organization, or Tribal educational agency, eligible to receive assistance under section 131 of Perkins V;

(B) A community or technical college or another IHE eligible to receive assistance under section 132 of Perkins V;

(C) A business or industry representative partner, which may include representatives of local or regional businesses or industries; and

(2) Must propose to serve two or more LEAs in the same State or region;

(3) May include any other relevant community stakeholders, such as local workforce development boards, labor-management partnerships, youth-serving organizations, and non-profit organizations; and

(4) Must include a description of how the project will be coordinated among partners that share a common economic region or labor market area, utilize labor market information to support development or implementation of the four pillars of career-connected learning, and leverage regional, State, or other resources in the achievement of program outcomes; and

(5) Must include a partnership agreement or proposed memorandum of understanding (MOU) among all partner entities, identified at the time of the application, that describes the role of each member of the partnership in carrying out the proposed project and the process for a formal MOU to be established.

Proposed Priority 4—Serving Students from Families with Low Incomes

Background:

Section 114(e)(4) of Perkins V instructs the Secretary to give priority to PIM projects that will predominantly serve students from low-income families.[38] To encourage and support efforts to increase the number of innovative and high-quality programs available to students from families with low incomes, particularly in the Nation's high-poverty communities, we propose to operationalize this statutory priority by requiring an applicant to describe its plan to serve students from families with low incomes and provide evidence that a specific minimum

[38] Section 114(e)(4) of Perkins V instructs the Secretary to give priority to PIM projects that will predominantly serve students from low-income families (also referred to as ''families with low incomes'').

percentage of students from families with low incomes will be served by the project over the course of the grant project period.

Proposed Priority:

To meet this priority, applicants must submit a plan to predominantly serve students from families with low incomes.

The plan must include—

(a) The specific activities the applicant proposes to ensure that the project will predominantly serve students from low-income families;

(b) The timeline for implementing the activities;

(c) The parties responsible for implementing the activities;

(d) The key data sources and measures demonstrating that the project is designed to predominantly serve students from low-income families; and

(e) Evidence that at least 51 percent of the students to be served by the project are from low-income families.

When demonstrating that the project is designed to predominantly serve secondary students from low-income families, the applicant must use one or more of the following data sources and measures for projects that will serve secondary students: children aged 5 through 17 in poverty counted in the most recent census data approved by the Secretary;[39] students eligible for a free or reduced-price lunch under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 *et seq.*); students whose families receive assistance under the State program funded under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*); students who are eligible to receive medical assistance under the Medicaid program; residence in a Census tract, a set of contiguous Census tracts, an American Indian Reservation, Oklahoma Tribal Statistical Area (as defined by the U.S. Census Bureau), Alaska Native Village Statistical Area or Alaska Native Regional Corporation Area, Native Hawaiian Homeland Area, or other Tribal land as defined by the Secretary of Labor in guidance, or a county that has a poverty rate of at least 25 percent as set every 5 years using American Community Survey 5-year data; or a composite of such indicators. Applicants may use data from elementary or middle schools that feed into a secondary school to establish that 51 percent of the students to be served by the project are students from low-income families.

For projects that will serve postsecondary students, the applicant must use one or more of the following data sources to demonstrate that the project is designed to predominantly serve students from families with low-incomes: students who are recipients of Federal Pell Grants or tuition assistance from the Bureau of Indian Education; students who receive, or whose families receive, assistance under the State program funded under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*); students who are eligible to receive medical assistance under the Medicaid program; or a composite of such indicators.

Proposed Priority 5—Rural Communities

Background:

Section 114(e)(5) of Perkins V directs the Department to award no less than 25 percent of PIM grant funds to projects proposing to fund career and technical education (CTE) activities that serve: (1) LEAs with an urban-centric district locale code of 32, 33, 41, 42, or 43, as determined by the Secretary (''rural communities'');[40] (2) IHEs that primarily serve one or more areas served by such an LEA; (3) a consortium of such LEAs or IHEs; (4) a partnership between such LEAs or IHEs and an educational service agency or a nonprofit organization; or (5) a partnership between such LEAs or IHEs and a State educational agency (SEA). The 25 percent funding requirement applies, however, only if the Department receives enough applications of sufficient quality.

To confirm that proposed projects will serve students in rural communities (as defined in this notice), the Department proposes that an applicant identify the rural LEA(s), including by providing each LEA's NCES identification number, that it proposes to serve.

Proposed Priority:

To meet this priority, an applicant must demonstrate that the proposed project will serve students residing in rural communities (as defined in this notice) and identify, by name, National Center for Education Statistics (NCES) LEA identification number, and NCES locale code, the rural LEA(s) that it proposes to serve in its grant application. Applicants may retrieve locale codes from the NCES School District search tool (*nces.ed.gov/ccd/districtsearch/*).

Types of Priorities:

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Proposed Requirements

Proposed Program Requirements

Background:

We propose to establish five program requirements, with respect to the matching requirement in section 114(e)(2) of Perkins V, the programs of study offered to students by each project, the independent evaluation (as defined in this notice) required by section 114(e)(8) of Perkins V, a final MOU, and a project implementation plan and timeline. We may apply these requirements in any year in which this program is in effect.

1. *Matching Contributions.* Section 114(e)(2) of Perkins V requires grantees to make a cash or in-kind matching contribution from non-Federal sources in an amount equal to not less than 50 percent of the funds provided under the grant. We propose to clarify that the supplanting prohibition in section 211(a) of Perkins V applies to grant funds provided under this program but does not apply to the matching requirement. This proposed clarification would enable a grantee to meet the matching requirement with non-Federal

[39] The U.S. Census Bureau LEA poverty estimates are available at: *www.census.gov/data/datasets/2017/demo/saipe/2017-school-districts.html.*

[40] The National Center for Education Statistics (NCES) has established 12 geographic classifications for schools and LEAs and identified corresponding locale codes. NCES classifies schools based on the type of geographic area where a school is physically located. It then classifies LEAs based on the enrollment-weighted locale assignments of the schools operated by the LEA. If a single locale accounts for a majority of the students in the LEA's schools, that locale is also assigned to the LEA. If there is not a majority, the LEA is assigned to the locale that accounts for a plurality of enrollment-weighted schools. The LEA locale codes identified in section 114(e)(5) of Perkins V correspond to the following locales: distant town (32), remote town (33), fringe rural (41), remote rural (42), and distant rural (43).

funds that were used by a grantee to support activities allowable under this program prior to its receipt of the grant. We believe this proposed clarification is consistent with the purposes of PIM to support the development and independent evaluation of innovations that, if successful, can be implemented as alternatives or improvements to existing activities and uses of funds. We also propose to clarify that contributions provided to meet the matching requirement in section 114(e)(2) of Perkins V may accrue over the duration of the first 3 years of the grant award period and, if applicable, the final 2 years of the grant award period so long as the grantee makes progress toward meeting the matching requirement in each year of the grant award period. In other words, a grantee would not be required to match 50 percent of the amount of each annual grant award but would instead be required to match 50 percent of the total grant award provided over the first 3-year project period and to make progress in meeting the requirement every year. If the project received funding for the fourth and fifth years of the project, the grantee would be required to match 50 percent of the funds provided over this two-year period. We propose this clarification because we anticipate that grantees may find it challenging to identify matching contributions at the beginning of the project period and could more readily identify contributions once the project is underway.

Section 114(e)(2)(B) of Perkins V authorizes the Secretary to waive the 50 percent matching requirement when an applicant ''demonstrates exceptional circumstances.'' We propose to identify illustrative examples of ''exceptional circumstances'' to clarify for prospective applicants the considerations the Department would make in assessing an applicant's efforts to ''demonstrate exceptional circumstances.'' These examples are based on examples of ''exceptional circumstances'' identified in section 4611(d) of the Elementary and Secondary Education Act of 1965 (ESEA) (20 U.S.C. 7261(d)), which authorizes the Secretary to waive the 10 percent matching requirement for grants awarded under the Education Innovation and Research (EIR) program on a case-by-case basis. The EIR program is similar in purpose and design to PIM because, like PIM, EIR supports the development and evaluation of innovations.[41] In addition to the EIR examples, we are proposing to add as an example those IHEs that, in the current or preceding year, have been granted a waiver by the Department of certain non-Federal cost-sharing requirements under the Federal Work Study program, the Federal Supplemental Educational Opportunity Grants program, or the TRIO Student Support Services program. These waivers are granted to IHEs that have low education and general expenditures and serve a large proportion of students receiving need-based assistance under Title IV of the Higher Education Act of 1965.

The examples of ''exceptional circumstances'' we are proposing are illustrative only and intended to provide guidance to prospective applicants on the kinds of considerations the Department would make in assessing the merits of a waiver request. We welcome comment on these proposed examples. The Department would evaluate each waiver request on a case-by-case basis, examining the individual circumstances described by an applicant. Additionally, the Department may find other circumstances that are not described in the proposed examples to be ''exceptional'' and for which granting a waiver is appropriate.

Proposed Requirement:

(a) A grantee must provide from non-Federal sources (*e.g.,* State, local, or private sources), an amount equal to not less than 50 percent of funds provided under the grant, which may be provided in cash or through in-kind contributions, to carry out activities supported by the grant, except that the Secretary may waive the matching funds requirement, on a case-by-case basis, upon a showing of exceptional circumstances, such as (but not limited to)—

(1) The difficulty of raising matching funds for a program to serve a rural area.

(2) The difficulty of raising matching funds on Tribal land.

(3) The difficulty of raising matching funds in areas with a concentration of local educational agencies or schools with a high percentage of students aged 5 through 17—

(A) who are living in poverty, as counted in the most recent census data approved by the Secretary;

(B) who are eligible for a free or reduced-price lunch under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 *et seq.*);

(C) whose families receive assistance under the State program funded under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*); or

(D) who are eligible to receive medical assistance under the Medicaid program.

(4) The difficulty of raising matching funds by an institution of higher education that, during the current or preceding year, has been granted a waiver by the Department of certain non-Federal cost-sharing requirements under the Federal Work Study program, the Federal Supplemental Educational Opportunity Grants program, or the TRIO Student Support Services program because it has low education and general expenditures and serves a large proportion of students receiving need-based assistance under Title IV of the Higher Education Act.

(b) Non-Federal funds used by a grantee to support activities allowable under this program prior to its receipt of the grant may be used to meet the matching requirements of this program. The prohibition against supplanting non-Federal funds in section 211(a) of Perkins V applies to grant funds provided under this program but does not apply to the matching requirement.

(c) Matching funds provided by a grantee may be met over the full duration of the grant award period, rather than per year, except that the grantee must make progress towards meeting the matching requirement in each year of the grant award period.

2. *Programs of Study.* We propose to require that the programs of study offered by projects to students meet two requirements. First, we propose to require that, by no later than the end of the first year of the project, the portion of each program of study that is intended to be completed during high school be aligned with the entrance requirements for public IHEs in the State and those institutions' standards and criteria for accessing college-credit courses. We propose this requirement so that programs of study will prepare students for postsecondary education without need for remediation that could delay or prevent their completion of a postsecondary credential.

Second, we propose to require that projects offer students programs of study that culminate with an associate, baccalaureate, or advanced degree, or that lead seamlessly to and through a Registered Apprenticeship program. This proposed requirement would permit programs of study to include the attainment of an industry-recognized credential or a postsecondary certificate, but they could not be the terminal credential in the program of study. We propose this requirement so that students will have the opportunity to choose pathways that lead to credentials

[41] Section 4611(a) of ESEA authorizes the Secretary to make awards under EIR to ''create, develop, implement, replicate, or take to scale entrepreneurial, evidence-based, field-initiated innovations to improve student achievement and attainment for high-need students'' and ''rigorously evaluate such innovations.''

that have the greatest value in the labor market, and so that students can always choose to return to education as a means of lifelong learning and upskilling throughout their career advancement. Eight state-level longitudinal studies carried out by researchers associated with the Center for Analysis of Postsecondary Education and Employment, which was funded by the Institute of Education Sciences between 2011 and 2017, found that, for each quarter after college, the earnings of male and female associate degree holders were approximately $1,160 and $1,790 higher per quarter, respectively, than for persons who attended community college but did not earn a credential. In contrast, on average, male and female certificate holders earned approximately $530 and $740 more per quarter than persons who attended community college but did not earn a credential. In two of the state studies, moreover, the labor market returns to certificates were negative.[42]

Depending on field of study, the economic returns to bachelor's degrees are at least as high as those for associate degrees and are often considerably greater. Using data from the American Community Survey, Hamilton Project economists examined the lifetime earnings of adults at different levels of educational attainment for 80 fields of study. The lifetime median earnings of bachelor's degree graduates were at least as high as the lifetime median earnings of associate degree holders for all but four fields of study and were often much higher. The typical bachelor's degree holder earned $335,000 more in cumulative career earnings than what the typical associate degree graduate earned.[43]

Proposed Requirement:

By no later than the end of the first year of the project, courses in programs of study offered by grantees to students for completion during high school must be designed to meet the entrance requirements and expectations for placement in credit-bearing coursework at public, in-state IHEs. The programs of study offered to students by grantees may include opportunities to attain an industry-recognized credential or a postsecondary certificate that participating students may earn during high school but must culminate with an associate, bachelor's, or advanced degree, or completion of a Registered Apprenticeship Program, upon completion of additional postsecondary education after high school graduation.

3. *Independent Evaluation.* Section 114(e)(8) of Perkins V requires each grantee to support an independent evaluation of its project. We are proposing to require that this evaluation include the collection and reporting of a set of common indicators to measure, in accordance with Department instructions, the extent to which the grantee is implementing career-connected high schools and achieving the program objectives. These proposed indicators include, for example, the percentage of students who graduated from high schools served by the proposed project who, prior to or upon graduation, earned postsecondary credits through their successful participation in dual or concurrent enrollment programs, completed a work-based learning opportunity for which the student received wages or academic credit, and earned an industry-recognized credential. Consistent with section 114(e)(8)(B) of Perkins V, we further propose to require the evaluation to disaggregate these indicators by major racial and ethnic group and special population (as defined by section 3 of Perkins V). Additionally, the evaluation would assess the grantee's success in implementing any project-specific objectives and, consistent with the requirements of section 114(e)(8)(A) of Perkins V, collect data on the performance indicators established in section 113 of Perkins V. Data collected for the evaluation may also be used to support a grantee's request for funding for years 4 and 5 of the project. Under section 114(e) of Perkins V, the Department may extend PIM grants after 3 years for one additional 2-year period if the grantee demonstrates that the project is achieving its program objectives and, as applicable, has improved education outcomes for CTE students, including special populations.

Proposed Requirement:

(a) The independent evaluation (as defined in this notice) supported by a grantee must, in accordance with instructions and definitions provided by the Secretary, report annually the number and percentage of students who graduated from high schools served by the proposed project who, prior to or upon graduation—

(1) Earned, through their successful participation in dual or concurrent enrollment programs in academic or career and technical education subject areas —

(i) any postsecondary credits; and, separately,

(ii) 12 or more postsecondary credits.

(2) Completed 40 or more hours of work-based learning for which they received wages or academic credit, or both.

(3) Attained an industry-recognized credential that is in-demand in the local, regional, or State labor market and associated with one or more jobs with median earnings that exceed the median earnings of a high school graduate.

(4) Met, in each year of high school, with a school counselor, college adviser, career coach, or other appropriately trained adult for education and career counseling during which they reviewed and updated a personalized postsecondary educational and career plan (as defined by this notice).

(b) The outcomes described in paragraph (a) must be disaggregated by—

(1) Subgroups of students, described in section 1111(c)(2)(B) of the ESEA; and

(2) Special populations, as defined by section 3(48) of Perkins V; and

(c) The independent evaluation (as defined in this notice) supported by a grantee must also report annually on any project-specific indicators identified by the grantee.

4. *Final MOU.* Proposed Priority 2 would permit applicants submitting partnership applications to include with their applications a preliminary MOU among the partners. We propose to require grantees that submitted partnership applications to provide the Department with a final MOU within 120 days of the grant award.

Proposed Requirement:

Within 120 days of receipt of its grant award, each grantee that submitted a partnership application must submit a final memorandum of understanding (MOU) among all partner entities that describes the roles and responsibilities of the partners in carrying out the project and its activities.

5. *Project Implementation Plan and Timeline.* Proposed Priority 1 requires that each applicant submit a detailed 5-year planning and implementation plan to increase the alignment of the last 2 years of high school and the first 2 years of postsecondary education in one or more high schools. We propose a requirement that by no later than the end of the fifth year of the project, each grantee's project will implement one or more of the four pillars of career-connected learning, as described in Proposed Priority 1 for students served

[42] Belfield, C. and Bailey, T. (2017), The Labor Market Returns to Sub-Baccalaureate College: A Review. Center for Analysis of Postsecondary Education and Employment, Teachers College, Columbia University. Retrieved from: *https://ccrc.tc.columbia.edu/publications/labor-market-returns-sub-baccalaureate-college-review.html.*

[43] Hershbein, B. and M. Kearney (2014), *Major Decisions: What Graduates Earn Over Their Lifetimes.* The Hamilton Project. Retrieved from: *https://www.hamiltonproject.org/papers/major_decisions_what_graduates_earn_over_their_lifetimes.*

by the project, according to the applicant's project implementation plan. We propose this requirement to reinforce that the overall goal of the program is to implement a cohesive and integrated plan for transforming high schools to prepare all young people effectively and equitably for their futures. We recognize that some grantees will be further along in developing policies and programming related to one or more of the four pillars at the outset of the project period, while others will need more time to focus on starting up one or more of the pillars. Grantees will be required to submit an implementation report on an annual basis.

Proposed Requirement:

Each grantee must have a project plan that includes an implementation timeline with benchmarks to implement one or more of the four pillars of career-connected learning for students served by the project, as described in Proposed Priority 1, by no later than the end of the fifth year of the project. Each grantee will submit a progress report documenting progress on the implementation plan and the timeline on an annual basis.

Proposed Application Requirements:

We propose four application requirements, one relating to matching funds and three related to the course sequences of the programs of study that will be offered to students by the proposed project. We may apply these requirements in any year in which this program is in effect.

1. *Demonstration of Matching Funds.* Section 114(e)(2) of Perkins V requires each grantee to provide from non-Federal sources (*e.g.,* State, local, or private sources), an amount equal to not less than 50 percent of funds provided under the grant, which may be provided in cash or through in-kind contributions, to carry out activities supported by the grant unless the requirement is waived due to ''exceptional circumstances.'' To implement this requirement, we propose to require each applicant to include in its grant application a budget detailing the source of the matching funds or a request for a waiver of the matching requirement. An applicant seeking a waiver of the matching requirements must describe and provide evidence of the exceptional circumstances that make it difficult for the applicant to provide matching funds, and an indication as to how it would carry out its proposed project if the matching requirement is not waived.

Proposed Requirement:

(a) Each applicant must provide from non-Federal sources (*e.g.,* State, local, or private sources) an amount equal to not less than 50 percent of funds provided under the grant, which may be provided in cash or through in-kind contributions, to carry out activities supported by the grant unless it receives a waiver due to exceptional circumstances. The applicant must include in its grant application a budget detailing the source of the matching funds or a request to waive the entirety or a portion of the matching requirement due to exceptional circumstances.

(b) An applicant that is unable to meet the matching requirement must include in its application a request to the Secretary to reduce the matching requirement, including the amount of the requested reduction, the total remaining match contribution, an explanation and evidence of the exceptional circumstances that make it difficult for the applicant to provide matching funds, and an indication as to whether it can carry out its proposed project if the matching requirement is not waived.

2. *Programs of Study.* We propose to require each applicant to identify and describe in its application the course sequences in the programs of study that will be offered by schools in the proposed project, including the certificate of completion of a Registered Apprenticeship or associate, bachelor's, or advanced degree that students may earn by completing each program of study.

Proposed Requirement:

Each applicant must identify and describe in its application the course sequences in the programs of study that will be offered by high schools in the proposed project, including the associate, bachelor's, advanced degree, or certificate of completion of a Registered Apprenticeship that students may earn by completing each program of study, and how students served by the proposed project will have equitable access to such programs of study.

3. *Secondary and Postsecondary Alignment.* One of the program requirements we propose in this notice would require that, by no later than the end of the first year of the project, the secondary coursework offered to students in funded projects be designed to meet the entrance requirements and expectations for placement in credit-bearing coursework at public, in-state IHEs. We propose a complementary application requirement here. We propose this requirement in order to give peer reviewers information they need to assess the extent to which the proposed project will prepare all students for postsecondary education without need for remediation, one of the selection criteria proposed elsewhere in this notice.

Proposed Requirement:

Each applicant must describe how it has aligned or will align the secondary coursework offered to students in funded projects to meet the entrance requirements and expectations for placement in credit-bearing coursework at public, in-state IHEs. If the alignment has not been achieved at the time of application, this description must include a timeline for completion of this work by the end of the first year of the project, as well as information on the persons who will be responsible for these activities and their roles and qualifications.

4. *Articulation and Credit Transfer Agreements.* We propose to require each applicant to provide an assurance that, by no later than the end of the first year of the project, LEAs and IHEs participating in the project will execute articulation or credit transfer agreements that ensure that postsecondary credits earned by students in dual or concurrent enrollment programs supported by the project will be accepted for transfer at the participating IHE and count toward the requirements for earning culminating postsecondary credentials for programs of study offered to students through the project. We propose this requirement so that students' participation in dual or concurrent enrollment programs results in college credits that may be used to accelerate students' completion of a postsecondary credential.

Proposed Requirement:

Each applicant must include in its application an assurance that by no later than the end of the first year of the project, LEAs, and IHEs participating in the project will execute articulation or credit transfer agreements that ensure that postsecondary credits earned by students in dual or concurrent enrollment programs supported by the project will be accepted for transfer at each participating IHE and count toward the requirements for earning culminating postsecondary credentials for programs of study offered to students through the project.

Proposed Definitions:

The Secretary proposes the following definitions for this program. We may apply these definitions in any year in which this program is in effect.

Independent evaluation means an evaluation that is designed and carried out independent of and external to the grantee but in coordination with any employees of the grantee who developed a project component that is

currently being implemented as part of the grant activities.

Industry-recognized credential means a credential that is—

(a) Developed and offered by, or endorsed by, a nationally recognized industry association or organization representing a sizable portion of the industry sector, or a product vendor;

(b) Awarded in recognition of an individual's attainment of measurable technical or occupational skills; and

(c) Sought or accepted by multiple employers within an industry or sector as a recognized, preferred, or required credential for recruitment, hiring, retention, or advancement.

Personalized postsecondary educational and career plan means a plan, developed by the student and, to the greatest extent practicable, the student's family or guardian, in collaboration with a school counselor or other individual trained to provide career guidance and academic counseling (as defined in section 3(7) of Perkins V), that is used to help establish personalized academic and career goals, explore postsecondary and career opportunities, identify programs of study and work-based learning that advance the student's personalized postsecondary education and career goals, and establish appropriate milestones and timelines for tasks important to preparing for success after high school, including applying for postsecondary education and student financial aid, preparing a resume, and completing applications for employment.

Rural community means an area served by an LEA with an urban-centric district locale code of 32, 33, 41, 42, or 43, as determined by the Secretary and defined by the National Center for Education Statistics (NCES) Locale framework.

Proposed Selection Criteria

Background:

We propose the following selection criteria for evaluating an application under this program. We may apply one or more of these criteria in any year in which this program is in effect. We propose that the Department may use one or more of the selection criteria established in the notice of final priorities, requirements, definitions, and selection criteria; any of the selection criteria in 34 CFR 75.210; or criteria based on the statutory requirements for the PIM program, in accordance with 34 CFR 75.209. In the NIA, we will announce the maximum possible points assigned to each criterion.

Proposed Selection Criteria

(a) *Significance.*

In determining the significance of the proposed project, the Department proposes to consider one or more of the following factors:

(1) The extent to which the proposed project addresses a regional or local labor market need identified through a comprehensive local needs assessment carried out under section 134(c) of Perkins V or labor market information produced by the State or other entity that demonstrates the proposed project will address State, regional, or local labor market needs.

(2) The extent to which the proposed project demonstrates that it will serve students who are predominantly from low-income families.

(3) The extent to which the proposed project addresses significant barriers to enrollment and completion in dual or concurrent enrollment programs and will expand access to these programs for students served by the project.

(b) *Quality of the project design.*

In determining the quality of the project design, the Department proposes to consider one or more of the following factors:

(1) The extent to which the proposed project is likely to be effective in increasing the successful participation in dual or concurrent enrollment programs (as defined by section 3 of Perkins V) by students who are not currently participating in such programs, and the likely magnitude of the increase.

(2) The extent to which the proposed project will increase the successful participation in work-based learning opportunities (as defined by section 3 of Perkins V) for which they received wages or academic credit, or both, prior to graduation by students who are not currently participating in such opportunities, and the likely magnitude of the increase.

(3) The extent to which the proposed project is likely to be effective in increasing successful participation in opportunities to attain an in-demand and high-value industry-recognized credential that is sought or accepted by multiple employers within an industry or sector as a recognized, preferred, or required credential for recruitment, hiring, retention, or advancement by students who are not currently participating in such opportunities, and the likely magnitude of the increase.

(4) The extent to which the proposed project will implement strategies that are likely to be effective in eliminating or mitigating barriers to the successful participation by all students in dual or concurrent programs (as defined by section 3 of Perkins V), work-based learning opportunities (as defined by section 3 of Perkins V), and opportunities to attain in-demand and high-value industry-recognized credentials (as defined in this notice), including such barriers as the out-of-pocket costs of tuition, books, and examination fees; transportation; and eligibility requirements that do not include multiple measures of assessing academic readiness.

(5) The extent to which the proposed project will provide all students effective and ongoing career guidance and academic counseling (as defined by section 3 of Perkins V) in each year of high school that—

(A) Will likely result, by no later than the end of the second year of the project, in a personalized postsecondary education and career plan for each student that is updated at least once annually with the assistance of a school counselor, career coach, mentor, or other adult trained to provide career guidance and counseling to high school students; and

(B) Includes the provision of current labor market information about careers in high-demand fields that pay living wages; advice and assistance in identifying, preparing for, and applying for postsecondary educational opportunities; information on Federal student financial aid programs; and assistance in applying for Federal student financial aid.

(6) The extent to which the proposed project is likely to prepare all students served by the project to enroll in postsecondary education following high school without need for remediation.

(c) *Quality of the management plan.*

In determining the quality of the management plan, the Department proposes to consider one or more of the following factors:

(1) The extent to which the project goals are clear, complete, and coherent, and the extent to which the project activities constitute a complete plan aligned to those goals, including the identification of potential risks to project success and strategies to mitigate those risks;

(2) The extent to which the management plan articulates key responsibilities for each party involved in the project and also articulates well-defined objectives, including the timelines and milestones for completion of major project activities, the metrics that will be used to assess progress on an ongoing basis, and annual performance targets the applicant will use to monitor whether the project is achieving its goals;

(3) The adequacy of the project's staffing plan, particularly for the first year of the project, including:

(A) The identification of the project director and, in the case of projects with unfilled key personnel positions at the beginning of the project, a description of how critical work will proceed; and

(B) The extent to which the project director has experience managing projects similar in scope to that of the proposed project.

(4) The extent of the demonstrated commitment of any partners whose participation is critical to the project's long-term success, including the extent of any evidence of support or specific resources from employers and other stakeholders.

(5) The extent to which employers in the labor market served by the proposed project will be involved in making decisions with respect to the project's implementation and in carrying out its activities.

(d) *Support for rural communities.* In determining the extent of the project's support for rural communities, the Department proposes to consider one or more of the following factors:

(1) The extent to which the applicant presents a clear, well-documented plan for primarily serving students from rural communities.

(2) The extent to which the applicant proposes a project that will improve the education and employment outcomes of students in rural communities.

Specific Requests for Comment

We invite you to submit comments regarding the proposed priorities, requirements, definitions, and selection criteria. To ensure that your comments have maximum effect in developing the final notice, we urge you to clearly identify the specific section of the proposed priorities, requirements, definitions, and selection criteria that each comment addresses.

The Department is particularly interested in comments on:

• Whether there are additional appropriate data sources demonstrating economic disadvantage that may also be appropriate sources for family income that applicants could use to demonstrate that a project will predominantly serve students from families with low incomes;

• Whether there are additional factors the Department should consider in assessing an applicant's efforts to ''demonstrate exceptional circumstances'' that merit a waiver of the 50 percent matching requirement, and whether additional examples should be included.

• Whether there are important aspects of assessing the likelihood of project success that the proposed selection criteria do not address; and

• Whether there is ambiguity in the language of specific selection criteria that would make it difficult for applicants to respond to the criteria and for peer reviewers to evaluate applications with respect to the selection criteria.

Final Priorities, Requirements, Definitions, and Selection Criteria

We will announce the final priorities, requirements, definitions, and selection criteria in a notice in the **Federal Register**. We will determine the final priorities, requirements, definitions, and selection criteria after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use these proposed priorities and one or more of these proposed priorities, requirements, definitions, and selection criteria, we invite applications through a notice in the **Federal Register**.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, as modified by Executive Order 14094, the Secretary must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866, as modified, defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities (also referred to as an ''economically significant'' rule);

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles stated in the Executive Order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866, as modified.

We have also reviewed this proposed regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866, as modified. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these proposed priorities, requirements, definitions, and selection criteria only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the

analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, territorial, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

Summary of Costs and Benefits: The Department believes that these proposed priorities, requirements, selection criteria, and definitions would not impose significant costs on applicants applying for assistance under section 114 of Perkins V. We also believe that the benefits of implementing the proposed priorities, requirements, definitions, and selection criteria justify any associated costs.

The Department believes that the proposed priorities, requirements, definitions, and selection criteria would help to ensure that grants provided under section 114(e) of Perkins V are awarded only for allowable, reasonable, and necessary costs; and eligible applicants consider carefully in preparing their applications how the grants may be used to improve student success in secondary education, postsecondary education, and careers. The proposed priorities, program requirements, selection criteria, and related definitions are necessary to ensure that taxpayer funds are expended appropriately.

The Department further believes that the costs imposed on an applicant by the proposed priorities, requirements, selection criteria, and definitions would be largely limited to the paperwork burden related to meeting the application requirements and that the benefits of preparing an application and receiving an award would justify any costs incurred by the applicant. The costs of these proposed requirements and definitions would not be a significant burden for any eligible applicant.

Elsewhere in this section under Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). This helps ensure that the public understands the Department's collection instructions, respondents provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The proposed requirements contain information collection requirements. Under the PRA the Department has submitted these requirements to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of the law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the notice of final priorities, requirements, definitions, and selection criteria we will display the control number assigned by OMB to any information collection proposed in this document and adopted in the notice of final priorities, requirements, definitions, and selection criteria.

For the years that the Department holds a PIM grant competition, we estimate 150 entities will apply and submit an application. We estimate that it will take each applicant 40 hours to complete and submit the application, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. The total burden hour estimate for this collection is 6,000 hours. At $97.82 per hour (using mean wages for Education and Childcare Administrators [44] and assuming the total cost of labor, including benefits and overhead, is equal to 200 percent of the mean wage rate), the total estimated cost for 150 applicants to complete the PIM application is approximately $583,680. The Department is requesting paperwork clearance on the OMB 1830–NEW data collection associated with this proposed requirement. That request will account for all burden hours and costs discussed within this section.

Consistent with 5 CFR 1320.8(d), the Department is soliciting comments on the information collection. We must receive your comments on the collection activities contained in these proposed priorities, requirements, definitions, and selection criteria on or before June 15, 2023. Comments related to the information collection activities must be submitted electronically through the Federal eRulemaking Portal at *www.regulations.gov* by selecting the Docket ID number ED–2023–OCTAE–0048 or via postal mail, commercial delivery, or hand delivery by referencing the Docket ID number and the title of the information collection request at the top of your comment. Comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Avenue SW, Room 6W208D, Washington, DC 20202–8240.

Note: The Office of Information and Regulatory Affairs and the Department review all comments related to the information collection activities posted at *www.regulations.gov.*

COLLECTION OF INFORMATION

Information collection activity	Estimated number of responses	Hours per response	Total estimated burden hours	Estimated cost at an hourly rate of $97.82
PIM Application	150	40	6,000	$583,680

[44] See *http://www.bls.gov/oes/current/oes_nat.htm.*

We consider your comments on this proposed collection of information in—

• Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;

• Evaluating the accuracy of our estimate of the burden of the proposed collection, including the validity of our methodology and assumptions;

• Enhancing the quality, usefulness, and clarity of the information we collect; and

• Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism. The Executive Order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: On request to the person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Amy Loyd,

Assistant Secretary for Career, Technical, and Adult Education.

[FR Doc. 2023–10220 Filed 5–15–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1, 11, and 41

[Docket No. PTO–C–2023–0010]

RIN 0651–AD67

Changes to the Representation of Others in Design Patent Matters Before the United States Patent and Trademark Office

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Patent and Trademark Office (USPTO or Office) proposes to amend the rules of practice in patent cases and the rules regarding the representation of others before the USPTO to create a separate design patent practitioner bar whereby admitted design patent practitioners would practice in design patent proceedings only. Presently, there is only one patent bar that applies to those who practice in patent matters before the Office, including in utility, plant, and design patents. The potential creation of a design patent practitioner bar would not impact the ability of those already registered to practice in any patent matters, including design patent matters, before the USPTO to continue to practice in any patent matters before the Office. Furthermore, it would not impact the ability of applicants for registration who meet the current criteria, including qualifying for and passing the current registration exam, to practice in any patent matters before the Office, including design patent matters. Expanding the admission criteria of the patent bar would encourage broader participation and keep up with the ever-evolving technology and related teachings that qualify someone to practice before the USPTO.

DATES: Written comments must be received on or before August 14, 2023.

ADDRESSES: For reasons of government efficiency, comments must be submitted through the Federal eRulemaking Portal at *www.regulations.gov.* To submit comments via the portal, one should enter docket number PTO–C–2023–0010 on the homepage and click ''search.'' The site will provide search results listing all documents associated with this docket. Commenters can find a reference to this proposed rule and click on the ''Comment'' icon, complete the required fields, and enter or attach their comments. Attachments to electronic comments will be accepted in Adobe® portable document format (PDF) or Microsoft Word® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of or access to comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Will Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline (OED), at 571–272–4097; Erin Harriman, Senior Legal Advisor, Office of Patent Legal Administration, at 571–272–7701; and Scott C. Moore, Acting Vice Chief Administrative Patent Judge, Patent Trial and Appeal Board, at 571–272–9797.

SUPPLEMENTARY INFORMATION: The Director of the USPTO has statutory authority to require a showing by patent practitioners that they possess ''the necessary qualifications to render applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.'' 35 U.S.C. 2(b)(2)(D). Courts have determined that the USPTO Director bears the primary responsibility for protecting the public from unqualified practitioners. *See Hsuan-Yeh Chang* v. *Kappos,* 890 F. Supp. 2d 110, 116–17 (D.D.C. 2012) (''Title 35 vests the [Director of the USPTO], not the courts, with the responsibility to protect [US]PTO proceedings from unqualified practitioners.'') (quoting *Premysler* v. *Lehman,* 71 F.3d 387, 389 (Fed. Cir. 1995)), aff'd sub nom., *Hsuan-Yeh Chang* v. *Rea,* 530 F. App'x 958 (Fed. Cir. 2013).

Pursuant to that authority and responsibility, the USPTO has promulgated regulations, administered by OED, that provide that registration to practice in patent matters before the

USPTO requires a practitioner to demonstrate possession of ''the legal, scientific, and technical qualifications necessary for him or her to render applicants valuable service.'' 37 CFR 11.7(a)(2)(ii). The Office determines whether an applicant possesses the legal qualification by administering a registration examination, which applicants for registration must pass before being admitted to practice. *See* 37 CFR 11.7(b)(ii). To take the registration exam, applicants must first demonstrate they possess specific scientific and technical qualifications. The USPTO sets forth guidance for establishing possession of these scientific and technical qualifications in the General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office (GRB), available at *www.uspto.gov/sites/default/files/documents/OED_GRB.pdf.* The GRB also contains the ''Application for Registration to Practice before the United States Patent and Trademark Office.''

The criteria for practicing before the Office are and continue to be based in part on a determination of the types of scientific and technical qualifications and legal knowledge that are essential for practitioners to possess. This helps ensure that only competent practitioners who understand the applicable rules and regulations and have the background necessary to describe inventions in a full and clear manner are permitted to practice.

Currently, there is only one patent bar that applies to those who practice in patent matters before the Office, including in utility, plant, and design patents. The same scientific and technical requirements for admission to practice apply regardless of the type of patent application (that is, whether the application is a utility patent application, a plant patent application, or a design patent application). On October 18, 2022, the USPTO published a request for comments in which it requested comments on the potential creation of a design patent practitioner bar. *See* Expanding Admission Criteria for Registration To Practice in Patent Cases Before the United States Patent and Trademark Office (87 FR 63044). On January 19, 2023, the USPTO extended the response period. *See* Expanding Admission Criteria for Registration To Practice in Patent Cases Before the United States Patent and Trademark Office (88 FR 3394). On January 31, 2023, the comment period closed. The Office received a number of comments both in support of and opposed to the creation of a separate design patent practitioner bar.

The request for comments asked: (1) whether a separate design patent practitioner bar should be created; and (2) if so, how applicants would be admitted to the bar, and what standards would apply to enable one to become a design patent practitioner. The Office received 21 comments in response to the request. Thirteen of those comments were in favor of creating a design patent practitioner bar, while eight of those comments were opposed. A number of comments in favor of the proposal noted that a design patent practitioner bar would: (1) align the criteria for design patent practitioners with those of design patent examiners at the USPTO; (2) improve design patent practitioner quality and representation; (3) allow more under-represented groups to practice design patent law and aid more under-represented inventors in acquiring patents; (4) enable individuals with valuable knowledge of design to aid design patent prosecution; (5) lower the costs of obtaining design patents by promoting competition among practitioners; (6) ensure consistent, high-quality patents via qualified practitioners; (7) enlarge the pool of available service providers, including those practitioners whose background may be more tailored to the needs of a patent applicant; and (8) increase economic opportunities for design practitioners by allowing them to access a new market for the provision of their professional services.

The request posited three different options for implementing a design patent practitioner bar. These included requiring design patent practitioner bar applicants to: (1) take the current registration examination, but with modified scientific and technical requirements; (2) be a U.S. attorney (*i.e.,* an active member in good standing of the bar of the highest court of any State); or (3) take a separate design bar examination instead of the current registration examination.

The majority of those who were in favor of creating and implementing a design patent practitioner bar preferred the first option, namely, that design patent practitioner bar applicants would be required to take the current registration examination, but the scientific and technical requirements would be modified. Those who were in favor of this option noted that if the modified scientific and technical requirements included design degrees, the patent quality of design patents would increase because individuals with design degrees would be better able to prepare and prosecute design patent applications. Additionally, commenters noted that this option could increase the pool of potential applicants, which could lead to beneficial procompetitive effects. Lastly, this option would mirror the hiring practices of the USPTO for design patent examiners in that the same degrees would enable the practice of design patent examination in the Office and in prosecution before the Office.

Therefore, based on the support of stakeholders and commenters, this proposed rulemaking would implement the first option. Under this option, the applicant should have a bachelor's, master's, or doctorate of philosophy degree in any of the following areas from an accredited college or university: industrial design, product design, architecture, applied arts, graphic design, fine/studio arts, or art teacher education, or a degree equivalent to one of the listed degrees. Accepting degrees equivalent to those design degrees listed above is in line with the current practice of accepting degrees that are equivalent to those listed in the GRB under Category A. These degrees are currently acceptable for those applying for design examiner positions with the Office. To ensure applicants to the design patent practitioner bar have the requisite knowledge of USPTO rules and regulations, the USPTO would also require them to take and pass the current registration examination. Applicants would also be required to undergo and pass a moral character evaluation. The evaluation would be the same evaluation that is currently conducted for patent bar applicants, and is described in the GRB.

As mentioned above, admitted design patent practitioners may practice in design patent matters only. Patent practitioners admitted in the past, present, and future who have fulfilled the scientific and technical requirements as enumerated in the GRB in Categories A through C will be authorized to practice in all patent matters, including in utility, plant, and design patents.

Discussion of Proposed Rule Changes

The USPTO proposes to amend § 1.4(d)(1) to add the requirement that a design patent practitioner indicate their design patent practitioner status by placing the word ''design'' adjacent to their handwritten signature.

The USPTO proposes to amend § 1.4(d)(2)(ii) to add the requirement that a design patent practitioner indicate their design patent practitioner status by placing the word ''design'' adjacent to the last forward slash of their S-signature.

The USPTO proposes to amend § 1.32 to update the definition of ''practitioner'' in light of the proposed amendments to § 11.6(d).

A power of attorney naming the practitioners associated with a customer number filed in an application may only include practitioners who are authorized to practice in that application. For example, a purported power of attorney naming a customer number listing a non-inventor design patent practitioner may not be appropriately filed in a utility or plant patent application, as that design patent practitioner is not authorized to practice in that application.

The USPTO proposes to amend § 11.1 to add a definition for ''design patent practitioner.''

The USPTO proposes to amend § 11.1 to amend paragraph (1) under the definition of ''practitioner'' to refer to § 11.6.

The USPTO proposes to amend § 11.1 to amend the definition of ''register or roster'' to include design patent practitioners.

The USPTO proposes to amend § 11.5 to amend paragraph (b)(1) to remove ''public use'' proceedings, which are no longer held, and insert ''derivation'' proceedings; re-designate paragraph (b)(2) as paragraph (b)(3); and insert a new paragraph (b)(2), which would define practice before the Office in design patent matters.

The USPTO proposes to amend § 11.6 to re-designate paragraph (d) as paragraph (e), and insert a new paragraph (d) to clarify the parameters under which attorneys and agents may be registered as design patent practitioners.

The USPTO proposes to amend § 11.8(b) to require design patent practitioners to submit an oath or declaration under the same parameters as other registered practitioners.

The USPTO proposes to amend § 11.10(b) to restrict former employees of the USPTO from serving as design patent practitioners, commensurate with the restrictions placed on other registered practitioners.

The USPTO proposes to amend § 11.16(c) to clarify that only a practitioner registered under § 11.6(a) or (b) may serve as a Patent Faculty Clinic Supervisor in the USPTO Law School Clinic Certification Program.

The USPTO proposes to amend § 11.704 to state that a registered practitioner under § 11.6(a) who is an attorney may use the designation ''Patents,'' ''Patent Attorney,'' ''Patent Lawyer,'' ''Registered Patent Attorney,'' or a substantially similar designation; a registered practitioner under § 11.6(b) who is not an attorney may use the designation ''Patents,'' ''Patent Agent,'' ''Registered Patent Agent,'' or a substantially similar designation; a registered practitioner under § 11.6(d) who is an attorney may use the designation ''Design Patent Attorney''; and a registered practitioner under § 11.6(d) who is not an attorney (*i.e.,* who is an agent) may use the designation ''Design Patent Agent.''

The USPTO proposes to amend § 41.106 by replacing the term ''registered patent practitioner'' with ''registered practitioner.'' This amendment is intended solely to conform the terminology of this section to that used elsewhere in part 41, and is not intended to alter the substantive scope of § 41.106. For avoidance of doubt, the USPTO clarifies that if the amendments specified in this proposed rule are adopted, the term ''registered practitioner,'' as used in parts 41 and 42, and the term ''USPTO patent practitioner,'' as used in § 42.57, would encompass ''design patent practitioners,'' as defined in the proposed amendments to § 11.1.

Rulemaking Requirements

A. Regulatory Flexibility Act: For the reasons set forth in this rulemaking, the Senior Counsel for Regulatory and Legislative Affairs, Office of General Law, of the USPTO, has certified to the Chief Counsel for Advocacy of the Small Business Administration that the changes proposed in this rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

This proposed rule would amend the rules regarding the representation of others before the USPTO to create a separate design patent practitioner bar in which admitted design patent practitioners would practice in design patent proceedings only. Presently, there is only one patent bar that applies to those who practice in patent matters before the Office, including in the utility, plant, and design patent areas. The potential creation of a design patent practitioner bar would not impact the ability of those already registered to practice in any patent matters, including design patent matters, before the USPTO. Furthermore, it would not impact the ability of applicants who meet the current criteria, including qualifying for and passing the current registration exam, to practice in any patent matters before the Office.

The Regulatory Flexibility Act of 1980 (RFA) requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. *See* 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996). The term ''small entities'' is comprised of small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An ''individual'' is not defined by the RFA as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered as costs for RFA purposes.

This rulemaking would create a separate design patent practitioner bar that would only impact individuals who apply for recognition to practice before the USPTO in design patent proceedings, and would not directly impact any small businesses. Additionally, the proposed changes do not add requirements or costs beyond those that currently exist for applicants or members to the USPTO practitioner bar. The proposed changes only expand the applicants that can represent certain matters before the USPTO. Applicants to the design patent practitioner bar would be expected to pay the same application and examination fee as applicants who want to practice in all patent matters, and be subject to existing requirements and procedures during the application process (for example, the same application and supporting documentation would be required of all applicants). Accordingly, the changes are expected to be of minimal or no additional burden to those practicing before the Office.

The Office acknowledges that the creation of a design patent practitioner bar would allow more practitioners to be recognized to practice before the USPTO, although they would be limited to design patent proceedings only. The Office considers these to be indirect impacts that are not considered to be costs for RFA purposes, but the Office welcomes any comments or data that may further inform the impact of this proposed rule.

For the reasons discussed above, this rulemaking will not have a significant economic impact on a substantial number of small entities.

B. Executive Order 12866 (Regulatory Planning and Review): This rulemaking has been determined to be not significant for purposes of E.O. 12866 (Sept. 30, 1993).

C. Executive Order 13563 (Improving Regulation and Regulatory Review): The Office has complied with E.O. 13563 (Jan. 18, 2011). Specifically, the Office has, to the extent feasible and applicable: (1) made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the 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 and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

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

E. 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 E.O. 13175 (Nov. 6, 2000).

F. Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under E.O. 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 E.O. 13211 (May 18, 2001).

G. 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 E.O. 12988 (Feb. 5, 1996).

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

I. Executive Order 12630 (Taking of Private Property): This rulemaking will not effect a taking of private property or otherwise have taking implications under E.O. 12630 (Mar. 15, 1988).

J. 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.*), prior to issuing any final rule, the USPTO will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the 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 U.S.-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).

K. Unfunded Mandates Reform Act of 1995: The proposed changes 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.*

L. 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.*

M. 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.

N. Paperwork Reduction Act of 1995: The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) requires that the Office consider the impact of paperwork and other information collection burdens imposed on the public. This rulemaking involves information collection requirements that are subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The collections of information involved in this rulemaking have been reviewed and previously approved by OMB under OMB control numbers 0651–0012 (Admission to Practice and Roster of Registered Patent Attorneys and Agents Admitted to Practice Before the USPTO) and 0651–0017 (Practitioner Conduct and Discipline). These information collections will be updated, alongside any final rulemaking, to reflect any updated forms included within these information collections. Any increased respondent and burden numbers associated with the introduction of the design patent bar options will be included in that update.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information has a currently valid OMB control number.

O. 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

37 CFR Part 1

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

37 CFR Part 11

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

37 CFR Part 41

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the USPTO proposes to amend 37 CFR parts 1, 11, and 41 as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

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

■ 2. Amend § 1.4 by revising paragraphs (d)(1) and (d)(2)(ii) to read as follows:

§ 1.4 Nature of correspondence and signature requirements.

* * * * *

(d)(1) *Handwritten signature.* A design patent practitioner must indicate their design patent practitioner status by placing the word ''design'' adjacent to their handwritten signature. Each piece of correspondence, except as provided in paragraphs (d)(2), (d)(3), (d)(4), (e), and (f) of this section, filed in an application, patent file, or other proceeding in the Office that requires a person's signature, must:

* * * * *

(2) * * *

(ii) A patent practitioner (§ 1.32(a)(1)), signing pursuant to §§ 1.33(b)(1) or 1.33(b)(2), must supply their registration number either as part of the S-signature or immediately below or adjacent to the S-signature. The hash (#) character may only be used as part of the S-signature when appearing before a practitioner's registration number; otherwise, the hash character may not be used in an S-signature. A design patent practitioner must additionally indicate their design patent practitioner status by placing the word ''design'' adjacent to the last forward slash of their S-signature.

* * * * *

■ 3. Amend § 1.32 by revising paragraph (a)(1) to read as follows:

§ 1.32 Power of attorney.

(a) * * *

(1) *Patent practitioner* means a registered patent attorney or registered patent agent under § 11.6. An attorney or agent registered under § 11.6(d) may only act as a practitioner in design patent applications or other design patent matters or design patent proceedings.

* * * * *

PART 11—REPRESENTATION OF OTHERS BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE

■ 4. The authority citation for part 11 continues to read as follows:

Authority: U.S.C. 500; 15 U.S.C. 1123; 35 U.S.C. 2(b)(2), 32, 41; Sec. 1, Pub. L. 113–227, 128 Stat. 2114.

■ 5. Amend § 11.1 by:

■ a. Adding, in alphabetical order, the definition for ''Design patent practitioner,'' and

■ b. Revising the definitions of ''Practitioner'' and ''Roster or register.''

The addition and revisions read as follows:

§ 11.1 Definitions.

* * * * *

Design patent practitioner means a practitioner who is registered under § 11.6(d).

* * * * *

Practitioner means:

(1) An attorney or agent registered to practice before the Office in patent matters under § 11.6;

(2) An individual authorized under 5 U.S.C. 500(b), or otherwise as provided by § 11.14(a), (b), and (c), to practice before the Office in trademark matters or other non-patent matters;

(3) An individual authorized to practice before the Office in patent matters under § 11.9(a) or (b); or

(4) An individual authorized to practice before the Office under § 11.16(d).

* * * * *

Roster or *register* means a list of individuals who have been registered as a patent attorney, patent agent, or design patent practitioner.

* * * * *

■ 6. Amend § 11.5 by:

■ a. Revising paragraph (b)(1),

■ b. Re-designating paragraph (b)(2) as (b)(3), and

■ c. Adding new paragraph (b)(2).

The revisions and addition read as follows:

§ 11.5 Register of attorneys and agents in patent matters; practice before the Office.

* * * * *

(b) * * *

(1) *Practice before the Office in patent matters.* Practice before the Office in patent matters includes, but is not limited to, preparing or prosecuting any patent application; consulting with or giving advice to a client in contemplation of filing a patent application or other document with the Office; drafting the specification or claims of a patent application; drafting an amendment or reply to a communication from the Office that may require written argument to establish the patentability of a claimed invention; drafting a reply to a communication from the Office regarding a patent application; and drafting a communication for an interference, derivation, and/or reexamination proceeding, a petition, an appeal to or any other proceeding before the Patent Trial and Appeal Board, or any other patent proceeding. Registration to practice before the Office in patent matters authorizes the performance of those services that are reasonably necessary and incident to the preparation and prosecution of patent applications or other proceedings before the Office involving a patent application or patent in which the practitioner is authorized to participate. The services include:

(i) Considering the advisability of relying upon alternative forms of protection which may be available under State law, and

(ii) Drafting an assignment or causing an assignment to be executed for the patent owner in contemplation of filing or prosecution of a patent application for the patent owner, where the practitioner represents the patent owner after a patent issues in a proceeding before the Office, and when drafting the assignment the practitioner does no more than replicate the terms of a previously existing oral or written obligation of assignment from one person or party to another person or party.

(2) *Practice before the Office in design patent matters.* (i) Practice before the Office in design patent matters includes, but is not limited to, preparing or prosecuting a design patent application; consulting with or giving advice to a client in contemplation of filing a design patent application or other document with the Office; drafting the specification or claim of a design patent application; drafting an amendment or reply to a communication from the Office that may require written argument to establish the patentability of a claimed design invention; drafting a reply to a communication from the Office regarding a design patent application; and drafting a communication for an interference, derivation, and/or reexamination proceeding, a petition, an appeal to or any other design patent proceeding before the Patent Trial and Appeal Board, or any other design patent proceeding.

(ii) Design patent registration to practice before the Office in design patent matters authorizes the performance of those services that are reasonably necessary and incident to the preparation and prosecution of design patent applications or other proceedings before the Office involving a design patent application or design patent in which the practitioner is authorized to participate. The services include:

(A) Considering the advisability of relying upon alternative forms of protection which may be available under State law, and

(B) Drafting an assignment or causing an assignment to be executed for the design patent owner in contemplation of filing or prosecution of a design patent application for the design patent owner,

where the design patent practitioner represents the design patent owner after a design patent issues in a proceeding before the Office, and when drafting the assignment the design patent practitioner does no more than replicate the terms of a previously existing oral or written obligation of assignment from one person or party to another person or party.

* * * * *

■ 7. Amend § 11.6 by:

■ a. Re-designating paragraph (d) as paragraph (e), and

■ b. Adding new paragraph (d).

The revision and addition read as follows:

§ 11.6 Registration of attorneys and agents.

* * * * *

(d) *Design patent practitioners.* Any citizen of the United States who is an attorney and who fulfills the requirements of this part may be registered as a design patent attorney to practice before the Office in design patent proceedings. Any citizen of the United States who is not an attorney, and who fulfills the requirements of this part may be registered as a design patent agent to practice before the Office in design patent proceedings.

* * * * *

■ 8. Amend § 11.8 by revising paragraph (b) to read as follows:

§ 11.8 Oath and registration fee.

* * * * *

(b) An individual shall not be registered as an attorney under § 11.6(a), registered as an agent under § 11.6(b) or (c), registered as a design patent practitioner under § 11.6(d), or granted limited recognition under § 11.9(b) unless, within two years of the mailing date of a notice of passing the registration examination or of a waiver of the examination, the individual files with the OED Director a completed Data Sheet, an oath or declaration prescribed by the USPTO Director, and the registration fee set forth in § 1.21(a)(2) of this subchapter. An individual seeking registration as an attorney under § 11.6(a) must provide a certificate of good standing of the bar of the highest court of a State that is no more than six months old.

* * * * *

■ 9. Amend § 11.10 by revising paragraph (b)(1) introductory text and (b)(2) introductory text to read as follows:

§ 11.10 Restrictions on practice in patent matters; former and current Office employees; government employees.

* * * * *

(b) * * *

(1) To not knowingly act as an agent, attorney, or design patent practitioner for or otherwise represent any other person:

* * * * *

(2) To not knowingly act within two years after terminating employment by the Office as agent, attorney, or design patent practitioner for, or otherwise represent any other person:

* * * * *

■ 10. Amend § 11.16 by revising paragraph (c)(1)(i) to read as follows:

§ 11.16 Requirements for admission to the USPTO Law School Clinic Certification Program.

* * * * *

(c) * * *

(1) * * *

(i) Be registered under § 11.6(a) or (b) as a patent practitioner in active status and good standing with OED;

* * * * *

■ 11. Amend § 11.704 by revising paragraph (b) to read as follows:

§ 11.704 Communication of fields of practice and specialization.

* * * * *

(b) A registered practitioner under § 11.6(a) who is an attorney may use the designation ''Patents,'' ''Patent Attorney,'' ''Patent Lawyer,'' ''Registered Patent Attorney,'' or a substantially similar designation. A registered practitioner under § 11.6(b) who is not an attorney may use the designation ''Patents,'' ''Patent Agent,'' ''Registered Patent Agent,'' or a substantially similar designation. A registered practitioner under § 11.6(d) who is an attorney may use the designation ''Design Patent Attorney.'' A registered practitioner under § 11.6(d) who is not an attorney may use the designation ''Design Patent Agent.'' Unless authorized by § 11.14(b), a registered patent agent shall not hold themself out as being qualified or authorized to practice before the Office in trademark matters or before a court.

* * * * *

PART 41—PRACTICE BEFORE THE PATENT TRIAL AND APPEAL BOARD

■ 12. The authority citation for part 41 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), 3(a)(2)(A), 21, 23, 32, 41, 134, 135, and Pub. L. 112–29.

■ 13. Amend § 41.106 by revising paragraph (f)(4) to read as follows:

§ 41.106 Filing and service.

* * * * *

(f) * * *

(4) A certificate made by a person other than a registered practitioner must be in the form of an affidavit.

Katherine K. Vidal,

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

[FR Doc. 2023–10410 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 230510–0129; RTID 0648–XC872]

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications; 2023–2024 Annual Specifications and Management Measures for Pacific Sardine

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement annual harvest specifications and management measures for the northern subpopulation of Pacific sardine (hereafter, Pacific sardine), for the fishing year from July 1, 2023, through June 30, 2024. The proposed action would prohibit most directed commercial fishing for Pacific sardine off the coasts of Washington, Oregon, and California. Pacific sardine harvest would be allowed only for use as live bait, in minor directed fisheries, as incidental catch in other fisheries, or as authorized under exempted fishing permits. The incidental harvest of Pacific sardine would be limited to 20 percent by weight of all fish per trip when caught with other stocks managed under the Coastal Pelagic Species Fishery Management Plan, or up to 2 metric tons per trip when caught with non-Coastal Pelagic Species stocks. The proposed annual catch limit for the 2023–2024 Pacific sardine fishing year is 3,953 metric tons. This proposed rule is intended to conserve, manage, and rebuild the Pacific sardine stock off the U.S. West Coast.

DATES: Comments must be received by May 31, 2023.

ADDRESSES: You may submit comments on this document, identified by NOAA–

NMFS–2023–0036, by the following method:

• *Electronic Submissions:* Submit all public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0036 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method 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, etc.), 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).

FOR FURTHER INFORMATION CONTACT: Taylor Debevec, West Coast Region, NMFS, (562) 619–2052, *Taylor.Debevec@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS manages the Pacific sardine fishery in the U.S. exclusive economic zone (EEZ) off the Pacific coast (California, Oregon, and Washington) in accordance with the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). The CPS FMP and its implementing regulations require NMFS to set annual catch levels for the Pacific sardine fishery based on the annual specification framework and control rules in the FMP. These control rules include the harvest guideline (HG) control rule, which, in conjunction with the overfishing limit (OFL) and acceptable biological catch (ABC) rules in the FMP, are used to manage harvest levels for Pacific sardine, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1801 *et seq.*

During public meetings each year, the NMFS Southwest Fisheries Science Center (SWFSC) presents the estimated biomass for Pacific sardine to the Pacific Fishery Management Council (Council), including the Council's CPS Management Team (Team), CPS Advisory Subpanel (Subpanel), and Scientific and Statistical Committee (SSC). The Team, Subpanel, and SSC review the biomass and the status of the fishery, and recommend applicable catch limits and additional management measures. Following Council review and public comment, the Council recommends catch limits and any in-season accountability measures to NMFS. NMFS publishes annual specifications in the **Federal Register** to establish these catch limits and management measures for each Pacific sardine fishing year.

This rule proposes the Council's recommended catch limits for the July 1, 2023–June 30, 2043 fishing year, management measures to ensure that harvest does not exceed those limits, an OFL, and an ABC that takes into consideration uncertainty surrounding the current estimate of biomass for Pacific sardine.

Recommended Catch Limits

According to the CPS FMP, the catch limit for the primary directed fishery is determined using the FMP-specified HG formula. This Pacific sardine HG control rule, the primary mechanism for setting the primary directed fishery catch limit, includes a CUTOFF parameter, which has been set at a biomass level of 150,000 metric tons (mt). This amount is subtracted from the annual biomass estimate before calculating the applicable HG for the fishing year. Because the biomass estimate used this year, 27,369 mt, is below that value, the formula results in an HG of zero, and no Pacific sardine are available for the primary directed fishery during the 2023–2024 fishing season. This is the ninth consecutive year that the primary directed fishery is closed.

During the 2019–2020 fishing year, the estimated biomass of Pacific sardine dropped below its 50,000-mt minimum stock size threshold (MSST), which triggered an overfished determination process. Accordingly, NMFS declared the stock overfished on June 26, 2019, and notified the Council of this determination on July 9, 2019. NMFS then worked with the Council to develop a rebuilding plan for Pacific which was finalized on June 24, 2021 (86 FR 33142). The rebuilding plan (Amendment 18 to the CPS FMP) stipulates that total catch limits (*i.e.,* OFL/ABC/ACL) are to be set annually based on annual stock assessments, the control rules in the FMP, and recommendations from the SSC regarding uncertainty in the assessment and OFL. The rebuilding plan also includes the following management measures: (1) closing the primary directed fishery until the biomass reaches or exceeds 150,000 mt; (2) restricting incidental limits in other primary directed CPS fisheries to no more than 20 percent until the biomass reaches or exceeds 50,000 mt; (3) limiting catch in the minor directed fishery to 1 mt per trip per day; and (4) other management measure the Council may recommend. The 2023–2024 proposed harvest specifications are consistent with the management strategy in the rebuilding plan.

This year, there was no new stock assessment because the Council had previously recommended postponing the assessment for a year so the SWFSC could address issues of uncertainty in the previous assessment. As such, the Council's SSC utilized the 2022 update stock assessment (''Update assessment of the Pacific sardine resource in 2022 for U.S. management in 2022–2023''), which the SSC previously agreed satisfied the Terms of Reference for an update assessment and represents the best scientific information available for management of Pacific sardine. The SSC also reviewed new information available since last year, such as a summer 2022 acoustic-trawl total biomass estimate of 69,506 mt and the outcome of the SSC CPS subcommittee meeting (March 20–21, 2023).

Based on the 2022 update assessment and associated estimated age 1+ biomass of 27,369 mt and the control rules in the FMP, the Council recommended, and NMFS is proposing, an OFL of 5,506 mt, an ABC of 3,953 mt, and an annual catch limit (ACL) of 3,953 mt. There would be a prohibition on commercial Pacific sardine catch, unless it is harvested as part of the live bait, tribal,[1] or minor directed fisheries, as incidental catch in other fisheries, or as part of exempted fishing permit (EFP) activities. The Council also recommended, and NMFS is proposing, an annual catch target (ACT) of 3,600 mt for the 2023–2024 fishing year. For comparison, the ABC/ACL and ACT established last year were 4,274 mt and 3,800 mt, respectively. Although the biomass estimate and OFL are the same this year, the proposed ABC/ACL and ACT for the 2023–2024 fishing year are lower due to uncertainty and staleness of the assessment and biomass estimate.

In conjunction with setting an ACT, the Council also recommended in-season and other management measures to ensure harvest opportunity under the ACT is maintained throughout the year, which are discussed in the next section.

Recommended Management Measures

The proposed annual harvest limits and management measures were developed in the context of NMFS' July 2019 declaration that the Pacific sardine stock was overfished and June 2021 approval of a rebuilding plan for the stock. Because the biomass remains below the 50,000 mt MSST, the FMP

[1] For the 2023–2024 fishing year, the Quinault Indian Nation has not requested a tribal set-aside, and therefore none is proposed.

requires that incidental catch of Pacific sardine in other CPS fisheries be limited to an incidental allowance of no more than 20 percent by weight (instead of a maximum of 40 percent allowed when below the CUTOFF but above the MSST).

The following are the proposed management measures and in-season accountability measures for the Pacific sardine 2023–2024 fishing year:

(1) If landings in the live bait fishery reach 2,500 mt of Pacific sardine, then a 1-mt per-trip limit of sardine would apply to the live bait fishery.

(2) An incidental per-landing limit of 20-percent (by weight) Pacific sardine applies to other CPS primary directed fisheries (*e.g.,* Pacific mackerel).

(3) If the ACT of 3,600 mt is attained, then a 1-mt per-trip limit of Pacific sardine would apply to all CPS fisheries (*i.e.,* 1) and 2) would no longer apply).

(4) An incidental per-landing allowance of 2 mt of Pacific sardine would apply to non-CPS fisheries until the ACL is reached.

At the April 2023 meeting, the Council also recommended NMFS approve two EFP proposals requesting an exemption from the prohibition to directly harvest sardine during their discussion of sardine management measures. Those EFP proposals include a total amount of up to 670 mt of the ACL.

All sources of catch including any fishing occurring as part of an EFP, the live bait fishery, and other minimal sources of harvest, such as incidental catch in CPS and non-CPS fisheries and minor directed fishing, will be accounted for against the ACT and ACL.

The NMFS West Coast Regional Administrator would publish a notice in the **Federal Register** to announce when catch reaches the incidental limits, as well as any changes to allowable incidental catch percentages. Additionally, to ensure that the regulated community is informed of any closure, NMFS would make announcements through other means available, including emails to fishermen, processors, and state fishery management agencies.

Classification

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the CPS FMP, other provisions of the MSA, and other applicable law, subject to further consideration after public comment.

NMFS finds that a 15-day comment period for this action provides a reasonable opportunity for public participation in this action pursuant to Administrative Procedure Act section 553(c) (5 U.S.C. 553(c)), while also ensuring that the final specifications are in place for the start of the Pacific sardine fishery on July 1, 2023. NMFS received the recommendations from the Council that form the basis for this rule after the Council's April 2023 meeting. The Council provided an opportunity for public comment at that meeting, as it does every year before adopting the recommended harvest specifications and management measures for the proceeding fishing year. The subject of this proposed rule—the establishment of the reference points—is considered a routine action, because they are calculated annually based on the framework control rules in the FMP. A prolonged comment period and subsequent potential delay in implementation past the start of the 2023 fishing year would be contrary to the public interest, as it could create confusion in the Pacific sardine industry around current specifications and management measures.

This proposed rule is exempt from review under Executive Order 12866.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with the tribal representative on the Council who has agreed with the provisions that apply to tribal vessels.

The Chief Counsel for Regulation of the Department of Commerce 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, for the following reasons:

For Regulatory Flexibility Act (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.

The purpose of this proposed rule is to conserve and rebuild the Pacific sardine stock by preventing overfishing, while still allowing harvest opportunity among differing fishery sectors. This will be accomplished by implementing the 2023–2024 annual specifications for Pacific sardine in the U.S. EEZ off the West Coast. The small entities that would be affected by the proposed action are the vessels that would be expected to harvest Pacific sardine as part of the West Coast CPS small purse seine fleet. In 2014, the last year that a directed fishery for Pacific sardine was allowed, there were approximately 81 vessels permitted to operate in the directed sardine fishery component of the CPS fishery off the U.S. West Coast; 58 vessels in the Federal CPS limited entry fishery off California (south of 39° N lat.); and a combined 23 vessels in Oregon and Washington's state Pacific sardine fisheries. We do not collect or have access to information about affiliation between vessels or affiliation between vessels and processing entities in this fishery, or receipts in Alaska, Hawaii, or international fisheries, so it is possible that some impacted entities may exceed $11 million in ex-vessel revenue or another size-standard threshold. Based on available data, the average annual West Coast revenue per vessel for all west coast vessels, including those described above potentially affected by this rule, was well below the threshold level of $11 million as of 2023; therefore, all of these vessels are considered small businesses under the RFA. Because each affected vessel is a small business, this proposed rule is considered to equally affect all of these small entities in the same manner. Therefore, this rule would not create disproportionate costs between small and large vessels/businesses.

The CPS FMP and its implementing regulations require NMFS to annually set an OFL, ABC, ACL, and HG or annual catch target for the Pacific sardine fishery based on the specified harvest control rules in the FMP applied to the current stock biomass estimate for that year. The derived annual HG is the level typically used to manage the principal commercial sardine fishery and is the harvest level NMFS typically uses for profitability analysis each year. As stated above, the CPS FMP dictates that when the estimated biomass drops below a certain level (150,000 mt), the HG is zero. Because there is again no directed fishing for the 2023–2024 fishing year, this proposed rule will not change the potential profitability compared to the previous fishing year. Additionally, the proposed 2023–2024 ACL is still expected to account for the various fishery sector needs (*i.e.,* live bait, incidental catch in other CPS fisheries, and minor directed fisheries).

The revenue derived from harvesting Pacific sardine is typically only one of the sources of fishing revenue for the commercial vessels that participate in this fishery. As a result, the economic impact to the fleet from the proposed action cannot be viewed in isolation. From year to year, depending on market

conditions and availability of fish, most CPS/sardine vessels supplement their income by harvesting other species. Many vessels in California also harvest anchovy, mackerel, and in particular, squid, making Pacific sardine only one component of a multi-species CPS fishery. Additionally, some sardine vessels that operate off of Oregon and Washington also fish for salmon in Alaska or squid in California during times of the year when sardine are not available. The purpose of the incidental catch limits proposed in this action are to ensure the vessels impacted by a prohibition on directly harvesting sardine can still access these other profitable fisheries while still minimizing Pacific sardine harvest.

CPS vessels typically rely on multiple species for profitability because abundance of Pacific sardine, like the other CPS stocks, is highly associated with ocean conditions and seasonality. Variability in ocean conditions and season results in variability in the timing and location of CPS harvest throughout the year. Because each species responds to ocean conditions in its own way, not all CPS stocks are likely to be abundant at the same time. Therefore, as abundance levels and markets fluctuate, the CPS fishery as a whole has relied on a group of species for its annual revenues.

Therefore the proposed action, if adopted, will 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.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act. There are no relevant Federal rules that may duplicate, overlap, or conflict with the proposed action.

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

Dated: May 10, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2023–10322 Filed 5–15–23; 8:45 am]

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Notices

Federal Register

Vol. 88, No. 94

Tuesday, May 16, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Advisory Committee Public Meeting; Correction

AGENCY: Agency for International Development (USAID).

ACTION: Notice of Advisory committee public meeting and request for public comment; correction.

SUMMARY: USAID published a document in the **Federal Register** of May 1, 2023, concerning the public meeting on May 24 and request for public comments. The document contained incorrect timing of the event.

FOR FURTHER INFORMATION CONTACT: Sophia Lajaunie, Designated Federal Officer for ACVFA, at *slajaunie@usaid.gov* or 202–531–9819.

SUPPLEMENTARY INFORMATION:

Corrections

In the **Federal Register** of May 1, 2023 in FR Doc. 2023–09172, on page 26516: Correct the Summary caption to read:

Pursuant to the Federal Advisory Committee Act (FACA), notice is hereby given of Advisory Committee on Voluntary Foreign Aid (ACVFA) public meeting on Wednesday, May 24, 2023 from 10:30 a.m.–12:00 p.m. ET.

And correct the second paragraph in the SUPPLEMENTARY INFORMATION section to read: Pursuant to its charter, ACVFA is holding an annual public meeting on May 24, 2023, from 10:30 a.m.–12:00 p.m. ET. This meeting is free and open to the public. The Committee welcomes public participation and comment before, during, and after the meeting via the web and/or email addresses provided above.

Dated: May 11, 2023.

Sophia Lajaunie,

ACVFA Designated Federal Officer.

[FR Doc. 2023–10393 Filed 5–15–23; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

[Docket #: RUS–23–ELECTRIC–0005]

Notice of Funding Opportunity for the Empowering Rural America (New ERA) Program

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Utilities Service (RUS or the Agency), a Rural Development (RD) agency of the United States Department of Agriculture (USDA), is soliciting Letters of Interest (LOI) for applications under the Empowering Rural America (New ERA) Program. In addition, the Agency is announcing the eligibility requirements, application process and deadlines, and the criteria that will be used by RUS to assess New ERA Applications. The New ERA Program provides RUS with $9.7 billion in appropriated loan and grant funds under the Inflation Reduction Act (IRA) of 2022. In keeping with the statutory authority for the program, RUS will utilize the New ERA funds to assist Eligible Entities to achieve the greatest reduction in Greenhouse Gas (GHG) emissions while advancing the long-term resiliency, reliability, and affordability of rural electric systems. All Eligible Entities are responsible for any expenses incurred in developing their LOIs and New ERA Applications.

DATES: Letters of Interest can be submitted beginning at 11:59 p.m. Eastern Time (ET) on July 31, 2023, and until 11:59 p.m. ET on August 31, 2023. Letters of Interest will not be accepted after 11:59 p.m. ET on August 31, 2023.

Application Process: Applicants must submit an LOI in order to be considered for an Invitation to Proceed. An Eligible Entity that is invited by RUS to proceed will receive an Invitation to Proceed and will have sixty (60) days to complete and submit a New ERA Application beginning from the date the Invitation to Proceed is emailed to the Applicant. If the sixty (60)-day deadline to submit the completed application falls on Saturday, Sunday, or a Federal holiday, the application is due the next business day. RUS reserves the right, in its sole discretion, to extend the sixty (60)-day deadline upon the written request of the Applicant if the Applicant demonstrates to the satisfaction of the Administrator that exceptional circumstances exist to warrant the extension. New ERA Awards will be made as soon as possible following the submission of a New ERA Application, and all New ERA funds must be fully disbursed on or before September 30, 2031.

ADDRESSES:

Letters of Interest (LOI) Submissions. All LOIs must be submitted to RUS electronically through an RUS on-line application portal. The Agency will finalize the specific requirements of submitting the LOI through the on-line application portal by separate notice in the **Federal Register**, the RUS website at *https://www.rd.usda.gov/programs-services/electric-programs/empowering-rural-america-new-era-program,* and *Grants.gov* on or before July 31, 2023.

Application Submissions. Eligible Entities selected to proceed with the New ERA Application must submit a completed New ERA Application package in accordance with the instructions that will be provided in the RUS Invitation to Proceed.

Other Information: Additional information, resources, and sample LOI are available at *https://www.rd.usda.gov/programs-services/electric-programs/empowering-rural-america-new-era-program.* The IRA Funding for Rural Development website is located at *www.rd.usda.gov/inflation-reduction-act.*

FOR FURTHER INFORMATION CONTACT: Christopher McLean, Assistant Administrator, Electric Program, Rural Utilities Service, Rural Development, United States Department of Agriculture, 1400 Independence Avenue SW, STOP 1568, Washington, DC 20250–1560; Telephone: 202–690–4492. Email to: *SM.RD.RUS.IRA.Questions@usda.gov.*

SUPPLEMENTARY INFORMATION:

Overview

Federal Awarding Agency Name: Rural Utilities Service (RUS).

Funding Opportunity Title: Empowering Rural America (New ERA) Program.

Announcement Type: Notice of Funding Opportunity (NOFO).

Assistance Listing Number: 10.758.

Dates: Letters of Interest can be submitted beginning at 11:59 p.m. ET on July 31, 2023, and until 11:59 p.m. ET on August 31, 2023. Letters of Interest will not be accepted after 11:59 p.m. ET

on August 31, 2023. An Eligible Entity that is invited by RUS to proceed with the New ERA Application will have sixty (60) days to submit such a completed New ERA Application beginning from the date the Invitation to Proceed is emailed to the Applicant.

The Agency encourages Applicants to consider eligible Projects under this funding notice that achieve the greatest reduction of GHG as defined in Section A.3. The RD mission of the USDA aims to:

- Assist rural communities recover economically through more and better market opportunities and through improved infrastructure;
- Ensure all rural residents have equitable access to RD programs and benefits from RD funded projects; and
- Reduce climate pollution and increase resilience to the impacts of climate change through economic support to rural communities.

A. Program Description

1. *Purpose of the Program.* For nearly a century, rural electric cooperatives have been the backbone of power delivery for rural America, building the infrastructure necessary for economic development and a high quality of life. Owned by their members, cooperatives are a fundamental part of rural communities, employing residents, pushing progress, and providing leadership.

The Empowering Rural America (New ERA) Program provides financial assistance to Eligible Entities, as described in Section C, to achieve the greatest reductions in GHG emissions through the cooperatives' voluntary transformation of rural electric systems in a way that promotes resiliency and reliability of rural electric systems and affordability for their members.

With the Inflation Reduction Act, the Biden-Harris Administration and the United States Congress are making the greatest investment in rural electrification since the New Deal. The Biden-Harris Administration understands the transformative nature and special qualities provided by this appropriation. Energy produced will be clean, affordable, reliable, and owned by the people who live in rural America. As a result, this legislation and the funding opportunity here allows for a New ERA in rural communities.

2. *Statutory and Regulatory Authority.* The New ERA Program is authorized under the Inflation Reduction Act of 2022 (Pub. L. 117–169, ''IRA''), subtitle C, section 22004, and will be administered by RUS. section 22004 amends 7 U.S.C. 8103 by adding subsection (j) to that section. Other regulations that apply to this Notice are 7 CFR parts 1710 through 1730, 1767, 1773, 1787, and 1970 (*https://www.ecfr.gov/current/title-7/subtitle-B/chapter-XVII*).

3. *Definitions.* The definitions applicable to this Notice are as follows:

Achievable Reductions Tool. A simple Excel spreadsheet tool developed by RUS. RUS will provide the Achievable Reductions Tool to the Applicant to input data related to its Portfolio of Actions, and estimate the reduction of GHG emissions from the Portfolio of Actions.

Administrator. The Administrator of the RUS, an agency under the RD mission area of the USDA.

Agency. The Rural Utilities Service (RUS).

Applicant. An Eligible Entity that has received an Invitation to Proceed to submit a New ERA Application.

Award. The financial assistance offered to an Applicant under this Notice.

Award Agreement. The agreement between RUS and the Applicant describing the terms and conditions of the Award.

Award Documents. All agreements and documentation to support and evidence the financial assistance and obligations of the Awardee, including the Award Agreement, loan or grant agreements, promissory notes, mortgages, deeds of trust, indentures, and other security agreements executed in connection with the Award.

Awardee. An entity that has been awarded funding under the New ERA Program.

Carbon Capture and Storage Systems. Those systems that capture and permanently store carbon dioxide so that it will not enter the atmosphere. Any proposed Carbon Capture and Storage System must be commercially proven and be able to capture and permanently store carbon dioxide within the timeframe of this program. Qualifying systems must demonstrate that they are delivering public health and other co-benefits, including not increasing other air pollutants.

Commercially Available Technology. Equipment, devices, applications, or systems that have a proven, reliable performance and replicable operating history specific to the proposed application. The equipment, device, application, or system is based on established patented design or has been certified by an industry-recognized organization and subject to installation, operating, and maintenance procedures generally accepted by industry practices and standards. Service and replacement parts for the equipment, device, application, or system must be readily available in the marketplace with established warranty applicable to parts, labor, and performance. The technology must be designed and meant for the proposed use.

Commitment Letter. The notification issued by the Administrator to an Applicant containing the total Award, the acceptable security arrangement, and such controls and conditions on the Awardees' financial, investment, operational and managerial activities deemed necessary by the Administrator to adequately secure the Government's interest. This notification will also describe the accounting standards and audit requirements applicable to the Award.

Community Benefit Plan. The Applicant's description of how the proposed Project will benefit communities and residents within the Eligible Service Area as further described in Section D.2.ii.s.

Distressed and Disadvantaged Communities. A Disadvantaged Community is determined by the Agency by using the Council on Environmental Quality's Climate and Economic Justice Screening Tool (CEJST) (which is incorporated into the USDA look-up map) which identifies communities burdened by climate change and economic and environmental injustice. Further, all communities within the boundaries of Federally Recognized Tribes will be determined to be Disadvantaged Communities by the Agency, in addition to Alaska Native Villages. Distressed Community is determined by the Agency by using the Economic Innovation Group's Distressed Communities Index (which is incorporated into the USDA look-up map), which uses several socio-economic measures to identify communities with low economic well-being. To determine if your project is located in a Disadvantaged Community or a Distressed Community, please use the following USDA look-up map: *https://ruraldevelopment.maps.arcgis.com/apps/webappviewer/index.html?id=4acf083be4c44bb7864d90f97de0c788.*

Eligible Activity(ies). The purchase of Renewable Energy, Renewable Energy Systems, Zero-Emission Systems, and Carbon Capture and Storage Systems, the deployment of such systems, or the implementation of energy efficiency improvements to electric generation or transmission systems of Eligible Entity, and the combinations of any such activities, as more fully described in Section C.

Eligible Award Costs are defined in Section C.3.i.

Energy Storage System(s). A facility capable of accepting energy, storing the energy for a period of time and then later releasing the stored energy.

Eligible Entity(ies). An electric cooperative described in section 501(c)(12) or 1381(a)(2) of the Internal Revenue Code of 1986 and is or has been a RUS or Rural Electrification Administration (REA) electric loan borrower pursuant to the Rural Electrification Act of 1936 (RE Act) or is serving a predominantly Rural Area (or a wholly or jointly owned subsidiary of any the preceding listed such electric cooperatives).

Eligible Service Area. An area as described in Section C.1.iii. of this NOFO.

Energy Communities. A community as defined by the Department of Treasury and the Internal Revenue Service at *https://www.irs.gov/pub/irs-drop/n-23-29.pdf* or through future governmental guidance.

Environmental and Historic Preservation Requirements. The National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C 4321, et seq), section 7 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*), and section 106 of the National Historic Preservation Act (NHPA)(54 U.S.C. 300101 *et seq.*), as well as their implementing regulations at 7 CFR part 1970, Environmental Policies and Procedures (including Farmland Protection Policy Act Implementation Policy), 50 CFR part 402, Interagency Cooperation, and 36 CFR part 800, Protection of Historic Properties

Financial Feasibility. An Eligible Entity's ability, as determined by the Administrator, to generate sufficient revenues to cover its expenses, sufficient cash flow to service its debts and obligations as they come due, and meet the financial ratios set forth in the applicable Award Documents.

Greenhouse Gases (GHG). For purposes of this NOFO, GHG shall mean carbon dioxide, methane, and nitrous oxide.

Indian Tribe. The term ''Indian Tribe'' has the meaning given the term in section 5304 of title 25.

Invitation to Proceed. A written notification issued by RUS to the Eligible Entity acknowledging that the LOI was received, reviewed, and inviting the Eligible Entity to submit a New ERA Application. The notification provides the Applicant instructions on how to submit the application package and details of the next steps in the application process.

Letter of Interest (LOI). A signed letter issued by an Eligible Entity notifying RUS of its intent to apply for an Award and addressing all the elements identified for a complete LOI in Section D.2.i. of this NOFO.

New ERA Application. An application containing all information required by RUS as identified in the Invitation to Proceed. The New ERA Application must be materially complete in form and substance satisfactory to RUS within the specified time as defined in section D of this NOFO.

Non-Federal Entities. As defined in 2 CFR 200.1, Non-Federal Entities are States, local governments, Indian Tribes, institutions of higher education, or nonprofit organizations. The definition of what constitutes a non-profit is also located in 2 CFR 200.1.

Off-taker. Shall mean: (1) The customers or members of the Applicant that purchase and receive electrical power and energy from the Applicant; or (2) the entity that has or will execute a Power Purchase Agreement (PPA) with the Applicant to purchase and receive electrical capacity and associated energy produced by the Project. The Off-taker may also be referred to in the PPA as the ''Buyer'', ''Customer'', ''Purchaser'', or another name that describes the entity purchasing the power.

Portfolio of Actions. The combination of the Applicant's proposed actions related to generation, transmission and distribution, including distributed energy resources, that will result in the reductions in GHG emissions and that support actions consistent with long-term resiliency, reliability, and affordability of rural electric systems.

Power Purchase Agreement (PPA). A binding agreement executed between the Applicant and an Off-taker under which the Off-taker agrees to purchase and receive from the Applicant the electrical capacity and associated energy produced by the Project at a pre-determined price and term. The PPA may include other transactions such as the selling and purchasing of environmental attributes or ancillary services such as voltage regulation and synchronization, and contingency reserves. Environmental attributes include all financial attributes that are created or otherwise arise from the Project's generation of electricity from a Renewable Energy System or Zero-Emission System that include, but are not limited to, any environmental air quality credits, green credits, renewable energy credits (RECs), carbon credits, emissions reduction credits, emission rate credits, certificates, tags, offsets, allowances, etc.

Project. New facilities acquired or constructed after the effective date of the IRA and compliant with all other applicable requirements of this Notice used to generate electricity from a Renewable Energy System, and/or to facilities that store electricity that supports the types of Renewable Energy Systems that are eligible to be financed with New ERA Program loan funds, as provided in section 22004 of the IRA, which will result in the deployment of Renewable Energy generation or storage capacity.

Project Award. An Award secured by a security interest in the assets and revenues of the Project and supporting credit enhancements relating to the Project rather than by a security interest in all of the assets of the Applicant's electric system. Any Award to a Applicant that is not a current operating utility shall be a Project Loan.

Renewable Energy. The term ''Renewable Energy'' means energy derived from: (1) wind, solar, renewable biomass (as defined by 7 U.S.C. 8101(13)), ocean (including but not limited to tidal, wave, current, and thermal), geothermal, hydroelectric, or energy sources that are naturally replenished and do not run out; or (2) hydrogen derived from renewable biomass or water using an energy source described in subparagraph (1).

Renewable Energy Systems. For purposes of this NOFO, the term Renewable Energy Systems means a system that generates usable Renewable Energy, including but not limited to: (1) Distribution and transmission lines and components necessary to move the Renewable Energy from the point of its generation to the initial point of sale; (2) Other components and ancillary infrastructure of a system described in subparagraph (1), such as an Energy Storage System and system efficiency measures to the distribution and transmission lines and components; and (3) Mechanisms for dispensing the Renewable Energy at retail.

Rural Area. A Rural Area shall mean one or more of the following:

- Any area of the United States, its territories, and insular possessions (including any area within the Federated States of Micronesia, the Marshall Islands, and the Republic of Palau) other than a city, town, or unincorporated area that has a population of greater than 50,000 inhabitants, adjusted to exclude individuals incarcerated on a long-term or regional basis or the first 1,500 individuals who reside in housing located on a military base; or
- Communities where non-rural service is necessary and incidental to

providing intended benefits to Rural Areas described above.

Secretary. The Secretary of the United States Department of Agriculture.

Substantially Underserved Trust Area (SUTA). An area defined under section 306F of the Rural Electrification Act (*https://www.rd.usda.gov/files/utprea36.pdf*).

System Awards. Awards where the Awardee will provide or has already provided RUS with a perfected senior lien in all its assets, both real and personal property, including intangible personal property and any property acquired after the date of the loan. Awards must be secured by all, or substantially all, of the system assets, including the Project to be financed with a System Award. System Awards are only available to operating electric cooperative utilities.

Transmission Energy Efficiency Improvements. Transmission Energy Efficiency Improvements to an Applicant's transmission system shall include measures that result in the demonstrable reduction of GHG emissions, including but not limited to: (1) Reduction in transmission energy line losses; (2) Investments that alleviate transmission congestion as it relates to the delivery of power generated from Renewable Energy Systems or Zero-Emission Systems; (3) Investments in technologies that increase the capacity and efficiency of existing transmission facilities or increase transmission capacity within existing rights-of-way, such as investments in advanced high-capacity conductor technologies or Grid-Enhancing Technologies; and (4) Construction of new transmission lines for the transmission of power generated from Renewable Energy Systems or Zero-Emission Systems.

Zero-Emission System. Any system that does not produce any GHG emissions when it is operated, including any infrastructure related to the deployment of such systems.

4. *Letters of Interest and Applications for Awards.* The Agency will review and evaluate the LOIs pursuant to the criteria described in Sections C, D.2.i, and E. The Agency will open an on-line application portal by notice in the **Federal Register**, the RUS website at *https://www.rd.usda.gov/programs-services/electric-programs/empowering-rural-america-new-era-program,* and *Grants.gov* on or before July 31, 2023. Letters of Interest must include data that estimates the reduction in GHG emissions that will result from their proposed Project(s).

At the LOI stage, the Agency will either: (1) allow the Eligible Entity to enter the data necessary to estimate the reduction of GHG emissions resulting from its Portfolio of Actions directly into the on-line submission portal (the ''on-line estimator''); or (2) ask the Eligible Entity to submit a completed Achievable Reduction Tool in the on-line submission portal, estimating the reduction of GHG emissions resulting from its Portfolio of Actions. Both the on-line estimator and the Achievable Reduction Tool provide a single comparable method for the Eligible Entity to provide the necessary data the Agency will use to score the LOI utilizing the criteria listed in Section E.1.ii. of this Notice. The Eligible Entity may also provide the data that is required within the on-line estimator and the Achievable Reduction Tool by another method. The Eligible Entity's use of other methods, however, may impact the Agency's timeline for review of the LOI. An Eligible Entity that elects to use methods other than the on-line estimator and the Achievable Reduction Tool must demonstrate that its chosen method provides comparable information as the on-line estimator or the Achievable Reduction Tool that will allow the Agency to score the Portfolio of Actions under the criteria listed in Section E.1.ii. of this Notice.

Upon review of the LOIs, RUS may issue an Invitation to Proceed to submit a New ERA Application to those Eligible Entities whose LOIs contain proposed Projects that the Agency determines are sufficiently strong in any of the criteria listed in Section E and advance the goals underlying the New ERA Program as described in this Notice.

The Agency will review and evaluate all New ERA Applications based on the information contained in the application and will utilize the same criteria that it utilized in evaluating the LOIs. The Applicant may utilize the same data it provided to the Agency with respect to the estimated GHG reduction stemming from the Portfolio of Actions that it provided in the LOI, if it certifies in the New ERA Application that the data is still accurate. The Agency advises all interested parties that the Eligible Entity bears the full burden and cost of preparing and submitting an LOI and, if invited, a New ERA Application in response to this Notice. RUS reserves the right to ask Applicants for clarifying information on, or additional information related to, the New ERA Application. The Agency reserves the right to offer an Applicant a financial package different than requested.

B. Federal Award Information

1. *Types of Awards:* Loans, Loan Modification, Loan/Grant Combination and Grants.

2. *Fiscal Year Funds:* Congress appropriated the IRA funds in FY 2023 and section 22004 requires all IRA funds to be advanced before September 30, 2031.

3. *Available Funds:* Total appropriated funds in the amount of $9.7 billion, through September 30, 2031.

RUS may, at its discretion, increase the total level of funding available in this Notice or in any category in this funding round from any available source, provided this Notice meets the requirements of the statute that made the funding available to the Agency.

A loan made pursuant to this Notice may not result in a disbursement of funds after September 30, 2031. A grant made pursuant to this Notice may not result in an outlay after September 30, 2031. Applicants are advised that the final advance date applied to individual Projects will be well in advance of September 30, 2031.

4. *Award Amounts:* As provided in section 22004 of IRA, no one Applicant may receive an amount equal to more than 10 percent of the total $9.7 billion of budget authority appropriated under section 22004, which equals $970 million. The Applicant's Portfolio of Actions may cost more than $970 million as long as the funded application uses less than $970 million in budget authority. The section further limits the amount of a grant to no more than 25 percent of the total Eligible Award Costs of the Applicant in carrying out a Project utilizing a grant.

5. *System Awards, Project Awards and Financial Assistance:* The following types of Awards and financial assistance are available under the New ERA Program:

i. *System Awards and Project Awards:* System Awards and Project Awards will be offered to Eligible Entities under the New ERA Program to finance Projects in accordance with Section C. of this Notice.

a. System Awards may, at the discretion of the Administrator, finance a New ERA Award up to 100 percent of the Eligible Award Costs included in the application based on the risk profile of the Applicant and the proposed Project. At the discretion of the Administrator, RUS may release proceeds from a System Award to finance Projects for costs incurred during the construction of the facilities. System Awards are only available to operating electric cooperative utilities.

b. Project Awards are generally secured by a senior security interest in the Project assets and the revenues generated from the Project, although the Agency may require additional collateral for a Project Award based on the risk profile of the New ERA Application and/or the Project. Project Awards will require additional cash reserves. Further, to the extent that a PPA is in place between the Awardee and an Off-taker, the Awardee must collaterally assign the PPA to RUS as security and the Off-taker must consent to such assignment. RUS will finance up to 75 percent of the total capitalized cost of the Project in the loan component of a Project Award. The Awardee will be required to initially provide and maintain for the term of the Project Award at least 25 percent of the Project's total capitalized cost in the form of cash or an equity investment that does not include debt from any source. RUS may consider allowing Awardees to utilize the grant component of the Award for the required equity where RUS determines it to be financially feasible. Further, RUS may consider financing up to 100 percent of the capitalized cost of a Project if the Project benefits a SUTA eligible territory as provided in section 306F of the RE Act. The Agency may consider allowing the Applicant to utilize, as the required equity component, any investment tax credits or elective payments in lieu of investment tax credits that the Awardee is entitled to receive under the Internal Revenue Code, if permitted under applicable authorities. The Agency may also consider allowing the Applicant to utilize as the required equity component any grant, including the grant component of the New ERA Award or a grant from any other source, if permitted under applicable authorities. The Agency may require the Awardee to provide additional credit support pending the Awardee's receipt of the Investment Tax Credit or Direct Payment in lieu of the Investment Tax Credit.

c. Unless RUS, in its discretion, advances Award funds to an Awardee with a System Award as described above, RUS will only advance Award proceeds after commercial operation of the Project is achieved and subsequent successful testing of the Project is conducted to the satisfaction of RUS, but in no case will funds be advanced after September 30, 2031.

ii. *Types of Financial Assistance:* Applicants are invited to propose assistance from any single financial assistance product or a combination of such products, described below. The Agency reserves the right to offer an Applicant a financial package different than requested. The most competitive applications, *i.e.* those that propose achieving the greatest reductions in GHG emissions, will receive the best financial offerings in terms of grant amounts and interest rates as outlined in the product offerings below.

a. *Loan Only.* An Applicant may request an Award to finance any Project or combination of Projects in its application with a loan only award. The interest rate for a loan only award may be set at a fixed percent at 2 percent, zero percent, or at a rate tied to the Federal government's cost of money. Applicants may request interest rates as low as zero percent on loan only awards, the loan portion o a loan and grant combination, or a loan to refinance or modify existing debt where an eligible Project(s) contained in the New ERA Application: (1) will either replace a stranded asset; or (2) 40 percent or more of the population served by the proposed service area is located within Distressed Communities, Disadvantaged Communities, or Energy Communities; or (3) will serve SUTA communities as defined in section 306F of the RE Act; or (4) will serve a service area located in Puerto Rico, United States Virgin Islands (USVI), Guam, American Samoa or other U.S. territories or Compact of Free Association (COFA) states. Principal will be deferred for a period of two years from the date of the promissory note. The amortization period will be based on the term of the Award as defined in section F.

b. *Loan and Grant Combinations and Grant Only Awards.*

1. *Loan and Grant Combination.* An Applicant may request to finance any Project or Projects in its application with a grant or grant/loan combination where the grant amount equals no more than 25 percent of the Eligible Award Costs. The interest rate and amortization for the loan component of the Award will be set as described in B.5.ii.a. above. Applicants may propose substituting cash for the loan component, or any portion of the loan component, at the time of application.

2. *Grant Only Awards.* An Applicant may request an Award to finance any Project or combination of Projects in its application with a 100 percent grant. A 100 percent grant Award may finance no more than 25 percent of the total eligible Project costs. Grants, both as a part of a loan and grant combination Award or as a 100 percent grant Award, will be considered based on the estimated reduction in GHG emissions stemming from the Applicant's proposed Portfolio of Actions as measured by the criteria outlined in Section E.1.ii. of this Notice. The grant portion of an Award must also be adequately secured, as determined by the RUS Administrator.

c. *Loan Refinancing or Loan Modification.* An Applicant may request to modify existing RUS or RUS guaranteed debt, or refinance debt from a third party, but only as such modification or refinancing relates to a stranded asset. The Applicant must demonstrate that it will utilize the benefits of such refinancing or modification to pay for or otherwise finance Eligible Activities. The interest rate on any new loan relating to a stranded asset loan refinancing or loan modification will be determined as provided in item B.5.ii.a. above. The term of the loan related to a stranded asset loan refinancing or loan modification will be based on overall Financial Feasibility as determined by the Agency and shall not exceed 35 years. Stranded asset loans may, where financially feasible and secure, be advanced upon execution of the applicable loan and security documents. If the Awardee does not perform its obligation described above it will be required to repay, in whole or in part, the refinancing or modification benefits to the U.S. Government for non-performance.

The amount of appropriated funds consumed by any individual funded New ERA Application will depend on the amount of grant used, which scores on a dollar-for-dollar basis, and the amount of loans, which scores at a subsidy rate related to the difference between the interest rate offered on the loan and prevailing treasury rates, portfolio risk, and other factors at the time of obligation. RUS will do this calculation before making an Award to ensure compliance with the statutory limitations described in Section B.4. The Agency further reserves the right to take into account when making Awards the cost effectiveness of the proposed Projects relative to the appropriated funds consumed.

6. *Anticipated Award Date:* Beginning March 1, 2024.

7. *Performance Period:* Five (5) years from the date of environmental clearance, but no later than September 30, 2031.

8. *Use of Other Governmental Funds:* The Agency will generally allow the Awardee to combine the incentives contained in this Notice with other governmental benefits, provided such combinations are otherwise permitted by law or regulation.

9. *Renewal or Supplemental Awards:* None.

10. *Type of Assistance Instrument:* Loan and Grant Agreements.

C. Eligibility Information

1. *Eligible Entities, Projects, Service Areas and other Eligibility Factors.*

i. Eligible Entities are:

a. Electric cooperatives described in section 501(c)(12) or 1381(a)(2) of the Internal Revenue Code of 1986 who are currently or have been in the past a RUS electric loan borrower pursuant to the RE Act;

b. Electric cooperatives serving predominantly Rural Areas; or

c. Wholly or jointly owned subsidiaries of such electric cooperatives listed in a and b.

For the purposes of this program, the term ''predominantly rural'' as used in (b) in this paragraph shall mean a service territory that must include at least 50 percent Rural Areas.

ii. An eligible Project includes a Portfolio of Actions that will result in the reduction in GHG emissions and be consistent with long-term resiliency, reliability, and affordability of rural electric systems. Such actions include, but are not limited to:

a. The purchase or construction of:

1. Renewable Energy.

2. Renewable Energy Systems.

3. Zero-Emission Systems.

4. Carbon Capture and Storage Systems.

b. Activities that will enable the deployment of the aforementioned systems and/or improve energy efficiency and strategies to support these goals such as, but not limited to:

1. Grid-edge, microgrid solutions, and other distributed energy strategies.

2. Energy Storage Systems in support of GHG emission reductions or Renewable Energy Systems;

3. Software and hardware to enable the integration and/or the use of additions and upgrades.

4. Modifying or refinancing existing loans from RUS or refinancing non-RUS loans for retiring non-Renewable Energy assets on an accelerated basis with savings reinvested into clean energy investments.

5. Entering a long-term agreement to purchase power from a Renewable Energy System or Zero-Emissions System.

6. Upgrade of existing Renewable Energy Systems or Zero-Emission Systems or related transmission facilities that increase the operating energy efficiency of these systems.

7. Transmission improvements that can significantly enable Renewable Energy Systems and Zero-Emissions Systems, reduce congestion, and improve the efficiency of the system.

8. Activities that will significantly reduce energy demand and GHG emissions.

iii. *Eligible Service Areas:*

a. Electricity generated from or transmitted by facilities financed with New ERA funds shall be delivered and distributed to consumers located in Eligible Service Areas as defined in this Section.

b. The facilities to be financed with an Award to an Applicant that is not a current or former RUS/REA borrower must provide electric service to consumers located in those areas that are considered ''predominantly rural.'' RUS, in making a determination of whether a service area is predominantly rural will:

1. Identify the service territory where electricity from the facilities to be financed by the proposed Award will be delivered and consumed; and

2. Further identify those areas within the service territory that are in Rural Areas in comparison to those that are in non-rural areas. The ratio of the population located in the Rural Areas versus the population of the entire service territory is referred to as the ''rural percentage'' of the service territory. Meters served in lieu of population may be used as a proxy to determine rural percentage of the service territory. For purposes of this NOFO, a service territory that is determined to have a rural percentage equal to or greater than 50 percent is considered predominantly rural and is an Eligible Service Area. RUS will make the rurality determination by examining the shapefile the Eligible Entity submits with its LOI as provided in Section D.2.i.a.7. of this Notice.

c. The service areas of any existing or former RUS and former REA electric loan borrowers under the RE Act are deemed to be ''100 percent rural'' and therefore Eligible Service Areas under this NOFO.

iv. Other Eligibility Factors: Program Factors. In addition to the above eligibility factors, the Agency may consider the following in determining which LOIs to select to provide an Invitation to Proceed, and then in evaluating the full New ERA Application.

a. *Reliability and Resiliency:*

1. All proposals must promote the reliability and resiliency of rural electric systems.

2. Plans may include Energy Storage Systems, microgrid systems that reduce GHG emissions, and other strategies to ensure the reliable provision of energy; and

3. Plans may include transmission improvements to enable the transmission of the power generated from Renewable Energy Systems or Zero-Emissions Systems to the consumer, reduce congestion, and improve system efficiency.

b. *Affordability:*

1. All proposals must be affordable to the consumers in the Eligible Service Area who will be served by the Project in question.

2. The Administrator reserves the discretion to take consumer impact and the efficient use of program funds into account when ranking projects at the LOI and Award stages.

3. Plans may include, whether eligible to be funded or not, energy efficiency improvements and other strategies to minimize and reduce costs for rate payers.

c. *Geographic Diversity:* In making selections for full applications, the Administrator may take the geographic distribution of proposed Projects into account.

d. *Resources:* In making selections for full applications, the Administrator may take the New ERA funding requested for the proposed Eligible Award Costs into account relative to the total budgetary resources available to the New ERA Program. The Administrator reserves the right to reduce the dollar amount offered based on this consideration.

e. *SUTA Considerations:* For the purposes of this funding notice, SUTA provisions will be available to the Administrator as it would be in the existing RUS Electric Infrastructure Loan Program under the RE Act;

f. *Other Funds:* In making selections for full applications, the Administrator may take into account the New ERA funding requested for the proposed Eligible Award Costs relative to the Applicant's ability to utilize funds from other Federal programs, other than New ERA or Powering Affordable Clean Energy (PACE) Programs, to finance the cost of the Project; and

g. *Financial Feasibility:* The Financial Feasibility of the requested financial assistance by evaluating the cost of the Project relative to the Applicant's ability to repay the loan component of the Award.

2. *Cost Sharing or Matching.*

For Project loans, RUS will finance up to 75 percent of the total capitalized cost of the Project in the loan component of a Project Award. The Awardee will be required to initially provide and maintain for the term of the Project Award at least 25 percent of the Project's total capitalized cost in the form of cash or an equity investment.

As noted in B.5.i.b above, the Agency may where Financially Feasible allow an Awardee to utilize the grant

component of the Award and/or any applicable tax credit that it expects to receive (including credit amounts expected to be received through Elective Pay elections under section 6417 of the Internal Revenue Code) toward the 25 percent equity requirement for a Project Award. Such financial equity may not come from the proceeds of any loan from any creditor, including insiders of the Awardee.

3. *Eligible and Ineligible Costs.*

Award funds must be used to pay only allowable, necessary, and eligible costs incurred post Award, except for approved pre-application expenses that are listed below. Eligible costs must be consistent with the cost principles identified in 2 CFR part 200, subpart E. Any request for an advance of funds under the Award that includes any ineligible costs will be rejected.

i. *Eligible award costs.* Award funds under this NOFO may be used to pay for the following costs:

a. To fund the construction or improvement or purchase of facilities, including buildings and land required to construct the facilities being financed with the Award and other allowable costs and expenses listed in 2 CFR part 200, subpart E. Award funds may also be utilized for the construction of new linear facilities or the upgrade of existing linear facilities that are necessary to operate any new generation facility including, but not limited to, transmission or distribution facilities that are needed to export the power;

b. To fund reasonable pre-award expenses as provided in 2 CFR part 200, subpart E. Pre-award expenses must be included in the first request for advance of Award funds.

c. To fund interest incurred during construction pursuant to 7 CFR 1710.106(a)(4); and

d. To refinance or modify existing debt as described in Section B of this NOFO.

ii. *Ineligible award costs.* Award funds under this part may not be used for any of the following purposes:

a. To fund operating expenses of the Awardee unless specifically outlined in the Applicant's Award Agreement;

b. To fund costs incurred prior to the date on which the application was submitted other than the eligible pre-award expenses under 2 CFR part 200, subpart E;

c. To fund an acquisition of an affiliate, or the purchase or acquisition of any facilities or equipment of an affiliate. Note that if affiliated transactions are contemplated in the application, approval of the application does not constitute approval to enter into affiliated transactions or acceptance of the affiliated arrangements that conflict with the obligations under the Award Documents; and

d. Any other expense that is not allowed pursuant to 2 CFR part 200, subpart E.

e. RUS will not approve funding under this Notice that violates the terms of an Applicant's existing wholesale power contract.

D. Application and Submission Information

1. *Address to Request Application Package.* Application information and samples concerning the New ERA Program are available at *https://www.rd.usda.gov/programs-services/electric-programs/empowering-rural-america-new-era-program.* If you require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, etc.) please contact USDA's TARGET Center at (202) 720–2600 (voice and TDD) or the 711 Relay Service.

Letters of Interest and New ERA Applications must be submitted in accordance with the instructions provided in the **ADDRESSES** section of this NOFO.

2. *Content and Form of Application Submission.*

The Agency will open an on-line application portal by notice in the **Federal Register**, the RUS website at *https://www.rd.usda.gov/programs-services/electric-programs/empowering-rural-america-new-era-program,* and *Grants.gov* on or before July 31, 2023. The application process for the New ERA Program will be conducted in two phases. Phase one will be submission of an LOI that includes sufficient information to determine a pool of prospective Applicants which advance the goals of the statute, achieve policy objectives, meet minimum requirements, and are within the funds allocated to the program. Those LOIs that meet the criteria will be issued an Invitation to Proceed to submit a full, complete New ERA Application (phase 2).

i. *Phase 1—LOI Submission.* The LOI must include the following:

a. Eligible Entity's Profile and Point of Contact Information:

1. Legal name of the Eligible Entity and applicable organizational information. If the Eligible Entity is a subsidiary of one or more Eligible Entities the Eligible Entity must list its owners in the LOI.

2. Eligible Entity's address, principal place of business, and website.

3. Eligible Entity's tax identification number and its Unique Entity Identifier (UEI) number from the System for Award Management (SAM) registry.

4. Specify if the Eligible Entity (a) is an existing RUS borrower; (b) is a former RUS or REA borrower; or (c) has never been a RUS or REA borrower.

5. Name and title of Eligible Entity's manager and/or point of contact, including first name, last name, title/position, phone, email, and other relevant contact information.

6. A Project name.

7. Location of the Project and the applicable service area using a digital shapefile. If the application asserts that the Project or the applicable service area is within a SUTA eligible area, it must describe how such location, or such applicable service area, is a SUTA covered area as provided in 7 CFR 1700.105.

b. A statement as to whether the subsequent New ERA Application will provide a request for a Project Award or System Award.

c. Identify the value of its net assets and specify if the Eligible Entity has ever been placed in receivership, court mandated liquidation, under a workout agreement, or has declared bankruptcy or has had a decree or order issued for relief in any bankruptcy, insolvency, or other similar action.

1. If the Eligible Entity is a current RUS borrower, the Eligible Entity must not be in default and must be current on any of its obligations to RUS.

2. The Applicant must submit a copy of its audited balance sheet and income statements for the last three years.

3. If applicable, the Eligible Entity must provide the balance sheet and income statements for the last three years of the entity or entities providing equity or security for the Award together with an explanation of the legal relationship among the legal entities.

4. If the Eligible Entity is a wholly or jointly owned subsidiary of an electric cooperative, the Eligible Entity must provide a balance sheet and income statement of each of its members.

d. Identify the type and amount of financial assistance described in Section B.5. it will seek in its application if it receives an Invitation to Proceed. If the Eligible Entity intends to seek a combination of the types of financial assistance listed in Section B.5, it must state the amount it intends to seek for each type of financial assistance.

e. Disclose if any foreign entity or foreign person has an ownership interest, voting interest, management rights, or an equity interest in the Eligible Entity or any rights in the proposed project(s).

f. Estimate the proposed GHG reduction from the Portfolio of Actions

as provided in Section A.4. of this Notice.

g. State the value of its Total Utility Plant (TUP) as of December 31, 2022.

h. Provide a technical description of the Project(s) it intends to finance if it receives an Award. The technical description must include the following:

1. A description of other actions related to the Projects that will allow the Eligible Entity to reduce its total GHG emissions.

2. The description of the Portfolio of Actions shall not exceed 1,500 words, and it must include a summary of the technical aspects of the various actions that will allow RUS to measure the reduction of GHG emissions resulting from the Portfolio of Actions.

3. The Eligible Entity must provide the amount of GHG emissions reductions under the evaluation criteria listed in Section E that will result from the implementation of its proposed Project(s) in the LOI. This will be completed by using the RUS Achievable Reductions Tool or submission of comparable data. Use of other methods by Eligible Entities may impact the Agency's timeline for review of the application. Eligible Entities that choose to use other methods will need to demonstrate that their method provides comparable information for the Agency to adequately estimate the reduction of GHG emission reductions stemming from its proposed Portfolio of Actions.

4. The Eligible Entity must also provide sufficient detail for RUS to determine that the Portfolio of Actions satisfies the technical requirements for this program and is consistent with industry standards and prudent utility practices.

i. RUS reserves the right to ask Eligible Entities for clarifying information on, or additional information related to, the LOI.

ii. *Phase 2—Application Submission.* Upon receiving an Invitation to Proceed, the Applicant must submit its application package within ninety (90) days of receipt of such invitation. The Applicant's application package must contain the applicable information and documents required in 7 CFR part 1710, subpart D as well as the following information and documentation:

a. *Cover Letter.* A signed cover letter from the Applicant's general manager or highest-ranking officer requesting an Award under this NOFO and include a brief executive summary.

b. *Articles of incorporation and bylaws or other applicable governing and organizational documents.* The Applicant must provide its articles of incorporation or other applicable organizational documents currently in effect, as filed with the appropriate state office, setting forth its corporate purpose, and the bylaws or other governing documents currently in effect, as adopted by its governing body. Applicants that are active RUS borrowers may comply with this requirement by notifying RUS, in writing, that there are no material changes to the documents already on file with RUS.

c. *Environmental and Historic Preservation Requirements.* If the Applicant has not received written notice from RUS that the Project environmental review process is formally concluded as provided in 7 CFR 1970.11, it must submit documents that establish that a review is in progress and no ground disturbance activities have started prior to receiving notice that the Environmental and Historic Preservation Requirements have been completed. This requirement requires the Applicant to include a certification that construction has not started and that it will not start prior to obtaining written notice from RUS. The Applicant must further state the type of environmental review document it believes needs to be prepared in accordance with 7 CFR part 1970 (*e.g.,* a Categorical Exclusion with an Environmental Report, an Environmental Assessment, or Environmental Impact Statement in accordance with subparts B, C, or D, respectively). The Applicant must provide a description of any potential environmental controversy or extraordinary circumstances, and the estimated timelines for completing the environmental process. Applicants are strongly advised that commencing construction prior to environmental or historic preservation clearance could make a Project ineligible for RUS financing.

d. *Financial Forecast.* In order to demonstrate that the loan is feasible as required in 7 CFR 1710.112, the Applicant must submit a financial forecast. For System Awards, the financial forecast must cover at least 10 years from the commercial operating date of the Project to be financed, and it must demonstrate that the Applicant's operation is economically viable and that the proposed loan is financially feasible. RUS may request projections for a longer period of time or additional information if RUS deems it necessary based on the financial structure of the Applicant and necessary to make a determination with respect to Financial Feasibility. For Project Awards, RUS may require that the financial forecast cover a period equal to the maturity period of the loan.

RUS will provide the Applicant with the specific information and data that must be included in the financial forecast in the Invitation to Proceed.

e. *Ratepayer Benefit:* The Award must provide demonstrable benefits to rate payers located in the service area. The Applicant must demonstrate in its New ERA Application that the consumer and financial benefits resulting from the Award will be shared between the Awardee and the Off-taker. This must be shown through a long-range financial forecast scenario that establishes that the revenue per kilowatt hour (KWh) the Applicant will receive from the sale of the power to the Off-taker would have been higher but for the Award. Additionally, a net present value calculation should be performed to demonstrate the financial benefit to the rate payer resulting from the Award versus business as usual. The Agency may also request additional ratepayer information over the course of the program.

f. *Power Purchase Agreement* (PPA). If the Applicant proposes to sell the energy generated from the Project to an Off-taker, the Applicant must provide an executed copy of the PPA with the Off-taker. If the Applicant is unable to execute a final PPA with the Off-taker prior to submitting its application, it must submit a draft of the PPA with its application and then submit the executed copy of the PPA when it is executed. RUS will not approve a New ERA Application that proposes to sell the energy to an Off-taker unless and until the Applicant submits an executed PPA with the Off-taker and RUS approves such PPA.

Further, if the Applicant proposes to sell power generated from the Project to an Off-taker under a PPA, the Applicant must provide a draft copy of the PPA with the Application, which must include two different rate schedules; one for the case without the provision of the Award and the other for the case with the provision of the Award. Because the PPA is essentially the mechanism by which consumers will benefit from the New ERA Program, all draft PPAs must be approved by RUS prior to being executed. RUS approval of the New ERA Application is predicated upon an executed PPA that has been approved by the Agency.

g. *Power Resources Owned, Co-owned or Leased.* If applicable, provide a discussion or table of the existing power resources available to the Applicant that includes generation facilities owned, co-owned or leased. The information provided should include: name of plant and unit; ownership interest (%); type

of unit and fuel used; net peak capacity; and in-service date.

h. *Power Purchase Contracts.* If applicable, provide a discussion of the Applicant's power purchase contracts (with terms greater than two years) that describes the capacity and energy resources purchased. The information should include: type of contract (take-or pay, unit power purchase, parties to the contract, amount (capacity and energy); and term and expiration date.

i. *Power Sales Contracts.* If applicable, a description of any existing power supply arrangements, such as wholesale power contracts, between an Off-taker and its members including the type of agreements (*e.g.,* all or partial requirements), the initial execution dates, and the dates the agreements expire. The Applicant must provide copies of the agreements if requested by the Agency.

j. *Engineering Report.* A signed, final engineering report or final engineering and power cost study must be provided with the New ERA Application or soon thereafter. The report must describe the purpose, design, costs, construction, and operation of the Project(s). A draft engineering report must be submitted for RUS approval prior to it being finalized and signed. RUS approval of the engineering report is required prior to the obligation of an Award; however, the Awardee may amend the engineering report with RUS' written approval after obligation. The finalized engineering report must be signed or approved by licensed professional engineer.

k. *Project Contracting.* The Applicant must provide a list of all engineering, procurement, and construction contracts it intends to use on the Project(s), with a brief description and cost estimate of each contract. At the Agency's discretion, any contracts selected by the Agency for review and approval must be submitted within period-of-time requested by the Agency. In no event will Award funds be obligated prior to RUS approval and any necessary applicable government approval of the selected Project contracts.

l. *Interconnection Agreements.* Agreements required to interconnect a Renewable Energy System or Zero-Emission System or Energy Storage System or microgrid system to a distribution or transmission system must be included with the application. If the Applicant is unable to submit the necessary interconnection agreement prior to submitting its New ERA Application, it must submit a draft of the interconnection agreement with its application and then submit the executed copy of the interconnection agreement when it is executed. RUS must approve any interconnection agreement before an Award is obligated.

m. *System Impact Studies.* The status and summary of any related System Impact Studies, as they may relate to the interconnection of the Project with a distribution or transmission network, must be provided with the application. System Impact Studies must be conducted, as applicable, to include load flow studies, short circuit analysis, system stability analysis, and conclusions (*e.g.,* identify voltage, overload, stability problems and proposed actions or contingencies; single contingency analysis of proposed facilities; transmission constraints; and system improvements needed). The nature of any required system upgrades and associated costs to be incurred by the Awardee, Off-taker or other entity must be identified. The Agency may request a copy of any System Impact Studies or links to review such studies. The Agency will not obligate an Award until the Applicant submits the System Impact Study.

n. *Transmission Service Agreement.* Transmission Service Agreements required to export, transmit or deliver the power from the Project to the Off-taker must be included with the application. These agreements must receive Agency approval and the Agency will not obligate an Award until it has approved all necessary Transmission Service Agreements.

o. *Other Major Agreements.* The Applicant must provide a list and a brief description-of all other major agreements that will need to be executed for the Project. Such agreements, if applicable, include, but are not limited to operations and maintenance arrangements, joint ownership arrangements, fuel management, and fuel supply and transportation. Agreements selected for approval by the Agency should be submitted within the period of time requested by the Agency. RUS will not approve the New ERA Application until all agreements requested for review have been approved by the Agency.

p. *Meteorological Data and Studies.* Renewable Energy Systems such as solar and wind projects must be supported with meteorological data and studies to determine the expected energy generation of the facility during the initial year of operation. The Applicant must identify the amount and basis of any annual degradation in energy output of the Renewable Energy Systems.

q. *Fuel and Fuel Transportation Strategies.* If applicable, the Applicant must describe the fuel and fuel transportation strategies of the Project and show that the fuel supply for the life of the Project is adequate. Fuel supply contracts and fuel transportation contracts must be identified, including the term of each contract. Copies of the fuel contracts or arrangements must be provided if requested by the Agency.

r. *Sources and Uses of Water.* The Applicant must identify the uses and source of water for the Project and provide evidence that the water supply will be adequate to meet both daily requirements and for the life of the Project. If requested by the Agency, (1) the Applicant must provide copies of any agreements or arrangements that would be used to purchase or receive water used and consumed by the Project; and/or (2) the applicable water balance diagram of the facilities must be provided.

s. *Technical and Financial Description.* The technical and financial description of the Portfolio of Actions shall not exceed 1,500 words per Project proposed in the New ERA Application and must include the following:

1. Description of each Project being requested for financing, including Project name, location, type, size, and renewable or zero-emission energy units generated and saved or carbon captured.

2. For each Project, submit an updated or revised digital shapefile of the proposed service area if such service area has changed from that contained in the digital shapefile submitted with the LOI.

3. For each Project, indicate the estimated dates to start construction and to achieve commercial operation.

4. Verification that the Project(s) will be designed, constructed and operated based on proven Commercially Available Technology.

5. The estimated total capital cost of each Project and the amount of Award funds being requested to finance each Project.

t. *Real Estate Agreements.* If the Applicant is leasing the real estate upon which it will build and operate the Project, the Applicant must submit an executed copy of the lease agreement with the application. The lease agreement must have a provision that allows the Applicant to collaterally assign the lease to RUS as security for the loan. Further, to the extent that the lessor under any lease with the Applicant has executed a mortgage or deed of trust on the real estate in question, the mortgagee must execute an attornment and non-disturbance agreement in favor of the Applicant that will allow the Applicant to continue to lease the real property in question and operate the Project in the event of the

lessor's default under the mortgage or deed of trust. RUS will not obligate an Award until the Applicant submits all applicable Real Estate Agreements.

u. *Community Benefit Plan.* The Applicant must confirm in its application that it will develop a Community Benefit Plan(s) through stakeholder engagement within the first year after the date RUS obligates the Award. The Agency will not advance any Award funds until the Awardee has developed its Community Benefit Plan(s). The Agency will not advance the grant portion of an Award until the Awardee implements its Community Benefit Plan(s).

The Applicant must identify in its application how it will develop its Community Benefits Plan(s) and any initial benefits to residents within the service area expected beyond the Project itself, including, but not limited to at least one of the following:

1. Investments in the American workforce such as local worker retraining and job creation;

2. The launch or expansion of systemic or consumer-based energy efficiency and carbon reduction measures such as providing on-bill financing or Pay-as-You-Save programs to improve the energy efficiency and beneficial electrification for consumers;

3. Land use agricultural integration that demonstrates ways for agricultural producers to benefit from clean energy projects; and

4. Diversity, equity, inclusion and accessibility and environmental justice goals set forth in Executive Order 14008, Part II, Section 223, the Justice40 Initiative, which aims to assure that 40 percent of the overall benefits of certain federal investments flow to disadvantaged communities.

v. *Refinancing and Modifications.* If the Applicant is seeking to refinance or modify existing debt, it must provide sufficient information and data to demonstrate how it will utilize the cash savings generated from the proposed loan refinancing or modification to purchase Renewable Energy, Renewable Energy Systems, Zero-Emission Systems, or Carbon Capture and Storage Systems; to deploy such systems; or to make energy efficiency improvements to electric generation and transmission systems.

w. *Award Type.* The Applicant must specify what type of Award (loan only, grant only, loan/grant combination, and/or loan refinancing/modification) it is seeking. If the Applicant is seeking more than one type of Award, it must clearly state the type of Award it is seeking for each Project and the amount of each type of Award.

x. *Non-RUS Funds.* The Applicant must identify the source of any non-RUS funds that it intends to utilize to finance the cost of the proposed Project in its application.

y. *Tribal Government Resolution of Consent.* For each Project that will be sited on Tribal Lands where a Federally Recognized Tribe has regulatory authority and for each Project whose service area includes Tribal Lands where a Federally Recognized Tribe has regulatory authority, certification from the appropriate Tribal official that it consents to or has no objection to the Project is required. The appropriate certification is a Tribal Government Resolution of Consent. The appropriate Tribal official is the Tribal Council of the Federally Recognized Tribe(s) with regulatory jurisdiction over the Tribal Lands at issue. Any Applicant that fails to provide a certification to provide service on the Tribal Lands identified in the application will not be considered for funding with respect to the infrastructure proposed to be constructed on Tribal Lands.

z. *Eligible Costs.* The Applicant must include in its New ERA Application a breakdown of the estimated eligible costs listed in Section C.3.i for which it intends to seek reimbursement.

aa. *Additional Information.* RUS reserves the right to require the Applicant to provide additional information or documentation in support of its application.

3. *System for Award Management and Unique Entity Identifier.*

i. At the time of application, each Applicant must have an active registration in the System for Award Management (SAM) before submitting its application in accordance with 2 CFR part 25. To register in SAM, entities will be required to obtain a Unique Entity Identifier (UEI). Instructions for obtaining the UEI are available at *https://sam.gov/content/entity-registration.*

ii. Applicants must maintain an active SAM registration, with current, accurate and complete information, at all times during which it has an active Federal award or an application under consideration by a Federal awarding agency.

iii. Applicants must ensure they complete the Financial Assistance General Representations and Certifications in SAM.

iv Applicants must provide a valid UEI in its application, unless determined exempt under 2 CFR 25.110.

v. The Agency will not make an Award until the Applicant has complied with all SAM requirements including providing the UEI. If an Applicant has not fully complied with the requirements by the time the Agency is ready to make an Award, the Agency may determine that the Applicant is not qualified to receive a Federal Award and use that determination as a basis for making a Federal Award to another Applicant.

4. *Submission Dates and Times.*

i. *Letters of Interest. Letters of Interest* can be submitted beginning at 11:59 p.m. ET on July 31, 2023, and until 11:59 p.m. ET on August 31, 2023. Letters of Interest will not be accepted after 11:59 p.m. ET on August 31, 2023.

ii. Eligible Entities that receive a written invitation to submit a full New ERA Application will have sixty (60) days from the date RUS sends the invitation to submit such a full New ERA Application. RUS reserves the right, in its sole discretion, to extend the sixty (60)-day deadline upon the written request of the Applicant if the Applicant demonstrates to the satisfaction of the Administrator that exceptional circumstances exist to warrant the extension.

iii. RUS also reserves the right to ask Applicants for clarifying information and additional verification of assertions in the LOI and New ERA Application.

5. *Intergovernmental Review.* Executive Order (E.O.) 12372, ''Intergovernmental Review of Federal Programs,'' is not required for this Program.

6. *Funding Restrictions.*

i. Projects that receive support from the PACE Program for construction will not be eligible for support for the direct purchase of power produced by that supported Project.

ii. The Agency will only finance Commercially Available Technologies.

iii. Given the statutory focus on reductions in GHG, the Agency will not utilize funds made available under this funding notice to: (a) finance new investments in new sources of fossil fueled power; or (b) system improvements at existing fossil fueled generation plants, regardless of whether such improvement is incorporated in the scoring of the Applicant's Portfolio of Actions, except Carbon Capture Systems and Energy Storage Systems.

iv. RUS will not provide funding under this NOFO for any Project if construction of the Project commenced before August 16, 2022, the effective date of the IRA.

7. *Other Submission Requirements.*

i. The Agency will accept LOIs through an online mechanism as opened on or before July 31, 2023, unless otherwise indicated by the Agency.

ii. By submitting the LOI, the Eligible Entity certifies to RUS that it has the

intent and ability to submit a complete New ERA Application within ninety (60) days of RUS emailing an Invitation to Proceed should RUS provide such Invitation to Proceed.

iii. An Applicant's receipt of an invitation to submit a full New ERA Application is not a guaranty that the Applicant will receive an Award or that Awards will be offered on the same terms as the Applicant sought.

iv. The Agency will accept consolidated LOIs and New ERA Applications from groups of Eligible Entities such as a generation and transmission utility and its distribution members or groups of distribution utilities. The Agency will score the consolidated LOIs and New ERA Applications by aggregating the estimated reduction in GHG emissions of each the Eligible Entity's Portfolio of Actions into one score. A consolidated LOI or New ERA Application will compete in either Category I, Category II, or Category III, as detailed in Section E.2.i.c., based on the combined TUP of the group, which will be the sum of the TUP of each participating Eligible Entity in the group. The Agency, however, reserves the right to evaluate each Eligible Entity's proposed Projects in order to determine the technical and Financial Feasibility of each Eligible Entity's proposed Project or Projects separately. Further, the Agency may review the Financial Feasibility of the New ERA Application on a disaggregated basis by conducting the underwriting individually for each of the individual Applicants. Consolidated Applicants must also be prepared to accept disaggregated contractual and financial commitments relating to their consolidated New ERA Application. Further, each Applicant in a consolidated LOI or New ERA Application must have an active SAM.gov registration at the time the consolidated LOI or New ERA Application is submitted.

v. Wholly or jointly owned subsidiaries of cooperatives are included in the definition of Eligible Entity under Section 22004 of the IRA. The Agency, therefore, will accept a single application from a joint venture entity between two or more Eligible Entities. A LOI or New ERA Application submitted by a joint venture entity will be reviewed and evaluated as any other LOI or New ERA Application requesting a Project Award. Further, in the LOI, each owner of the joint venture entity must also attest to its willingness and demonstrate its ability to provide adequate security for their share of the Award as well as their performance of all related program commitments.

vi. The Agency will accept only one New ERA Application per Applicant whether individually or as part of a consolidated application.

vii. Applicants who have submitted proposals under the funding notice for the PACE Program may not include the same proposal or project for funding under this Notice. The Agency will consider separate, single proposals under the PACE and New ERA Programs from the same Applicant provided the proposed actions are separate and distinct. In order to receive separate PACE and New ERA Awards the Applicant must demonstrate to the satisfaction of the Administrator that the Applicant has the financial and technical ability to carry out both Awards.

viii. For purposes of this NOFO, an electric cooperative and any subsidiary in which it holds a majority ownership or voting interest shall be considered one entity for purposes of determining the 25 percent limitation on the grant component of a New ERA Award as provided in section 22004 of the IRA.

E. Letters of Interest and Application Review Information

1. *Criteria.*

i. *Letters of Interest.* Applicants must submit an LOI that contains the information required in Section D.2.i. of this Notice. The LOIs will be used to invite a pool of final applications that advance the purposes of the New ERA Program.

RUS will review and evaluate the LOIs to determine if they are eligible, competitive and within the funding limits and policy objectives of the New ERA Program. RUS will evaluate the LOIs based on the criteria listed in Section C.1.iv. and E.1.ii. below. Thus, Eligible Entities are encouraged to consider the criteria in Section C.1.iv. and E.1.ii. below when preparing their LOI's. Letters of Interest in which the technical description of the Project(s) exceed 1,500 words may be disregarded.

Once RUS has reviewed and evaluated the LOIs, Eligible Entities will be informed if they are invited to submit a New ERA Application. Eligible Entities that receive an Invitation to Proceed will have sixty (60) days from when the date of the Invitation to Proceed is sent to submit a New ERA Application to RUS. In the Invitation to Proceed, the Agency reserves the right to: (a) suggest modifications to the proposal outlined in the LOI; (b) negotiate a final package of assistance with each Eligible Entity; and (c) update an Applicant's evaluation based on the full application proposal submitted. Each Eligible Entity that receives an Invitation to Proceed will have a General Field Representative (GFR) assigned to it. An Invitation to Proceed does not constitute an offer by the Agency, nor does it constitute approval of the Applicant's New ERA Application.

ii. *New ERA Application.* RUS will review each New ERA Application based upon: (a) RUS' general underwriting requirements contained in 7 CFR part 1710, subpart D; and (b) the Applicant's Portfolio of Actions using the selection criteria identified in 1 through 4 below. Each of the metrics in the criteria below will be generated by the Achievable Reductions Tool or other methods acceptable to RUS as noted above. Pursuant to IRA section 22004, the heaviest weight will be given to the reduction of GHG emissions (CO_2e). Points will be awarded as follows:

1. Annual tons of carbon dioxide equivalent (CO_2e) reduced (from generation resources owned or purchased): up to 30 points.

2. Annual tons of CO_2e avoided: up to 10 points.

3. Percentage difference in renewable or zero-emission energy in the energy mix (from generation resources owned and purchased): up to 10 points.

4. Percentage decrease in the carbon intensity of the energy mix (from generation resources owned and purchased): up to 10 points.

2. *Review and Selection Process.*

i. RUS will acknowledge the receipt of LOIs and New ERA Applications via an email to the Applicant. After receipt of LOIs and New ERA Applications, RUS will take the following actions:

a. Incomplete LOIs and applications or ineligible applications as of the deadline for submission will not be considered further, and the Applicant will be notified in writing.

b. Letters of Interest and New ERA Applications will be reviewed for completeness and ranked based on the scoring criteria in E.1.ii. above.

c. Applicants with complete applications will be placed into one of three categories based on their year ending 2022 TUP value.

1. *Category I:* Applicants with a TUP value equal to or over $500 million.

2. *Category II:* Applicants with a TUP value under $500 million but over $200 million.

3. *Category III:* Applicants with a TUP value equal to or less than $200 million.

d. Applicants will then compete for Awards within their category and based on the evaluation of metrics that reflect achieving the greatest reductions in GHG emissions. RUS expects to utilize at least 60 percent of the funds made available under this Notice for Category

I Applicants, up to 20 percent of funds made available under this Notice for Category II, and up to 20 percent of the funds made available under this Notice for Category III Applicants. This split in the value of TUP reflects the likely lower total costs for smaller entities to transition to Renewable Energy Systems or Zero-Emissions Systems and the desire to ensure that both large and small Applicants are able to benefit from the program while ensuring that the program meets its statutory requirement to achieve the greatest reduction in GHG.

e. RUS will not approve a specific request for financial assistance if RUS determines that the requested financial assistance imposes an undue risk to RUS' loan portfolio in general.

f. For the purposes of this NOFO, the Agency will apply the SUTA provisions of section 306F of the RE Act as it would to a program contained in section 306F(a)(1).

3. *Other Information.*

The Administrator shall have the authority and sole discretion, to: (i) Shift funding between Category I, Category II, and Category III Applicants, (ii) Offer financing in different amounts or on different terms than what the Applicant proposes in its application; (iii) Reject any application or any Project in an application regardless of RUS' evaluation of the Project that the Administrator determines is not eligible, feasible, securable, or executable within the timeframe of the Award; (iv) Add additional funding to this competition if such funding becomes available; and (v) Make an offer that references funding from other RUS programs separate from a New ERA Award.

F. Federal Award Administration Information

1. *Federal Award Notices.*

i. *Award Notices.* Applicants will be notified of their application's status as follows:

a. Applicants not selected for funding will be notified in writing.

b. Successful Applicants will receive a Commitment Letter from the Administrator specifying: (i) The total amount of the Award approved by RUS; and (ii) Any additional controls on its financial, investment, operational and managerial activities; acceptable security arrangements; and such other conditions deemed necessary by the Administrator to adequately secure the Government's interest and ensure repayment. Upon receipt of the acceptance of the Award from the Awardee, RUS will begin to prepare the Award Documents with the assistance of the Applicant. Upon completion of the Award Documents, RUS will forward those documents to the Applicant.

1. The Administrator may incorporate any applicable provisions of 2 CFR part 200, in addition to the provisions of 2 CFR part 200 that have been incorporated into this NOFO, into the Award Agreement if the Award is comprised only of a grant.

2. Receipt of a Commitment Letter from the Administrator does not authorize the Awardee to commence performance under the Award. All RUS requirements and Award conditions specified in the Commitment Letter must be met before loan or grant funds will be disbursed. Applicants may not commence construction on any Project until RUS provides the Applicant with written environmental clearance of the Projects as provided in 7 CFR part 1970. RUS will notify the Awardee when it is authorized to commence performance using New ERA funds.

ii. *Funding Disbursements and Restriction.* The Agency will use all tools at its disposal to obligate funds in a timely manner. RUS will disburse funds to the Awardee in accordance with the terms of the executed Award Documents, this NOFO, and the applicable provisions of 7 CFR parts 1710 through 1730, 1767, 1773, 1787, and 1970 (*https://www.ecfr.gov/current/title-7/subtitle-B/chapter-XVII*).

a. Except as related to a stranded asset loan, all Award funds will be disbursed as a reimbursement for Eligible Award Costs.

b. The executed Award Agreement will contain a provision stating that no Award funds will be advanced after September 30, 2031. The Agency will set a last day for advance in the Award Agreements well in advance of this statutory limit. All undisbursed funds as of close of business on September 30, 2031, will automatically be rescinded.

c. Unless stated otherwise in the NOFO or in the applicable Award Agreement, RUS will advance grant funds upon the Awardee's completion and testing of the Project to the satisfaction of RUS as provided in Section B.5.i.c. of this NOFO and the reporting of such testing to RUS.

d. The Administrator may condition any advance on the Awardee meeting specific requirements prior to making any advance on an Award.

e. The Awardee is encouraged to display USDA standard infrastructure investment signage, available for download from the Agency, during construction of the Project. Expenditures for such signage shall be a permitted eligible cost of the Project.

iii. *Award term.* Except Awards that include a loan refinancing or loan modification, Awards will be for a term not to exceed the lesser of: (a) The expected useful life of the Project: (b) The term of the PPA (if required for execution between the Awardee and the Off-taker): (c) The term of the lease for the land that the Project will occupy (if such land is not owned by the Awardee), (d) The expiration dates of power supply arrangements between the Awardee and its members should the Awardee provide the power supply needs of the members under such power supply arrangements; or (e) 35 years. The term of an Award that includes a loan refinancing or loan modification will be determined on a case-by-case basis based on the Financial Feasibility of the Award.

iv. *Interest rate.* Loans made under the New ERA Program will bear interest per annum at the percentages specified in section B of this NOFO.

v. *Repayment.* Except for a loan relating to loan refinancing or loan modification, the repayment of each advance on a loan to the Awardee must be fully amortized over the remaining term of the loan as determined in Section F.1.iii. The repayment of an advance on a loan relating to the refinancing or modification of an existing loan must be fully amortized over the term of the loan as specified in the Award Documents. The amortization will be premised upon equal monthly debt service payments over the term of the loan portion of the Award. Further, unless otherwise provided in the NOFO, the provisions of 7 CFR parts 1710 and 1714 (*https://www.ecfr.gov/current/title-7/subtitle-B/chapter-XVII*), applicable to direct loans, shall apply to any loan made pursuant to an Award.

vi. *Prepayment.* An Awardee may prepay the loan component of an Award, at par, at any time. All other terms under the Award Documents will continue for any remaining portion of the Award.

vii. *Financial ratios.* The requirements for coverage ratios will be set forth in the Commitment Letter and the Awardee's Award Documents with RUS. The minimum coverage ratios required of the Awardee, whether applied on an annual or average basis, will be determined by the Administrator on case-by-case basis based on the risk profile of the Awardee and specific loan features. Existing RUS borrowers will be subject to their current financial coverage ratios contained in the applicable loan agreements or indentures unless otherwise determined by the Administrator. When new Award

Documents are executed, the Administrator may, on a case-by-case basis, increase the coverage ratio of the Awardee if the Administrator determines that higher ratios are required to ensure the repayment of a loan made by RUS. Also, the Administrator may, on a case-by-case basis, reduce the coverage ratios if the Administrator determines that the lower ratios are required to ensure the repayment of the loan made by RUS.

viii. *Equity requirements.* As noted in Section B.5.i.b., RUS will require the Awardee to provide at least 25 percent equity in the Project for a Project Award. For System Awards, the Administrator may, in the Administrator's sole discretion, deem it acceptable to loan the full cost of the Project. The required equity position will be determined by the Administrator on a case-by-case basis and will be set forth in the Commitment Letter and the Award documents as a condition to the Award. As noted above, RUS may consider allowing the Awardee to meet the equity requirements by utilizing any grant component of the Award or any other grant, if permitted under applicable authorities. Further, RUS may consider allowing the Awardee to meet the equity requirement by utilizing any applicable investment tax credit or an elective direct payment in lieu of the investment tax credit relating to the Project as permitted in the Internal Revenue Code of 1986 and its implementing regulations. In each case, RUS must find that such uses of the tax benefits relating to the Project are financially feasible. If the Award is grant only because the Awardee is financing the portion of the cost of the Project not covered by the grant solely from a non-RUS source, the Administrator may consider waiving the equity requirement.

ix. *Opinion of counsel.* An opinion of counsel is required at closing and must be acceptable to the Administrator, opining that the Awardee is properly organized and has the required corporate authority to enter into the proposed transaction. It must also identify the proposed collateral to secure the Award and certify that such collateral is free of liens or identify any issues that may arise for the Government regarding the securing and perfecting of a first and prior lien on such property comprising the collateral.

x. The Award Documents. The Agency will provide the Awardee with the applicable Award Documents that the Award must execute.

xi. *Award term and conditions.* The Administrator reserves the right to modify or waive certain requirements if the Administrator believes such modifications or waiver are in the best interest of the Government and the Administrator has determined that the loan component of any Award will be repaid in the designated time period and the security for such loan is adequate. Also, the Administrator, at their sole discretion, may add such terms and conditions in an Award Agreement to ensure the loan is timely repaid and is adequately secured. Additionally, as provided in 7 U.S.C. 1981(b)(4) the Administrator retains the right to modify the terms of any Award pursuant to the terms of that authority.

xii. *Reporting.*

a. *Performance Reporting.* RUS will establish periodic reporting requirements. These will be enumerated in the Award Documents.

b. *Accounting Requirements:* RUS accounting requirements include compliance with Accounting Principles Generally Accepted in the United States (GAAP), as well as compliance with the requirements of the applicable regulations: 2 CFR part 200 subpart E, 48 CFR 31, and the system of accounting prescribed in 7 CFR part 1767. The Administrator may modify the accounting requirements if it is deemed necessary to satisfy the purpose of the statute.

c. *Audit Requirements:* Awardees will be required to prepare and furnish to RUS audits as follows:

1. Non-Federal Entities shall provide RUS with an audit pursuant to 2 CFR part 200, subpart F. The Awardee must follow subsection 502 in determining federal awards expended. All RUS loans impose an ongoing compliance requirement for the purpose of determining federal awards expended during a fiscal year. In addition, the Awardee must include the value of new federal loans made along with any grant expenditures from all federal sources during the Awardee's fiscal year. Therefore, the audit submission requirement for this program begins in the Awardee's fiscal year that the loan is made and thereafter, based on the balance of federal loan(s) at the beginning of the audit period. All required audits must be submitted within the earlier of: (i) 30 calendar days after receipt of the auditor's report; or (ii) nine months after the end of the Awardee's audit period; and

2. For all other entities, Awardees shall provide RUS with an audit within 120 days after the as of audit date in accordance with 7 CFR part 1773. Note that with respect to advances that contain loan funds, the audit is required after an advance has been made, and, thereafter, from the close of each subsequent fiscal year until the loan is repaid in full. With respect to advances that only contain grant funds, the audit is required until all grant funds have been advanced or rescinded and all financial compliance requirements have been fully satisfied. While an audit is required, Awardees must also submit a report on compliance and internal controls over financial reporting, as well as a report on compliance with aspects of contractual agreements and regulatory requirements.

xiii. *Monitoring.* Awardees must comply with all reasonable RUS requests to support ongoing monitoring efforts including monitoring an Awardee's construction progress and progress towards achieving project related GHG reductions. The Awardee must afford RUS, through their representatives, a reasonable opportunity, at all times during business hours and upon prior notice, to have access to and the right to inspect any or all books, records, accounts, invoices, contracts, leases, payrolls, timesheets, cancelled checks, statements, and other documents, electronic or paper of every kind belonging to or in possession of the Awardee or in any way pertaining to its property or business, including its parents, affiliates, and subsidiaries, if any, and to make copies or extracts therefrom. Failure to comply with reasonable RUS requests could result in a termination of the Award Agreement.

2. *Administrative and National Policy Requirements.*

The items listed in this Notice implement the appropriate administrative and national policy requirements, which include but are not limited to:

i. Execution of an Award Agreement and related Award Documents;

ii. Compliance with other applicable Federal statutes and regulations to include 7 U.S.C 8103, the generally applicable provisions of 7 CFR parts 1700 through 1730, 1767, 1773, and 1787, 1970 or any successor regulations (*https://www.ecfr.gov/current/title-7/subtitle-B/chapter-XVII*).

iii. Except as provided in the NOFO and in the executed Award Documents, all other generally applicable regulations contained in 7 CFR Chapter XVII will apply to New ERA Program Awards.

iv. All existing RUS Electric Program bulletins apply (*https://www.rd.usda.gov/resources/regulations/bulletins*).

v. Additional requirements that apply to recipients selected for this program can be found in the Grants and Agreements regulations of the Department of Agriculture codified in 2

CFR parts 180, 400, 415, 417, 418, 421; 2 CFR parts 25 and 170 (*https://www.ecfr.gov/current/title-2*); and 48 CFR 31.2 (*https://www.ecfr.gov/current/title-48/chapter-1/subchapter-E/part-31/subpart-31.2*), and successor regulations to these parts.

G. Federal Awarding Agency Contact(s)

For general questions about this announcement, please contact the point of contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

H. Build America, Buy America Requirements

Infrastructure Project Awards under this announcement must meet the following domestic preference requirements:

1. *Funding to Non-Federal Entities.* Awardees that are Non-Federal Entities shall be governed by the requirements of section 70914 of the Build America, Buy America Act (BABAA) within the Infrastructure Investment and Jobs Act (IIJA), and its implementing regulations. The Act requires the following Buy America preference:

i. All iron and steel used in the Project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

ii. All manufactured products used in the Project are produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.

iii. All construction materials (excludes cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives) are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

BABAA only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does BABAA apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project. Any requests for waiver of these requirements must be submitted pursuant to USDA's guidance available online at *https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver.*

2. *Funding to all other entities.* All other Awardees shall be governed by the Agency's Buy American requirement at 7 CFR part 1787. Rural electric cooperatives, for-profit organizations, and investor-owned utilities are not considered Non-Federal Entities. Any requests for waiver of these requirements must be submitted pursuant to those regulations.

I. Other Information

1. *Congressional Review Act Statement:* Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act or CRA); 5 U.S.C. 801 *et seq.,* this action meets the threshold for a major rule, as defined by 5 U.S.C. 804(2), because it will result in an annual effect on the economy of $100,000,000 or more. Accordingly, the Agency will not take action on LOIs until sixty (60) days has lapsed from notification to Congress.

2. *Administrative Procedure Act Statement.* This NOFO is being issued without advance rulemaking or public comment. The Administrative Procedure Act of 1946 (APA), as amended (5 U.S.C. 553), has several exemptions to rulemaking requirements. Among them is an exception for a matter relating to ''loans, grants, benefits, or contracts.''

3. *Paperwork Reduction Act.* In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), USDA requested that the Office of Management and Budget (OMB) conduct an emergency review of a new information collection that contains the Information Collection and Recordkeeping requirements contained in this Notice.

In addition to the emergency clearance, the regular clearance process is hereby being initiated to provide the public with the opportunity to comment under a full comment period, as the Agency intends to request regular approval from OMB for this information collection. Comments from the public on new, proposed, revised, and continuing collections of information help the Agency assess the impact of its information collection requirements and minimize the public's reporting burden. Comments may be submitted regarding this information collection through the Federal eRulemaking Portal at *https://www.regulations.gov.* In the ''Search for dockets and documents on agency actions'' box, type in the DOCKET # from this notice to submit or view public comments and to view supporting and related materials available electronically. Information on using *Regulations.gov,* including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''FAQ'' link. Comments on this information collection must be received by July 17, 2023.

Title: Empowering Rural America (New ERA) Program.

OMB Control Number: 0572–NEW.

The following estimates are based on the average over the first 3 years the program is in place.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 31.853 hours per response.

Respondents: Electric cooperatives, subsidiaries of electric cooperatives.

Estimated Number of Respondents: 250.

Estimated Number of Responses per Respondent: 23.296.

Estimated Number of Responses: 5,824.

Estimated Total Annual Burden (hours) on Respondents: 185,514.

Copies of this information collection may be obtained from Pamela Bennett, Management Analyst, Regulatory Division, RD Innovation Center, telephone: 202–720–9639; email: *pamela.bennett@usda.gov.* All responses to this information collection and recordkeeping notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

4. *National Environmental Policy Act.* All recipients under this Notice are subject to the requirements of 7 CFR part 1970.

5. *Wage Rate Requirements.* As provided in 7 U.S.C. 8103(f) all Projects funded under the New ERA Program, as a condition of receiving a grant or loan under this section, an Eligible Entity shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed, in whole or in part, with the grant or loan, as the case may be, shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in

accordance with 40 U.S.C. 31, sections 3141 through 3144, 3146, and 3147.

6. *Federal Funding Accountability and Transparency Act.* All Applicants, in accordance with 2 CFR part 25, must be registered in SAM and have a UEI number as stated in Section D.3 of this notice. All recipients of Federal financial assistance are required to report information about first-tier sub-awards and executive total compensation in accordance with 2 CFR part 170.

7. *Civil Rights Act.* All grants made under this notice are subject to Title VI of the Civil Rights Act of 1964 as required by the USDA in 7 CFR part 15, subpart A (eCFR:: 7 CFR part 15 Subpart A—Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964) and section 504 of the Rehabilitation Act of 1973, Title VIII of the Civil Rights Act of 1968, Title IX, Executive Order 13166 (Limited English Proficiency), Executive Order 11246, and the Equal Credit Opportunity Act of 1974.

8. *Nondiscrimination Statement.* In accordance with Federal civil rights laws and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the 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 711 Relay Service.

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.usda.gov/oascr/program-discrimination-complaint-filing,* 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; or

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Andrew Berke,

Administrator, Rural Utilities Service, USDA Rural Development.

[FR Doc. 2023–10392 Filed 5–15–23; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

[Docket#: RUS–23–ELECTRIC–0003]

Notice of Funding Opportunity for the Powering Affordable Clean Energy (PACE) Program

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Utilities Service (RUS or the Agency), a Rural Development (RD) Agency of the United States Department of Agriculture (USDA), is soliciting Letters of Interest (LOI) for loan Applications, announcing the Application process for those loans, and providing deadlines for Applications from eligible entities under the Powering Affordable Clean Energy (PACE) Program. These loan funds will be made to qualified PACE Applicants to finance power generation Projects for Renewable Energy Resource (RER) systems or Energy Storage Systems (ESS) that support RER Projects. The PACE Program has $1,000,000,000 available in appropriated funds under the Inflation Reduction Act of 2022 (IRA).

DATES: Letters of Interest (LOIs) can be submitted beginning at 11:59 a.m. Eastern Time (ET) on June 30, 2023, until 11:59 a.m. ET September 29, 2023.

An applicant that is invited by RUS to proceed with the loan Application will have 60 days, or a time agreeable to the Agency, to complete and submit a loan Application beginning from the date the Invitation to Proceed is emailed to the PACE Applicant. If the deadline to submit the completed Application falls on Saturday, Sunday, or a Federal holiday, the Application is due the next business day. RUS reserves the right, in its sole discretion, to extend the deadline upon the written request of the applicant if the applicant demonstrates to the satisfaction of the Administrator that exceptional circumstances exist to warrant the extension.

ADDRESSES:

Letters of Interest (LOI) Submissions. All LOIs must be submitted to RUS electronically through an on-line application window. The Agency will finalize the specific requirements of submitting the LOI through the on-line application window by notice in the **Federal Register** and the RUS website at *https://www.rd.usda.gov/programs-services/electric-programs/powering-affordable-clean-energy-pace-program* on or before June 30, 2023.

Application Submissions. LOI submitters chosen to proceed with the loan Application must submit a completed loan Application package in accordance with the instructions provided in the RUS' Invitation to Proceed.

Other information. Additional information and resources are available at *https://www.rd.usda.gov/programs-services/electric-programs/powering-affordable-clean-energy-pace-program.* Information on IRA Funding for RD is located at the following website: *https://www.rd.usda.gov/inflation-reduction-act#fn.*

FOR FURTHER INFORMATION CONTACT: Christopher A. McLean, Assistant Administrator, Electric Program, RUS, RD, USDA, 1400 Independence Avenue SW, STOP 1568, Washington, DC 20250–1560; Telephone: 202–690–4492; Email: *SM.RD.RUS.IRA.Questions@usda.gov.*

SUPPLEMENTARY INFORMATION:

Overview

Federal Awarding Agency Name: Rural Utilities Service (RUS).

Funding Opportunity Title: Powering Affordable Clean Energy (PACE) Program.

Announcement Type: Notice of Funding Opportunity (NOFO).

Assistance Listing: 10.757.

Dates: Letters of Interest (LOIs) can be submitted beginning at 11:59 a.m. Eastern Time (ET) on June 30, 2023 until 11:59 a.m. ET September 29, 2023.

An applicant that is invited by RUS to proceed with the loan Application

will have 60 days, or within a time agreeable to the Agency to complete and submit a loan Application beginning from the date the Invitation to Proceed is emailed to the PACE Applicant. If the deadline to submit the completed Application falls on Saturday, Sunday, or a Federal holiday, the Application is due the next business day. RUS reserves the right, in its sole discretion, to extend the deadline upon the written request of the applicant if the applicant demonstrates to the satisfaction of the Administrator that exceptional circumstances exist to warrant the extension.

Rural Development Key Priorities: The Agency encourages applicants to consider projects that will advance the following key priorities:

• Assisting rural communities to recover economically through more and better market opportunities and through improved infrastructure;

• Ensuring all rural residents have equitable access to Rural Development (RD) programs and benefits from RD funded projects; and

• Reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities.

A. Program Description

1. *Purpose of the Program.* The IRA contains many transformative provisions. Importantly, it makes the largest investment in clean energy in U.S. history, allowing communities that have previously been left out of the clean energy economy to access affordable, reliable, and clean energy. The IRA also marks the largest investment in rural electrification since the 1930s, providing unique opportunities to advance economic development and quality of life in rural communities. The Biden-Harris Administration has prioritized these initiatives, elevating the role of infrastructure and the needs of rural America in its policies and their implementation.

The goal of the PACE Program is to support clean, affordable energy growth across America. The PACE Program provides loans to eligible entities, with varying levels of loan forgiveness, for Projects that generate and/or store electricity from RER.

2. *Statutory and Regulatory Authority.* PACE is authorized under Section 22001 of the Inflation Reduction Act, (IRA) Public Law 117–169 (IRA). Other Federal statutes and regulations that apply to this notice are: Section 317 of the Rural Electrification Act of 1936, 7 U.S.C. 940g (RE Act), 7 U.S.C. 8103, 7 CFR parts 1700–1730, 1767, 1773, and 1787, and 7 CFR part 1970.

The PACE Program is to be carried out by the RUS pursuant to Section 22001 of the IRA. Section 22001 of the IRA amends Section 9003 of the Farm Security and Rural Investment Act of 2002 by adding new subsection (h). Section 22001 of the IRA provides RUS with $1,000,000,000 in appropriated funds ''for the cost of loans under Section 317 of the RE Act.'' Additionally, Section 22001 of the IRA provides that PACE funds may be utilized to finance Projects that store electricity generated from eligible renewable energy sources listed under Section 317 of the RE Act. These Project Loans or System Loans will be forgiven up to 50 percent, or more under certain circumstances, provided the Awardee and the Project otherwise meet the term and conditions of the loan forgiveness.

Pursuant to Section 317(b) of the RE Act, loans shall be made for the purpose of constructing electric generation from renewable energy sources. Section 22001 of the IRA also provides that loan funds may be utilized for Projects that store electricity for such generation facilities. Further, Section 317(b) requires that the power generated from the eligible renewable energy source be for resale to rural and nonrural residents. Lastly, Section 317(c) requires that the rate of a loan shall be equal to the average tax-exempt municipal rate of similar maturities.

3. *Definitions.* The definitions applicable to this notice are as follows:

Administrator. The Administrator of the RUS, an agency under the RD mission area of the USDA.

Agency. The Rural Utilities Service (RUS).

Application. An application containing all information required by RUS as identified in the Invitation to Proceed. The application is materially complete in form and substance satisfactory to RUS within the specified time.

Award. The financial assistance offered to a PACE Applicant.

Awardee. An entity that has been awarded a PACE Award.

Commercially Available Technology. Equipment, devices, applications, or systems that have a proven, reliable performance, and replicable operating history specific to the proposed application. The equipment, device, application, or system is based on established patented design or has been certified by an industry-recognized organization and subject to installation, operating, and maintenance procedures generally accepted by industry practices and standards. Service and replacement parts for the equipment, device, application, or system must be readily available in the marketplace with established warranty applicable to parts, labor, and performance.

Commitment Letter. The notification issued by the Administrator to a PACE Applicant containing the total Award amount, the acceptable security arrangement, the proposed level of loan forgiveness, and such controls and conditions on the PACE Awardee's financial, investment, operational and managerial activities deemed necessary by the Administrator to adequately secure the Government's interest. This notification will also describe the accounting standards and audit requirements applicable to the Award.

Community Benefit Plan. The PACE Applicant's explanation as to how the Project will benefit the residents of the service area identified in the Application.

Distressed and Disadvantaged Communities. A Disadvantaged Community is determined by the Agency by using the Council on Environmental Quality's Climate and Economic Justice Screening Tool (which is incorporated into the USDA look-up map) which identifies communities burdened by climate change and environmental injustice. Distressed Community is determined by the Agency by using the Economic Innovation Group's Distressed Communities Index (which is incorporated into the USDA look-up map), which uses several socio-economic measures to identify communities with low economic well-being. To determine if your Project is located in a Disadvantaged Community or a Distressed Community, please use the following USDA look-up map: *https://ruraldevelopment.maps.arcgis.com/apps/webappviewer/index.html?id=4acf083be4c44bb7864d90f97de0c788.*

Energy Community. A community as defined by the Department of Treasury and the Internal Revenue Service at *https://www.irs.gov/pub/irs-drop/n-23-29.pdf* or through future governmental guidance.

Energy Storage System (ESS). A facility capable of accepting energy, storing the energy for a period of time, and then later releasing the stored energy in support of a Renewable Energy Resource (RER).

Environmental Attributes. All financial attributes that are created or otherwise arise from the Project's generation of electricity from a renewable or zero emission energy system that include but are not limited to, any environmental air quality

credits, green credits, renewable energy credits (RECs), carbon credits, emissions reduction credits, emission rate credits, certificates, tags, offsets, allowances, etc.

Environmental and Historic Preservation Requirements. The National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C 4321, *et seq.*), Section 7 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*), and Section 106 of the National Historic Preservation Act (NHPA)(54 U.S.C. 300101 *et seq.*), as well as their implementing regulations at 7 CFR part 1970, Environmental Policies and Procedures (including Farmland Protection Policy Act Implementation Policy), 50 CFR part 402, Interagency Cooperation, and 36 CFR part 800, Protection of Historic Properties.

Financial Feasibility. An eligible entity's ability as determined by the Administrator to generate sufficient revenues to cover its expenses, sufficient cash flow to service its debts and obligations as they come due, and meet the financial ratios set forth in the applicable loan documents.

Indian Tribe. The term ''Indian Tribe'' has the meaning given the term in 25 U.S.C 5304.

Invitation to Proceed. A written notification issued by RUS to the applicant acknowledging that the Letter of Interest (LOI) was received and reviewed and inviting the applicant to submit an Application. The notification also provides the applicant instructions on how to submit the loan Application package and details of the next steps in the Application process.

Letter of Interest (LOI). An electronically signed submission made through the RUS window completed by an eligible entity notifying RUS of its intent to apply for a loan and addressing all the elements identified in Section D.2(a) of this notice.

Non-Federal Entities. As defined in 2 CFR 200.1, Non-Federal Entities are States, local governments, Indian Tribes, institutions of higher education (IHE), or nonprofit organizations. The definition of what constitutes a non-profit is also located in 2 CFR 200.1.

Off-Taker. Shall mean: (1) the customers or members of the PACE Applicant that purchase and receive the electrical power and energy from the PACE Applicant; or (2) the entity that has or will execute a Power Purchase Agreement (PPA) with the PACE Applicant to purchase and receive electrical capacity and associated energy produced by the Project. The Off-Taker may also be referred to in the PPA as the ''Buyer'', ''Customer'', ''Purchaser'' or another name that describes the entity purchasing the power.

Power Purchase Agreement (PPA). A binding agreement executed between the PACE Applicant and an Off-Taker under which the Off-Taker agrees to purchase and receive from the PACE Applicant the electrical capacity and associated energy produced by the Project at a pre-determined price and term. The PPA may include other transactions such as the selling and purchasing of Environmental Attributes or ancillary services (*e.g.,* voltage regulation and synchronization, contingency reserves).

Powering Affordable Clean Energy (PACE) Applicant. An eligible entity that has submitted an Application pursuant to an Invitation to Proceed.

Project. New facilities constructed after the effective date of the IRA and compliant with all other applicable requirements of this notice used to generate electricity from an RER, and/or to store electricity that support the types of RERs that are eligible to be financed with PACE Program loan funds, as provided in Section 22001 of the IRA and Section 317 of the RE Act, which will result in the deployment of renewable energy generation or storage capacity.

Project Loans. A PACE Award secured by a security interest in the assets and revenues of the Project and supporting credit enhancements relating to the Project rather than by a security interest in all of the assets of the PACE Applicant's electric utility system. Any PACE Award to a PACE Applicant that is not a current operating utility shall be a Project Loan.

Renewable Energy Resource or *Renewable Energy Source (RER).* An energy conversion system fueled from a solar, wind, hydropower, biomass, or geothermal source of energy as defined in Section 317(a) of the RE Act.

Rural Area. A rural area shall mean:

(a) Any area other than a city, town, or unincorporated area that has a population of greater than 20,000 inhabitants. or

(b) Service areas of current RUS Borrowers or former RUS and Rural Electrification Act (REA) borrowers which will be deemed rural for the purposes of their Applications.

Rural Partners Network (RPN). The RPN is an alliance of Federal agencies and commissions working directly with rural communities to expand rural prosperity through job creation, infrastructure development, and community improvement.

RUS Borrower. A current RUS borrower under the RE Act.

Secretary. The Secretary of the United States Department of Agriculture.

Substantially Underserved Trust Area (SUTA). An area defined under Section 306F of the RE Act.

System Loans. PACE Awards secured through a senior security interest in all assets of the PACE Applicant, which must be a currently operating electric utility.

4. *Application of Awards.* LOIs will be queued as they are received and reviewed on rolling basis in the order they are received. The Agency will review and evaluate LOIs based on the criteria found in Section E.1(a) of this notice. Upon review of the LOI, RUS may issue an Invitation to Proceed to the applicant. The Agency will review the loan Application and evaluate it based on the criteria found in Section E.1(b) of this notice. The Agency advises all interested parties that the applicant bears the full burden in preparing and submitting an LOI, as well as its Application submission as a PACE Applicant, in response to this notice.

B. Federal Award Information

1. *Type of Award:* Loan & Loan Forgiveness.

2. *Fiscal Year Funds:* 2023 & 2024.

3. *Available Funds:* Total appropriated amount of $1 billion in appropriated funds through September 30, 2031. However, based on projected subsidy rates, RUS expects to have approximately $2.7 billion available to lend for the PACE Program. There will be a minimum of $300 million of appropriated funds committed to each category outlined in this Section of the notice.

RUS may, at its discretion, increase the total level of funding available in this funding round or in any category in this funding round from any available source provided the Awards meet the requirements of the statute which made the funding available to the Agency.

4. *Award Amounts:* The maximum loan amount, inclusive of the forgivable portion, of any individual Award is limited to $100,000,000. The minimum amount of any individual Award is $1,000,000.

5. *Loan Type:* RUS will offer both Project Loans and System Loans as described below.

(a) *Project Loans.* This loan type applies to applicants that are not eligible for, or have decided not to pursue, a System Loan. Project Loans will be used to finance specific eligible Projects where the Award will be secured through a senior security interest on the Project's assets and the revenues generated from the Project's assets. A Project may also require the Awardee to commit additional cash reserves. Further, to the extent that a

PPA is in place with respect to the Project's assets, the Awardee must collaterally assign the PPA to RUS as security, with the Off-Taker's consent to such assignment. The Administrator may consider tax credits or direct payments in lieu of tax credits the Awardee receives under the Internal Revenue Code when calculating equity investment requirements for a PACE Applicant's proposed Project. If the Administrator allows a PACE Applicant to meet the financial equity requirement by utilizing applicable tax benefits, the Administrator may require additional credit support from the PACE Applicant pending the PACE Applicant's receipt of the tax benefit. Further, the Agency may utilize its authority under Section 306F of the RE Act and finance up to 100% of the cost of Projects benefitting SUTA areas. Project Award funds will only be released after commercial operation of the Project is commenced and RUS has confirmed that the Awardee has satisfied all other conditions specified in the Award.

(b) *System Loans.* System Loans are only available to currently operating electric utilities. The PACE Applicant will provide, if it has not already provided, RUS with a perfected senior lien on all of its existing assets, both real and personal, including intangible personal property, as well as after-acquired property. At the Administrator's discretion, PACE Applicants which are generation and transmission suppliers may be permitted to secure a System Loan through an indenture, provided that RUS is granted a perfected senior security interest in all its assets by the trustee. System Loans may finance 100% of the Project costs included in an Application. At the discretion of the Administrator, System Loan funds can be released to finance Projects for costs incurred during construction of the facilities; however, loan forgiveness will not occur until the Project has been completed and RUS has confirmed that the Awardee has satisfied all other conditions specified in the Award.

6. *Loan Forgiveness Categories:* The following percentages shall be forgiven on Awards meeting the requirements outlined in Sections E and F of this notice. RUS will initially allocate a minimum of $300 million to each category.

(a) *Category I.* Up to 20 percent total loan forgiveness;

(b) *Category II.* Up to 40 percent total loan forgiveness if 50 percent or more of the population served by the proposed service area is located within the following areas:

(1) Energy Communities; or

(2) Distressed or Disadvantaged Communities.

(c) *Category III.* Up to 60 percent total loan forgiveness if:

(1) The proposed service area is located in Puerto Rico, United States Virgin Islands (USVI), Guam, American Samoa or other U.S. territories or Compact of Free Association (COFA) states; or

(2) The proposed service area consists of 60 percent or more of a Tribal area or serves an area that constitutes a SUTA; or

(3) The Project is owned by an Indian Tribe defined by the Federally Recognized Indian Tribe List Act of 1994 (Pub. L. 103–454; 108 Stat. 4791, 4792), including their wholly owned arms and instrumentalities, or an Alaska Native Corporation, including regional or village corporations, as defined under or established pursuant to the Alaska Native Claims Settlement Act (Pub. L. 104–42; 85 State. 688).

7. *Anticipated Award Date:* From September 2023 to December 2025.

8. *Performance Period:* Five (5) years from the date of environmental clearance, but no later than September 30, 2031.

9. *Use of other governmental funds:* The Agency will generally allow the Awardee to combine the incentives contained in this notice with other governmental benefits, provided such combinations are otherwise permitted by law or regulation.

10. *Renewal or Supplemental Awards:* None.

11. *Type of Assistance Instrument:* Loan Agreement.

C. Eligibility Information

1. *Eligible Applicants.* RUS will accept LOIs and Applications from entities as described below:

(a) For-profit organizations.

(b) State or local governments.

(c) Indian Tribes defined by the Federally Recognized Indian Tribe List Act of 1994 (Pub. L. 103–454; 108 Stat. 4791, 4792), including their wholly arms and instrumentalities.

(d) Alaska Native Corporations, including regional or village corporations as defined under or established pursuant to the Alaska Native Claims Settlement Act (Pub. L. 104–42; 85 State. 688)

(e) Nonprofits.

(f) Institutions of higher education.

(g) Community-based organizations, distribution electric cooperatives, and generation and transmission electric cooperatives.

LOIs and Applications from any entity in the above categories will be evaluated for funding. Where applicable and possible, applicants are encouraged to work with Distressed and Disadvantaged Communities, Energy Communities, Puerto Rico, the United States Virgin Islands (USVI), Guam, American Samoa or other U.S. territories or Compact of Free Association (COFA) states, tribal entities, and RPN communities.

2. *Cost Sharing and Matching.*

(a) *Project Loans.* Awards will finance up to 75% of the total capitalized costs of a Project. Awardees will be required to provide at least 25% of the Project's total capitalized cost in the form of cash or equity investments, which may not be derived from debt instruments.

(b) *System Loans.* PACE System Loans may cover 100% of the total costs of the Project.

3. *Other.*

(a) *Eligible Service Areas.*

(1) Electricity generated or stored from facilities shall be provided to "rural and nonrural residents" in eligible service areas.

(2) *Rural Percentage of the Service Territory.* The rural percentage will be calculated at the applicant's choosing by either:

(i) The population located in the Rural Areas of a service territory versus the total population of the entire service territory; or

(ii) Meters served in the Rural Areas of a service territory versus meters served in the entire service territory.

For the purpose of this notice, the minimum rural percentage by the chosen methodology must be at least 50 percent, unless waived by the Administrator based upon a showing that there exist social equity considerations, such as SUTA, significant energy burdens, severe economic needs, or substantial added benefits to rural consumers.

(3) *Rural Determination.* If the PACE Applicant is not a RUS Borrower, a rural determination will be conducted by RUS in order to:

(i) Identify the service territory where electricity from the facilities to be financed by PACE Award would be delivered and consumed; and

(ii) Further identify those areas within the service territory that are rural.

(b) *Project Eligibility.*

(1) Projects can be developed by eligible applicants developing new renewable power generation from RER and ESS for use by Off-Takers through a PPA or a financial guarantee that ensures Financial Feasibility.

(2) New facilities that generate electricity from an RER, including facilities that store electricity that support such assets. However, RUS will not approve facilities that violate the

terms of a PACE Applicant's existing wholesale power contract.

(3) New linear facilities, including microgrids, and equipment that are necessary to operate the Project including, but not limited to, transmission or distribution facilities that are needed to export, transmit, and deliver power from the generating facility to the Off-Taker.

(4) The upgrading of existing linear facilities and equipment that are necessary to operate the Project including, but not limited to, transmission or distribution facilities that are needed to export, transmit, and deliver power from the generating facility to the Off-Taker.

(5) The Project may include one or more RERs and/or ESSs.

(6) Facilities may be co-located to operate interconnectedly or independently or constructed at separate sites.

(7) RERs and ESSs must be installed so that the RER can provide energy and any ancillary services for resale to rural and nonrural residents located in eligible service areas.

(8) Applicants can request interconnection and other costs associated with being able to deliver the RER and/or the ESS to Off-Takers, including related microgrid investments. Successful applicants may also recover a portion of their capitalizable pre-application costs pursuant to 7 CFR part 1767 and this notice.

(9) Applicant may include in its loan Application the costs specified in 7 CFR 1710.106, including interest during construction (IDC) pursuant to 7 CFR 1710.106(a)(4).

D. Application and Submission Information

1. *Address to Request Application Package.* The Agency will finalize the on-line application window by notice in the **Federal Register** on or before June 30, 2023. The PACE Program Application Guide and copies of necessary forms and samples will become available at *https://www.rd.usda.gov/programs-services/electric-programs/powering-affordable-clean-energy-pace-program.* If you require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape) please contact USDA's TARGET Center at (202) 720–2600 (voice and TDD) or the 711 Relay Service.

2. *Content and Form of Application Submission.*

(a) *Letter of Interest (LOI) Submission.* The LOI must include the information as listed below in this Section. LOI submitters should be aware that the final Application will require more information as included in Section D.2(b) of this notice.

(1) *LOI submitter's profile and point of contact information.*

(i) Legal name and status of the LOI submitter.

(ii) The LOI submitter's address and principal place of business.

(iii) The LOI submitter's tax identification number and its Unique Entity Identifier (UEI) number from the System for Award Management (SAM) registry.

(iv) Legal structure of LOI submitter (*e.g.,* cooperative, corporation, limited-liability company, State or local government entity, municipality, federally recognized Tribe). If the applicant is a non-governmental entity, a statement as to whether the entity is organized as a non-profit.

(v) If the LOI submitter is a State or local governmental entity, a certification that it can enter into contracts with the Federal government, incur debt, and provide security for such debt. Federal government entities are not eligible for financing.

(vi) Name and title of LOI submitter's manager and/or point of contact, which must include general contact information, as well as an email address to receive RUS' Invitation to Proceed.

(vii) The location of the Project and the applicable service area using a digital Shapefile. The applicable service area must demonstrate that the Project will provide economical clean energy to rural residents as outlined in Section C.3(a) of this notice.

(viii) The LOI submitter's net assets value.

(ix) A certification as to whether the LOI submitter over the last 10 years has been placed in receivership liquidation, has been under a workout agreement, has declared bankruptcy, or has had a decree or order issued for relief in any bankruptcy, insolvency, or other similar action.

(x) A statement as to whether the Project(s) will serve a SUTA area as defined in Section A.3 of this notice.

(2) *Financial Information.* A copy of the LOI submitter's balance sheet and income statements for the shorter of the last three years or the years the LOI submitter has been in operation. If the LOI submitter has no operating history, the LOI submitter must provide RUS with information RUS deems necessary to evaluate the financial strength of the LOI submitter. The LOI submitter must also provide the balance sheet and income statements for the last three years of any entity or entities providing equity or security for the loan, with an explanation of the legal relationship to the LOI submitter.

(3) *Technical Description of the Project.* A technical description of the Project, which shall not exceed 1,500 words, and must include the following:

(i) Type of loan being requested, Project Loan or System Loan. See Section B.5 of this notice.

(ii) A description of each RER and ESS being requested for PACE financing including Project name, location, type, size, and renewable energy units generated and saved.

(iii) Verification that the Project(s) will be designed, constructed, and operated based on Commercially Available Technology.

(iv) For each Project, the estimated dates to start construction and to achieve commercial operation.

(v) The estimated total capital cost of each Project and the amount of Award funds being requested to finance each Project.

(vi) Proposed financial structure of the owners, equity investors and other participants, which shall include estimated sources and uses of all funds.

(vii) If applicable, a description and status of any PPA that will be used to sell and deliver the electrical output of the Project(s) to Off-Takers.

(viii) If applicable, a description of any existing power sales contracts, such as wholesale power contracts, between Off-Takers and its members.

(ix) Status of, and estimated timelines to complete, if known, any applicable Federal, State, or local permitting or environmental review processes.

(x) *Ratepayer and Community Benefit.* A brief discussion from the LOI submitter that if it is invited to submit an Application, it will demonstrate in its Application how it will pass on a portion of the savings from the loan forgiveness to the Off-Taker as described in Section B.6 of this notice and that the LOI submitter will provide the required information from Section D.2(b)(19) for the Community Benefit Plan.

(xi) *Prevailing wage.* Pursuant to 7 U.S.C. 8103(f), a certification that, pursuant to 7 U.S.C. 8103(f), the LOI submitter will comply with the provisions of the Davis-Bacon Act so that any laborers and mechanics employed on the Project or any contractor or subcontractor in: (A) the construction of such facility, and (B) with respect to any taxable year, for any portion of such taxable year the alteration or repair of such facility, shall be paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently

determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31 of title 40, United States Code.

(xii) *Loan Forgiveness Level.* A statement as to what level of loan forgiveness outlined in Section B.6 of the notice that the LOI submitter believes it is eligible and the reason(s) why it believes it is eligible for that specific level of loan forgiveness.

If the LOI submitter cannot provide any of the information or documents listed above, it must notify RUS prior to submitting an Application.

(b) *Application Submission.* An LOI submitter that receives an Invitation to Proceed must submit Application packages containing the information and documents required in 7 CFR 1710.501, as well as the following information and documentation:

(1) *Loan Application letter.* The letter may be signed by any authorized representative of the PACE Applicant; however, the authorization must also be submitted with the Application.

(2) *Articles of incorporation and bylaws and other governing and organizational documents.* The PACE Applicant must provide the articles of incorporation, bylaws, and other organizational documents currently in effect. PACE Applicants that are RUS Borrowers may comply with this requirement by notifying in writing to RUS that there are no material changes to the documents already on file with RUS. Other governmental applicants must only provide evidence of their ability to enter into debt obligations.

(3) *Environmental and Historic Preservation Requirements.* If the PACE Applicant has not received written notice from RUS that the Project environmental review process is formally concluded as provided in 7 CFR 1970.11, it must submit documents that establish that a review is in progress and no ground disturbance activities have started prior to receiving notice that the Environmental and Historic Preservation review requirements have been completed. This requirement requires the PACE Applicant to include a certification that construction has not started and that it will not start prior to obtaining written notice from RUS. The PACE Applicant must further state the type of environmental review document it believes needs to be prepared in accordance with 7 CFR part 1970 (*e.g.,* a Categorical Exclusion with an Environmental Report, an Environmental Assessment, or Environmental Impact Statement in accordance with subparts B, C, or D, respectively). The PACE Applicant must provide a description of any potential environmental controversy or extraordinary circumstances, and the estimated timelines for completing the environmental process. PACE Applicants are strongly advised that commencing construction prior to environmental or historic preservation clearance could make a Project ineligible for RUS financing, regardless of a Project's place in the queue.

(4) *Financial Forecast.* In order to demonstrate that the loan is feasible as required in 7 CFR 1710.112, the PACE Applicant must submit a financial forecast. For System Loans, the financial forecast must cover at least 10 years from the commercial operating date of the Project to be financed, must demonstrate that the PACE Applicant's operation is economically viable and that the proposed loan is financially feasible. RUS may request projections for a longer period of time or additional information, if RUS deems it necessary based on the financial structure of the PACE Applicant. The PACE Applicant must submit the financial forecast in the form prescribed by RUS in the Invitation to Proceed.

(5) *PPA.* If the PACE Applicant proposes to sell power generated from the Project to an Off-Taker under a PPA, the PACE Applicant must provide a draft copy of the PPA with the Application, which must be structured to allow two different rate schedules; one for the case without loan forgiveness and the other for the case with loan forgiveness. Because the PPA is essentially the mechanism by which consumers will benefit from the PACE program, all draft PPAs must be approved by RUS prior to being executed. RUS approval of the PACE Application is predicated upon an executed PPA that has been approved by the Agency.

(6) *Power Resources Owned, Co-owned or Leased.* If applicable, provide a discussion or table of the existing power resources available to the applicant that includes generation facilities owned, co-owned or leased. The information provided should include: name of plant and unit, ownership interest (%), type of unit and fuel used, net peak capacity, and in-service date.

(7) *Power Purchase Contracts.* If applicable, provide a discussion of the applicant's power purchase contracts (with terms greater than two years) that describes the capacity and energy resources purchased. The information should include: type of contract (take-or pay, unit power purchase, etc.), parties to the contract, amount (capacity and energy); and term and expiration date.

(8) *Power Sales Contracts.* A description of any existing power sales contracts, such as wholesale power contracts, between an Off-Taker and its members must be provided that includes the type of agreements (*e.g.,* all or partial requirements), the initial execution dates, and the dates the agreements expire. The PACE Applicant must provide copies of the agreements if requested by the Agency.

(9) *Engineering Report.* A signed final engineering report or final engineering and power cost study must be provided with the Application, or soon thereafter. The report must describe the purpose, design, costs, construction, and operation of the Project(s). A draft engineering report must be submitted for RUS approval prior to it being finalized and signed. An approved engineering report is a prerequisite to the obligation of PACE funds; however, the PACE borrower may amend the engineering report with RUS' written approval. The finalized engineering report must be signed or approved by licensed professional engineer.

(10) *Project Contracting.* The PACE Applicant must provide a list of all engineering, procurement, and construction contracts it intends to use on the Project(s), with a brief description and cost estimate of each contract. At the Agency's discretion, any contracts selected by the Agency for review and approval must be submitted within the period of time requested by the Agency. In no event will Award funds be disbursed prior to the selected Project contracts receiving Agency approval and any other necessary approvals.

(11) *Interconnection Agreements.* If an interconnection agreement is needed, draft agreements required to interconnect an RER, ESS, or related microgrid system to a distribution or transmission network must be included with the Application. These agreements must be approved by the Agency before the Award funds are disbursed.

(12) *System Impact Studies.* The status and summary of any related system impact studies as they may pertain to the interconnection of the Project with a distribution or transmission network must be provided with the Application. System impact studies must be conducted, as applicable, to include load flow studies, short circuit analysis, system stability analysis, and conclusions (*e.g.,* identify voltage, overload, stability problems and proposed actions or contingencies; single contingency analysis of proposed facilities; transmission constraints; and system improvements needed). The nature of any required system upgrades

and associated costs to be incurred by the Awardee, Off-Taker, or other entity must be identified. The Agency may request a copy of any system impact studies or links to review such studies.

(13) *Transmission Service Agreements.* Transmission service agreements required to export, transmit or deliver the power from the Project to the Off-Taker, if any, must be included with the Application. These agreements must receive Agency approval before Award funds are disbursed.

(14) *Other Major Agreements.* The PACE Applicant must provide a list and a brief description of all other major agreements that will need to be executed for the Project. Such agreements, if applicable, include, but are not limited to O&M arrangements, joint ownership arrangements, fuel management, and fuel supply and transportation. Agreements selected for approval by the Agency should be submitted within the period of time requested by the Agency. RUS will not approve the PACE Application until all agreements requested for review have been approved by the Agency.

(15) *Meteorological Data and Studies.* RERs such as solar and wind Projects must be supported with meteorological data and studies to determine the expected energy generation of the facility during the initial year of operation. The PACE Applicant must identify the amount and basis of any annual degradation in energy output of the RERs.

(16) *Fuel and Fuel Transportation Strategies.* If applicable to the Project, the PACE Applicant must describe the fuel and fuel transportation strategies of the Project and show that the fuel supply for the life of the Project is adequate. Fuel supply contracts and fuel transportation contracts must be identified, including the term of each contract. Copies of the fuel contracts or arrangements must be provided if requested by the Agency.

(17) *Sources and Uses of Water.* The PACE Applicant must identify the uses and source of water for the Project, as well as evidence that the water supply will be adequate to meet both daily demands and demands for the life of the Project. If requested by the Agency, the PACE Applicant must provide copies of any agreements or arrangements that would be used to purchase or receive water used and consumed by the Project and the applicable water balance diagram of the facilities.

(18) *Real Estate Matters.* If the PACE Applicant is leasing the real estate upon which it will build and operate the Project, the PACE Applicant must submit an executed copy of the lease agreement with the Application. Lease agreements must contain, or be amended to contain, a provision that allows the PACE Applicant to collaterally assign the lease to RUS as security for the loan. Further, to the extent that the lessor under any lease with the PACE Applicant has executed a mortgage or deed of trust with respect to the real estate to another party, that party must execute an attornment and non-disturbance agreement in favor of the PACE Applicant that will allow the PACE Applicant to continue to lease the real property and operate the Project in the event of the lessor's default under the mortgage or deed of trust. The PACE Applicant must submit any attornment and non-disturbance agreements to RUS with its PACE Application.

(19) *Community Benefit Plan.* The PACE Applicant must submit a Community Benefit Plan, which should be implemented within the first year of receiving Award funds, but which is expected to be provided beyond the Project itself, including, but not limited to:

(i) Investments in the American workforce such as local worker retention, retraining and job creation;

(ii) The launch or expansion of systemic or consumer-based energy efficiency and carbon reduction measures such as providing on-bill financing or Pay as You Save programs to improve the energy efficiency and beneficial electrification for consumers;

(iii) Land use agricultural integration that demonstrates ways for traditional farming and ranching to benefit from clean energy Projects; and

(iv) Diversity, equity, inclusion, and accessibility goals set forth in the Justice40 Initiative.

(20) *Tribal Government Resolution of Consent.* A certification from the appropriate Tribal official is required if the Project, or any part of it, will be sited on Tribal land where a Tribal government has regulatory authority. Any non-Tribal PACE Applicant that fails to provide a certification to provide service on the Tribal lands identified in the proposed Project or the proposed service area will not be considered for funding.

(21) *Estimated Costs.* The applicant must include in its loan Application a breakdown of the estimated costs listed in Section C.3(b)(9) of this notice for which it intends to seek reimbursement.

3. *System for Award Management and Unique Entity Identifier.*

(a) At the time of Application, each PACE Applicant must have an active registration in the System for Award Management (SAM) before submitting its Application in accordance with 2 CFR part 25. In order to register in SAM, entities will be required to obtain a Unique Entity Identifier (UEI). Instructions for obtaining the UEI are available at *https://sam.gov/content/entity-registration.*

(b) PACE Applicants must maintain an active SAM registration, with current, accurate and complete information, at all times during which it has an active Federal award or an Application under consideration by a Federal awarding agency.

(c) PACE Applicants must ensure they complete the Financial Assistance General Certifications and Representations in SAM.

(d) PACE Applicants must provide a valid UEI in its Application, unless determined exempt under 2 CFR 25.110.

(e) The Agency will not make an Award until the PACE Applicant has complied with all SAM requirements. If a PACE Applicant has not fully complied with the requirements by the time the Agency is ready to make an Award, the Agency may determine that the PACE Applicant is not qualified to receive a Federal Award and use that determination as a basis for making a Federal Award to another PACE Applicant.

4. *Submission Dates and Times.*

(a) *LOI Submissions.* LOIs can be submitted beginning at 11:59 a.m. Eastern Time (ET) on June 30, 2023 until 11:59 a.m. ET on September 29, 2023.

(b) *Application Submissions.* A LOI submitter that receives an Invitation to Proceed will have 60 days, or a time agreeable to the Agency, to complete and submit its loan Application. If the deadline to submit the Application falls on Saturday, Sunday, or a Federal holiday, the Application is due the next business day. The Administrator may grant an extension of time to complete the documentation required for an Application if, in the Administrator's sole judgment, extraordinary circumstances prevented the PACE Applicant from completing the Application within the timeframe herein stipulated. In extending an Invitation to Proceed to a LOI submitter in the queue, RUS reserves the right to meet overall RUS program objectives and therefore, may notify the PACE Applicant that the amount of financing to be Awarded is below the level sought by the PACE Applicant.

(c) *General.* RUS reserves the right to ask PACE Applicants for clarifying information on, or additional information related to, the LOI or Application.

5. *Intergovernmental Review.* Intergovernmental Review under

Executive Order 12372 is not required in this program.

6. *Funding Restrictions.*

(a) Entities that plan to submit or have submitted Applications under the RUS Empowering Rural America (New ERA) Program may not apply for the same Project under the PACE Program. Failure to follow this limitation will cause the PACE Applicant to be disqualified from all potential Awards.

(b) Only Projects where construction began after August 16, 2022, the effective date of the IRA, will be eligible for funding under PACE Program.

(c) Funding will not be provided for merchant power Projects or Projects where a non-utility entity is generating power for its own use.

(d) Funding will not be provided for the purchase of any existing RER or ESS.

(e) There are no Application or origination fees for loans under the PACE Program.

(f) RUS will only finance Projects that utilize Commercially Available Technology under this notice.

(g) PACE Applicants can request interconnection and other costs associated with being able to deliver the RER and/or the ESS to Off-Takers.

7. *Other Submission Requirements.*

(a) An entity may only submit one LOI. RUS will not accept paper LOIs. A sample LOI and additional information is available at *https://www.rd.usda.gov/programs-services/electric-programs/powering-affordable-clean-energy-pace-program.*

(b) Each LOI submitter may only submit one Application, upon receiving a RUS Invitation to Proceed.

(c) Each PACE Applicant may only receive one Award.

(d) An Invitation to Proceed or RUS' approval of a PACE Application does not constitute approval of any agreement or document that the PACE Applicant must provide to RUS for RUS' approval as outlined in this notice or in the applicable PACE loan agreement.

(e) A PACE Applicant must, after submitting a LOI or loan Application, promptly notify RUS of any changes in its circumstances that materially affect the information contained in the loan Application.

(f) Applicants (''co-applicants'') may submit a joint/consolidated LOI or a Joint Application for consideration (collectively the ''Joint LOI'' or ''Joint Application''). If a joint LOI contains two or more proposed Projects, the Agency may evaluate each proposed Project separately as to whether to provide an Invitation to Proceed concerning each proposed Project. The Agency may also disaggregate its review of the technical and Financial Feasibility of the individual Projects contained in a joint LOI or a joint Application. Further, the Agency may require co-applicants to accept separate contractual and financial commitments relating to the Project or Projects contained in the joint Application.

E. Application Review Information

1. *Criteria.*

(a) *LOI.* RUS will process and evaluate complete LOI on a rolling basis in the order they are received. In reviewing LOIs, RUS will assess the following:

(1) *Applicant eligibility.* The applicant's eligibility to participate in the PACE Program.

(2) *Project eligibility.* The eligibility of the proposed Project under the terms of Section 22001 of the IRA and the technical feasibility of the proposed Project.

(3) *Geographic Diversity.* The Administrator may consider geographic diversity in reviewing and evaluating LOIs.

(4) *Financial status.* The financial status of the applicant to determine the applicant's likelihood to successfully secure and repay the PACE loan.

(6) *Allocation of Funds Among Categories.* The amount of funding available in the category due to a disproportionate number of LOI in that category and whether RUS will be able to reallocate funding from another category listed in Section B.6 of this notice.

(b) *Application.* RUS will evaluate and review each Application based on the criteria provided in 7 CFR part 1710 subpart D and will assess the following:

(1) *Financial coverage ratios.* The Administrator may set financial coverage ratios based on the risk profile of the PACE Applicant and specific loan terms. Those financial ratios will be included in the PACE borrower's loan documents with RUS. RUS Borrowers will be subject to their current debt service coverage ratios in their current loan documents, unless notified otherwise.

(2) *Financial Equity Requirements.* As noted in Section C.2 of this notice, RUS will require the Awardee to provide at least 25% equity in the Project for PACE Project loans. However, the Administrator may consider requests to waive the 25% financial equity requirement for PACE Awards where the Project will serve areas covered under SUTA. System Loans that provided RUS with a perfected senior lien on all assets of the PACE Applicant will not have an additional equity requirement. The required financial equity position will be set forth in the Commitment Letter and the loan documents as a condition to the PACE loan. RUS may consider allowing the Awardee to meet the financial equity requirements by utilizing any appliable direct payment or tax credit relating to the Project as provided in Internal Revenue Code of 1986 and its implementing regulations. If the Administrator allows a PACE Applicant to meet the financial equity requirement by utilizing applicable tax credits or direct payments relating to the Project, the Agency may require additional security or credit support from the PACE Applicant pending the PACE Applicant's receipt of the tax credit or direct payment.

(3) *Community Benefit Plan.*

(4) *Loan forgiveness minimum requirements.*

(i) *Ratepayer Benefit:* Loan forgiveness must provide demonstrable benefits to rate payers located in the service area. The PACE Applicant must demonstrate in its LOI that the consumer benefits and financial benefits resulting from the forgivable portion of the loan will be shared between the Awardee and the Off-Taker. This must be shown through a long-range financial forecast scenario that establishes that the revenue per kilowatt hour (KWh) the PACE Applicant will receive from the sale of the power to the Off-Taker would have been higher but for the loan forgiveness. Additionally, a net present value (NPV) calculation should be performed to demonstrate the financial benefit to the rate payer with the addition of the loan forgiveness versus business as usual without loan forgiveness.

(ii) *Technical Feasibility and Commercially Available Technology.* RUS must determine that the Project is technically feasible and confirm that the Project uses a Commercially Available Technology.

(iii) *Financially Feasible.* The proposal must be financially feasible and adequately securable, as outlined in 7 CFR 1710.112.

2. *Review and Selection Process.*

(a) *LOI.* RUS will consider only complete LOIs as they are received. LOIs will be accepted on a rolling basis and evaluated as received based on the criteria described in Section E.1(a) of this notice. Only LOIs selected to receive an Invitation to Proceed will be able to proceed with the Application.

(b) *Application.* LOI submitters that receive an Invitation to Proceed will have 60 days, or a time agreeable to the Agency, from the date RUS sends the Invitation to Proceed to submit an Application to the Agency. A General Field Representative (GFR) will be

assigned to assist the PACE Applicant during this part of the Application process. RUS will process Applications in the order they are received.

All Applications will be reviewed based on the criteria provided in Section E.1(b) of this notice. RUS will make Awards under the PACE Program based on Applications that meet the requirements contained in this notice. The Agency reserves the right to offer the PACE Applicant less than the loan funding and loan forgiveness requested.

F. Federal Award Administration Information

1. *Loan Terms and Conditions.* A successful PACE Applicant will receive a Commitment Letter from the Administrator notifying of the following: total Award amount approved by RUS; the amount of the loan that will be forgiven; any additional controls on its financial, investment, operational and managerial activities; acceptable security arrangements; and such other conditions deemed necessary by the Administrator to adequately secure the Government's interest and ensure repayment. Upon receipt of the acceptance of the Award offer by the PACE Awardee, RUS will begin to prepare the loan documents. Upon completion of the loan documents, RUS will forward the loan documents to the PACE Applicant.

Receipt of a Commitment Letter from the Administrator does not authorize the PACE Awardee to commence performance under the Award. All RUS requirements and loan conditions specified in the Commitment Letter must be met before the Awardee may commence construction on the Project and before RUS will disperse the proceeds of the Award, including but not limited to the Awardee receiving notice that the Environmental and Historic Preservation requirements have been completed. RUS will notify the Awardee when it is authorized to commence construction of the Projects.

(a) *Maturity of a PACE Loan.* The maturity of a PACE loan will be the lesser of:

(1) The expected useful life of the Project,

(2) The term of the PPA (if required for execution between the PACE Applicant and the Off-Taker),

(3) The term of the lease for the land that the Project will occupy (if such land is not owned by the PACE Applicant),

(4) The expiration dates of power sales contracts between the PACE Applicant and its members should the PACE Applicant provide the power supply needs of the members under such power sales contracts,

(5) The loan term requested by the PACE Applicant, or

(6) 35 years.

(b) *Waiver and Modification of Term and Conditions.* The Administrator reserves the right to modify or waive certain requirements if:

(1) The Administrator believes such modifications or waivers are in the best interest of the government,

(2) The Administrator has determined that the loan will be repaid on or before the maturity date, and

(3) The security is adequate.

The Awardee may be required to establish and maintain reserves sufficient for timely loan payments, emergency maintenance, extensions to the facilities, and replacement of short-lived assets.

(c) *Interest rate.* Loans made under PACE Program will bear interest equal to the municipal rate as provided in Section 317(c) of the RE Act, and as further described in the first sentence of 7 CFR 1714.4(a) and 7 CFR 1714.5(a)–(c). Municipal rates can be found at *https://www.rd.usda.gov/page/rural-utilities-loan-interest-rates.* Note that because there is no interest rate cap for the PACE Program, the third sentence of 7 CFR 1714.4(a) and 7 CFR 1714.5(d) shall not apply.

(d) *Prepayment.* Prepayment of PACE loans will be governed by Sections 305(c) and 306B of the RE Act and the provisions of 7 CFR part 1714, subpart A and 7 CFR 1786, subpart F that relate to municipal rate loans. If the Awardee prepays a PACE loan, its obligations under the Community Benefit Plan will continue for a period equal to the shorter of: (1) the original term of the Award, or (2) five years from the date the Project was placed in service.

(e) *Repayment.* The repayment of each advance to the PACE borrower must be amortized over the term on the PACE loan, such that the Awardee will make equal monthly payments that will pay all principal and interest on such advance no later than the maturity date.

(f) *Financial Ratios.* Financial ratios shall be determined as set forth in Section E.1(b)(1) of this notice.

(g) *Collateral.* Project Loans will be secured through a senior security interest on the Project's assets and the revenues generated from the Project's assets. System Loans will be secured by assets of the Awardee. For RUS Borrowers, the Agency may rely, at its sole discretion, on existing security arrangements with RUS if it is determined that the government has adequate collateral. When an Awardee is unable by reason of preexisting encumbrances, or otherwise, to furnish a senior perfected security interest on its entire system, the Administrator may accept other forms of security, such as a guarantee from the appropriate party, an irrevocable letter of credit, or revenue pledges, if the Administrator determines that such credit support is reasonably adequate and acceptable.

(h) *Opinion of counsel.* An opinion of counsel is required at closing and must be acceptable to the Administrator, opining, *inter alia,* that the Awardee is properly organized and has the authority to enter into the Award and that RUS has a first priority, senior lien on the required collateral, unless other collateral arrangements have been agreed to with the Agency.

(i) *Cybersecurity.* An Awardee must certify that it has adopted and implemented a cybersecurity risk mitigation and remediation plan that is consistent with prudent utility practice. Additionally, the Awardee must certify that such cybersecurity risk mitigation and remediation plan is in effect at the time of each advance request.

(j) *General Provisions.* Unless otherwise stated in this notice or in the loan documents, a PACE loan will be governed by the municipal rate loan provisions contained in 7 CFR parts 1710, 1714, and 1721.

(k) *Funding Disbursements and Restriction.*

(1) *General.* RUS will disburse funds to the Awardee in accordance with the terms of the Award documents. All Award funds will be disbursed as a reimbursement for eligible program costs after the Project is complete, and its performance verified in a manner that is sufficient to RUS. RUS reserves the right to consider requests to disburse funds prior to completion of the Project by Awardees with System Loans. Pursuant to Section 22001 of the IRA, the Award agreements must contain a provision that requires the advance of all loan funds on or before September 30, 2031. All undisbursed funds as of close of business on September 30, 2031, will automatically be rescinded; however, the Agency will set a last day for advance in the Award agreements well in advance of the statutory limit.

(2) *Advances and Loan Forgiveness Information.* RUS will disburse Award funds to the Awardee after the Awardee has satisfied all conditions of its Award agreement with respect to the release of funds. This may include, but not be limited to, certain milestone conditions being achieved during construction to the satisfaction of RUS or the results of any required performance testing of the Project that RUS has reviewed and determined to be acceptable. RUS will

forgive the portion of the loan specified in the Award agreement at the time RUS disburses the Award proceeds if the Awardee demonstrates to RUS' satisfaction that the Project is functioning as represented in the PACE Application. The maximum loan forgiveness amount for each loan forgiveness category is described in Section B.6 of this notice.

If, however, RUS determines after having forgiven a portion of the loan that the Awardee is no longer in compliance with the terms of the Award agreement, RUS will require the Awardee to repay the entire PACE loan in full.

(3) *Signage.* The Awardee is encouraged to display USDA standard infrastructure investment signage, available for download from the Agency, during construction of the Project. Expenditures for such signage shall be a permitted eligible cost of the Project.

2. *Administrative and National Policy Requirements.* The items listed in this notice implement the appropriate administrative and national policy requirements, which include but are not limited to:

(a) Execution of a PACE loan agreement and related loan documents;

(b) Compliance with policies, guidance, and requirements as described in Section A.2 of this notice, and any successor regulations.

(c) Except as provided in the notice and in the executed loan agreements, all other generally applicable regulations contained in 7 CFR parts 1700–1730, 1767, 1773, and 1787, and 7 CFR part 1970 will apply to PACE loans, as well as relevant Bulletins published by the RUS Electric Program.

As required by 7 U.S.C. 8103(f), the Projects financed through the PACE Program will be subject to the Wage Rate Requirements (formerly Davis-Bacon Act) prevailing wage requirements contained in Subchapter IV of Chapter 31 of Title 40 of the United States Code and the Department of Labor's implementing regulations contained in 29 CFR parts 1, 3, and 5.

(d) Pursuant to the Defense Production Act of 1950 and the Foreign Investment Risk Review Modernization Act of 2018, RUS will require PACE Applicants to disclose any foreign person or foreign entity that has an ownership, management rights, or voting interesting in the PACE Applicant or the Project.

3. *Reporting.*

(a) *Performance Reporting.* RUS will establish periodic reporting requirements that will be outlined in the Award documents.

(b) *Accounting Requirements.* Awardees must comply with Accounting Principles Generally Accepted in the United States, (GAAP), as well as compliance with the requirements of the applicable regulations: 2 CFR part 200 subpart E Cost Principles, 48 CFR 31 Federal Acquisition Regulations Contract Cost Principles, and the system of accounting prescribed by 7 CFR part 1767 Accounting Requirements for RUS Electric Borrowers.

(c) *Audit Requirements.* Awardees will be required to prepare and furnish to RUS audits as follows:

(1) Awardees that are Non-Federal Entities shall provide RUS with an audit pursuant to 2 CFR part 200, subpart F, Audit Requirements. The Non-Federal Entity Awardee must follow subsection 2 CFR 200.502 in determining federal awards expended.

All RUS loans impose an ongoing compliance requirement for the purpose of determining federal awards expended during a fiscal year. In addition, the Awardee must include the value of new federal loans made along with any grant expenditures from all federal sources during the Awardee's fiscal year. Therefore, the audit submission requirement for this program begins in the Awardee's fiscal year that the loan is made and thereafter, based on the balance of federal loan(s) at the beginning of the audit period. All required audits must be submitted within the earlier of:

(i) 30 calendar days after receipt of the auditor's report; or

(ii) nine months after the end of the Awardee's audit period.

(2) For all other entities, Awardees shall provide RUS with an audit within 120 days after the as of audit date in accordance with 7 CFR part 1773. Note that with respect to advances that contain loan funds, the audit is required after an advance has been made, and, thereafter, from the close of each subsequent fiscal year until the loan is repaid in full. While an audit is required, Awardees must also submit a report on compliance and internal controls over financial reporting, as well as a report on compliance with aspects of contractual agreements and regulatory requirements.

(d) *Monitoring Requirements.* Awardees must comply with all reasonable RUS requests to support ongoing monitoring efforts. Awardees must afford RUS, through their representatives, a reasonable opportunity, at all times during business hours and upon prior notice, to have access to and the right to inspect any or all books, records, accounts, invoices, contracts, leases, payrolls, timesheets, cancelled checks, statements, and other documents, electronic or paper of every kind belonging to or in possession of the Awardee or in any way pertaining to its property or business, including its parents, affiliates, and subsidiaries, if any, and to make copies or extracts therefrom. Failure to comply with reasonable RUS requests could result in a termination of the Award agreement.

G. Federal Awarding Agency Contact(s)

For general questions about this announcement, please contact the point of contact listed in the **FOR FURTHER INFORMATION CONTACT** Section of this notice.

H. Build America, Buy America Requirements

Infrastructure Project Awards under this announcement must meet the following domestic preference requirements:

1. *Funding to Non-Federal Entities.* Awardees that are Non-Federal Entities shall be governed by the requirements of Section 70914 of the Build America, Buy America Act (BABAA) within the Infrastructure Investment and Jobs Act (IIJA), and its implementing regulations. The Act requires the following Buy America preference:

(a) All iron and steel used in the Project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(b) All manufactured products used in the Project are produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.

(c) All construction materials (excludes cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives) are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

BABAA only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools,

equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does BABAA apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project. Any requests for waiver of these requirements must be submitted pursuant to USDA's guidance available online at *https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver.*

2. *Funding to all other entities.* All other Awardees shall be governed by the Agency's Buy American requirement at 7 CFR part 1787. For purposes of BABAA compliance, for-profit organizations are not considered Non-Federal Entities. However, this does not alter independent statutory authorities that USDA may have to include domestic content requirements in awards of Federal financial assistance issued to for-profit organizations. Any requests for waiver of these requirements must be submitted pursuant to those regulations.

I. Other Information

1. *Administrative Procedure Act Statement.* This notice is being issued without advance rulemaking or public comment. The Administrative Procedure Act of 1946 (APA), as amended (5 U.S.C. 553), has several exemptions to rulemaking requirements. Among them is an exception for a matter relating to ''loans, grants, benefits, or contracts.''

2. *Congressional Review Act Statement.* Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act or CRA); 5 U.S.C. 801 *et seq.,* the Office of Information and Regulatory Affairs in the Office of Management and Budget designated this action as a major rule as defined by 5 U.S.C. 804(2), because it is likely to result in an annual effect on the economy of $100,000,000 or more. Accordingly, there is a 60-day delay in the effective date of this action, and the Agency will not take action on LOIs until the later of 60 days after notification to Congress or July 17, 2023. The 60-day delay required by the CRA is not expected to have a material impact upon the administration and/or implementation of this program.

3. *Paperwork Reduction Act.* In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), USDA requested that the Office of Management and Budget (OMB) conduct an emergency review of a new information collection that contains the Information Collection and Recordkeeping requirements contained in this notice.

In addition to the emergency clearance, the regular clearance process is hereby being initiated to provide the public with the opportunity to comment under a full comment period, as the Agency intends to request regular approval from OMB for this information collection. Comments from the public on new, proposed, revised, and continuing collections of information help the Agency assess the impact of its information collection requirements and minimize the public's reporting burden. Comments may be submitted regarding this information collection through the Federal eRulemaking Portal at *https://www.regulations.gov.* In the ''Search for dockets and documents on agency actions'' box, type in the DOCKET # from this notice to submit or view public comments and to view supporting and related materials available electronically. Information on using *Regulations.gov,* including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''FAQ'' link. Comments on this information collection must be received by July 17, 2023.

Title: Powering Affordable Clean Energy (PACE) Program.

OMB Control Number: 0572–NEW.

The following estimates are based on the average over the first 3 years the program is in place.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10.632 hours per response.

Respondents: Private entities, governmental entities, nonprofits, Indian Tribes, district organizations, institutions of higher education.

Estimated Number of Respondents: 200.

Estimated Number of Responses per Respondent: 8.47.

Estimated Number of Responses: 1,694.

Estimated Total Annual Burden (hours) on Respondents: 18,010.

Copies of this information collection may be obtained from Katherine Anne Mathis, Management Analyst, Regulatory Division, RD Innovation Center, telephone: 202–713–7565; email: *katherine.mathis@usda.gov.* All responses to this information collection and recordkeeping notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

4. *National Environmental Policy Act.* All recipients under this notice are subject to the requirements of 7 CFR part 1970.

5. *Federal Funding Accountability and Transparency Act.* All applicants, in accordance with 2 CFR part 25, must be registered in SAM and have a UEI number as stated in Section D.3 of this notice. All recipients of Federal financial assistance are required to report information about first-tier sub-awards and executive total compensation in accordance with 2 CFR part 170.

6. *Wage Rate Requirements.* As provided in 7 U.S.C. 8103(f) all Projects funded under the PACE Program, as a condition of receiving a grant or loan under this Section, an eligible entity shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed, in whole or in part, with the grant or loan, as the case may be, shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with 40 U.S.C. 31, Sections 3141 through 3144, 3146, and 3147.

7. *Civil Rights Act.* All grants made under this notice are subject to Title VI of the Civil Rights Act of 1964 as required by the USDA in 7 CFR part 15, subpart A (eCFR:: 7 CFR part 15 Subpart A—Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964) and Section 504 of the Rehabilitation Act of 1973, Title VIII of the Civil Rights Act of 1968, Title IX, Executive Order 13166 (Limited English Proficiency), Executive Order 11246, and the Equal Credit Opportunity Act of 1974.

8. *Nondiscrimination Statement.* In accordance with Federal civil rights laws and the USDA civil rights regulations and policies, the 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 711 Relay Service.

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.usda.gov/sites/default/files/documents/ad-3027.pdf* 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; or

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

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Andrew Berke,

Administrator, Rural Utilities Service, USDA Rural Development.

[FR Doc. 2023–10388 Filed 5–15–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Technology Letter of Explanation

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on March 8, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Bureau of Industry and Security, Department of Commerce.

Title: Technology Letter of Explanation.

OMB Control Number: 0694–0047.

Form Number(s): None.

Type of Request: Extension of a currently approved information collection.

Number of Respondents: 6,283.

Average Hours per Response: 30 minutes to 2 hours.

Burden Hours: 9,416.

Needs and Uses: This collection is necessary under section 748.8(o) and supplement 2 section (o) to Part 748 of the Export Administration Regulations (EAR). Licensing officers must make decisions on licensing the export of United States commodities and technical data to foreign countries. When an export involves certain technical data or knowhow described in the Export Administration Regulation, additional information is required to fully understand the transaction and make a licensing decision. The Technology Letter of Explanation provides a written description of the technology proposed for export sufficient to allow BIS technical staff to evaluate the impact of licensing the export on United States national security and foreign policy. The letter of assurance puts the consignee on notice that the technology is subject to U.S. export controls and causes the consignee to certify that it will not release the data or the direct product of the data to certain specified country group nationals; thus providing assurance that U.S. national security data will be safeguarded and used only for the stated end use. The additional information is necessary to evaluate technology exports as covered under this collection.

Affected Public: Business or other for-profit organizations.

Frequency: On Occasion.

Respondent's Obligation: Voluntary.

Legal Authority: EAR sections 748.8 and sup 2 section (o) to part 748.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0694–0047.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–10431 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–089]

Certain Steel Racks and Parts Thereof From the People's Republic of China: Amended Final Results of Countervailing Duty Administrative Review in Part; 2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is amending the final results of the administrative review of the countervailing duty (CVD) order on certain steel racks and parts thereof from the People's Republic of China (China), covering the period of review (POR) January 1, 2020, through December 31, 2020, to correct ministerial errors.

DATES: Applicable May 16, 2023.

FOR FURTHER INFORMATION CONTACT: Drew Jackson, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4406.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the final results of this review on April 10, 2023.[1] On April 11 and 12, 2023, we received timely submitted ministerial error comments from the petitioner[2] and Nanjing Dongsheng Shelf Manufacturing Co., Ltd. (Dongsheng), respectively.[3] We

[1] *See Certain Steel Racks and Parts Thereof from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2020,* 88 FR 21177 (April 10, 2023) (*Final Results*).

[2] The petitioner is the Coalition for Fair Racks Imports.

[3] *See* Petitioner's Letter, ''Ministerial Error Allegations,'' dated April 11, 2023; *see also*

Continued

are amending the *Final Results* to correct the ministerial errors raised by the petitioner and Dongsheng.

Legal Framework

A ministerial error, as defined in section 751(h) of the Tariff Act of 1930, as amended (the Act), includes ''errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.'' [4] With respect to final results of administrative reviews, 19 CFR 351.224(e) provides that Commerce ''will analyze any comments received and if appropriate, correct any ministerial error by amending . . . the final results of review . . .''

Ministerial Error

Commerce determines that, in accordance with section 751(h) of the Act and 19 CFR 351.224(f), it made ministerial errors in the *Final Results.* Pursuant to 19 CFR 351.224(e), Commerce is amending the *Final Results* to reflect the correction of these ministerial errors in the calculation of Dongsheng's countervailable subsidy rate, which changes from 6.09 percent to 5.90 percent. For a detailed discussion of Commerce's analysis, *see* the Ministerial Error Memorandum and Amended Analysis Memorandum.[5] As a result of this change, the rate for the non-selected companies under review also changes from 6.09 percent to 5.90 percent.[6]

Amended Final Results of Review

As a result of correcting the ministerial errors described above, Commerce determines the following net countervailable subsidy rates for the period January 1, 2020, through December 31, 2020:

Dongsheng's Letter, ''Ministerial Error Comment,'' dated April 12, 2023.

[4] *See* 19 CFR 351.224(f).

[5] *See* Memoranda, ''Ministerial Error Memorandum for the Final Results of the 2020 Administrative Review of the Countervailing Duty Order on Certain Steel Racks and Parts Thereof from the People's Republic of China,'' dated concurrently with this notice (Ministerial Error Memorandum); and ''2020 Administrative Review of the Countervailing Duty Order on Certain Steel Racks and Parts Thereof from the People's Republic of China: Amended Final Results Calculations for Nanjing Dongsheng Shelf Manufacturing Co., Ltd.,'' dated concurrently with this notice (Amended Analysis Memorandum).

[6] *Id.*

Company	Subsidy rate (percent *ad valorem*)
Nanjing Dongsheng Shelf Manufacturing Co., Ltd	5.90
Non-Selected Companies Under Review [7]	5.90

Disclosure

We intend to disclose the calculations performed for these amended final results within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Assessment

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce shall determine and U.S. Customs and Border Protections (CBP) shall assess, countervailing duties on all appropriate entries of subject merchandise in accordance with the amended final results of this review.

We intend to issue liquidation instructions to CBP 35 days after publication of the amended final results of this review.

Cash Deposit Requirements

In accordance with section 751(a)(2)(C) of the Act, Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for the companies subject to this review, effective April 10, 2023, the date of publication of the *Final Results* in the **Federal Register**. For all non-reviewed companies, CBP will continue to collect cash deposits of estimated countervailing duties at the most recent company specific or all-others rate applicable to the company, as appropriate. These cash deposits, when imposed, shall remain in effect until further notice.

Administrative Protective Order

This notice serves as a final reminder to parties subject to an 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 or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is sanctionable violation.

[7] *See* the appendix to this notice for a full list of companies not individually examined in this review.

Notification to Interested Parties

We are issuing and publishing these amended final results of review in accordance with sections 751(h) and 777(i) of the Act and 19 CFR 351.224(e).

Dated: May 10, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Companies Not Selected for Individual Examination

1. Ateel Display Industries (Xiamen) Co., Ltd.
2. CTC Universal (Zhangzhou) Industrial Co., Ltd.
3. David Metal Craft Manufactory Ltd.
4. Fujian Ever Glory Fixtures Co., Ltd.
5. Guangdong Wireking Housewares and Hardware Co., Ltd.
6. Hebei Wuxin Garden Products Co., Ltd.
7. Huanghua Xinxing Furniture Co., Ltd.
8. i-Lift Equipment Ltd.
9. Johnson (Suzhou) Metal Products Co., Ltd.
10. Master Trust (Xiamen) Import and Export Co., Ltd.
11. Nanjing Ironstone Storage Equipment Co., Ltd.
12. Nanjing Kingmore Logistics Equipment Manufacturing Co., Ltd.
13. Ningbo Xinguang Rack Co., Ltd.
14. Redman Corporation
15. Redman Import & Export Limited
16. Suzhou (China) Sunshine Hardware & Equipment Imp. & Exp. Co. Ltd.
17. Tianjin Master Logistics Equipment Co., Ltd.
18. Xiamen Baihuide Manufacturing Co., Ltd.
19. Xiamen Ever Glory Fixtures Co., Ltd.
20. Xiamen Golden Trust Industry & Trade Co., Ltd.
21. Xiamen Kingfull Imp and Exp Co., Ltd. (d.b.a) Xiamen Kingfull Displays Co., Ltd.
22. Xiamen LianHong Industry and Trade Co., Ltd.
23. Xiamen Luckyroc Industry Co., Ltd.
24. Xiamen Luckyroc Storage Equipment Manufacture Co., Ltd.
25. Xiamen Meitoushan Metal Products Co., Ltd.
26. Xiamen Power Metal Display Co., Ltd.
27. Xiamen XinHuiYuan Industrial & Trade Co., Ltd.
28. Xiamen Yiree Display Fixtures Co., Ltd.
29. Zhangjiagang Better Display Co., Ltd.

[FR Doc. 2023–10412 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Western Alaska Community Development Quota Program

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before July 17, 2023.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0269 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Gabrielle Aberle, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802–1668. Telephone (907) 586–7228.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS), Alaska Regional Office, is requesting extension of a currently approved information collection that contains four components necessary for NMFS to manage the Western Alaska Community Development Quota Program (CDQ Program).

NMFS and the North Pacific Fishery Management Council manage the groundfish fisheries in the exclusive economic zone off Alaska under the authority of the *Magnuson-Stevens Fishery Conservation and Management Act* (16 U.S.C. 1801 *et seq.*) (Magnuson-Stevens Act). The groundfish fisheries in the Bering Sea and Aleutian Islands are managed under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area.

The CDQ Program is an economic development program authorized under the Magnuson Stevens Act to provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Area, to support economic development in western Alaska, to alleviate poverty and provide economic and social benefits for residents of western Alaska, and to achieve sustainable and diversified local economies in western Alaska.

This information collection is used by NMFS to manage the small vessel CDQ fisheries, transfer quota among the CDQ groups, and authorize the use of alternative harvest regulations under certain circumstances.

This information collection contains the following four components:

- The CDQ Vessel Registration System is an online system used by the CDQ groups to add small hook-and-line catcher vessels to the CDQ vessel registration list. Registered vessels are exempt from the requirements to obtain and carry a License Limitation Program license under regulations at 50 part 679. This system is also used to remove vessels from the CDQ vessel registration list.
- The Groundfish/Halibut CDQ and Prohibited Species Quota (PSQ) Transfer Request form is used to transfer annual amounts of groundfish and halibut CDQ and PSQ, except Bering Sea Chinook salmon, between two CDQ groups. This form is completed by the transferring and receiving CDQ groups.
- The Application for Approval of Use of Non-CDQ Harvest Regulations is used by a CDQ group, an association representing CDQ groups, or a voluntary fishing cooperative to request approval to use non CDQ harvest regulations when the CDQ regulations are more restrictive than the regulations otherwise required for participants in non-CDQ groundfish fisheries.
- An appeals process is provided for an applicant who receives an adverse initial administrative determination related to its Application for Approval of Use of Non-CDQ Harvest Regulations.

II. Method of Collection

The information is collected by mail, fax, delivery, email, and electronically through eFISH. The applications are available as fillable PDFs on the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/permit/alaska-community-development-quota-cdq-program-applications-and-forms.*

III. Data

OMB Control Number: 0648–0269.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Not-for-profit institutions; Business or other for-profit organizations.

Estimated Number of Respondents: 6.

Estimated Time per Response: CDQ Vessel Registration System, 10 minutes; Groundfish/Halibut CDQ and PSQ Transfer Request, 30 minutes; Application for Approval of Use of Non-CDQ Harvest Regulations, 5 hours; Appeals, 4 hours.

Estimated Total Annual Burden Hours: 36 hours.

Estimated Total Annual Cost to Public: $0 in recordkeeping and reporting costs.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we

cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–10432 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC998]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of hybrid meeting open to the public offering both in-person and virtual options for participation.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a four-day meeting to consider actions affecting the Gulf of Mexico fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will convene Monday, June 5 through Thursday, June 8, 2023. Times are: Monday, June 5, 2023, 8 a.m.–5:15 p.m.; Tuesday, June 6, 2023 and Wednesday, June 7, 2023, 8 a.m.–5 p.m.; and Thursday, June 8, 2023, 8 a.m.–4:30 p.m., CDT.

ADDRESSES:

Meeting address: The meeting will take place at The Battle House Renaissance Hotel, located at 26 N. Royal Street, Mobile, AL 36602–3802.

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

FOR FURTHER INFORMATION CONTACT: Dr. Carrie Simmons, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Monday, June 5, 2023; 8 a.m.–5:15 p.m., CDT

The meeting will begin with Law Enforcement Committee reviewing the Law Enforcement Technical Committee's (LETC) Meeting Summary from the March 2023 meeting. The Ecosystem Committee will review the Ecosystem Technical Committee's (ETC) Report and Scientific and Statistical Committee (SSC) Recommendations on a Gulf of Mexico Ecosystem Model (GoMEM) to support fisheries management.

The Data Collection Committee will receive an update on the Southeast For-Hire Integrated Reporting (SEFHIER) Program and next steps. The *Shrimp* Committee will discuss the next steps for the Congressional Funding Budget for *Shrimp* Vessel Position Data Reporting and Summary of the May 2023 *Shrimp* Advisory Panel Meeting.

Sustainable Fisheries Committee will receive an overview presentation on *Rice's Whale* Status and Recent Speed Limit Petition in the Gulf of Mexico; and, review Multi-year Annual Catch Limits. The Committee will review SSC Recommendations on Report from the Marine Recreational Information Program (MRIP) Transition Team on *Red Snapper* and other Species in the Gulf State Supplemental Surveys; Evaluation of Interim Analysis Process; and Management Strategy Evaluation Workshop.

The Council will convene in a CLOSED SESSION of the FULL COUNCIL to finalize selection of *Coastal Migratory Pelagic* (CMP) Advisory Panel (AP) members.

Tuesday, June 6, 2023; 8 a.m.–5 p.m., CDT

The *Reef Fish* Committee will discuss Individual Fishing Quota (IFQ) Program Objectives; review State Survey Private Angling Landings and Discards for *Red Snapper;* Final Action Item: Recalibration of *Red Snapper* Recreational Catch Limits and Modifications of *Gray Snapper* Catch Limits; Draft Framework Action: Modifications to Recreational and Commercial *Greater Amberjack* Management Measures, and review the SSC Summary Report from the May 2023 Meeting including Recommendations on the *Black Grouper and Yellowfin Group* Catch Limits and *Mid-water Snapper* Complex Catch Limits.

Wednesday, June 7, 2023; 8 a.m.–5 p.m., CDT

The Reef Fish Committee will reconvene to review Final Action Item: Draft Amendment 56: Modifications to the *Gag Grouper* Catch Limits, Sector Allocations, and Fishing Seasons, and Draft *Snapper Grouper* Amendment 44/ *Reef Fish* Amendment 55: Catch Level Adjustments and Allocations for the Southeast U.S. *Yellowtail Snapper.*

At approximately 11:15 a.m., CDT, the Council will reconvene with a Call to Order, Announcements and Introductions, Adoption of Agenda and Approval of Minutes. The Council will present the 2022 Law Enforcement Officer of the Year Award; followed by presentations on Update on the Commission's Recently-Finished *Red Drum* Fishery Profile; Exempted Fishing Permit from Mote Marine Lab; NOAA Fisheries Request for Comments on Advance Notice of Proposed Rulemaking for National Standard Guidelines 4, 8, and 9; and, an update from the Bureau of Ocean Energy Management (BEOM) on Wind Energy Development in the Gulf of Mexico.

The Council will hold public comment testimony from 2 p.m. to 5 p.m., CDT on Final Action Items: Recalibration of *Red Snapper* Recreational Catch Limits and Modifications of *Gray Snapper* Catch Limits and Draft Amendment 56: Modifications to the *Gag Grouper* Catch Limits, Sector Allocations and Fishing Seasons; Comments on *Rice's Whale* Petition and Exempted Fishing Permits; and, open testimony on other fishery issues or concerns. Public comment may begin earlier than 2 p.m. CDT, but will not conclude before that time. Persons wishing to give public testimony in-person must register at the registration kiosk in the meeting room. Persons wishing to give public testimony virtually must sign up via the link on the Council website. Registration for virtual testimony is open at the start of the meeting, Monday, June 5th at 8 a.m., CDT and closes one hour before public testimony begins on Wednesday, June 7th at 1 p.m. CDT. Public testimony may end before the published agenda time if all registered in-person and virtual participants have completed their testimony.

Thursday, June 8, 2023; 8 a.m.–4:30 p.m., CDT

The Council will receive Committee reports from Law Enforcement, Ecosystem, Data Collection, *Shrimp,* Sustainable Fisheries, and *Reef Fish* Management Committees as well as the closed session report and recommendations on the exempted fishing permit. The Council will receive updates from the following supporting agencies: Alabama Law Enforcement Efforts; South Atlantic Fishery Management Council; NOAA Office of Law Enforcement (OLE); Gulf States Marine Fisheries Commission; U.S. Coast Guard; U.S. Fish and Wildlife Service; and Department of State.

The Council will discuss any Other Business items; and, receive Litigation update if any.

—Meeting Adjourns

The meeting will be a hybrid meeting; both in-person and virtual participation available. You may register for the

webinar to listen-in only by visiting *www.gulfcouncil.org* and click on the Council meeting on the calendar.

The timing and order in which agenda items are addressed may change as required to effectively address the issue, and the latest version along with other meeting materials will be posted on the website as they become available.

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

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid or accommodations should be directed to Kathy Pereira, (813) 348–1630, at least 15 days prior to the meeting date.

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

Dated: May 11, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–10417 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD011]

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of a public meeting.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold its Social Science Planning Committee (SSPC) meeting to discuss and make recommendations on fishery management issues in the Western Pacific Region.

DATES: The meeting will be held on May 31, 2023, from 1 p.m. to 5 p.m., Hawaii Standard Time (HST). See **SUPPLEMENTARY INFORMATION** for the agenda.

ADDRESSES: The meeting will be held by web conference via Webex. Instructions for 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.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: A public comment period will be provided in the agendas. The order in which agenda items are addressed may change. The meeting will run as late as necessary to complete scheduled business.

Agenda

Wednesday, May 31, 2023, 1 p.m. to 5 p.m.

1. Welcome and Introductions
2. Approval of Agenda
3. Annual Stock Assessment and Fishery Evaluation (SAFE) Reports
   A. Socioeconomic Modules 2022 Report Updates
   B. Fisher Observations
4. Socioeconomic Considerations for Council Actions and Issues
   A. Territory Bottomfish Management Unit Species Revision
   B. Multi-year Territorial Bigeye Tuna Catch and Allocation Specifications
   C. Review of the American Samoa Large Vessel Prohibited Area Impacts
   D. Proposed Designation of a National Marine Sanctuary for the Pacific Remote Islands
5. National Standard 4 (Allocation) and 8 (Fishing Communities) Guidance Review
6. Review of Research Priorities
7. Project Updates
8. Public Comment
9. Discussion and Recommendations
10. Other Business

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: May 11, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–10422 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD008]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Monkfish Research Set-Aside (RSA) Working Group via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Monday, June 5, 2023, at 1 p.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/1546553695344469849.*

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

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

SUPPLEMENTARY INFORMATION:

Agenda

The Monkfish Research Set-Aside Working Group will meet to discuss expectations for the working group. This includes a review of the work plan, timing, and objectives of the work. They will also discuss the 2019 Program Review of New England Research Set-Aside Programs. Evaluate the findings and recommendations of the report specific to monkfish and determine which, if any, should be further considered. They will discuss challenges and opportunities to improve the Monkfish RSA program. Identify a list of challenges and potential solutions that can be further evaluated by working group members. Other business may be discussed, as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action

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

Special Accommodations

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

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

Dated: May 11, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–10418 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD014]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The MAFMC will hold a public joint meeting (webinar) of its Mackerel, Squid, and Butterfish (MSB) Committee and Advisory Panel to consider potential alternatives for a framework adjustment to the MSB Fishery Management Plan that could implement a volumetric vessel hold baseline requirement and vessel hold upgrade restriction for *Illex* limited access permits.

DATES: The meeting will be held on Thursday, June 1, 2023, from 9 a.m. to 12 p.m.

ADDRESSES: Webinar connection information will be posted to the calendar prior to the meeting at *www.mafmc.org.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: In September 2022, NOAA Fisheries disapproved an Amendment to the MSB fishery management plan that would have reduced directed limited access permits to address excess capacity in the *Illex* fishery. The Council subsequently voted to initiate and develop a framework action to consider a volumetric vessel hold baseline requirement and upgrade restriction for all *Illex* limited access permits. This action is intended to control future increases in capacity.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Shelley Spedden, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: May 11, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–10420 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD020]

Endangered Species; File No. 27233

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that David Portnoy, Ph.D., Texas A&M University, Corpus Christi, TX 78412, has applied in due form for a permit to import scalloped hammerhead shark parts for purposes of scientific research.

DATES: Written, telefaxed, or email comments must be received on or before June 15, 2023.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 27233 from the list of available applications. These documents are also available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 27233 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Erin Markin, Ph.D., (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The applicant is requesting authorization to import scalloped hammerhead (*Sphyrna lewini*) parts for genetic analysis. Parts would be from animals that have been previously collected or opportunistically acquired from fish markets representing the following geographic locations: Mexico (Eastern Pacific Distinct Population Segment (DPS), up to 100 individuals), Sierra Leone (Eastern Atlantic DPS, up to 50 individuals), Cabo Verde (Eastern Atlantic DPS, up to 50 individuals), all other countries (Eastern Pacific DPS, up to 100 individuals), and all other countries (Eastern Atlantic DPS, up to 50 individuals). The requested duration of the permit is 6 years.

Dated: May 11, 2023.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–10404 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC997]

New England Fishery Management Council; Public Meeting; Correction

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

ACTION: Notice of correction of a public meeting.

SUMMARY: The New England Fishery Management Council is convening an ad-hoc sub-panel of its Scientific and

Statistical Committee (SSC) via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Thursday, June 1, 2023, beginning at 1 p.m.

ADDRESSES:

Webinar registration information: https://attendee.gotowebinar.com/register/5510384372857768792.

Call in information: 1 (415) 655–0060, Access Code: 723–991–313.

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

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

SUPPLEMENTARY INFORMATION: The original notice published in the **Federal Register** on May 11, 2023 (88 FR 30300). The original notice stated that the webinar meeting would begin at 9 a.m. This notice corrects the start time of the meeting to 1 p.m.

All other previously-published information remains unchanged.

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

Dated: May 11, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–10416 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–P–2022–0027]

Expanding Admission Criteria for Registration To Practice in Patent Cases Before the United States Patent and Trademark Office

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

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) previously published a notice requesting comments on the scientific and technical requirements to practice in patent matters before the USPTO. Specifically, the Office sought input on whether it should revise the scientific and technical criteria for admission to practice in patent matters to require the USPTO to periodically review certain applicant degrees on a predetermined timeframe, make certain modifications to the accreditation requirement for computer science degrees, and add clarifying instructions to the General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases before the United States Patent and Trademark Office (GRB) for limited recognition applicants. The USPTO has considered the comments and, based on the support for the proposals, is implementing updates to the GRB. Expanding the admission criteria of the patent bar would encourage broader participation and keep up with the ever-evolving technology and related teachings that qualify someone to practice before the USPTO.

DATES: The new version of the GRB incorporating the proposed updates will be published and be applicable as of May 16, 2023.

FOR FURTHER INFORMATION CONTACT: Will Covey, Director for the Office of Enrollment and Discipline (OED), at 571–272–4097 or *oed@uspto.gov*.

SUPPLEMENTARY INFORMATION:

Summary

On October 18, 2022, the Office published a request for comments on four proposals on the scientific and technical requirements to practice in patent matters before the USPTO. The first proposal was to add commonly accepted Category B degrees to Category A on a predetermined timeframe, namely every three years. The Office received 10 comments responsive to this proposal. The second proposal was to remove the requirement that computer science degrees be accredited by the Accreditation Board for Engineering and Technology (ABET) in order to be considered under Category A, and instead, to propose that the USPTO would accept all Bachelor of Science in computer science degrees from accredited colleges or universities under Category A. The Office received 14 comments responsive to this proposal. The third proposal was to clarify the instructions for applicants who are applying for limited recognition. The Office received five comments responsive to this proposal. A majority of the comments were supportive of the suggested changes regarding these three proposals. The fourth proposal, whether to implement a design patent practitioner bar, and, if so, how to do so, will be addressed in a separate notice.

This notice provides information related to the implementation of the first three proposals. Based on the USPTO's evaluation and comments received, the USPTO is changing the criteria to: add common Category B degrees to Category A on a predetermined timeframe, namely every three years, and remove the requirement that in order to qualify under Category A, Bachelor of Science in computer science degrees must be accredited by the Computer Science Accreditation Commission of the Computing Sciences Accreditation Board, or by the Computing Accreditation Commission of the ABET, on or before the date the degree was awarded. Instead, all Bachelor of Science degrees in computer science from an accredited university or college will be accepted under Category A. Additionally, the instructions to limited recognition applicants to apply for recognition will be clarified to aid applicants in the application process.

Background

The Director of the USPTO is given statutory authority to require a showing by patent practitioners that they possess ''the necessary qualifications to render applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.'' 35 U.S.C. 2(b)(2)(D). The courts have determined that the USPTO Director bears primary responsibility for protecting the public from unqualified practitioners.

Pursuant to that responsibility, USPTO regulations provide that registration to practice in patent matters before the USPTO requires a practitioner to, *inter alia,* demonstrate possession of scientific and technical qualifications.[1] The role of patent practitioners with scientific and technical backgrounds in providing full and clear patent specifications and claims has long been acknowledged. The USPTO publishes the GRB, which sets forth guidance for establishing possession of scientific and technical qualifications. The GRB also provides applicants instructions on how to apply to become a patent practitioner. The GRB is available at *www.uspto.gov/sites/default/files/documents/OED_GRB.pdf*.

The GRB lists three categories of scientific and technical qualifications that typically make one eligible for admission to the registration examination in order to practice before the Office in all patent matters: (1) Category A for specified bachelor's, master's, and doctorate of philosophy degrees; (2) Category B for other degrees

[1] Legal representation before Federal agencies is generally governed by the provisions of 5 U.S.C. 500. That statute, however, provides a specific exception for representation in patent matters before the USPTO. 5 U.S.C. 500(e). *See* 35 U.S.C. 2(b)(2)(D) (formerly 35 U.S.C. 31).

with technical and scientific training; and (3) Category C for individuals who rely on practical engineering or scientific experience by demonstrating that they have passed the Fundamentals of Engineering test. If a candidate for registration does not qualify under any of the categories listed in the GRB, the USPTO will conduct an independent review for compliance with the scientific and technical qualifications pursuant to 37 CFR 11.7(a)(2)(ii).

The USPTO has evaluated, and continues to evaluate, the list of typically qualifying training set forth in the GRB. These evaluations seek to clarify guidance on what will satisfy the scientific and technical qualifications, to identify possible areas of improved administrative efficiency, and to clarify instructions where warranted. To that end, the USPTO published a notice requesting comments on three proposed updates to the GRB, namely, to add commonly accepted Category B degrees to Category A every three years; to remove the requirement that computer science degrees be accredited by ABET in order to be considered under Category A, and instead accept all Bachelor of Science in computer science degrees from accredited colleges or universities; and to clarify the instructions for applicants who are applying for limited recognition. *See* Request for Comments on Expanding Admission Criteria for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office, 87 FR 63044 (October 18, 2022).

The USPTO received comments from intellectual property organizations, industry, individual patent practitioners, and the general public. The USPTO acknowledges and appreciates the many comments that were submitted from the intellectual property community. The comments are available at *www.regulations.gov/docket/PTO-P-2022-0027/comments*. The USPTO has considered the comments, including those that raised concerns or provided suggestions. The USPTO is implementing the proposals as stated in the request for comments, and as explained below. Additional suggestions beyond the scope of the request for comments and the questions posed therein were provided within many of the comments. The USPTO appreciates the suggestions and may address them in the future, once further evaluation and data is garnered.

This notice merely describes agency policy and procedures and does not involve substantive rulemaking. While the criteria for admission to practice in patent matters is generally described in 37 CFR 11.7, the rule does not set forth the specific scientific and technical criteria for admission.

Update 1: Review Commonly Accepted Category B Degrees and, Where Warranted, Add Them to Category A Every Three Years

In early 2020, the Office undertook a review of Category B applications to identify bachelor's degrees that are routinely accepted as demonstrating the requisite scientific and technical qualifications. In September 2021, the Office added 14 of these degrees, which were previously evaluated under the criteria listed in Category B, to Category A. The review of degrees is ongoing and is currently based on data from those applying for the registration exam. Category A is not an exhaustive list of all degrees that would qualify, and the USPTO's practice is to accept degrees when the accompanying transcript demonstrates equivalence to a Category A degree (for example, molecular cell biology may be equivalent to biology).[2] A determination of equivalency does not indicate that the degrees are the same. Rather, it is an evaluation that the degrees have the same or similar scientific and technical rigor required to provide patent applicants valuable service. Currently, the average processing time for applicants with Category A degrees is seven calendar days. The average processing time for applicants with Category B degrees is 10–14 calendar days.

Given the fast pace at which technology and related teachings evolve, the USPTO will review commonly accepted Category B degrees and add them to Category A on a three-year timeframe, beginning from the publication date of this notice. These reviews will clarify guidance on what would satisfy the scientific and technical qualifications, improve administrative efficiency, and simplify the application process. Conducting such reviews on a three-year cycle will provide adequate time for the USPTO to gather, review, and analyze the degree data from a sufficient number of applicants for the registration exam. One commenter suggested that such reviews rely on the technical and analytic ability required by the particular degree. Once the potential degrees that may be moved from Category B to Category A are ascertained based on applicant data, the degrees will be assessed to determine whether they present sufficient technical and scientific qualifications necessary to render patent applicants valuable service. *See Premysler* v. *Lehman,* 71 F.3d 387, 389 (Fed. Cir. 1995). Other commenters suggested specific degrees for current incorporation into Category A. The degrees suggested either are not ones that are currently awarded by a great majority of institutions (*e.g.,* artificial intelligence), are not ones that applicants actually have or that a lot of applicants have (*e.g.,* artificial intelligence and cheminformatics), or are ones that would already be evaluated as equivalent to a current Category A degree (*e.g.,* cell biology as equivalent to biology). As stated in this notice, the USPTO will continue to collect and analyze data on the degrees on a three-year cycle.

Lastly, a number of commenters suggested making applicants' degrees publicly available. The USPTO is not permitted to blanketly reveal such information, as stated in the Privacy Act Statement that accompanies the application in the GRB, and there is no current infrastructure to do so.

Update 2: Accept Bachelor of Science Degrees in Computer Science From Accredited Colleges and Universities Under Category A

Prior to this notice, acceptable computer science degrees under Category A must have been accredited by the Computer Science Accreditation Commission of the Computing Sciences Accreditation Board or by the Computing Accreditation Commission of the ABET on or before the date the degree was awarded. As of the publication of this notice, this criterion will be changed so that all Bachelor of Science degrees in computer science from accredited colleges and universities will be accepted under Category A, regardless of whether the degree program is accredited by the ABET. An overwhelming majority of those who commented on this proposal were in favor of this change, as they thought ABET accreditation did not convey a perceivable benefit.

Update 3: Provide Clarifying Instructions in the GRB for Limited Recognition Applicants

The USPTO requested input on whether the instructions below should be added to the GRB to aid limited recognition applicants in applying for recognition. Based on the support of commenters, these instructions will be placed in the GRB. These instructions will not change the process by which applicants for limited recognition apply for recognition. One commenter suggested that instructions be given for

[2] *See* OED Frequently Asked Questions (FAQs), available at *www.uspto.gov/learning-and-resources/patent-and-trademark-practitioners/oed-frequently-asked-questions-faqs*.

each immigration status or visa category; however, the ever-changing landscape of immigration prohibits such an exhaustive list. The instructions below are to be inserted under Section F of the GRB.

F. *Eligibility of Aliens: No grant of registration except under 37 CFR 11.6(c).* An applicant who is not a United States citizen and does not reside in the U.S. is not eligible for registration except as permitted by 37 CFR 11.6(c). Presently, the Canadian Intellectual Property Office is the only patent office recognized as allowing substantially reciprocal privileges to those admitted to practice before the USPTO. The registration examination is not administered to aliens who do not reside in the United States.

Limited recognition to practice before the Office in patent matters. An alien residing in the United States may apply for limited recognition to practice before the Office in patent matters pursuant to 37 CFR 11.9(b). To be admitted to take the examination, an applicant must fulfill the requirements as stated above and 37 CFR 11.9(b), which includes that establishing that such recognition is consistent with the capacity of employment authorized by United States immigration authorities, for example the United States Citizenship and Immigration Services (USCIS), United States Department of State, U.S. Customs and Border Patrol, and the U.S. Department of Labor. The evidence establishing such consistency must demonstrate: (1) the applicant's authorization to reside in the United States, and (2) the applicant's authorization to work or be trained in the United States. It must include a copy of both sides of any work or training authorization and copies of *all* documents submitted to and received from the immigration authorities regarding admission to the United States, and a copy of any documentation submitted to the U.S. Department of Labor. This may include a complete copy of the application for a particular immigration status, the application for a work or training permit, and/or any related approved notices.

Qualifying documentation should specifically show that the immigration authorities have authorized the applicant to be employed or trained in the capacity of representing patent applicants before the USPTO by preparing and prosecuting their patent applications. Any approval that is pending at the time the application is submitted will result in the applicant being denied admission to the examination.

A qualifying alien within the scope of 8 CFR 274a.12(b) or (c) is not registered upon passing the examination. Therefore, such qualifying aliens will not be patent attorneys or patent agents. Rather, such an applicant will be given limited recognition under 37 CFR 11.9(b) if recognition is consistent with the capacity of employment or training authorized by immigration authorities. Documentation establishing an applicant's qualification to receive limited recognition must be submitted with the applicant's application.

Katherine K. Vidal,

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

[FR Doc. 2023–10409 Filed 5–15–23; 8:45 am]

BILLING CODE 3510–16–P

CONSUMER FINANCIAL PROTECTION BUREAU

[Docket No. CFPB–2023–0034]

Agency Information Collection Activities: Comment Request

AGENCY: Consumer Financial Protection Bureau.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau or CFPB) is requesting the Office of Management and Budget's (OMB's) approval for a new information collection titled ''Making Ends Meet Survey.''

DATES: Written comments are encouraged and must be received on or before July 17, 2023 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: PRA_Comments@cfpb.gov.* Include Docket No. CFPB–2023–0034 in the subject line of the email.
- *Mail/Hand Delivery/Courier:* Comment Intake, Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552. Because paper mail in the Washington, DC, area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically.

Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Anthony May, PRA Officer, at (202) 435–7278 or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Making Ends Meet Survey.

OMB Control Number: 3170–00XX.

Type of Review: New collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 4,500.

Estimated Total Annual Burden Hours: 1,375.

Abstract: The Dodd-Frank Wall Street Reform and Consumer Protection Act charges the Consumer Financial Protection Bureau with researching, analyzing, and reporting on topics relating to the Bureau's mission including consumer behavior, consumer awareness, and developments in markets for consumer financial products and services. To improve its understanding of how consumers engage with financial markets, the Bureau has successfully used surveys under its ''Making Ends Meet'' program. The ''Making Ends Meet'' program has also used the Bureau's Consumer Credit Information Panel (CCIP) as a frame to survey people about their experiences in consumer credit markets. The Bureau seeks approval for two yearly surveys under the ''Making Ends Meet'' program. These surveys solicit information on the consumer's experience related to household financial shocks, particularly shocks related to the economic effects of the COVID–19 pandemic, how households respond to those shocks, and the role of savings to help provide a financial buffer.

The first survey will be a follow-up to respondents from the Bureau's 2023 ''Making Ends Meet'' survey to better understand household financial experiences dealing with medical debt as well as consumers' interactions with various financial products. The second survey will go to a new sample of consumers from the CCIP and will address several topics of interest to the Bureau possibly including the impact of

natural disasters and other environmental events, credit shopping behavior, additional follow-up regarding debt collection, and the assessment of various fees throughout the financial services ecosystem.

Request for Comments: Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB's approval. All comments will become a matter of public record.

Anthony May,

Paperwork Reduction Act Officer, Consumer Financial Protection Bureau.

[FR Doc. 2023–10423 Filed 5–15–23; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[AIT–221028B–PL]

Notice of Intent To Grant Partially Exclusive Patent License

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

ACTION: Notice of intent.

SUMMARY: Pursuant to the Bayh-Dole Act and implementing regulations, the Department of the Air Force hereby gives notice of its intent to grant a partially exclusive patent license to Sensor Biometrics, LLC, a small business LLC incorporated in the state of Nebraska and having a place of business at 8526 F Street, Suite 103, Omaha, NE 68127.

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

ADDRESSES: Submit written objections to Darryl Ahner, AFIT ORTA, 2950 Hobson Way, Wright-Patterson AFB, OH 45433; or Email: *AFIT.CZ.ORTA@us.af.mil*. Include Docket No. AIT–221028B–PL in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Darryl Ahner, AFIT ORTA, 2950 Hobson Way, Wright-Patterson AFB, OH 45433; Telephone: 937–255–3636 or Email: *AFIT.CZ.ORTA@us.af.mil*.

SUPPLEMENTARY INFORMATION:

Abstract of patent application(s):

A method for cyber security monitor includes monitoring a network interface that is input-only configured to surreptitiously and covertly receive bit-level, physical layer communication between networked control and sensor field devices. During a training mode, a baseline distinct native attribute (DNA) fingerprint is generated for each networked field device. During a protection mode, a current DNA fingerprint is generated for each networked field device. The current DNA fingerprint is compared to the baseline DNA fingerprint for each networked field device. In response to detect at least one of RAA and PAA based on a change in the current DNA fingerprint to the baseline DNA fingerprint of one or more networked field devices, an alert is transmitted, via an external security engine interface to an external security engine.

Intellectual Property

Application No. 16/886,874, filed 29 May 2020 and entitled *Passive Physical Layer Distinct Native Attribute Cyber Security Monitor*.

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

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

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–10373 Filed 5–15–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–375–000]

Elba Liquefaction Company, LLC; Southern LNG Company, LLC; Notice of Application for Amendment and Establishing Intervention Deadline

Take notice that on April 28, 2023, Elba Liquefaction Company, LLC (ELC), and Southern LNG Company, LLC (SLNG), 569 Brookwood Village, Suite 749, Birmingham, Alabama 35209, filed an application under section 3(a) of the Natural Gas Act (NGA) requesting an amendment to its June 1, 2016 Order [1] (2016 Order) to modify certain Movable Modular Liquefaction System (MMLS) Dehydration and Heavies Removal units that will reduce the fouling rate in the liquefaction units, reduce the resultant flaring events associated with cold box deriming, and therefore allow the MMLS to operate in an optimized condition for longer periods of time without fouling. Accordingly, this project is referred to as the Elba Liquefaction Optimization Project.

Specifically, ELC and SLNG request authorization to (1) make modifications to ten (10) MMLS units; (2) construct and operate a new condensate plant; (3) install three (3) new liquid nitrogen vaporizers; and (4) increase the total liquefaction capacity of the MMLS units up to approximately 2.9 MTPA from 2.5 MTPA (0.0553 Bcf/d).

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 (*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. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application may be directed to Francisco Tarin, Director, Regulatory, or Patricia Francis, Vice President and Managing Counsel, Elba Liquefaction Company, LLC and Southern LNG Company, LLC; 569 Brookwood Village, Suite 749, Birmingham, Alabama,

[1] Elba Liquefaction Company, L.L.C., 155 FERC ¶ 61,219, (2016).

35209. Or alternately to Francisco Tarin at (719) 667–7517 or by email at *Francisco_Tarin@kindermorgan.com,* or, Patricia Francis at (205) 325–7696 or by email at *Patricia_Francis@kindermorgan.com.*

Pursuant to Section 157.9 of the Commission's Rules of Practice and Procedure,[2] 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 May 31, 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,[3] any person[4] 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,[5] and must be submitted by the protest deadline, which is May 31, 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[6] and the regulations under the NGA[7] by the intervention deadline for the project, which is May 31, 2023. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/how-guides.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before May 31, 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 CP23–375–000 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[8]

(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 CP23–375–000.

To mail via USPS, use the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

To send via any other courier, use the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FERCOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served to the applicant by mail to: Francisco Tarin, Director, Regulatory, or Patricia Francis, Vice President and Managing Counsel, Elba Liquefaction Company, LLC and Southern LNG Company, LLC; 569 Brookwood Village, Suite 749, Birmingham, Alabama, 35209. Or alternately to Francisco Tarin at (719) 667–7517 or by email (with a link to the document) at *Francisco_Tarin@kindermorgan.com,* or, Patricia Francis

[2] 18 CFR (Code of Federal Regulations) 157.9.

[3] 18 CFR 157.205.

[4] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[5] 18 CFR 157.205(e).

[6] 18 CFR 385.214.

[7] 18 CFR 157.10.

[8] 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.

at (205) 325–7696 or by email (with a link to the document) at *Patricia_Francis@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.*

Intervention Deadline: 5:00 p.m. Eastern Time on May 31, 2023.

Dated: May 10, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10385 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2715–026]

Kaukauna Utilities; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* P–2715–026.

c. *Date filed:* July 22, 2022.

d. *Applicant:* Kaukauna Utilities (Kaukauna).

e. *Name of Project:* Combined Locks Hydroelectric Project (Combined Locks Project or project).

f. *Location:* The existing project is located on the Lower Fox River in the Village of Combined Locks and the Village of Little Chute, Outagamie County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. Zachary Moureau, Environmental & Compliance Manager, Kaukauna Utilities, 777 Island Street, Kaukauna, WI 54130–7077; (920) 462–0238; *zmoureau@ku-wi.org.*

i. *FERC Contact:* Kelly Wolcott, (202) 502–6480, or *kelly.wolcott@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* 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: Combined Locks Hydroelectric Project (P–2715–026).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted but is not ready for environmental analysis.

l. *The Combined Locks Project consists of:* (1) a concrete and cyclopean stone dam approximately 654 feet long and 27 feet high with additional 24 inch nominal flashboards mounted upon the spillway crest at elevation 674.6 feet International Great Lakes Datum of 1985 (IGLD85); (2) a 126.9-acre reservoir at normal full pool elevation 676.7 feet IGLD85; (3) a powerhouse approximately 65 feet wide by 130 feet long housing two 3.1-megawatt (MW) generators, for a total authorized capacity of 6.2 MW; (4) a tailrace channel; (5) a 265-foot-long, 4.16-kilovolt (kV) interconnection line from the powerhouse to transformer and 1,442-foot-long, 12.47-kV interconnection line from the transformer to the substation; and (6) appurtenant facilities.

The Combined Locks Project is operated as a run-of-the-river in coordination with the United States Army Corps of Engineers (Corps), which releases flows into the Lower Fox River from the Corps' Lake Winnebago. Kaukauna maintains the impoundment within a 2-foot range of the top of the wooden flashboards, when possible. The project average annual generation between 2014 and 2020 was 42,744 megawatt hours.

Kaukauna does not propose changes to project facilities or operations. Kaukauna proposes to: (1) continue to operate the project in a run-of-river mode to protect aquatic resources; (2) continue to dispose of large woody debris and trash collected from the trashracks; (3) implement invasive species monitoring every 2 years, and manage species categorized as ''prohibited'' by the Wisconsin Department of Natural Resources if observed in the project boundary; and (4) evaluate the project dam for National Register of Historic Places eligibility.

m. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested individuals an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*www.ferc.gov*) using the ''eLibrary'' link. At this time, the Commission has suspended access to the Commission's Public Access Room. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests 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 protests or motions to intervene must be received

on or before the specified deadline date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE;'' (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 protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

o. *Procedural schedule:* The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

Issue Scoping Document 1 for comments—May 2023
Scoping Document 1 comments due—June 2023
Issue Scoping Document 2 (if necessary)—July 2023
Issue Notice of Ready for Environmental Analysis—July 2023

Dated: May 10, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10381 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meetings

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

TIME AND DATE: May 18, 2023, 10:00 a.m.

PLACE: Room 2C, 888 First Street NE, Washington, DC 20426.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: Agenda. * *Note*—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Kimberly D. Bose, Secretary, Telephone (202) 502–8400.

For a recorded message listing items stricken from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed online at the Commission's website at *https://elibrary.ferc.gov/eLibrary/search* using the eLibrary link.

1101ST—MEETING

[Open Meeting; May 18, 2023, 10:00 a.m.]

Item No.	Docket No.	Company
Administrative		
A–1	AD23–1–000	Agency Administrative Matters.
A–2	AD23–2–000	Customer Matters, Reliability, Security and Market Operations.
A–3	AD06–3–000	2023 Summer Energy Market and Reliability Assessment
Electric		
E–1	RD22–4–001	North American Electric Reliability Corporation.
E–2	ER23–1511–000	Arroyo Solar LLC.
	TS23–3–000	
E–3	ER22–2359–000	PJM Interconnection, L.L.C.
E–4	ER22–2339–000	Southwest Power Pool, Inc.
E–5	ER22–2310–000	PacifiCorp.
E–6	ER22–2293–000	Dominion Energy South Carolina, Inc.
E–7	ER22–2317–000	Portland General Electric Company.
E–8	ER22–2346–000	El Paso Electric Company.
E–9	ER22–2356–000	Public Service Company of Colorado.
E–10	ER22–2345–000	NorthWestern Corporation.
E–11	ER22–2360–000	Tri-State Generation and Transmission Association, Inc.
E–12	ER23–430–001; ER23–431–001	Evergy Kansas Central, Inc.
	ER23–433–001	Southwest Power Pool, Inc.
E–13	OMITTED	
E–14	ER22–2385–001; ER22–2385–000	Panorama Wind, LLC.
E–15	ER16–2320–007; ER16–2320–009	Pacific Gas and Electric Company.
E–16	ER21–2455–003; ER21–2455–004	California Independent System Operator Corporation.
E–17	EL23–42–000	Soltage Executive Employees, LLC.
E–18	ER23–1544–000	Otter Tail Power Company.
E–19	EC98–2–005; ER18–2162–004	Louisville Gas and Electric Company and Kentucky Utilities Company.
E–20	AD21–15–000	Joint Federal-State Task Force on Electric Transmission.
Gas		
G–1	PL23–2–000	Policy Statement on Proposed Penalty Guidelines for Natural Gas Act Project Violations.
Hydro		
H–1	P–15261–000	Nevada Hydro Company, Inc.
H–2	OMITTED	
H–3	DI21–1–001	Badger Mountain Hydro, LLC.

1101ST—MEETING—Continued

[Open Meeting; May 18, 2023, 10:00 a.m.]

Item No.	Docket No.	Company
	Certificates	
C–1	CP17–458–021	Midship Pipeline Company, LLC.
C–2	CP22–514–000	Corpus Christi Liquefaction, LLC
C–3	CP18–512–000	Corpus Christi Liquefaction, LLC and Corpus Christi Liquefaction Stage III, LLC
C–4	CP19–502–002	Commonwealth LNG, LLC
C–5	CP22–461–000	Transcontinental Gas Pipe Line Company, LLC.

A free webcast of this event is available through the Commission's website. Anyone with internet access who desires to view this event can do so by navigating to *www.ferc.gov's* Calendar of Events and locating this event in the Calendar. The Federal Energy Regulatory Commission provides technical support for the free webcasts. Please call (202) 502–8680 or email *customer@ferc.gov* if you have any questions.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters but will not be telecast.

Issued: May 11, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–10517 Filed 5–12–23; 4:15 pm]

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 & Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–767–000.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (SRP June 2023) to be effective 6/1/2023.

Filed Date: 5/9/23.

Accession Number: 20230509–5100.

Comment Date: 5 p.m. ET 5/22/23.

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 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: May 10, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–10395 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Staff Attendance at North American Electric Reliability Corporation Standards Committee Meeting

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission and/or Commission staff may attend the following meeting:

Standards Committee Teleconference WebEx Meeting:

May 17, 2023 (1:00 p.m.–3:00 p.m. eastern time)

Further information regarding these meetings may be found at: *https://www.nerc.com/Pages/Calendar.aspx.*

The discussions at the meetings, which are open to the public, may address matters at issue in the following Commission proceeding:

Docket No. RD23–1–000: Extreme Cold Weather Reliability Standards, EOP–011–3 and EOP–012–1

For further information, please contact Chanel Chasanov, 202–502–8569, or *chanel.chasanov@ferc.gov.*

Dated: May 10, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10384 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–9772–000]

Book, II, Robert A.; Notice of Filing

Take notice that on May 10, 2023, Robert A. Book, II submitted for filing, 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 p.m. Eastern Time on May 31, 2023.

Dated: May 10, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10383 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–1720–000]

Holtville BESS, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Holtville BESS, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 30, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: May 10, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–10394 Filed 5–15–23; 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 exempt wholesale generator filings:

Docket Numbers: EG23–150–000.
Applicants: Solar Partners XI, LLC.
Description: Solar Partners XI, LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.
Filed Date: 5/10/23.
Accession Number: 20230510–5013.
Comment Date: 5 p.m. ET 5/31/23.

Docket Numbers: EG23–151–000.
Applicants: Horizon Solar, LLC.
Description: Horizon Solar, LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.
Filed Date: 5/10/23.
Accession Number: 20230510–5138.
Comment Date: 5 p.m. ET 5/31/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21–630–003.
Applicants: 325MK 8ME LLC.
Description: Notice of Non-Material Change in Status of 325MK 8ME LLC.
Filed Date: 5/10/23.
Accession Number: 20230510–5060.
Comment Date: 5 p.m. ET 5/31/23.

Docket Numbers: ER23–1167–002.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Amendment to Original NSA, SA No. 6804; Queue No. AC2–090 to be effective 4/25/2023.
Filed Date: 5/10/23.
Accession Number: 20230510–5066.
Comment Date: 5 p.m. ET 5/31/23.

Docket Numbers: ER23–1411–000.
Applicants: Newport Solar LLC.
Description: Supplement to March 17, 2023, Newport Solar, LLC Application of Newport Solar, LLC for market-based rate authority.
Filed Date: 5/8/23.
Accession Number: 20230508–5189.
Comment Date: 5 p.m. ET 5/15/23.

Docket Numbers: ER23–1419–001.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Amendment to Original NSA, SA No. 6833; Queue No. AE2–148 to be effective 5/17/2023.
Filed Date: 5/10/23.
Accession Number: 20230510–5095.
Comment Date: 5 p.m. ET 5/31/23.

Docket Numbers: ER23–1457–001.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Amendment to Original NSA, SA No. 6846; Queue Nos. P22, O38 to be effective 5/24/2023.
Filed Date: 5/10/23.
Accession Number: 20230510–5070.
Comment Date: 5 p.m. ET 5/31/23.

Docket Numbers: ER23–1482–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Tariff Amendment: 2023–05–10_SA 3370 ATC-Red Barn

Energy Sub 2nd Rev GIA (J855) to be effective 3/20/2023.

Filed Date: 5/10/23.

Accession Number: 20230510–5114.

Comment Date: 5 p.m. ET 5/31/23.

Docket Numbers: ER23–1852–000.

Applicants: Buchanan Generation, LLC.

Description: Request for Limited Waiver and Request for Shortened Comment Period and Expedited Action of Buchanan Generation, LLC.

Filed Date: 5/8/23.

Accession Number: 20230508–5182.

Comment Date: 5 p.m. ET 5/15/23.

Docket Numbers: ER23–1859–000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: § 205(d) Rate Filing: Amendment to Service Agreement FERC No. 864 to be effective 4/10/2023.

Filed Date: 5/10/23.

Accession Number: 20230510–5067.

Comment Date: 5 p.m. ET 5/31/23.

Docket Numbers: ER23–1860–000.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.15: CPV Five Bridges Solar LGIA Termination Filing to be effective 5/10/2023.

Filed Date: 5/10/23.

Accession Number: 20230510–5081.

Comment Date: 5 p.m. ET 5/31/23.

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: May 10, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–10396 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–9771–000]

Thomas Jr., Jesse R.; Notice of Filing

Take notice that on May 10, 2023, Jesse R. Thomas Jr. submitted for filing, 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 May 31, 2023.

Dated: May 10, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10379 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RD22–5–000]

Commission Information Collection Activities (FERC–725D(1)); Comment Request

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on a new information collection, FERC–725D(1), Mandatory Reliability Standards FAC–001–4 and FAC–002–4. This notice will be part of an information collection request that will be submitted to the Office of Management and Budget (OMB) for a review of the information collection requirements.

DATES: Comments on the collection of information are due June 15, 2023.

ADDRESSES: Send written comments on FERC–725D(1) to OMB through *www.reginfo.gov/public/do/PRAMain,* Attention: Federal Energy Regulatory Commission Desk Officer. Please identify the OMB control number (1902–NEW) in the subject line. Your comments should be sent within 30 days of publication of this notice in the **Federal Register**.

Please submit copies of your comments (identified by Docket No. RD22–5–000) to the Commission as noted below. Electronic filing through *https://www.ferc.gov* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.

○ *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

○ *Hand (including courier) delivery: Deliver to:* Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions:

OMB submissions must be formatted and filed in accordance with submission guidelines at *www.reginfo.gov/public/do/PRAMain*; Using the search function under the ''Currently Under Review field,'' select Federal Energy Regulatory Commission; click ''submit'' and select ''comment'' to the right of the subject collection.

FERC submissions must be formatted and filed in accordance with submission guidelines at: *https://www.ferc.gov.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *https://www.ferc.gov.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov* and telephone at (202) 502–8663.

SUPPLEMENTARY INFORMATION:

Title: FERC–725D(1), RD22–5–000, Mandatory Reliability Standards FAC–001–4 and FAC–002–4.

OMB Control No.: 1902–NEW.

Respondents: Transmission owners and generator owners for Reliability Standard FAC–001–4. Planning coordinators for Reliability Standard FAC–002–4.[1]

Frequency of Information Collection: Once during years 1 and 2. On occasion during year 3 and beyond.

Abstract: The Facilities Design, Connections, and Maintenance Reliability Standards address topics such as facility interconnection requirements, facility ratings, system operating limits, and transfer capabilities. These Reliability Standards are designated with the prefix ''FAC.''

On November 23, 2002 the Commission published an order approving new Reliability Standards FAC–001–4 and FAC–002–4 (87 FR 71602). The Commission approved those new standards to help ensure appropriate coordination and communication regarding the interconnection of facilities.

At present, the collections of information associated with all ''FAC'' Reliability Standards are authorized under FERC–725D (OMB Control Number 1902–0247). Ordinarily, the Commission would ask OMB to approve the collections of information associated with the new Reliability Standards as revisions of FERC–725D. However, another information collection request pertaining to FERC–725D is pending at OMB,[2] and only one request per information collection is allowed to be pending at OMB at the same time. FERC–725D(1) is a temporary placeholder number to avoid conflicting with the pending request already submitted to OMB regarding FERC–725D.

Previous Reliability Standard FAC–001–003 required transmission owners and generator owners to complete coordinated studies on new or ''materially modified'' existing interconnections. As approved in the November 23, 2022 order, FAC–001–4 requires coordinated studies of ''qualified changes'' in interconnections instead of ''materially modified'' interconnections. This revision is intended to prevent confusion with the Commission-defined term ''Material Modification'' in *pro forma* interconnection procedures and agreements.[3] The term ''qualified changes'' refers to changes in existing interconnected facilities that can have reliability impacts and helps ensure that they are properly addressed in interconnection requirements and studies.

In the November 23 order, the Commission also revised Requirement R6 of existing Reliability Standard FAC–002–3 by authorizing the planning coordinator to define the term ''qualified change'' and requiring public posting of the definition.

Necessity of Information: Mandatory.

Internal Review: The Commission has reviewed the collections of information associated with the rulemaking in Docket No. RD22–5–000, and has determined that the described information collection activities are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry.

Estimate of Annual Burden: The responsibilities of applicable entities for FAC–001–4 (*i.e.,* transmission owners and generator owners) are the same as those approved for Reliability Standard FAC–001–3 in FERC–725D. Table 1, below, accordingly shows the same burdens as approved in FERC–725D, with updated costs.

TABLE 1—ESTIMATED BURDENS FOR FAC–001–4

Types of responses	Types and numbers of respondents	Number of annual responses per respondent	Total number of responses	Average number of burden hours and cost per response[4]	Total burden hours and cost
A	B	C	D (Column B × Column C)	E	F (Column D × Column E)
Documentation & Updates	498 GOs/TOs	1	498	34 hrs.; $3,094	16,932 hrs. $1,491,672.
Evidence Retention	498 GOs/TOs	1	498	1 hr.; $91.00	498 hrs.; $45,318.

[1] The NERC Glossary, at *https://www.nerc.com/pa/Stand/Glossary%20of%20Terms/Glossary_of_Terms.pdf,* defines these terms. A transmission owner (TO) is the entity that owns and maintains transmission facilities. A generator owner (GO) is the entity that owns and maintains generating units. A planning coordinator, formerly known as a planning authority (PA/PC), is the responsible entity that coordinates and integrates transmission facilities, service plans, resource plans, and protection systems.

[2] That pending request would not affect FAC–001–3 or FAC–002–3, the predecessors to the Reliability Standards approved by the Commission in its November 23, 2022 order.

[3] The regulation at 18 CFR 35.28(c)(1) requires every public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce to have on file with the Commission an open access transmission tariff consisting of the *pro forma* tariff promulgated by the Commission, or such other tariff as may be approved by the Commission. The regulation at 18 CFR 35.28(f)(1) requires every public utility that is required to have on file a non-discriminatory open access transmission tariff to amend such tariff by adding the standard interconnection procedures and agreement and the standard small generator interconnection procedures and agreement required by the Commission.

[4] The Commission staff estimates that the industry's hourly cost for wages plus benefits is similar to the Commission's $91.00 FY 2022 average hourly cost for wages and benefits.

Under, FAC–002–4, the new collection FERC–725D(1) represents a minor additional burden to planning coordinators, due to the requirement that they develop the definition of ''qualified change'' for new and existing interconnections of generation, transmission or electricity end user facilities. This burden is expected to be greater in years one and two than in year three and beyond for FAC–002–4. The burden and cost estimates for FAC–002–4 are based on the increase in the reporting and recordkeeping burden imposed by the revised Reliability Standards. Our estimates are based on the NERC Compliance Registry as of September 16, 2022, which indicates 63 planning coordinators.

TABLE 2—ESTIMATED BURDENS FOR FAC–002–4

Type and numbers of respondents	Number of annual responses per respondent	Total number of responses	Average number of burden hours and cost per response	Total burden hours and cost
A	B	C (Column A × Column B)	D	E (Column C × Column D)
63 PA/PCs Years 1 and 2	1	63	120 hrs.; $7,200	7,560 hrs.; $453,600.
63 PA/PCs Ongoing, beginning in Year 3	1	63	40 hrs.; $2,520	2,520 hrs.; $158,760.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: May 9, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10351 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15298–000]

LinkPast Solutions, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 25, 2023, LinkPast Solutions, Inc., filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of hydropower on the Black River in Jefferson County, New York. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Great Mills Hydro Project (Plant #1) would consist of the following: (1) a new 330-foot-long concrete gravity dam at the site of an existing breached dam; (2) an impoundment with an approximate surface area of 220 acres and a storage capacity of 1,100 acre-feet at a normal pool elevation of 609.05 feet National Geodetic Vertical Datum of 1929; (4) a new 85-foot-long by 65-foot-wide reinforced concrete powerhouse housing two or more axial flow vertical turbine-generator units with a total installed capacity of 5 megawatts; (5) additional new DIVE-turbine-generator (generator directly connected to the turbine shaft that can be completely submerged) units to utilize flows below the minimum or above the maximum hydraulic capacities of the main powerhouse; (6) a new 50-foot-long by 50-foot-wide switchyard; (7) two new access roads, one on the north and the other on the south shores of the river; (8) a new 2.23-mile-long, 115-kilovolt transmission line; and (9) appurtenant facilities. The proposed project would have an average annual generation of 24,500 megawatt-hours.

Applicant Contact: Brian McArthur, LinkPast Solutions, Inc., P.O. Box 5474, Clark, New Jersey 07066; phone: (848) 628–4414.

FERC Contact: Monir Chowdhury; phone: (202) 502–6736.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support 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.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's website at *https://elibrary.ferc.gov/eLibrary/search.* Enter the docket number (P–15298) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 9, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10356 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–9773–000]

Loehr, Jason C.; Notice of Filing

Take notice that on May 10, 2023, Jason C. Loehr submitted for filing, 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 May 31, 2023.

Dated: May 10, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10380 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 553–244]

Seattle City Light; Notice of Application Tendered for Filing With the Commission and Establishing Procedural Schedule for Licensing and 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.:* 553–244.

c. *Date Filed:* April 28, 2023.

d. *Applicant:* Seattle City Light (City Light).

e. *Name of Project:* Skagit River Hydroelectric Project (project)

f. *Location:* The existing project is located on the Skagit River, in Whatcom, Snohomish, and Skagit Counties, Washington. The project occupies Federal lands under the jurisdiction of the National Park Service and the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Chris Townsend, Director of Natural Resources and Hydropower Licensing, Seattle City Light, P.O. Box 34023, Seattle, WA 98124; telephone (206) 304–1210.

i. *FERC Contact:* Matt Cutlip, (503) 552–2762 or *matt.cutlip@ferc.gov*.

j. This application is not ready for environmental analysis at this time.

k. The Project *Description:* The project consists of three hydroelectric developments (*i.e.,* Ross, Diablo, and Gorge), a transmission line corridor that is about 100 miles long containing multiple transmission lines, two company towns (*i.e.,* Newhalem and Diablo), and numerous recreation and interpretive facilities. The project also includes 10,803.4 acres of fish and wildlife mitigation land.

The Ross Development is located at river mile (RM) 105.1 on the Skagit River and consists of: (1) a 540-foot-high, 1,300-foot-long concrete arch and gravity dam with two spillways, each of which has six 20-foot-high, 19.5-foot-wide radial tainter gates, two butterfly valves at an elevation of 1,346.2 feet, and two jet valves at elevations of 1,275.2 and 1,260.2 feet; (2) the 11,725-surface-acre Ross Lake with a storage capacity of 1,432,000 acre-feet at normal maximum water surface elevation of 1,608.76 feet; (3) two bifurcated intake structures with four 20-foot-wide, 198.13-foot-long openings and trashracks; (4) one 1,800-foot-long and one 1,634-foot-long, 24.5-foot-diameter concrete-lined power tunnels; (5) four 16-foot-diameter, 350-foot-long penstocks; (6) a powerhouse containing four generating units with a total authorized installed capacity of 352.5 MW; (7) two 230-kilovolt (kV), 3.8-mile-long transmission lines extending from the power plant to Diablo Switchyard; and (8) appurtenant facilities.

The Diablo Development is located at RM 101.2 on the Skagit River and consists of: (1) a 389-foot-high, 1,180-foot-long concrete arch and gravity dam, with a northern spillway that has 12 19-foot-tall, 20-foot-wide radial tainter gates and a southern spillway with seven 19-foot-high, 20-foot-wide radial tainter gates, and a valve house containing three butterfly valves and one Larner Johnson type valve at an elevation of 1,050.6 feet; (2) the 905-surface-acre Diablo Lake with a gross storage capacity of 88,880 acre-feet at normal maximum water surface elevation of 1,211 feet; (3) two bifurcated intake structures with four approximately 16.75- to 18.75-foot-wide, 153.71-foot-long openings and trashracks; (4) a 19.5-foot-diameter, 1,990-foot-long power tunnel, of which 1,800 feet is concrete-lined and the other 190 feet is steel-lined; (5) two 15-foot-diameter penstocks and two 5-foot-diameter penstocks each 290 feet long; (6) a surge tank; (7) a powerhouse containing four generating units with a total authorized installed capacity of 158.47 MW; (8) a switchyard; (9) a 230-kV, 5.8-mile-long transmission line extending from Diablo Switchyard to the Gorge Switchyard; (10) three 230-kV, 87.6-mile-long transmission lines running from Diablo Switchyard to Bothell Substation; and (11) appurtenant facilities.

The Gorge Development is located at RM 96.6 on the Skagit River and consists of: (1) a 300-foot-high, 670-foot-long combination concrete arch and gravity dam with a 94-foot-wide spillway that has two 50-foot-high, 47-

foot-wide fixed wheel gates and a log chute; (2) the 235-surface-acre Gorge Lake with a gross storage capacity of 8,200 acre-feet at normal maximum water surface elevation of 881.5 feet; (3) a bifurcated intake structure with two 20-foot-wide, 88.9-foot-long openings and trashracks; (4) a 20.5-foot-diameter, 11,000-foot-long concrete-lined power tunnel; (5) three 10-foot-diameter penstocks and one 15-foot-diameter penstock, each 1,600 feet long and each fitted with a 10-foot-diameter butterfly biplane and relief valves; (6) a surge tank; (7) a powerhouse containing four generating units with a total authorized installed capacity of 189.3 MW; (8) a switchyard; (9) a 230-kV, 36.8-mile-long transmission line extending from Gorge Switchyard to North Mountain Substation; and (10) appurtenant facilities.

The three project developments are hydraulically coordinated to operate as a single project. Project operation under the existing license is designed to meet four objectives, which are prioritized as follows: (1) flood control, (2) salmon and steelhead protection flows downstream of Gorge Powerhouse, (3) recreation, and (4) power generation. To achieve these goals, City Light adheres to specific license requirements for Ross Lake levels and for stream flows and ramping rates downstream of Gorge Powerhouse.

Under existing operations, Ross Lake is drawn down on a yearly basis during winter to capture flows from spring runoff and to provide for downstream flood control. The drawdown typically begins after Labor Day and continues until the lake reaches its lowest level in late March or early April. The current license requires City Light to draw down Ross Lake to a level that provides 60,000 acre-feet of storage for flood control by November 15 and 120,000 acre-feet by December 1 and to maintain this available storage through March 15. Ross Lake levels are also managed to meet recreational needs during the summer months. The current license requires City Light to fill Ross Lake as soon as possible after April 15, achieve full pool depth by July 31, and maintain full pool depth through Labor Day.

The Diablo Development is operated to regulate flow between the Ross and Gorge Developments. Under normal operation, Diablo Lake typically fluctuates between 4 and 5 feet per day.

The Ross Powerhouse and Diablo Powerhouse are typically operated continuously to pass flow downstream, although generation is occasionally increased or decreased for short periods to help meet load-following demand or other project purposes.

The Gorge Development is operated primarily to provide a continuous, stable flow regime in the upper Skagit River for salmon and steelhead protection. City Light typically limits Gorge Lake fluctuations to about 3 to 5 feet and does not typically operate the powerhouse to meet load-following demand. The Gorge Development creates a 2.5-mile-long bypassed reach of the Skagit River between the dam and powerhouse. There are no minimum flow requirements in the existing license for the Gorge bypassed reach. Therefore, except during spill events at Gorge Dam, bypassed reach flow is limited to accretion flow, spill-gate seepage, tributary input, and precipitation runoff.

l. 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 document (P–553). For assistance, contact FERC at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). At this time, the Commission has suspended access to the Commission's Public Reference Room. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll free, (886) 208–3676 or TTY (202) 502–8659.

m. 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.

n. Procedural Schedule:

The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target Date
City Light files final study report for Study CR–04 Properties with Traditional Cultural Significance Study [1].	March 2024.
Notice of Acceptance/Notice of Ready for Environmental Analysis.	April 2024.
Filing of recommendations, preliminary terms and conditions, and fishway prescriptions.	June 2024.

[1] City Light indicates in section 4.2.9.1 of the Final License Application Exhibit E that the study results for this Commission staff-approved study would be filed in the first quarter of 2024.

o. 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: May 9, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10357 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15296–000]

Tivis Branch Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 3, 2023, Tivis Branch Hydro, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Flannagan Hydroelectric Project to be located at the U.S. Army Corps of Engineers' (Corps) Huntington District John W. Flannagan Dam on the Pound River in Dickenson County, Virginia. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) new four 0.36-megawatt (MW) turbine-generator units to be placed inside the Corps' intake tower with a total installed capacity of 1.44 MW; (2) a new 40-foot-long, 40-foot-wide operating space inside the Corps' intake tower; (3) a new 300-foot-long conduit attached to the access bridge (which provides access to the Corps' intake tower); (4) a new 15-foot-long, 15-foot-wide substation pad including a 4.16/12.47-kilovolt (kV) step-up transformer; (5) a new 300-foot-long, 4.16-kV generator lead to the

substation pad; (6) a 30-foot-long, 12.47-kV transmission line connecting the substation pad to the existing 12.47-kV Appalachian Power Company's distribution line; and (7) appurtenant facilities. The proposed project would have an annual generation of 8,000 megawatt-hours.

Applicant Contact: Ryan A. Cook, Tivis Branch Hydro, LLC, 5 Dover Street, Suite 102, New Bedford, MA 02740; phone: (508) 436–4100.

FERC Contact: Woohee Choi; email: *woohee.choi@ferc.gov;* phone: (202) 502–6336.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *https://ferconline.ferc.gov/eFiling.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–15296–000.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–15296) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 10, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10382 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15299–000]

LinkPast Solutions, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 25, 2023, LinkPast Solutions, Inc., filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of hydropower on the Black River in Jefferson County, New York. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Great Mills Hydro Project (Plant #2) would consist of the following: (1) a new 1,850-foot-long dam (a mix of concrete gravity dam, earthen dike, and wing walls) at the site of an existing breached dam; (2) an impoundment with an approximate surface area of 140 acres and a storage capacity of 850 acre-feet at a normal pool elevation of 589.90 feet National Geodetic Vertical Datum of 1929; (4) a new 90-foot-long by 65-foot-wide reinforced concrete powerhouse housing two or more axial flow vertical turbine-generator units with a total installed capacity of 8 megawatts; (5) additional new DIVE-turbine-generator (generator directly connected to the turbine shaft that can be completely submerged) units to utilize flows below the minimum or above the maximum hydraulic capacities of the main powerhouse; (6) a new 50-foot-long by 50-foot-wide switchyard; (7) two new access roads, one on the north and the other on the south shores of the river; (8) a new 0.69-mile-long, 115-kilovolt transmission line; and (9) appurtenant facilities. The proposed project would have an average annual generation of 40,000 megawatt-hours.

Applicant Contact: Brian McArthur, LinkPast Solutions, Inc., P.O. Box 5474, Clark, New Jersey 07066; phone: (848) 628–4414.

FERC Contact: Monir Chowdhury; phone: (202) 502–6736.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support 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.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's website at *https://elibrary.ferc.gov/eLibrary/search.* Enter the docket number (P–15299) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 9, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–10355 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding,

to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e) (1) (v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. 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. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket Nos.	File date	Presenter or requester
Prohibited:		
CP20–55–000	05–1–2023	FERC Staff.[1]
Exempt:		
1. CP16–22–000	04–26–2023	US Senator Sherrod Brown.
2. CP17–458–000	04–26–2023	US Representative Tom Cole.
3. P–14861–002	04–28–2023	FERC Staff.[2]
4. CP22–44–000	05–02–2023	FERC Staff.[3]

[1] Emailed comments dated 4/28/2023 from Naomi Yoder.
[2] Memo dated 4/28/23 regarding communication with the US Fish & Wildlife Service.
[3] Summary of the 4/27/2023 phone call with Equitrans.

Dated: May 10, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–10397 Filed 5–15–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2017–0430; FRL–XXXX]

Notice of Proposed Radon Credentialing Criteria; Extension of the Comment Period

AGENCY: Environmental Protection Agency, Office of Radiation and Indoor Air.

ACTION: Notice of availability; extension of the comment period.

SUMMARY: The Environmental Protection Agency (EPA) is announcing an extension of the public comment period by 30 days for the Notice of Proposed Radon Credentialing Criteria.

DATES: The comment period for the Notice of Proposed Radon Credentialing Criteria (88 FR 17215), is extended. Comments must be received on or before June 21, 2023.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2017–0430 by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2017–0430 in the subject line of the message.
- *U.S. Postal Service Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Air and Radiation Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. EPA–HQ–OAR–2017–0430. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Katrin Kral, Indoor Environments Division, Office of Radiation and Indoor Air 6609T, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; 202–343–9454; *kral.katrin@epa.gov.*

SUPPLEMENTARY INFORMATION: The EPA published the Notice of Proposed Radon Credentialing Criteria on March 22, 2023, in the **Federal Register** (88 FR 17215), which included a request for comments and key questions, on or before May 22, 2023, on The Proposed Radon Credentialing Criteria document (available in the docket). The purpose of this Notice is to extend the public comment period.

Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2017–0430, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section.

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

Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or

other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*.

1. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the notice by docket number, subject heading, **Federal Register** date, and page number.
- Provide a brief description of yourself and your role or organization before addressing the questions.
- Identify the question(s) you are responding to from the KEY QUESTIONS section by question number when submitting your comments. You do not need to address every question.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow it to be reproduced.
- Illustrate your concerns with specific examples and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

B. How can I learn more about this?

The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2017–0430 that includes the Proposed Radon Credentialing Criteria document, which is the subject of this notice. Please refer to the original **Federal Register** for information about this proposed action and a list of key questions on which the Agency is seeking feedback.

The EPA hosted a public information session on April 12, 2023. To access a recording of the session, accompanying slides and a Questions and Answers document, visit EPA's radon website at *https://www.epa.gov/radon/epas-draft-criteria-radon-credentialing-organizations*. The information session covered the EPA's role in overseeing the quality of radon service providers as well as conformity assessment and application of voluntary consensus standards within federal programs, including the proposed criteria.

We are extending the public comment period through June 21, 2023. This action will provide the public additional time to provide comments.

Jonathan D. Edwards,

Director, Office of Radiation and Indoor Air.

[FR Doc. 2023–10378 Filed 5–15–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

[NOTICE 2023–XX]

2024 Presidential Candidate Matching Fund Submission Dates and Post Date of Ineligibility Dates To Submit Statements of Net Outstanding Campaign Obligations

AGENCY: Federal Election Commission.

ACTION: Notice of matching fund submission dates and submission dates for statements of net outstanding campaign obligations for 2024 presidential candidates.

SUMMARY: The Federal Election Commission is publishing matching fund submission dates for publicly funded 2024 presidential primary candidates. Eligible candidates may present one submission and/or resubmission per month on the designated date. The Commission is also publishing the dates on which publicly funded 2024 presidential primary candidates must submit their statements of net outstanding campaign obligations after their dates of ineligibility. Candidates are required to submit a statement of net outstanding campaign obligations prior to each regularly scheduled date on which they receive Federal matching funds, on dates set forth in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: Zuzana Pacious, Audit Division, 1050 First Street NE, Washington, DC 20463, (202) 694–1200 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Matching Fund Submissions

Presidential candidates eligible to receive Federal matching funds may present submissions and/or resubmissions to the Federal Election Commission once a month on designated submission dates. The Commission will review the submissions/resubmissions and forward certifications for eligible candidates to the Secretary of the Treasury. Because no payments can be made during 2023, submissions received during 2023 will be certified in late December 2023, for payment in 2024. 11 CFR 9036.2(c); *see also* 26 U.S.C. 9032(6), 9037(b) (allowing payments only during matching payment period that begins in calendar year of election). Treasury Department regulations require that funds for the general election grants be set aside before any matching fund payments are made. Information provided by the Treasury Department shows the balance in the fund as of March 31, 2023, was $434,911,060 and the Commission estimates that funds will be available for matching payments in January 2024. During 2024 and 2025, certifications will be made on a monthly basis. The last date a candidate may make a submission is March 3, 2025.

The submission dates specified in the following list pertain to non-threshold matching fund submissions and resubmissions *after the candidate establishes eligibility*. The threshold submission on which that eligibility will be determined may be filed at any time and will be processed within fifteen business days, unless review of the threshold submission determines that eligibility has not been met.

Net Outstanding Campaign Obligations Submissions

Under 11 CFR 9034.5, a candidate who received Federal matching funds must submit a net outstanding campaign obligations (''NOCO'') statement to the Commission within 15 calendar days after the candidate's date of ineligibility (''DOI''), as determined under 11 CFR 9033.5. *See also* 26 U.S.C. 9033(c) (describing periods of eligibility for payments). The candidate's net outstanding campaign obligations equal the total of all outstanding obligations for qualified campaign expenses plus estimated necessary winding down costs less cash on hand, the fair market value of capital assets, and amounts owed to the committee, or a commercially reasonable amount based on the collectability of those amounts. 11 CFR 9034.5(a). Candidates will be notified of their DOI by the Commission.

A candidate who has net outstanding campaign obligations post-DOI may continue to submit matching payment requests provided the candidate certifies that the remaining net outstanding campaign obligations equal or exceed the amount submitted for matching. 11 CFR 9034.5(f)(1). If the candidate so certifies, the Commission will process the request and certify the appropriate amount of matching funds.

Candidates must also file revised NOCO statements in connection with each matching fund request submitted after the candidate's DOI. 11 CFR 9034.5(f)(2). These statements are due

just before the next regularly scheduled payment date, on a date to be determined by the Commission. They must reflect the financial status of the campaign as of the close of business three business days before the due date of the statement and must also contain a brief explanation of each change in the committee's assets and obligations from the most recent NOCO statement. *Id.*

The Commission will review the revised NOCO statement and adjust the committee's certification to reflect any change in the committee's financial position that occurs after submission of the matching payment request and the date of the revised NOCO statement. The following schedule includes both matching fund submission dates and submission dates for revised NOCO statements.

SCHEDULE OF MATCHING FUND SUBMISSION DATES AND DATES TO SUBMIT REVISED STATEMENTS OF NET OUTSTANDING CAMPAIGN OBLIGATIONS (NOCO) FOR 2024 PRESIDENTIAL CANDIDATES

Matching fund submission dates	Revised NOCO submission dates
January 2, 2024	December 21, 2023.
February 1, 2024	January 24, 2024.
March 1, 2024	February 22, 2024.
April 1, 2024	March 22, 2024.
May 1, 2024	April 23, 2024.
June 3, 2024	May 23, 2024.
July 1, 2024	June 21, 2024.
Aug. 1, 2024	July 24, 2024.
September 3, 2024	August 23, 2024.
October 1, 2024	September 23, 2024.
November 1, 2024	October 24, 2024.
December 2, 2024	November 21, 2024.
January 2, 2025	December 23, 2024.
February 3, 2025	January 24, 2025.
March 3, 2025	February 21, 2025.

On behalf of the Commission.

Dara S. Lindenbaum,

Chair, Federal Election Commission.

[FR Doc. 2023–10352 Filed 5–15–23; 8:45 am]

BILLING CODE 6715–01–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 May 31, 2023.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Michael Estes, Debra Estes, Dean Tabor, and Sharon Tabor, all of Fisher, Illinois; Lyndon S. Estes, Westfield, Indiana; Boyd M. Estes, Chicago, Illinois; Tate Estes, Colona, Illinois; and the Lyndon W. Estes-Trust, Champaign, Illinois, Lyndon W. Estes as trustee, Fisher, Illinois;* to form the Estes Family Control Group, a group acting in concert, to retain voting shares of Fisher Bancorp, Inc., and thereby indirectly retain voting shares of The Fisher National Bank, both of Fisher, Illinois, and Catlin Bank, Catlin, Illinois.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–10428 Filed 5–15–23; 8:45 am]

BILLING CODE 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 1009 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; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: June 20, 2023.

Time: 10:00 a.m. to 1:00 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 3G54, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Hitendra S. Chand, 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 3G54, Rockville, MD 20852, (240) 627–3245, *hiten.chand@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: May 10, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–10364 Filed 5–15–23; 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 Meetings

Pursuant to section 1009 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: Neurological Sciences Training Initial Review Group; NST–4 Study Section.

Date: June 13, 2023.

Time: 10:30 a.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Steven Glenn Britt, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH NSC, 6001 Executive Blvd., Suite 3208, MSC, 9529 Rockville, MD 20852, 301–480–1953, *steve.britt@nih.gov*.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; BPN Small Molecule and Biologic Therapeutic Drug Discovery for Disorders of the Nervous System.

Date: June 14–15, 2023.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Eric S. Tucker, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC,, 6001 Executive Blvd., Suite 3208, MSC, 9529 Rockville, MD 20852, 301–827–0799, *eric.tucker@nih.gov*.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders B Study Section.

Date: June 20, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Alexandrian, 480 King Street, Alexandria, VA 22314.

Contact Person: Joel A Saydoff, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Room 3205, MSC, 9529 Rockville, MD 20852, 301–496–9223, *joel.saydoff@nih.gov*.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders A Study Section.

Date: June 22–23, 2023.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Natalia Strunnikova, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC, 9529 Rockville, MD 20852, 301–402–0288, *natalia.strunnikova@nih.gov*.

(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: May 10, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–10363 Filed 5–15–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; Notice of Closed Meeting

Pursuant to section 1009 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 Dental and Craniofacial Research Special Emphasis Panel; Research and Training/Education Review.

Date: June 22, 2023.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Dental and Craniofacial Research 6701 Democracy Boulevard Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Aiwu Cheng, Ph.D., MD, Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, National Institute of Dental and Craniofacial Research, 6701 Democracy Blvd., Bethesda, MD 20892, (301) 594–4859, *Aiwu.cheng@nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: May 10, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–10362 Filed 5–15–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 30-Day Comment Request; Regular Clearance for the National Institute of Mental Health Data Archive (NDA), (NIMH)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

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

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Andrew Hooper, National Institute of Mental Health (NIMH) Project Clearance Liaison, Science Policy and Evaluation Branch, Office of Science Policy, Planning and Communications, NIMH, Neuroscience Center, 6001 Executive Boulevard, MSC 9667, Bethesda, Maryland 20892, call (301) 480–8433, or email your request, including your mailing address, to *nimhprapubliccomments@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** on March 6, 2023, pages 13835–13836 (Vol. 88, No. 43) and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institute of Mental Health

(NIMH), National Institutes of Health, may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

In compliance with section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

Proposed Collection Title: The National Institute of Mental Health Data Archive (NDA), NIMH, 0925–0667, expiration date 1/31/2024, REVISION, National Institute of Mental Health (NIMH), National Institutes of Health (NIH).

Need and Use of Information Collection: The NIMH Data Archive (NDA) is an infrastructure that allows for the submission and storage of human subjects' data from researchers conducting studies related to many scientific domains, regardless of the source of funding. The NIH and the NIMH seek to encourage use of the NDA by investigators in the field of multiple scientific research domains to achieve rapid scientific progress. In order to manage access to this data system, NIMH collects information from two categories of NDA users: (1) Investigators who seek permission to access data from the NDA for the purpose of scientific investigation, scholarship or teaching, or other forms of research and research development, via the Data Use Certification (DUC), and (2) investigators who request permission to submit data to the NDA for the purpose of scientific investigation, scholarship or teaching, or other forms of research and research development, via the Data Submission Agreement (DSA). This REVISION request is intended to facilitate NDA users' completion of the DUC and DSA by providing them with clearer guidance and updated background information.

OMB approval is requested for three years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 1,875.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondents	Number of respondents	Number of projects per respondent	Average time per response (in hours)	Total burden hours
NDA Data Submission Agreement (DSA).	Researchers submitting data	300	1	90/60	450
NDA Data Use Certification (DUC).	Researchers requesting access to data.	950	1	90/60	1,425
Total			1,250		1,875

Dated: May 10, 2023.

Andrew A. Hooper,

Project Clearance Liaison, National Institute of Mental Health, National Institutes of Health.

[FR Doc. 2023–10348 Filed 5–15–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Administrative Forfeiture: New Publication Timeline for the Notice of Seizure and Intent To Forfeit

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

ACTION: General notice.

SUMMARY: This notice announces that U.S. Customs and Border Protection (CBP) is changing its processes concerning the publication of the Notice of Seizure and Intent to Forfeit for CBP seizures and administrative forfeitures. Currently, CBP neither publishes the Notice of Seizure and Intent to Forfeit online (available at *www.forfeiture.gov*) nor does it post such a notice, if required, at the appropriate U.S. Customhouse or U.S. Border Patrol Station or Sector office until the administrative process has been exhausted. CBP will now publish the Notice of Seizure and Intent to Forfeit online and, if required, post it at the appropriate U.S. Customhouse or U.S. Border Patrol Station or Sector office at approximately the same time that it first sends a written Notice of Seizure to the party or parties it has identified as potentially having an interest in property seized by CBP. The new publication timeline will make the administrative forfeiture process more efficient without affecting the rights or obligations of any interested party.

DATES: This general notice is effective on May 16, 2023.

FOR FURTHER INFORMATION CONTACT: Lisa Santana Fox, Director, Fines, Penalties and Forfeitures Division, Office of Field Operations, U.S. Customs and Border Protection at (202) 344–2150 or *lisa.k.santanafox@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

U.S. Customs and Border Protection (CBP) has the authority to seize property for violations of customs laws and other laws enforced by CBP. *See, e.g.,* Title 19, United States Code Section 482 (19 U.S.C. 482), 19 U.S.C. 1581, and 19 U.S.C. 1602; *see also* Title 19, Code of Federal Regulations Section 162.21 (19 CFR 162.21). CBP has the authority to administratively forfeit property if the seized property meets certain conditions. 19 U.S.C. 1607. Generally, seized property is eligible for administrative forfeiture if it is a conveyance used to unlawfully import, export, transport, or store a controlled substance or prohibited chemical. *See id.* CBP may also administratively forfeit prohibited merchandise, monetary instruments as defined by 31 U.S.C. 5312(a)(3), or other property that does not exceed $500,000 in value.[1] *Id.*

The procedural aspects of the administrative forfeiture process are governed by one of two statutes. The first statute is Section 2 of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) (Pub. L. 106–185, 114 Stat. 202), codified at 18 U.S.C. 983. CAFRA provides certain procedures that CBP must follow when proceeding with a seizure and forfeiture under that statutory authority. *See also* 19 CFR part 162, subpart H (CBP regulations

[1] If the seized property is not eligible for an administrative forfeiture process, CBP will refer the case for judicial forfeiture. *See* 19 U.S.C. 1610; 19 CFR 162.32(c).

implementing CAFRA as it applies to seizures made by CBP). CAFRA does not apply, however, to all CBP seizures.[2] When CAFRA does not apply, the procedural aspects of the seizure and forfeiture process are governed by the Tariff Act of 1930, as amended (codified at 19 U.S.C. 1600, *et seq.*), and CBP's regulations at 19 CFR parts 162 and 171. Although CAFRA and the Tariff Act of 1930, as amended, specify different procedures and timeframes, the general administrative forfeiture process is the same under both statutes. A brief description of that process follows.

CBP initiates the administrative forfeiture process by mailing a Notice of Seizure to any party it identifies as potentially having an interest in the property. *See* 19 CFR 162.31, 162.92. The Notice of Seizure provides notice of the seizure and outlines the options for responding. After receiving the Notice of Seizure, a party interested in seeking relief must timely file a claim or a petition with CBP or make an offer in compromise.[3]

In addition to the Notice of Seizure, which is mailed to interested parties, CBP also publishes a Notice of Seizure and Intent to Forfeit on an official government forfeiture website (available at *www.forfeiture.gov*). The purpose of the Notice of Seizure and Intent to Forfeit is to provide notice to the public of the seizure and impending administrative forfeiture and allow any interested party who did not receive a Notice of Seizure to file a claim with CBP. *See* 19 U.S.C. 1607; 19 CFR 162.45(b). CBP publishes the Notice of Seizure and Intent to Forfeit on the government website for at least 30 consecutive days. 19 CFR 162.45(b). For property valued at $5,000 or less, CBP also posts the Notice of Seizure and Intent to Forfeit for three successive weeks in a conspicuous place that is accessible to the public at the appropriate U.S. Customhouse or U.S. Border Patrol Station or Sector office. 19 CFR 162.45(b)(2).

Any party seeking relief from the seizure and administrative forfeiture, and who did not receive a Notice of Seizure, may file a claim with CBP but the claim must be timely. *See* 18 U.S.C. 983(a)(2); 19 U.S.C. 1608; *see also* 19 CFR 162.47(a), 162.94(b). For seizures subject to CAFRA, where the notice of seizure is not received, the party must file the claim within 30 calendar days after the date of final publication of the Notice of Seizure and Intent to Forfeit. 19 CFR 162.94(b). For all other seizures, the party must file a claim within 20 days from the date of the first publication of the Notice of Seizure and Intent to Forfeit and must include a cash bond, unless CBP has waived the bond requirement. *See* 19 U.S.C. 1608; 19 CFR 162.47. The applicable deadline is specified in the Notice of Seizure and Intent to Forfeit.

If no action is taken by interested parties in response to either the Notice of Seizure or the Notice of Seizure and Intent to Forfeit (or if CBP denies a petition or offer in compromise), CBP will execute a Declaration of Administrative Forfeiture declaring the property forfeited and transferring full title of the forfeited property to CBP.

It has been CBP's practice to first mail the Notice of Seizure to any party identified by CBP as potentially having an interest in the property and then wait either for a party to file a claim or petition or for those respective timeframes to expire before publishing the Notice of Seizure and Intent to Forfeit. Once the deadline for filing a claim or petition has passed (or the administrative process has been exhausted), CBP has historically published the Notice of Seizure and Intent to Forfeit on the official government forfeiture website and, if required, posted it at the appropriate U.S. Customhouse or U.S. Border Patrol Station or Sector office.

New Publication Timeline for the Notice of Seizure and Intent To Forfeit

This notice announces that CBP now will publish a Notice of Seizure and Intent to Forfeit on the official government forfeiture website (and post the notice at the relevant U.S. Customhouse or U.S. Border Patrol Station or Sector office, if applicable) at approximately the same time that it first sends a written Notice of Seizure to the party or parties identified as potentially having an interest in the property. CBP will no longer wait for the timeframe for filing a claim or petition to expire before publishing or posting the Notice of Seizure and Intent to Forfeit. This means that both the parties identified by CBP as potentially having an interest in the property and the public will be notified of the seizure and impending administrative forfeiture at approximately the same time.

This new publication timeline will apply to all property seized by CBP and eligible for administrative forfeiture, including seizures governed by CAFRA and by the Tariff Act of 1930, as amended. This includes seizures processed by CBP on behalf of U.S. Immigration and Customs Enforcement, Homeland Security Investigations. The new publication timeline does not apply to Schedule I and Schedule II controlled substances, which are summarily forfeited without notice. *See* 21 U.S.C. 881(f) and 19 CFR 162.45a.

This change will enable CBP to process seizures and forfeitures more efficiently. By notifying the public earlier in the process, all parties with a potential interest in the property will be identified earlier. Additionally, CBP expects that the overall processing time for seizures will decrease, allowing it to spend fewer resources on storage, inventory, and other administrative functions related to managing seized property.

The new publication timeline for the Notice of Seizure and Intent to Forfeit does not affect the rights or obligations of any interested party. This document does not change any of the respective deadlines for filing for relief, either in response to a Notice of Seizure or a Notice of Seizure and Intent to Forfeit. All interested parties will continue to be subject to the applicable requirements and deadlines specified by statute and in CBP's regulations. CBP is not changing any of its regulations or other procedures at this time.

Pete Flores,

Executive Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection.

[FR Doc. 2023–10434 Filed 5–15–23; 8:45 am]

BILLING CODE 9111–14–P

[2] CAFRA does not apply to seizures authorized under the Tariff Act of 1930, as amended, or any other provision of law codified in title 19, the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*, the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301, *et seq.*), the Trading with the Enemy Act (50 U.S.C. 4301, *et seq.*), the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*), and Section 1 of Title VI of the Act of June 15, 1917 (40 Stat. 233, 22 U.S.C. 401).

[3] For seizures under CAFRA, an interested party must file a claim within 35 calendar days after the date the notice of seizure is mailed. 19 CFR 162.94(b). Filing a claim means that the seizure will be transferred to a court for a judicial forfeiture process. *See* 19 CFR 162.94(f). For CAFRA and non-CAFRA seizures, an interested party must file a petition within 30 days from the date that the Notice of Seizure is mailed. 19 CFR 171.2(b). CBP will process the petition according to 19 CFR part 171. Additionally, at any time prior to forfeiture, an interested party may make an offer in compromise in accordance with 19 U.S.C. 1617 and 19 CFR 161.5. *See also* 19 CFR 171.31.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–ES–2023–N045; MO# 300030113; OMB Control Number 1018–0165]

Agency Information Collection Activities; Submission to the Office of Management and Budget; Implementing Regulations for Petitions

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 revisions.

DATES: Interested persons are invited to submit comments on or before June 15, 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. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to *Info_Coll@fws.gov.* Please reference ''1018–0165'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, 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.

On February 9, 2023, we published in the **Federal Register** (88 FR 8451) a notice of our intent to request that OMB approve this information collection. In that notice, we solicited comments for 60 days, ending on April 10, 2023. In an effort to increase public awareness of, and participation in, our public commenting processes associated with information collection requests, the Service also published the **Federal Register** notice on *Regulations.gov* (Docket FWS–HQ–ES–2023–0006) to provide the public with an additional method to submit comments (in addition to the typical *Info_Coll@fws.gov* email and U.S. mail submission methods). We received one anonymous comment which did not address the information collection requirements. No response to that comment is required.

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 Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), specifies the process by which the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services, we) make decisions on listing, delisting, or changing the status of a listed species, or revising critical habitat. Any interested person may submit a written petition to the Services requesting to add a species to the Lists of Endangered and Threatened Wildlife and Plants (Lists), remove a species from the Lists, change the listed status of a species, or revise the boundary of an area designated as critical habitat. The petition process is a central feature of the ESA and serves a beneficial public purpose.

Petitions

Information collected from petitioners used to determine whether to list a species includes:

(1) Petitioner's name; signature; address; telephone number; and association, institution, or business affiliation;

(2) Scientific and any common name of the species that is the subject of the petition;

(3) Clear indication of the administrative action the petitioner seeks (*e.g.,* listing of a species or revision of critical habitat);

(4) Detailed narrative justification for the recommended administrative action that contains an analysis of the supporting information presented;

(5) Literature citations that are specific enough for the Services to locate the supporting information cited by the petition, including page numbers or chapters, as applicable;

(6) Electronic or hard copies of supporting materials (*e.g.,* publications, maps, reports, and letters from authorities) cited in the petition;

(7) For petitions to list, delist, or reclassify a species:

• Information to establish whether the subject entity is a ''species'' as defined in the ESA;

• Information on the current geographic range of the species, including range States or countries; and

• Copies of notification letters to States (explained in more detail below);

(8) Information on current population status and trends and estimates of current population sizes and

distributions, both in captivity and the wild, if available;

(9) Identification of the factors under section 4(a)(1) of the ESA that may affect the species and where these factors are acting upon the species;

(10) Whether any or all of the factors alone or in combination identified in section 4(a)(1) of the ESA may cause the species to be an endangered species or threatened species (*i.e.,* place the species in danger of extinction now or in the foreseeable future), and, if so, how, including a description of the magnitude and imminence of the threats to the species and its habitat;

(11) Information on existing regulatory protections and conservation activities that States or other parties have initiated or have put in place that may protect the species or its habitat;

(12) For petitions to revise critical habitat:

• Description and map(s) of areas that the current designation (a) does not include that should be included or (b) includes that should no longer be included, and the rationale for designating or not designating these specific areas as critical habitat. Petitioners should include sufficient supporting information to substantiate the requested changes, which may include GIS data or boundary layers that relate to the request, if appropriate;

• Description of physical or biological features essential for the conservation of the species and whether they may require special management considerations or protection;

• For any areas petitioned to be added to critical habitat within the geographical area occupied by the species at the time it was listed, information indicating that the specific areas contain the physical or biological features that are essential to the conservation of the species and may require special management considerations or protection. The petitioner should also indicate which specific areas contain which features;

• For any areas petitioned for removal from currently designated critical habitat within the geographical area occupied by the species at the time it was listed, information indicating that the specific areas do not contain the physical or biological features that are essential to the conservation of the species, or that these features do not require special management consideration or protections; and

• For areas petitioned to be added to or removed from critical habitat that were outside the geographical area occupied by the species at the time it was listed, information indicating why the petitioned areas are or are not essential for the conservation of the species; and

(13) A complete, balanced representation of the relevant facts, including information that may contradict claims in the petition.

Notification of States

For petitions to list, delist, or change the status of a species, or for petitions to revise critical habitat, regulations require petitioners to provide notice of their intention to submit a petition to the State agency responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition occurs. Because a court of appeals invalidated this regulatory requirement, the Service proceeds with processing petitions even without evidence that the petitioner has provided notice to the responsible State agency. There are no forms associated with this information collection.

Title of Collection: Implementing Regulations for Petitions, 50 CFR 424.14.

OMB Control Number: 1018–0165.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals, private sector, and State/Tribal governments.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $280.00 (for materials, printing, postage, and data equipment maintenance, etc.).

Requirement	Annual number of respondents	Average number of responses each	Annual number of responses	Average completion time per response (hours)	Estimated annual burden hours
Petitioner—Prepare and Submit Petitions (50 CFR 424.14(c), (d), (e), and (g)					
Individuals	2	1	2	120	240
Private Sector	11	1	11	120	1,320
Government	1	1	1	120	120
Petitioner—Notify States (50 CFR part 424)					
Individuals	1	1	1	1	1
Private Sector	1	1	1	1	1
Government	1	1	1	1	1
Totals	17		17		1,683

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. 2023–10369 Filed 5–15–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK940000 L14100000.HM0000 234; OMB Control No. 1004–0216]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Alaska Native Vietnam-Era Veterans Allotments

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Land Management (BLM) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before June 15, 2023.

ADDRESSES: Written comments and recommendations for this information collection request (ICR) 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: To request additional information about this ICR, contact Candy Grimes, by email at *cgrimes@blm.gov*, or by telephone at 907–271–5998. 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 PRA (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we invite the public and other Federal agencies to comment on new, proposed, revised and continuing collections of information. This helps the BLM assess impacts of its information collection requirements and minimize the public's reporting burden. It also helps the public understand BLM information collection requirements and ensure requested data are provided 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 February 17, 2023 (88 FR 10375). No comments were received in response to this notice.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again inviting the public and other Federal agencies to comment on the proposed ICR described below. The BLM is 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 might the agency 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 submitted in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The information that is collected under this OMB Control Number enables the BLM to collect information related to Alaska Native veteran land allotment applications. The authority for this Program is section 1119 of the John D. Dingell, Jr. Conservation, Management, and Recreation Act of March 12, 2019, Public Law 116–9, codified at 43 U.S.C. 1629g-1 . This OMB Control Number is currently scheduled to expire on November 30, 2023. The BLM request that OMB renew this OMB Control Number for an additional three years.

Title of Collection: Alaska Native Vietnam-Era Veterans Allotments (43 CFR 2569).

OMB Control Number: 1004–0216.

Form Numbers: Alaska Native Vietnam-Era Veterans Allotments Application, AK 2569–10.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals and State/Local/Tribal governments.

Total Estimated Number of Annual Respondents: 1,265.

Total Estimated Number of Annual Responses: 1,265.

Estimated Completion Time per Response: Varies from 4.5 hours to 30 minutes per response.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Number of Annual Hours: 3,828.

Total Estimated Annual Nonhour Burden Cost: $55,000.

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 King,

Information Collection Clearance Officer.

[FR Doc. 2023–10347 Filed 5–15–23; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CRPS–NPS0035665; PPWOCRADI0, PPMRSCR1Y.Y00000, P103601 (222); OMB Control Number 1024–0271]

Agency Information Collection Activities; Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before June 15, 2023.

ADDRESSES: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *http://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. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 12201 Sunrise Valley Drive, (MS–242) Reston, VA 20191 (mail); or *phadrea_ponds@nps.gov* (email). Please reference Office of Management and Budget (OMB) Control Number 1024–0271 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Dorothy FireCloud, Native American Affairs Liaison, Assistant to the Director, Office of Native American Affairs at *dorothy_firecloud@nps.gov* (email); or (202) 354–2126 (telephone). Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or Tele Braille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. 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), 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 April 22, 2022 (87 FR 24194) and ended on June 21, 2022. We did not receive any comments in response to that notice.

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.

(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: Gathering and removing plants or plant parts is currently prohibited in National Park System areas unless specifically authorized by Federal statute or treaty rights or conducted under the limited circumstances authorized by an existing regulation codified in 36 CFR 2.1(c). Regulations codified in 36 CFR part 2 allow the gathering and removal of plants or plant parts by enrolled members of federally recognized tribes for traditional purposes. The regulations authorize agreements between the NPS and federally recognized tribes to facilitate the continuation of tribal cultural practices on lands within areas of the National Park System where those practices traditionally occurred, without causing a significant adverse impact to park resources or values. The regulations:

- respect tribal sovereignty and cultural practices,
- further the government-to-government relationship between the United States and the Indian Tribes, and
- provide system-wide consistency for this aspect of NPS-Tribal relations.

The agreements explicitly recognize the special government-to-government relationship between the United States and Indian Tribes and are based upon mutually agreed upon terms and conditions subject to the requirements of 36 CFR 2.6(f). The agreements serve as the documents through which the NPS authorizes tribal gathering implemented by an accompanying permit authorized by 36 CFR 1.6. Only enrolled members of a federally recognized tribe are allowed to collect plants or plant parts, and the tribe must be traditionally associated with the specific park area. This traditional association must predate the establishment of the park. The plant gathering must meet a traditional purpose that is a customary activity and practice rooted in the history of the tribe and is important for the continuation of the tribe's distinct culture. Authorized plant gathering must be sustainable and may not result in a significant adverse impact on park resources or values. The sale and commercial use of plants or plant parts within areas of the National Park System will continue to be prohibited by the NPS regulations in 36 CFR 2.1(c)(3)(v).

The information collections associated with 36 CFR part 2 include:

(1) The initial request from a tribe that we enter into an agreement with the tribe for gathering and removal of plants or plant parts for traditional purposes. The request must include the information specified in part 2.6(c).

(2) The agreement defines the terms under which the NPS may issue a permit to a tribe for plant gathering purposes. To make determinations based on tribal requests or to enter into an agreement, we may need to collect information from specific tribal members or tribes who make requests. The agreement must contain the information specified in part 2.6(f).

(3) Tribes may submit an appeal to the NPS to provide additional information on the historical relationship of the tribe, traditional uses of plants to be gathered, and/or the impact of gathering on the resource of concern in the event of a denial by the NPS on this issue.

Title of Collection: Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 36 CFR 2.

OMB Control Number: 1024–0271.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Indian Tribes.

Total Estimated Number of Annual Responses: 30.

Estimated Completion Time per Response: Varies from 4 to 80 hours (times vary depending upon the activity).

Total Estimated Number of Annual Burden Hours: 530 hours.

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 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.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–10398 Filed 5–15–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRSS–NPS35432; PPWONRADD3, PPMRSNR1Y.NM0000, 199P103601 (213); OMB Control Number 1024–0236]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Research Permit and Reporting System Applications and Reports

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before June 15, 2023.

ADDRESSES: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *http://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. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 12201 Sunrise Valley Drive, (MS–242) Reston, VA 20191 (mail); or *phadrea_ponds@nps.gov* (email). Please reference OMB Control Number 1024–0236 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Timothy Watkins, Science Access & Engagement Coordinator; *tim_watkins@nps.gov* (email); or: 202–513–7189 (phone). Please reference OMB Control Number 1024–0236 in the subject line of your comments. 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), 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 7, 2022 (87 FR 40547). We did not receive any comments.

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.

(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: NPS policy requires that research studies and specimen collection conducted by researchers, other than NPS employees on official duty, require an NPS scientific research and collecting permit. The permitting process adheres to regulations codified in 36 CFR 2.1 which prohibit the disturbing, removing, or possessing of natural, cultural, and archeological resources. Additionally, regulations codified in 36 CFR 2.5 govern the collection of specimens in parks for the purpose of research, baseline inventories, monitoring, impact analysis, group study, or museum display.

As required by these regulations, a permitting system is managed for scientific research and collecting. NPS forms 10–741a, *Application for a Scientific Research and Collecting Permit* and 10–741b, *Application for a Science Education Permit,* are used to collect information from persons seeking a permit to conduct natural or social science research and collection activities in individual units of the National Park System. Individuals who receive a permit must report on the activities conducted under the permit using form 10–226 *Investigator's Annual Report*; 10–741C *Field Work Check-in Report,* and Form 10–741D *Field Work Check-out Report*.

The information in this collection is used to manage the use and preservation of park resources, and to report on the status of permitted research and collecting activities. We encourage respondents to use RPRS to complete and submit applications and reports. Additional information about existing applications, reporting forms, guidance and explanatory material can be found on the RPRS website (*https://irma.nps.gov/RPRS/*).

Title of Collection: Research Permit and Reporting System Applications and Reports, 36 CFR 2.1 and 2.5.

OMB Control Number: 1024–0236.

Form Number: NPS Forms 10–226, 10–741A, 10–741B, 10–741C, and 10–741D.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals; businesses; academic and research institutions; and Federal, State, local, and tribal governments.

Total Estimated Number of Annual Responses: 8,590.

Estimated Completion Time per Response: Varies. from 10 minutes to 90 minutes, depending on activity.

Total Estimated Number of Annual Burden Hours: 6,884.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion for applications; annually for reports.

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.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–10401 Filed 5–15–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–VRP–OPH–NPS0035461; PPWOVPADH0, PPMPRHS1Y.Y00000 (222); OMB Control Number 1024–0286]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Office of Public Health, Disease Reporting and Surveillance Forms

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to revise an information collection.

DATES: Interested persons are invited to submit comments on or before June 15, 2023.

ADDRESSES: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *http://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. Please provide a copy of your comments to theNPS Information Collection Clearance Officer (ADIR–ICCO), 12201 Sunrise Valley Drive, (MS –242) Reston, VA 20191 (mail); or *phadrea_ponds@nps.gov* (email). Please reference the Office of Management and Budget (OMB) Control Number ''1024–0286'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Dr. Maria Said, Branch Chief, U.S. Public Health Service Epidemiology, Office of Public Health, National Park Service, Washington, DC 20240 (mail); *maria_said@nps.gov* (email) or (202) 513–7151 (telephone). Please reference OMB Control Number 1024–0286 in the subject line of your comments. 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), 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 September 12, 2022 (87 FR 55845). 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.

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The NPS Organic Act of 1916, 54 U.S.C. 100101 *et seq.,* and the Public Health Service Act, 42 U.S. Code chapter 6A, gives the NPS broad authority to collect information to protect and promote visitor health across the National Parks. Each year, the NPS Office of Public Health (OPH) responds to multiple service-wide incidents involving human disease transmission within the park system. Many of these incidents involve the spread of common and highly contagious viruses spread through contaminated food, water, person-to-person, or contaminated surfaces. In the event of illness incidents, public health responders also consider and investigate the possibility of other etiological agents. The Disease Reporting and Surveillance System (DRSS) provides information on the symptoms, duration, and location of illness, which allows public health workers to work rapidly and appropriately to address the incidents.

NPS Forms 10–685 *Concession Employee Illness Report* and 10–686 *Tour Vehicle Passenger Illness Report* are used for monitoring health trends in NPS units, detecting potential clusters or outbreaks, and informing and implementing disease response and control activities. We are seeking to make the following revisions to update the forms.

(1) adding two questions at the beginning of both forms to obtain the name and email address of the person completing the form

(2) a question (on Form 10–685) about whether the sick employee received a diagnosis, and

(3) adding the Office of Public Health's contact information,

This data provides parks, OPH staff, managers of park concessioners, and

park clinic concessioners with an early warning system for potential outbreaks to inform public health interventions.

Title of Collection: Office of Public Health, Disease Reporting and Surveillance Forms.

OMB Control Number: 1024–0286.

Form Number: NPS Forms 10–685 and 10–686.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals/households and private sector.

Total Estimated Number of Annual Responses: 590.

Estimated Completion Time per Response: Concession Employee Illness: 10 minutes; Tour Vehicle Passenger Illness: 15 minutes.

Total Estimated Number of Annual Burden Hours: 73.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

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.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–10399 Filed 5–15–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRSS–BRD–NPS0035656; PWONRADB0 PPMRSNR1Y.NM00000 (222); OMB Control Number 1024–0265]

Agency Information Collection Activities; NPS Institutional Animal Care and Use Committee (IACUC) General Submission, Exhibitor, Annual Review, and Amendment Forms

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before June 15, 2023.

ADDRESSES: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *http://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. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 12201 Sunrise Valley Drive, (MS–242) Reston, VA 20191 (mail); or *phadrea_ponds@nps.gov* (email). Please reference Office of Management and Budget (OMB) Control Number 1024–0265 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR by mail, contact Allie Petersen, NPS IACUC Administrator by mail at Biological Resource Division, 1201 Oakridge Drive, Suite 200, Fort Collins, CO, 80525; or *npsiacuc@nps.gov* (email). You may also contact Dr. Laurie Baeten at *laurie_baeten@nps.gov* (email) or (970) 966–0756 (telephone). Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or Tele Braille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. 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), 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 April 22, 2022 (87 FR 24196) and ended on June 21, 2022. We did not receive any comment on that notice. We reopened the comment period with a second notice published October 28, 2022 (87 FR 65245). This notice including information about a new electronic platform, *Key Solutions protocol IACUC Software Module for Animal Subjects* that was not described in the original notice. We receive the following comments for that notice.

Comment 1: The first comment was concerned with the welfare of dogs, cats, and primates in lab research, none of which are included in the scope of the NPS IACUC. The NPS IACUC primarily reviews field and ecological research of North American wildlife, most often in free-ranging settings. The second comment was about the review process, not this specific information collection. The commenter also suggested we add more language, definitions, and references regarding harm, pain, and distress to our forms.

NPS Response: In our response, we assured the commenter that our IACUC is well-situated to review the protocols we receive. We will also work towards incorporating additional language, definitions, and references regarding pain and distress in our communications with researchers.

Comment 2: The second comment did not specially address the information in the 60-day notice.

NPS Response: We acknowledge receipt but did not provide a response.

At the time of this submission, the electronic platform is currently under development and will not be in use before this collection expires. Therefore, the program is requesting an extension, without change to the currently approved collection. We will submit a request for revision when the electronic platform is operational.

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.

(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: Pursuant to the Animal Welfare Act (AWA), its Regulations (AWAR), and the Interagency Research Animal Committee (IRAC), any entity or institution that uses vertebrate animals for research, testing, or training purposes must have an oversight committee to evaluate all aspects of that institution's animal care and use. To be in compliance, the NPS is responsible for managing and maintaining an Institutional Animal Care and Use Committee (IACUC) that has the experience and expertise necessary to assess and approve all research, testing, or training activities involving vertebrate animals on NPS-managed lands and territories. All research, testing, or training projects involving animals taking place on NPS territories must be approved by the NPS IACUC prior to their commencement. IACUC will collect the following information in the current forms from submitters for consideration by the committee:

- IACUC General Submission (GS) Form (NPS Form 10–1301)
- IACUC Amendment Form (NPS Form 10–1301A)
- IACUC Annual Review Form (NPS Form 10–1302)
- IACUC Concurrence Form (NPS Form 10–1303)
- IACUC Field Study Form (NPS Form 10–1304)

As directed by the AWA, NPS IACUC is a self-regulating entity that currently consists of a Chair, NPS Regional members, and two additional members (a veterinarian serving as the ''Attending Veterinarian'' and another individual serving as the ''Unaffiliated Member at-Large'').

Title of Collection: NPS Institutional Animal Care and Use Committee (IACUC) General Submission, Annual Review, Concurrence, Field Study, and Amendment Forms.

OMB Control Number: 1024–0265.

Form Numbers: NPS Forms 10–1301, 10–1301A, 10–1302, 10–1303 and 10–1304.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: State and local governments; nonprofit organizations and private businesses.

Respondent's Obligation: Mandatory.

Total Estimated Annual Number of Responses: 230.

Estimated Completion Time per Response: 15 min to 3 hours (times vary depending upon the activity).

Total Estimated Annual Burden Hours: 140 Hours.

Frequency of Collection: On occasion.

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.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–10400 Filed 5–15–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection; 2023 Law Enforcement Administrative and Management Statistics (LEMAS) Supplement Survey—Post-Academy Training and Officer Wellness (PATOW)

AGENCY: Bureau of Justice Statistics, Department of Justice.

ACTION: 60-day Notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until July 17, 2023.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Jennifer K. Gellie, Acting Chief, Counterintelligence and Export Control Section, National Security Division, 175 N Street NE, Constitution Square Building Three, Suite 1.100, Washington, DC 20002, email: *fara.public@usdoj.gov,* telephone: (202) 233–0776.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Abstract: The LEMAS core survey, conducted every 3 to 4 years since 1987, is based on a nationally representative sample of approximately 3,500 general-purpose LEAs and provides national estimates of law enforcement salaries, expenditures, operations, equipment, information systems and policies and procedures. In addition to these regular surveys, BJS also fields LEMAS supplement surveys to capture detailed information on specific topics pertaining to specific issues in law enforcement. BJS implemented this model of regular LEMAS core surveys and thematic supplement surveys following recommendations from the National Research Council. The first LEMAS supplement survey was fielded in 2017 (OMB Control Number 1121–0354, expired 2/28/2019), with a focus on body-worn camera use among law enforcement agencies. The 2023 LEMAS supplement focuses on two topics, post-academy law enforcement training and agency responses to suicide. Post-academy training is defined as law enforcement training provided to full-time sworn personnel with general arrest powers at any point in their law enforcement career following any recruit or field training. Applicable

topics include the number and types of training instructors used; training budgets; the resources that are accessible to officers through the agency's training program; the number of instruction hours provided for each training topic; and the types of special training programs offered to active full-time sworn personnel. The 2023 LEMAS supplement will also address law enforcement agency responses to suicide. The Federal Bureau of Investigation (FBI) launched the Law Enforcement Suicide Data Collection (LESDC) in January 2022 (OMB Control Number 1110–0082). The 2023 LEMAS supplement survey is intended to be a supporting effort to LESDC by collecting agency-level information on formal wellness programs currently available to full-time sworn personnel and related policies and training.

Overview of This Information Collection:

Type of Information Collection: New collection.

The Title of the Form/Collection: 2023 Law Enforcement Administrative and Management Statistics (LEMAS) Supplement Survey—Post-Academy Training and Officer Wellness (PATOW).

The agency form number, if any, and the applicable component of the Department sponsoring the collection: No agency form number at this time. The applicable component within the Department of Justice is the Bureau of Justice Statistics (BJS), in the Office of Justice Programs.

Affected public who will be asked or required to respond, as well as the obligation to respond: Affected public is State, Local and Tribal Governments and the obligation to respond is voluntary.

An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: An agency-level survey will be sent to approximately 3,500 LEA respondents. The expected burden placed on these respondents is about 1.75 hours per respondent.

An estimate of the total annual burden (in hours) associated with the collection: There are an estimated 6,125 total burden hours associated with this information collection.

An estimate of the total annual cost burden associated with the collection, if applicable: The estimated annual cost burden for this collection is $0.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response	Total annual burden (hours)
LEMAS Supplement Survey	3,500	1	3,500	1.75	102
Unduplicated Totals	3.500		3,500		102

If additional information is required contact: John R. Carlson, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: May 11, 2023.

John Carlson,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–10419 Filed 5–15–23; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0094]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Annual Survey of Jails (ASJ)

AGENCY: Bureau of Justice Statistics, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register**, on February 22, 2023, allowing a 60-day comment period. Following publication of the 60-day notice, the Bureau of Justice Statistics received four comments. Two of the comments expressed support for the continuation of the Annual Survey of Jails. The other two comments suggested new items to collect in the survey, including diagnosed disability and education level at admission; education and job training received during incarceration; job preparedness upon release; information on people who identify as transgender; jail population counts by combined race/ethnicity and sex categories; and admissions and releases from jail by race/ethnicity.

DATES: Comments are encouraged and will be accepted for 30 days until June 15, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Zhen Zeng, Bureau of Justice Statistics, 810 Seventh Street NW, Washington, DC 20531 (email: *Zhen.Zeng@usdoj.gov;* telephone: 202–598–9955).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within

30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/*PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1121–0094. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ 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 DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a currently approved collection.

2. *Title of the Form/Collection:* Annual Survey of Jails (ASJ).

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form: CJ–5, The applicable component within the Department of Justice is the Bureau of Justice Statistics (BJS), in the Office of Justice Programs.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public: State, Local and Tribal Governments. Abstract: The ASJ is the only national collection that tracks annual changes in the local jail population in the United States and provides national estimates on the number of persons confined in jails, the number of persons jails supervised in programs outside jail, characteristics of the jail population, counts of admissions and releases, and number of staff employed. Policymakers, correctional administrators, and government officials use the ASJ data to develop new policies and procedures, plan budgets, and maintain critical oversight. The ASJ is fielded every year except in the years when BJS conducts the Census of Jails (OMB Control No. 1121–0100). BJS requests clearance for the 2023 and 2025 ASJ under OMB Control No. 1121–0094. In 2024, BJS plans to conduct the Census of Jails and will not field the ASJ in the same year. In 2023, BJS will introduce a verification module to the web instrument to update (1) the agency's contact information; (2) regional and private jail flags; (3) the name and address of the facilities under the agency's jurisdiction; and (4) eligibility of each facility to be included in the ASJ.

5. *Obligation to Respond:* Voluntary.

6. *Total Estimated Number of Respondents:* 940.

7. *Total Estimated Number of Responses:* 940.

8. *Time per Response:* 88 minutes.

9. *Total Estimated Annual Time Burden:* 1,378 hours.

10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: John R. Carlson, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218 Washington, DC 20530.

Dated: May 4, 2023.

John R. Carlson,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–09886 Filed 5–15–23; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

Employment and Training Administration (ETA) Program Year (PY) 2023 Workforce Innovation and Opportunity Act (WIOA) Section 167, National Farmworker Jobs Program (NFJP) Grantee Allotments

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice; request for comments.

SUMMARY: This notice announces allotments for Program Year (PY) 2023 for the National Farmworker Jobs Program (NFJP).

DATES: The PY 2023 NFJP allotments become effective for the grant period that begins July 1, 2023. Written comments on this notice are invited and must be received on May 30, 2023.

ADDRESSES: Comments are accepted via email to *NFJP@dol.gov.* Please enter ''PY23 National Farmworker Jobs Program Grantee Allotments Public Comment'' in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Steven Rietzke, Chief, Division of National Programs, Tools and Technical Assistance, Office of Workforce Investment, at 202–693–3980. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This notice is published pursuant to Section 182(d) of the WIOA, Prompt Allotment of Funds.

I. Background

The Department is announcing preliminary PY 2023 allotments for the NFJP. This notice provides information on the amount of funds available during PY 2023 to state service areas awarded through the PY 2020 Funding Opportunity Announcement (FOA) for the NFJP Career Services and Training and Housing Grants. The allotments are based on the funds appropriated in the Consolidated Appropriations Act, 2023, Public Law 117–328 (from this point forward will be referred to as the ''the Act'').

In appropriating these funds, Congress provided $90,134,000 for formula grants (of which $90,032,000 was allotted after $102,000 was set aside for program integrity), $6,591,000 for migrant and seasonal farmworker housing (of which $6,584,000 was allotted after $7,000 was set aside for program integrity and of which not less than 70 percent shall be for permanent housing), and another $671,000 was set aside for discretionary purposes. The Housing grant allotments are distributed as a result of a competition and according to language in the appropriations law requiring that of the total amount available, not less than 70 percent shall be allocated to permanent housing activities, leaving not more than 30 percent to temporary housing activities.

This notice includes the following sections:

• Section II of this notice provides a discussion of the data used to populate the formula.

• Section III describes the hold-harmless provision for the implementation year.

• Section IV describes minimum funding provisions to address State service areas that would receive less than $60,000.

• Section V describes the application of the formula and the hold-harmless provision using preliminary state allotments for PY 2023.

II. Description of Data Files and Allotment Formula

As with all state planning estimates since 1999, the PY 2023 estimates are based on four data sources: (1) State-level, 2017 hired farm labor expenditure data from the United States Department of Agriculture's (USDA) Census of Agriculture (COA); (2) regional-level, 2017 average hourly earnings data from the USDA's Farm Labor Survey; (3) regional-level, 2010–2018 demographic data from the ETA's National

Agricultural Workers Survey (NAWS); and, (4) 2015–2019 (5-year file) data from the United States Census Bureau's American Community Survey (ACS).

The formula's original methodology is described in the **Federal Register** notice 64 FR 27390, May 19, 1999. In PY 2018, ETA incorporated two modifications to the allotment formula to provide more accurate estimates of each state service area's relative share of persons eligible for the program. The formula also used updated data from each of the four data files serving as the basis of the formula since 1999. The revised formula methodology is described in the **Federal Register** notice 83 FR 32151, July 11, 2018. In PY 2021, ETA incorporated two modifications to the allotment formula. These modifications are described in **Federal Register** notice 86 FR 32063, June 16, 2021. The **Federal Register** notices are accessible at *https://www.federalregister.gov/*.

The Department will continue to apply the modifications that were incorporated in the PY 2021 allotments to the PY 2023 allotments, including the expansion to include farmworkers who are in families with total family incomes at or below 150 percent of the poverty line rather than the higher of the poverty line or 70 percent of the lower living standard income level. ETA will subsequently revise the PY 2024 guidance regarding the definition of ''low-income individual'' as needed if the same provision is not included in subsequent appropriations.

III. Description of the Hold-Harmless Provision

ETA will continue the hold-harmless provision as instituted in PY 2018. The hold-harmless provision provides for a stop loss/stop gain limit to transition to the use of the updated data. This approach is based on a state service area's previous year's allotment percentage, which is its relative share of the total formula allotments. The stop gain provision provides that no state service area will receive an amount that is more than 150 percent of their previous year's allotment percentage. The staged transition of the hold-harmless provision is as follows:

(1) In PY 2021, each state service area received an amount equal to at least 95 percent of their PY 2020 allotment percentage, as applied to the PY 2021 formula funds available.

(2) In PY 2022, each state service area received an amount equal to at least 90 percent of their PY 2021 allotment percentage, as applied to the PY 2022 formula funds available.

(3) In PY 2023, each state service area will receive an amount equal to at least 85 percent of their PY 2022 allotment percentage, as applied to the PY 2023 formula funds available.

In PY 2024, since the Department has a responsibility to use the most current and reliable data available, amounts for the new awards will be based on updated data from the sources described in Section II, pending their availability. At that time, the Department will determine whether the changes to state allotments are significant enough to warrant another hold-harmless provision. Otherwise, allotments to each state service area will be for an amount resulting from a direct allotment of the proposed funding formula without adjustment.

IV. Minimum Funding Provisions

A state area that would receive less than $60,000 by application of the formula will, at the option of the DOL, receive no allotment or, if practical, be combined with another adjacent state area. Funding below $60,000 is deemed insufficient for sustaining an independently administered program. However, if practical, a state jurisdiction that would receive less than $60,000 may be combined with another adjacent state area.

V. Program Year 2023 Preliminary State Allotments

The state allotments set forth in the Table appended to this notice reflect the distribution resulting from the allotment formula described above. For PY 2022, $88,160,000 was allotted for career services and training grants, $6,447,000 was allotted for housing grants, and $657,000 was retained for other discretionary purposes.

For PY 2023, the funding level provided for in the Act for the migrant and seasonal farmworker program is $97,396,000. Congress provided $90,134,000 for formula grants (of which $90,032,000 was allotted after $102,000 was set aside for program integrity), $6,591,000 for migrant and seasonal farmworker housing (of which $6,584,000 was allotted after $7,000 was set aside for program integrity and of which not less than 70 percent shall be for permanent housing), and another $671,000 was set aside for other discretionary purposes.

For purposes of illustrating the effects of the updates to the allotment formula, columns 2 and 3 show the state allotments with the application of the 90 percent hold-harmless for PY 2022 and 85 percent hold-harmless for PY 2023. The dollar difference between PY 2022 and PY 2023 allotments is shown in column 4. The percent difference is reported in column 5.

Brent Parton,

Acting Assistant Secretary, Employment and Training, Labor.

U.S. DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, NATIONAL FARMWORKER JOBS PROGRAM—CAREER SERVICES AND TRAINING GRANTS

[PY 2023 Allotments to States]

State	PY 2022 90% StopLoss/ 150% StopGain	PY 2023 85% StopLoss/ 150% StopGain	$ Difference	% Difference
Total	$88,160,000	$90,032,000	$1,872,000	2.12
Alabama	776,212	800,937	24,725	3.19
Alaska	....	....	....	0.00
Arizona	2,553,478	2,634,816	81,338	3.19
Arkansas	1,265,495	1,305,806	40,311	3.19
California	23,164,574	23,902,460	737,886	3.19
Colorado	1,763,318	1,819,486	56,168	3.19
Connecticut	531,602	548,535	16,933	3.19
Delaware	163,949	169,171	5,222	3.19
Dist of Columbia	....	....	....	0.00
Florida	3,328,614	3,266,891	(61,723)	−1.85
Georgia	1,756,823	1,812,785	55,962	3.19

U.S. DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, NATIONAL FARMWORKER JOBS PROGRAM—CAREER SERVICES AND TRAINING GRANTS—Continued

[PY 2023 Allotments to States]

State	PY 2022 90% StopLoss/ 150% StopGain	PY 2023 85% StopLoss/ 150% StopGain	$ Difference	% Difference
Hawaii	284,832	247,248	(37,584)	−13.20
Idaho	2,327,447	2,401,585	74,138	3.19
Illinois	1,939,999	2,001,796	61,797	3.19
Indiana	1,303,529	1,345,052	41,523	3.19
Iowa	1,863,100	1,922,448	59,348	3.19
Kansas	1,318,690	1,360,695	42,005	3.19
Kentucky	923,511	864,671	(58,840)	−6.37
Louisiana	829,992	856,431	26,439	3.19
Maine	432,739	446,523	13,784	3.19
Maryland	552,597	570,199	17,602	3.19
Massachusetts	543,815	561,137	17,322	3.19
Michigan	2,199,069	2,269,118	70,049	3.19
Minnesota	1,668,177	1,721,315	53,138	3.19
Mississippi	924,370	953,815	29,445	3.19
Missouri	1,293,215	1,334,410	41,195	3.19
Montana	741,784	765,413	23,629	3.19
Nebraska	1,322,506	1,364,634	42,128	3.19
Nevada	237,476	245,041	7,565	3.19
New Hampshire	154,787	159,717	4,930	3.19
New Jersey	816,449	842,456	26,007	3.19
New Mexico	1,132,485	1,168,559	36,074	3.19
New York	2,300,453	2,373,732	73,279	3.19
North Carolina	2,333,344	2,179,435	(153,909)	−6.60
North Dakota	780,688	805,556	24,868	3.19
Ohio	1,524,192	1,572,744	48,552	3.19
Oklahoma	928,725	958,308	29,583	3.19
Oregon	2,340,449	2,415,002	74,553	3.19
Pennsylvania	1,868,860	1,928,391	59,531	3.19
Puerto Rico	2,140,963	2,112,901	(28,062)	−1.31
Rhode Island	68,784	70,975	2,191	3.19
South Carolina	717,495	718,772	1,277	0.18
South Dakota	706,000	728,488	22,488	3.19
Tennessee	791,308	686,894	(104,414)	−13.20
Texas	4,671,373	4,788,352	116,979	2.50
Utah	693,559	715,651	22,092	3.19
Vermont	217,113	224,029	6,916	3.19
Virginia	886,698	811,392	(75,306)	−8.49
Washington	4,783,367	4,935,737	152,370	3.19
West Virginia	137,443	119,307	(18,136)	−13.20
Wisconsin	1,823,100	1,881,174	58,074	3.19
Wyoming	331,452	342,010	10,558	3.19

[FR Doc. 2023–10370 Filed 5–15–23; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Generic Clearance for Quick Turnaround Surveys

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 June 15, 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: Authority for this information collection is in Sections 168 and 169 of the Workforce Innovation and Opportunity Act of 2014 (WIOA) (Pub. L. 113–128). Section 169 of WIOA authorizes the collection of both evaluations (section 169(a)) and research activities (section 169(b)). The ''quick turnaround'' surveys and site visits will focus on a variety of issues concerning governance, administration, funding, and service delivery for the broad spectrum of programs administered by ETA. These information collections will fill critical gaps in ETA's need for accurate, timely information to improve the ability of these programs to serve current and potential jobseekers as well as employers effectively and efficiently. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 30, 2022 (87 FR 53010).

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: Generic Clearance for Quick Turnaround Surveys.

OMB Control Number: 1205–0436.

Affected Public: Individuals or Households; State, Local, and Tribal Governments; Private Sector—Businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 7,000.

Total Estimated Number of Responses: 7,000.

Total Estimated Annual Time Burden: 7,000 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: May 10, 2023.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2023–10372 Filed 5–15–23; 8:45 am]

BILLING CODE 4510–FM–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0098]

Monthly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

AGENCY: Nuclear Regulatory Commission.

ACTION: Monthly notice.

SUMMARY: Pursuant to section 189.a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular monthly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration (NSHC), notwithstanding the pendency before the Commission of a request for a hearing from any person.

DATES: Comments must be filed by June 15, 2023. A request for a hearing or petitions for leave to intervene must be filed by July 17, 2023. This monthly notice includes all amendments issued, or proposed to be issued, from March 31, 2023, to April 27, 2023. The last monthly notice was published on April 18, 2023.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

• *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0098. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Shirley Rohrer, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–5411; email: *Shirley.Rohrer@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0098, facility name, unit number(s), docket number(s), application date, and subject 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–2023–0098.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

• *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0098, facility name, unit number(s), docket

number(s), application date, and subject, in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Proposed No Significant Hazards Consideration Determination

For the facility-specific amendment requests shown in this notice, the Commission finds that the licensees' analyses provided, consistent with section 50.91 of title 10 of *the Code of Federal Regulations* (10 CFR) ''Notice for public comment; State consultation,'' are sufficient to support the proposed determinations that these amendment requests involve NSHC. Under the Commission's regulations in 10 CFR 50.92, operation of the facilities in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The Commission is seeking public comments on these proposed determinations. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determinations.

Normally, the Commission will not issue the amendments until the expiration of 60 days after the date of publication of this notice. The Commission may issue any of these license amendments before expiration of the 60-day period provided that its final determination is that the amendment involves NSHC. In addition, the Commission may issue any of these amendments prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. If the Commission takes action on any of these amendments prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final NSHC determination for any of these amendments, any hearing will take place after issuance. The Commission expects that the need to take action on any amendment before 60 days have elapsed will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by any of these actions may file a request for a hearing and petition for leave to intervene (petition) with respect to that action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration, which will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 (*https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML20340A053*) and on the NRC's public website at *https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate.*

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ADAMS Accession No. ML13031A056) and on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other

adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)-(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

The following table provides the plant name, docket number, date of application, ADAMS accession number, and location in the application of the licensees' proposed NSHC determinations. For further details with respect to these license amendment applications, see the applications for amendment, which are available for public inspection in ADAMS. For additional direction on accessing information related to this document, see the ''Obtaining Information and Submitting Comments'' section of this document.

LICENSE AMENDMENT REQUEST(S)

Arizona Public Service Company, et al; Palo Verde Nuclear Generating Station, Units 1, 2, and 3; Maricopa County, AZ	
Docket No(s)	50–528, 50–529, 50–530.
Application date	December 7, 2022, as supplemented by letter dated April 12, 2023.
ADAMS Accession Nos	ML22341A613, ML23102A324.
Location in Application of NSHC	Pages 8–11 of the enclosure to the application and page 1 of the enclosure to the supplement.
Brief Description of Amendment(s)	The proposed amendments would adopt Technical Specification Task Force (TSTF) Traveler TSTF–107–A, Revision 4, ''Separate Control Rods that are Untrippable versus Inoperable,'' and, additionally, provide an action for limited duration loss of some position indication for multiple control element assemblies, in lieu of Limiting Condition for Operation (LCO) 3.0.3 entry. The proposed amendments would modify Technical Specifications LCO 3.1.5, ''Control Element Assembly (CEA) Alignment,'' Conditions A through D.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Carey Fleming, Senior Counsel, Pinnacle West Capital Corporation, 500 N 5th Street, MS 8695, Phoenix, AZ 85004.
NRC Project Manager, Telephone Number	Siva Lingam, 301–415–1564.
Constellation Energy Generation, LLC; Quad Cities Nuclear Power Station, Units 1 and 2; Rock Island County, IL	
Docket No(s)	50–254, 50–265.
Application date	February 3, 2023.
ADAMS Accession No	ML23034A219.
Location in Application of NSHC	Pages 3 and 4 of Attachment 1.

LICENSE AMENDMENT REQUEST(S)—Continued

Brief Description of Amendment(s)	The proposed amendments would revise the Quad Cities Nuclear Power Station, Units 1 and 2, technical specifications by moving the low-pressure coolant injection valve alignment note currently located in Surveillance Requirement 3.5.1.2 to Limiting Condition for Operation 3.5.1.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 4300 Winfield Road, Warrenville, IL 60555.
NRC Project Manager, Telephone Number	Robert Kuntz, 301–415–3733.
Duke Energy Carolinas, LLC; McGuire Nuclear Station, Units 1 and 2; Mecklenburg County, NC	
Docket No(s)	50–369, 50–370.
Application date	February 16, 2023.
ADAMS Accession No	ML23047A465.
Location in Application of NSHC	Pages 8 and 9 of Attachment 1.
Brief Description of Amendment(s)	The proposed amendments would modify technical specification requirements to permit the use of risk-informed completion times in accordance with Technical Specifications Task Force (TSTF) Traveler TSTF–505, Revision 2, ''Provide Risk-Informed Extended Completion Times—Risk Informed Technical Specification Task Force Initiative 4b.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Tracey Mitchell LeRoy, Deputy General Counsel, Duke Energy Corporation, 4720 Piedmont Row Dr., Charlotte, NC 28210.
NRC Project Manager, Telephone Number	John Klos, 301–415–5136.
Duke Energy Carolinas, LLC; McGuire Nuclear Station, Units 1 and 2; Mecklenburg County, NC	
Docket No(s)	50–369, 50–370.
Application date	February 17, 2023.
ADAMS Accession No	ML23048A022.
Location in Application of NSHC	Pages 27 and 28 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would modify the licensing basis to allow for the implementation of the provisions of 10 CFR 50.69, ''Risk-informed categorization and treatment of structures, systems and components for nuclear power reactors'' which would allow adjustment of the scope of equipment subject to special treatment controls.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Tracey Mitchell LeRoy, Deputy General Counsel, Duke Energy Corporation, 4720 Piedmont Row Dr., Charlotte, NC 28210.
NRC Project Manager, Telephone Number	John Klos, 301–415–5136.
Florida Power & Light Company, et al.; St. Lucie Plant, Unit Nos. 1 and 2; St. Lucie County, FL	
Docket No(s)	50–335, 50–389.
Application date	December 2, 2022.
ADAMS Accession No	ML22336A071.
Location in Application of NSHC	Pages 23–25 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would modify the licensing basis by the addition of a license condition to allow for the implementation of the provisions of 10 CFR 50.69, ''Risk-Informed Categorization and Treatment of Structures, Systems and Components for Nuclear Power Reactors.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Steven Hamrick, Senior Attorney 801 Pennsylvania Ave. NW, Suite 220, Washington, DC 20004.
NRC Project Manager, Telephone Number	Natreon Jordan, 301–415–7410.
Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Unit 3; Burke County, GA	
Docket No(s)	52–025.
Application date	April 4, 2023.
ADAMS Accession No	ML23094A268.
Location in Application of NSHC	Pages 6–7 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendment would remove Combined License (COL) Appendix C, ''Inspections, Tests, Analyses, and Acceptance Criteria,'' and make appropriate revisions to the COL that references this appendix.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Stanford Blanton, Balch & Bingham LLP, P.O. Box 306, Birmingham, AL 35201.
NRC Project Manager, Telephone Number	Cayetano Santos, 301–415–7270.
Tennessee Valley Authority; Browns Ferry Nuclear Plant, Units 1, 2, and 3; Limestone County, AL	
Docket No(s)	50–259, 50–260, 50–296.
Application date	March 10, 2023.
ADAMS Accession No	ML23069A100.
Location in Application of NSHC	Pages E3 and E4 of the Enclosure.

LICENSE AMENDMENT REQUEST(S)—Continued

Brief Description of Amendment(s)	The proposed amendments would revise Browns Ferry Nuclear Plant, Units 1, 2, and 3, technical specification (TS) actions applicable when a residual heat removal (RHR) shutdown cooling subsystem is inoperable and provide a TS exception to entering Mode 4 if both required RHR shutdown cooling subsystems are inoperable. The proposed changes are consistent with Technical Specification Task Force (TSTF) Traveler TSTF–566–A, "Revise Actions for Inoperable RHR Shutdown Cooling Subsystems," and Traveler TSTF–580–A, Revision 1, "Provide Exception from Entering Mode 4 with No Operable RHR Shutdown Cooling."
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	David Fountain, Executive VP and General Counsel, Tennessee Valley Authority, 6A West Tower, 400 West Summit Hill Drive, Knoxville, TN 37902.
NRC Project Manager, Telephone Number	Kimberly Green, 301–415–1627.
Tennessee Valley Authority; Browns Ferry Nuclear Plant, Units 1, 2, and 3; Limestone County, AL	
Docket No(s)	50–259, 50–260, 50–296.
Application date	March 30, 2023.
ADAMS Accession No.	ML23089A167.
Location in Application of NSHC	Pages E8 and E9 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would revise Browns Ferry Nuclear Plant, Units 1, 2, and 3. Technical Specification Surveillance Requirements 3.4.3.2 and 3.5.1.11 by supplementing the current requirement to verify the safety relief valves and automatic depressurization valves, respectively, open when manually actuated with an alternate requirement that verifies the valves are capable of being opened in accordance with the inservice testing program (IST) and revising the frequency to be in accordance with the IST.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	David Fountain, Executive VP and General Counsel, Tennessee Valley Authority, 6A West Tower, 400 West Summit Hill Drive, Knoxville, TN 37902.
NRC Project Manager, Telephone Number	Kimberly Green, 301–415–1627.
Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN	
Docket No(s)	50–390, 50–391.
Application date	March 20, 2023.
ADAMS Accession No	ML23079A270.
Location in Application of NSHC	Pages E1–19—E1–93 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would revise Watts Bar Nuclear Plant (Watts Bar), Units 1 and 2, Technical Specification (TS) 4.2.1, "Fuel Assemblies," to increase the number of tritium producing burnable absorber rods that can be irradiated in the core to 2,496. The proposed amendments would revise Watts Bar, Unit 1, TS 5.9.6, "Reactor Coolant System (RCS) Pressure and Temperature Limits Report (PTLR)," to be consistent with Watts Bar, Unit 2, TS 5.9.6. The proposed amendments also would revise both units' TS 5.9.6.b to add WCAP–18124–NP–A Rev. 0 Supplement 1–NP–A, Rev. 0, "Fluence Determination with RAPTOR–M3G and FERRET—Supplement for Extended Beltline Materials." Lastly, the proposed amendments would revise the Watts Bar Dual-Unit Update Final Safety Analysis Report to modify the source term for the design basis accident analyses to allow the core fission product inventory to be calculated using an updated version of the ORIGEN code.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	David Fountain, Executive VP and General Counsel, Tennessee Valley Authority, 6A West Tower, 400 West Summit Hill Drive, Knoxville, TN 37902.
NRC Project Manager, Telephone Number	Kimberly Green, 301–415–1627.
Wolf Creek Nuclear Operating Corporation; Wolf Creek Generating Station, Unit 1; Coffey County, KS	
Docket No(s)	50–482.
Application date	March 1, 2023.
ADAMS Accession No	ML23060A481.
Location in Application of NSHC	Pages 6 and 7 of the Attachment.
Brief Description of Amendment(s)	The proposed amendment would revise the technical specifications by removing the Power Range Neutron Flux Rate—High Negative Rate Trip function, consistent with Westinghouse Topical Report WCAP–11394–P–A, "Methodology for the Analysis of the Dropped Rod Event," that was approved by the NRC staff.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Thomas C. Poindexter, Nukelaw LLC, 66 Franklin Street, Unit 502, Annapolis, MD 21401.
NRC Project Manager, Telephone Number	Samson Lee, 301–415–3168.

III. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last monthly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed NSHC determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated in the safety evaluation for each amendment.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated in the safety evaluation for the amendment.

For further details with respect to each action, see the amendment and associated documents such as the Commission's letter and safety evaluation, which may be obtained using the ADAMS accession numbers indicated in the following table. The safety evaluation will provide the ADAMS accession numbers for the application for amendment and the **Federal Register** citation for any environmental assessment. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

LICENSE AMENDMENT ISSUANCE(S)

Constellation Energy Generation, LLC; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert County, MD	
Docket No(s)	50–317, 50–318.
Amendment Date	April 24, 2023.
ADAMS Accession No	ML23086C067.
Amendment No(s)	345 (Unit 1), 323 (Unit 2).
Brief Description of Amendment(s)	The amendment deleted certain license conditions from the Calvert Cliffs Renewed Facility Operating Licenses that impose specific requirements on the decommissioning trust fund agreement. The provisions of 10 CFR 50.75(h) that specify the regulatory requirements for decommissioning trust funds applies to the licensee.
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Constellation Energy Generation, LLC; Clinton Power Station, Unit No. 1; DeWitt County, IL; Dresden Nuclear Power Station, Units 2 and 3; Grundy County, IL; LaSalle County Station, Units 1 and 2; LaSalle County, IL; Quad Cities Nuclear Power Station, Units 1 and 2; Rock Island County, IL; Nine Mile Point Nuclear Station, LLC and Nine Mile Point Nuclear Station, Unit 2; Oswego County, NY	
Docket No(s)	50–461, 50–237, 50–249, 50–373, 50–374, 50–410, 50–254, 50–265.
Amendment Date	April 25, 2023.
ADAMS Accession No	ML23081A038.
Amendment No(s)	Clinton 249; Dresden 280 (Unit 1), 273 (Unit 2); LaSalle 259 (Unit 1), 244 (Unit 2); Nine Mile Point 193 (Unit 2); Quad Cities 295 (Unit 1), 291 (Unit 2).
Brief Description of Amendment(s)	The amendments revised the technical specifications for each facility based on Technical Specification Task Force (TSTF) Traveler TSTF–306, Revision 2, ''Add Action to LCO 3.3.6.1 to Give Option to Isolate the Penetration'' (ML003725864).
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Energy Northwest; Columbia Generating Station; Benton County, WA	
Docket No(s)	50–397.
Amendment Date	April 27, 2023.
ADAMS Accession No	ML23083B401.
Amendment No(s)	271.
Brief Description of Amendment(s)	The amendment revised Columbia Generating Station Technical Specification (TS) 3.4.9, ''Residual Heat Removal (RHR) Shutdown Cooling System—Hot Shutdown,'' in accordance with Technical Specifications Task Force (TSTF) Traveler TSTF–580, Revision 1, ''Provide Exception from Entering Mode 4 With No Operable RHR Shutdown Cooling.'' Specifically, the proposed changes provided a TS exception to entering Mode 4 if both required RHR shutdown cooling subsystems are inoperable.
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Nine Mile Point Nuclear Station, LLC and Constellation Energy Generation, LLC; Nine Mile Point Nuclear Station, Unit 2; Oswego County, NY	
Docket No(s)	50–410.
Amendment Date	April 17, 2023.
ADAMS Accession No	ML23082A350.
Amendment No(s)	192.

LICENSE AMENDMENT ISSUANCE(S)—Continued

Brief Description of Amendment(s)	The amendment revised the surveillance requirements (SR) associated with Nine Mile Point 2 Technical Specification (TS) Section 3.8.1, "AC Sources—Operating," to reduce the number of fast starts of the emergency diesel generators (EDGs). Specifically, TS SR 3.8.1.2 is revised to identify the "Start Test" testing requirements for the EDGs. In addition, a new SR was created to identify the "Fast Start" testing requirements for the EDGs.
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Tennessee Valley Authority; Sequoyah Nuclear Plant, Units 1 and 2; Hamilton County, TN; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN	
Docket No(s)	50–327, 50–328, 50–390, 50–391.
Amendment Date	April 5, 2023.
ADAMS Accession No	ML23072A065.
Amendment No(s)	Sequoyah 364 (Unit 1) and 358 (Unit 2), Watts Bar 160 (Unit 1) and 68 (Unit 2).
Brief Description of Amendment(s)	The amendments revised Sequoyah Units 1 and 2 Technical Specification (TS) 3.4.12, "Low Temperature Overpressure Protection (LTOP) System," and the Watts Bar Units 1 and 2 TS 3.4.12 "Cold Overpressure Mitigation System (COMS)," by adding a note to the Limiting Condition for Operation regarding pump testing.
Public Comments Received as to Proposed NSHC (Yes/No).	No.
TMI–2 Solutions, LLC; Three Mile Island Nuclear Station, Unit 2; Londonderry Township, Dauphin County, PA	
Docket No(s)	50–320.
Amendment Date	March 31, 2023.
ADAMS Accession No	ML23051A042 (package).
Amendment No(s)	67.
Brief Description of Amendment(s)	This amendment eliminated certain technical specifications, the limiting conditions for Post-Defueling Monitored Storage and surveillance requirements that have already been met, or that are no longer applicable based the facility's current radiological conditions. The amendment allowed TMI–2 Solutions to relocate certain administrative controls from Section 6, "Administrative Controls," to the Decommissioning Quality Assurance Plan, subsequently controlling them in accordance with 10 CFR 50.54(a) pursuant to the criteria contained in 10 CFR 50.36 and in accordance with the recommendations, guidance and purpose of NRC Administrative Letter 95–06 (ML20101P963).
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Virginia Electric and Power Company; Surry Power Station, Unit Nos. 1 and 2; Surry County, VA	
Docket No(s)	50–280, 50–281.
Amendment Date	April 25, 2023.
ADAMS Accession No	ML23100A065.
Amendment No(s)	310 (Unit 1) 310 (Unit 2).
Brief Description of Amendment(s)	The amendments revised the designation of the Surry Power Station, Unit Nos. 1 and 2, turbine buildings as tornado-resistant structures, which will be reflected in the Surry Updated Final Safety Analysis Report.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Dated: May 9, 2023.

For the Nuclear Regulatory Commission.

Jamie M. Heisserer,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2023–10211 Filed 5–15–23; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collections for OMB Review; Comment Request; Liability for Termination of Single-Employer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intent to request extension of OMB approval of collection of information.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) intends to request that the Office of Management and Budget (OMB) extend approval, under the Paperwork Reduction Act, of a collection of information contained in its regulation on Liability for Termination of Single-Employer Plans (OMB control number 1212–0017; expires August 31, 2023). This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

DATES: Comments must be received on or before July 17, 2023 to be assured of consideration.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: paperwork.comments@pbgc.gov.* Refer to Liability for Termination of Single-Employer Plans information collection in the subject line.
- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101.

Commenters are strongly encouraged to submit comments electronically. Commenters who submit comments on paper by mail should allow sufficient time for mailed comments to be received before the close of the comment period.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to OMB control number 1212–0017. All comments received will be posted without change to PBGC's website, *http://www.pbgc.gov,* including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

Copies of the collection of information may be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101, or calling 202–229–4040 during normal business hours. If you are deaf or hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

FOR FURTHER INFORMATION CONTACT: Melissa Rifkin (*rifkin.melissa@pbgc.gov*), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101; 202–229–6563. If you are deaf or hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Section 4062 of the Employee Retirement Income Security Act of 1974, as amended, provides that the contributing sponsor of a single-employer pension plan and members of the sponsor's controlled group (''the employer'') incur liability (''employer liability'') if the plan terminates with assets insufficient to pay benefit liabilities under the plan. PBGC's statutory lien for employer liability and the payment terms for employer liability are affected by whether and to what extent employer liability exceeds 30 percent of the employer's net worth. Section 4062.6 of PBGC's employer liability regulation (29 CFR part 4062) requires a contributing sponsor or member of the contributing sponsor's controlled group that believes employer liability upon plan termination exceeds 30 percent of the employer's net worth to so notify PBGC and submit net worth information to PBGC. This information is necessary to enable PBGC to determine whether and to what extent employer liability exceeds 30 percent of the employer's net worth.

The collection of information under the regulation has been approved by OMB under control number 1212–0017 (expires August 31, 2023). PBGC intends to request that OMB extend its approval for another three years. 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.

PBGC estimates that an average of 21 contributing sponsors or controlled group members per year will respond to this collection of information. PBGC further estimates that the average annual burden of this collection of information will be 12 hours and $5,400 per respondent, with an average total annual burden of 252 hours and $113,400.

PBGC is soliciting public comments to—

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodologies and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Issued in Washington, DC, by.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2023–10414 Filed 5–15–23; 8:45 am]

BILLING CODE 7709–02–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Generic Clearance for the Collection of Qualitative and Quantitative Feedback on Agency Service Delivery

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intent to request extension of OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation intends to request that the Office of Management and Budget (OMB) extend approval, under the Paperwork Reduction Act, of the collection of information on qualitative and quantitative feedback on PBGC's service delivery (OMB Control Number 1212–0066; expires October 31, 2023). This notice informs the public of PBGC's intent and solicits comments on

the proposed information collection. This collection of information was developed as part of a Federal Government-wide effort to streamline the process for seeking feedback from the public on service delivery.

DATES: Comments must be received on or before July 17, 2023 to be assured of consideration.

ADDRESSES: Comments may be submitted by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Email: paperwork.comments@pbgc.gov.* Refer to OMB Control Number 1212–0066 in the subject line.

• *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101.

Commenters are strongly encouraged to submit comments electronically. Commenters who submit comments on paper by mail should allow sufficient time for mailed comments to be received before the close of the comment period.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to OMB control number 1212–0066. All comments received will be posted without change to PBGC's website, *http://www.pbgc.gov,* including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

Copies of the collection of information may be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101, or calling 202–229–4040 during normal business hours. If you are deaf or hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

FOR FURTHER INFORMATION CONTACT: Melissa Rifkin (*rifkin.melissa@pbgc.gov*), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101; 202–229–6563. (If you are deaf or hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.)

SUPPLEMENTARY INFORMATION: This information collection activity will gather qualitative and quantitative customer and stakeholder feedback in an efficient, timely manner, in accordance with PBGC's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on the public's perceptions and opinions. By quantitative feedback we mean numeric scores evaluating PBGC services and customer satisfaction using the American Customer Satisfaction Index (ACSI) methodology. This feedback provides insights into customer or stakeholder perceptions, experiences and expectations, provides early warnings of issues with service, and focuses attention on areas where changes in PBGC's communication with the public, in training of staff, or in operations might improve the delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between PBGC and its customers and stakeholders. These collections also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback targets areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information were not collected, vital feedback from customers and stakeholders on PBGC's services would be unavailable.

PBGC only submits a collection for approval under this generic clearance if it meets the following conditions:

• The collections are voluntary;

• The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;

• The collections are non-controversial and do not raise issues of concern to other Federal agencies;

• Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;

• Personally identifiable information (PII) is collected only to the extent necessary and is not retained;

• Except for information that will be included in PBGC's annual report, information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;

• Information gathered will not be used for the purpose of substantially informing influential policy decisions; and

• Information from qualitative surveys gathered will yield qualitative results; the collections will not be designed or expected to yield statistically reliable results or be used as though the results are generalizable to the population of interest;

• Information from quantitative surveys will be based on statistical methods and will yield quantitative results, such as satisfaction scores that can be generalized to the population.

As a general matter, these information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Annually, over the next three years, PBGC estimates that it will conduct three activities involving about 2,375 respondents, each of whom will provide one response. The number of respondents will vary by activity: 25 for usability testing, 50 for focus groups (5 groups of 10 respondents), and 2,300 for customer satisfaction surveys.

PBGC estimates the annual burden of this collection of information as 725 hours: 2 hours per response for usability testing (total 50 hours); 2 hours per response for focus groups (total 100 hours); and 15 minutes per response for customer satisfaction surveys (total 575 hours). No cost burden to the public is anticipated.

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.

PBGC is soliciting public comments to—

• Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Issued in Washington DC.

Stephanie Cibinic,

Deputy Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2023–10411 Filed 5–15–23; 8:45 am]

BILLING CODE 7709–02–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–149 and CP2023–152; MC2023–150 and CP2023–153; MC2023–151 and CP2023–154]

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:* May 18, 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:

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I. Introduction
II. Docketed Proceeding(s)

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).:* MC2023–149 and CP2023–152; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 118 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* May 10, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* May 18, 2023.

2. *Docket No(s).:* MC2023–150 and CP2023–153; *Filing Title:* USPS Request to Add Priority Mail, First-Class Package Service & Parcel Select Contract 13 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* May 10, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* May 18, 2023.

3. *Docket No(s).:* MC2023–151 and CP2023–154; *Filing Title:* USPS Request to Add Priority Mail, First-Class Package Service & Parcel Select Contract 14 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* May 10, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* May 18, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–10433 Filed 5–15–23; 8:45 am]

BILLING CODE 7710–FW–P

[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).

POSTAL SERVICE

Change in Classifications of General Applicability for Competitive Products

AGENCY: Postal Service™.

ACTION: Notice of a change in classifications of general applicability for competitive products.

SUMMARY: This notice sets forth changes in classifications of general applicability for competitive products, namely, Priority Mail Express and Priority Mail. The changes begin the ''wind-down'' period for the Loyalty Program.

DATES: *Applicable:* June 10, 2023.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: On May 9, 2023, pursuant to their authority under 39 U.S.C. 3632, the Governors of the Postal Service established classification changes for competitive products. The Governors' Decision and the record of proceedings in connection with such decision are reprinted below in accordance with section 3632(b)(2). Mail Classification Schedule language containing the new classification changes can be found at *www.prc.gov.*

Tram T. Pham,

Attorney, Ethics and Legal Compliance.

Decision of the Governors of the United States Postal Service on Changes in Classifications of General Applicability for Competitive Products (Governors' Decision No. 23–4)

May 9, 2023

Statement of Explanation and Justification

Pursuant to authority under section 3632 of title 39, as amended by the Postal Accountability and Enhancement Act of 2006 (''PAEA''), we establish classification changes of general applicability for certain competitive products, specifically Priority Mail Express and Priority Mail. The changes are described generally below, with a detailed description of the changes in the attachment. The attachment

includes the draft Mail Classification Schedule sections with classification changes in legislative format.

First introduced in August 2020 at the height of the COVID–19 pandemic, the Loyalty Program proved to be a valuable incentive program for the Postal Service's small and micro business customers who utilize Click-N-Ship to ship packages at Retail rates. Despite the successes of the Loyalty Program, management has determined to offer a new opportunity for its small and micro business customers by permitting them to access commercial rates via Click-N-Ship. Accordingly, management has deemed it appropriate to begin to sunset the existing Loyalty Program over the next twelve months.

Beginning on June 10, 2023, Loyalty Program customers will no longer be able to earn additional credits on Priority Mail Express and Priority Mail shipments via Click-N-Ship. Credits must then be redeemed no later than June 9, 2024, which will conclude the one-year wind down period. Customers will be able to redeem their credits on Priority Mail Express and Priority Mail shipments that are made at Commercial rates during this wind down period. After the conclusion of this wind down period in 2024, the Postal Service intends to remove the Loyalty Program from the Mail Classification Schedule in a subsequent Commission filing.

Order

The changes in classification set forth herein shall be effective on June 10, 2023. We direct the Secretary to have this decision published in the **Federal Register** in accordance with 39 U.S.C. 3632(b)(2), and direct management to file with the Postal Regulatory Commission appropriate notice of these changes.

By The Governors:

/s/ __________________________________

Roman Martinez IV,

Chairman, Board of Governors.

United States Postal Service Office of the Board of Governors

Certification of Governors' Vote on Governors' Decision No. 23–4

Consistent with 39 U.S.C. 3632(a), I hereby certify that, on May 9, 2023, the Governors voted on adopting Governors' Decision No. 23–4, and that a majority of the Governors then holding office voted in favor of that Decision.

/s/ __________________________________

Date: May 9, 2023

Michael J. Elston,

Secretary of the Board of Governors.

[FR Doc. 2023–10375 Filed 5–15–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Change in Rates and Classes of General Applicability for Competitive Products

AGENCY: Postal Service™.

ACTION: Notice of a change in rates and classifications of general applicability for competitive products.

SUMMARY: This notice sets forth changes in rates and classifications of general applicability for competitive products.

DATES: *Applicable:* July 9, 2023.

FOR FURTHER INFORMATION CONTACT: Elizabeth Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: On May 9, 2023, pursuant to their authority under 39 U.S.C. 3632, the Governors of the Postal Service established prices and classification changes for competitive products. The Governors' Decision and the record of proceedings in connection with such decision are reprinted below in accordance with section 3632(b)(2). Mail Classification Schedule language containing the new prices and classification changes can be found at *www.prc.gov.*

Tram T. Pham,

Attorney, Ethics and Legal Compliance.

Decision of the Governors of the United States Postal Service on Changes in Rates and Classifications of General Applicability for Competitive Products (Governors' Decision No. 23–3)

May 9, 2023

Statement of Explanation and Justification

Pursuant to authority under section 3632 of title 39, as amended by the Postal Accountability and Enhancement Act of 2006 (''PAEA''), we establish prices and classifications of general applicability for the Postal Service's competitive products. The changes are described generally below, with a detailed description of the changes in the Postal Service's associated draft Mail Classification Schedule change document. That document contains the draft Mail Classification Schedule sections with classification changes in legislative format, and new prices displayed in the price charts.

As shown in the nonpublic annex being filed under seal herewith, the changes we establish should enable each competitive product to cover its attributable costs (39 U.S.C. 3633(a)(2)) and should result in competitive products as a whole complying with 39 U.S.C. 3633(a)(3), which, as implemented by 39 CFR 3035.107(c), requires competitive products collectively to contribute a minimum of 10.4 percent to the Postal Service's institutional costs. Accordingly, no issue of subsidization of competitive products by market dominant products should arise (39 U.S.C. 3633(a)(1)). We therefore find that the new prices and classification changes are in accordance with 39 U.S.C. 3632–3633 and 39 CFR 3035.102 and 104.

I. Domestic Products

A. Priority Mail Express

Priority Mail Express prices will remain unchanged for July 2023, and the existing structure of Retail and Commercial price categories will be maintained.

B. Priority Mail

Priority Mail prices will remain unchanged for July 2023, and the existing structure of Retail and Commercial price categories will be maintained.

C. Parcel Select

On average, Parcel Select prices as a whole will increase 1.4 percent. Prices for destination-entered non-Lightweight Parcel Select, the Postal Service's bulk ground shipping product, will increase 2.1 percent on average. For destination delivery unit (DDU) entered parcels, prices will remain unchanged. For destination sectional center facility (DSCF) destination entered parcels, the average price increase is 5.7 percent. For destination network distribution center (DNDC) parcels, the average price increase is 0.9 percent. No additional price changes for destination hub (DHub) parcels are planned beyond what we previously established in Governors' Decision 23–2. Prices for Parcel Select Lightweight will decrease by 0.1 percent on average. Prices for USPS Connect Local, introduced in 2022, will remain unchanged for 2023. To accommodate mailers' concerns regarding programming changes, the Postal Service will maintain its ounce-based prices at 15.999 ounces, as well as including a one-pound price. No other structural changes are proposed.

D. First-Class Package Service (Renamed USPS Ground Advantage)

Consistent with the prior order of the Postal Regulatory Commission in October of 2022, the Postal Service intends to implement the enhanced and expanded First-Class Package Service (FCPS) product. Beginning on July 9, 2023, FCPS will be extended up to seventy pounds, will incorporate USPS Retail Ground (including Limited Overland Routes) and Parcel Select Ground (including cubic pricing), and will be renamed USPS Ground Advantage. Minor price changes are planned for FCPS as it transitions to USPS Ground Advantage in July 2023. Prices for the Limited Overland Routes (LOR) will remain unchanged. As the newly-constituted USPS Ground Advantage product, customers will see a 3.2 percent decrease in Retail prices and 0.7 percent decrease in Commercial prices for July 2023. To accommodate mailers' concerns regarding programming changes, the Postal Service will maintain its ounce-based prices at 15.999 ounces, as well as including a one-pound price. No other structural changes are proposed.

F. Domestic Extra Services

Domestic Special Services prices will remain unchanged for July 2023.

II. International Products

A. International Ancillary Services and Special Services

Prices for several international ancillary services will be increased, with an average overall increase of 6.3 percent.

No other price or classification changes for International Products are being made.

Order

The changes in prices and classes set forth herein shall be effective at 12:01 a.m. on July 9, 2023. We direct the Secretary to have this decision published in the **Federal Register** in accordance with 39 U.S.C. 3632(b)(2) and direct management to file with the Postal Regulatory Commission appropriate notice of these changes.

By The Governors:

/s/

Roman Martinez IV,

Chairman, Board of Governors.

United States Postal Service Office of the Board of Governors

Certification of Governors' Vote on Governors' Decision No. 23–3

Consistent with 39 U.S.C. 3632(a), I hereby certify that, on May 9, 2023, the Governors voted on adopting Governors' Decision No. 23–3, and that a majority of the Governors then holding office voted in favor of that Decision.

/s/

Date: May 9, 2023,

Michael J. Elston,

Secretary of the Board of Governors.

[FR Doc. 2023–10374 Filed 5–15–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97471; File No. SR–NASDAQ–2023–011]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 7, Section 2

May 10, 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 May 1, 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 below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend The Nasdaq Options Market LLC (''NOM'') Pricing Schedule at Options 7, Section 2.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NOM's Pricing Schedule at Options 7, Section 2(1), ''Nasdaq Options Market—Fees and Rebates.'' Specifically, the Exchange proposes to amend note 2 within Options 7, Section 2(1).

Today, NOM Options 7, Section 2(1) provides for various fees and rebates applicable to NOM Participants. Specifically, the Exchange pays the following Rebates to Add Liquidity in Penny Symbols:

	Tier 1	Tier 2	Tier 3	Tier 4	Tier 5	Tier 6
Customer	($0.20)	($0.25)	($0.43)	($0.44)	($0.45)	[7] ($0.48)
Professional	(0.20)	(0.25)	(0.43)	(0.44)	(0.45)	(0.47)
Broker-Dealer	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)
Firm	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)
Non-NOM Market Maker	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)	(0.10)
NOM Market Maker	(0.20)	(0.25)	[4] (0.30)	[4] (0.32)	(0.44)	(0.48)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Additionally, today, NOM pays and assesses the following Fees and Rebates to Add Liquidity in Non-Penny Symbols:

Customer	($0.80)
Professional	(0.80)
Broker-Dealer	0.45
Firm	0.45
Non-NOM Market Maker	0.45
NOM Market Maker	0.35/(0.30)

FINALLY, THE EXCHANGE ASSESSES THE FOLLOWING FEES TO REMOVE LIQUIDITY IN PENNY AND NON-PENNY SYMBOLS: FEES TO REMOVE LIQUIDITY IN PENNY AND NON-PENNY SYMBOLS

	Penny symbols	Non-penny symbols
Customer	$0.49	$0.85
Professional	0.49	0.85
Broker-Dealer	0.50	1.10
Firm	0.50	1.10
Non-NOM Market Maker	0.50	1.10
NOM Market Maker	0.50	1.10

Currently, the Non-NOM Market Makers [3] and NOM Market Makers [4] who remove liquidity in Penny Symbols and Non-Penny Symbols are subject to note 2 within NOM Options 7, Section 2(1), which provides,

Participants that add 1.30% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of total industry customer equity and ETF option ADV contracts per day in a month will be subject to the following pricing applicable to executions: a $0.48 per contract Penny Symbols Fee for Removing Liquidity when the Participant is (i) both the buyer and the seller or (ii) the Participant removes liquidity from another Participant under Common Ownership.

Participants that add 1.50% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of total industry customer equity and ETF option ADV contracts per day in a month and meet or exceed the cap for The Nasdaq Stock Market Opening Cross during the month will be subject to the following pricing applicable to executions less than 10,000 contracts: a $0.32 per contract Penny Symbols Fee for Removing Liquidity when the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership.

Participants that add 1.75% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of total industry customer equity and ETF option ADV contracts per day in a month will be subject to the following pricing applicable to executions less than 10,000 contracts: a $0.32 per contract Penny Symbols Fee for Removing Liquidity when the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership.

At this time, the Exchange proposes to amend note 2 within NOM Options 7, Section 2(1) to increase the $0.32 per contract NOM Market Maker and Non-NOM Market Maker Penny Symbol and Non-Penny Symbol Fees to Remove Liquidity to $0.38 per contract for executions less than 10,000 contracts when the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. In order to receive the lower NOM Market Maker and Non-NOM Market Maker Penny Symbol and Non-Penny Symbol Fees to Remove Liquidity of $0.38 per contract, Participants would continue to either: (1) add 1.50% of Customer,[5] Professional,[6] Firm,[7] Broker-Dealer [8] or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of total industry customer equity and ETF option ADV contracts per day in a month and meet or exceed the cap for The Nasdaq Stock Market Opening Cross during the month; or (2) add 1.75% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of total industry customer equity and ETF option ADV contracts per day in a month. The $0.38 per contract fee is in comparison to the $0.50 per contract Penny Symbol Fee to Remove Liquidity for NOM Market Makers and Non-NOM Market Makers and the $1.10 per contract Non-Penny Symbol Fee to Remove Liquidity for NOM Market Makers and Non-NOM Market Makers. Customers and Professionals would continue to pay a $0.49 per contract Penny Symbols Fee to Remove Liquidity and an $0.85 per contract Non-Penny Symbol Fee to Remove Liquidity. Broker-Dealers and Firms would continue to pay a $0.50 per contract Penny Symbols Fee to Remove Liquidity and an $1.10 per contract Non-Penny Symbol Fee to Remove Liquidity. Despite the increase to the Penny Symbol and Non-Penny Symbol Fees to Remove Liquidity for NOM Market Makers and Non-NOM Market Makers, the Exchange believes the incentive offered in note 2 within NOM Options 7, Section 2(1) will continue to incentivize NOM Participants to direct liquidity to NOM for an opportunity to pay lower NOM Market Makers and Non-NOM Market Makers Penny Symbol or Non-Penny Symbol Fees to Remove Liquidity.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission* [11] (''NetCoalition''), the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range

[3] The term ''Non-NOM Market Maker'' or (''O'') is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM. *See* Options 7, Section 1(a).

[4] The term ''NOM Market Maker'' or (''M'') is a Participant that has registered as a Market Maker on NOM pursuant to Options 2, Section 1, and must also remain in good standing pursuant to Options 2, Section 9. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security. *See* Options 7, Section 1(a).

[5] The term ''Customer'' or (''C'') applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation (''OCC'') which is not for the account of broker or dealer or for the account of a ''Professional'' (as that term is defined in Options 1, Section 1(a)(47)). *See* Options 7, Section 1(a).

[6] The term ''Professional'' or (''P'') means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Options 1, Section 1(a)(47). All Professional orders shall be appropriately marked by Participants. *See* Options 7, Section 1(a).

[7] The term ''Firm'' applies to any transaction that is identified by a member or member organization for clearing in the Firm range at OCC. *See* Options 7, Section 1(a).

[8] The term ''Broker-Dealer'' or (''B'') applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. *See* Options 7, Section 1(a).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''[12]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to attract additional order flow to the Exchange and increase its market share relative to its competitors.

The Exchange's proposal to amend note 2 within NOM Options 7, Section 2(1) to increase the $0.32 per contract NOM Market Maker and Non-NOM Market Maker Penny Symbol and Non-Penny Symbol Fees to Remove Liquidity to $0.38 per contract for executions less than 10,000 contracts when the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership and they meet the requisite order flow requirements[13] is reasonable because despite the increase to the NOM Market Maker and Non-NOM Market Maker Penny Symbol and Non-Penny Symbol Fees to Remove Liquidity, the Exchange believes the incentive offered in note 2 within NOM Options 7, Section 2(1) will continue to incentivize NOM Participants to direct liquidity to NOM for an opportunity to pay lower NOM Market Maker and Non-NOM Market Maker Penny Symbol and Non-Penny Symbol Fees to Remove Liquidity. Participants would continue to be offered an opportunity to lower NOM Market Maker and Non-NOM Market Maker Penny Symbol and Non-Penny Symbol Fees to Remove Liquidity, thereby attracting order flow to the Exchange to the benefit of all other market participants.

The Exchange's proposal to amend note 2 within NOM Options 7, Section 2(1) to increase the $0.32 per contract NOM Market Maker and Non-NOM Market Maker Penny Symbol and Non-Penny Symbol Fees to Remove Liquidity to $0.38 per contract for executions less than 10,000 contracts when the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership and they meet the requisite order flow requirements is equitable and not unfairly discriminatory because the Exchange will uniformly pay the lower Non-NOM Marker Maker or NOM Market Maker Penny Symbol or Non-Penny Symbol Fees for Removing Liquidity to all qualifying NOM Participants. Offering these discounts to NOM Market Makers is equitable and not unfairly discriminatory because NOM Market Makers have obligations to the market and regulatory requirements which do not apply to other market participants.[14] A NOM Market Maker has the obligation, for example, to make continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and not make bids or offers or enter into transactions that are inconsistent with a course of dealings. The proposed differentiation as between NOM Market Makers and other market participants recognizes the differing contributions of NOM Market Makers. For the above reasons, the Exchange believes that NOM Market Makers are entitled to discounted fees, provided they qualify for the discount. The Exchange believes it is equitable and not unfairly discriminatory to offer the fee discount to Non-NOM Market Makers because the Exchange is offering Participants flexibility in the manner in which they are submitting their orders. Non-NOM Market Makers have obligations on other exchanges to qualify as a market maker. Also, the Exchange believes that market makers not registered on NOM will be encouraged to send orders to NOM as an away market maker (Non-NOM Market Maker) with this incentive. Because the incentive is being offered to both market makers registered on NOM and those not registered on NOM, the Exchange believes that the proposal is equitable and not unfairly discriminatory because it encourages market makers to direct liquidity to NOM to the benefit of all Participants. This proposal recognizes the overall contributions made by market makers to a listed options market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Inter-Market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges. Because competitors are free adjust their order routing practices, the Exchange believes that the degree to which pricing changes in this market may impose any burden on competition is extremely limited.

Intra-Market Competition

The proposed amendments do not impose an undue burden on intra-market competition. In terms of intra-market competition, the Exchange does not believe that its proposals will place any category of market participant at a competitive disadvantage. The Exchange's proposal to amend note 2 within NOM Options 7, Section 2(1) to increase the $0.32 per contract NOM Market Maker and Non-NOM Market Maker Penny Symbol and Non-Penny Symbol Fees to Remove Liquidity to $0.38 per contract for executions less than 10,000 contracts when the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership and they meet the requisite order flow requirements does not impose an undue burden on competition because the Exchange will uniformly pay the lower Non-NOM Marker Maker or NOM Market Maker Penny Symbol or Non-Penny Symbol Fees for Removing Liquidity to all qualifying NOM Participants. Offering

[12] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca-2006–21)).

[13] In order to receive the lower fee of $0.38 per contract proposed in note 2 of Options 7, Section 2(1), Participants would continue to either: (1) add 1.50% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of total industry customer equity and ETF option ADV contracts per day in a month and meet or exceed the cap for The Nasdaq Stock Market Opening Cross during the month; or (2) add 1.75% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of total industry customer equity and ETF option ADV contracts per day in a month.

[14] *See* NOM Options 2, Sections 4 and 5.

these discounts to NOM Market Makers does not impose an undue burden on competition because NOM Market Makers have obligations to the market and regulatory requirements which do not apply to other market participants.[15] A NOM Market Maker has the obligation, for example, to make continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and not make bids or offers or enter into transactions that are inconsistent with a course of dealings. The proposed differentiation as between NOM Market Makers and other market participants recognizes the differing contributions of NOM Market Makers. For the above reasons, the Exchange believes that NOM Market Makers are entitled to discounted fees, provided they qualify for the discount. Offering the fee discount to Non-NOM Market Makers does not impose an undue burden on competition because the Exchange is offering Participants flexibility in the manner in which they are submitting their orders. Non-NOM Market Makers have obligations on other exchanges to qualify as a market maker. Also, the Exchange believes that market makers not registered on NOM will be encouraged to send orders to NOM as an away market maker (Non-NOM Market Maker) with this incentive. Because the incentive is being offered to both market makers registered on NOM and those not registered on NOM, the Exchange believes that the proposal does not impose an undue burden on competition because it encourages market makers to direct liquidity to NOM to the benefit of all Participants. This proposal recognizes the overall contributions made by market makers to a listed options market.

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[16] and paragraph (f)(2) of Rule 19b–4 thereunder.[17] 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
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2023–011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2023–011. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–NASDAQ–2023–011, and should be submitted on or before June 6, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–10359 Filed 5–15–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97473; File No. SR–BX–2023–009]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at BX Options 7, Section 2 To Increase the Taker Fee for Customer Orders in SPY

May 10, 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 May 1, 2023, Nasdaq BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Pricing Schedule at BX Options 7, Section 2 to increase the taker fee for customer orders in SPY.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/bx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

[15] *See* NOM Options 2, Sections 4 and 5.

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

The purpose of the proposed rule change is to amend the BX Pricing Schedule at Options 7, Section 2 to increase the Customer [3] Taker Fee in SPY from $0.31 to $0.33 per contract.

Today, the Exchange charges Customer orders a Taker Fee of $0.46 per contract in Penny Symbols. For Customer orders in SPY, the Exchange charges a reduced Taker Fee of $0.31 per contract. The Exchange now proposes to increase the Customer Taker Fee in SPY from $0.31 to $0.33 per contract.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [6]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [7]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes that its proposal to increase the Customer Taker Fee in SPY from $0.31 to $0.33 per contract is reasonable. While the Customer Taker Fee in SPY is increasing, Customers will continue to receive favorable pricing compared to all other market participants on BX. In particular, no other market participants except Customers are currently eligible to receive this reduced Taker Fee in SPY. These market participants are instead assessed the Penny Taker Fee of $0.50 per contract today. Accordingly, the Exchange believes that its SPY Taker Fee will remain attractive for Customers, and will continue to attract such order flow to BX to the benefit of all market participants who may interact with this flow.

The Exchange believes that offering the reduced Taker Fee in SPY of $0.33 per contract to Customers is equitable and not unfairly discriminatory because the proposed pricing will apply uniformly to all similarly situated Participants. Customer liquidity benefits all market participants by providing more trading opportunities which attracts market makers. An increase in the activity of these market participants in turn facilitates tighter spreads and may cause an additional corresponding increase in order flow from other market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of intra-market competition, all pricing would be uniformly assessed to similarly situated market participants. Customers will continue to receive favorable pricing as compared to other market participants because Customer liquidity enhances market quality on the Exchange by providing more trading opportunities, which benefits all market participants.

In terms of inter-market competition, the Exchange believes that with the proposed changes, its pricing remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Participants or competing order execution venues to maintain their competitive standing in the financial markets.

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.

[3] The term ''Customer'' or (''C'') applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation (''OCC'') which is not for the account of broker or dealer or for the account of a ''Professional'' (as that term is defined in Options 1, Section 1(a)(48)).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[7] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[8]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BX–2023–009 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–BX–2023–009. 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. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–BX–2023–009, and should be submitted on or before June 6, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–10358 Filed 5–15–23; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34914; File No. 812–15396]

JPM Private Markets Fund, et al.

May 10, 2023.

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice.

Notice of application for an order ("Order") under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

APPLICANTS: JPMorgan Private Markets Fund; J.P. Morgan Investment Management Inc.; Courier Private Equity Fund L.P.; Florida Sunshine State Fund L.P.; PEG Aggregator 2022 L.P.; PEG Aggregator 2023 L.P.; PEG Co-Investment Fund L.P.; PEG Global Private Equity VIII L.P.; PEG Global Private Equity IX L.P.; PEG Global Private Equity X (HOLDING) L.P.; PEG Global Private Equity XI (HOLDING) L.P.; PEG HO Private Equity Fund L.P.; PEG U.S. Corporate Finance VII L.P.; PEG Venture Capital VI L.P.; PEG Welborn Private Equity Fund L.P.; PEG Z Global Private Equity Fund L.P.; Red River Venture Capital Fund II L.P.; UISIF Private Equity Fund L.P.; Teamsters Joint Council No. 83 Of Virginia Pension Fund Private Equity Fund L.P.; 2018 Private Equity Fund L.P.

FILING DATES: The application was filed on October 13, 2022, and amended on January 13, 2023 and March 29, 2023.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below.

Hearing requests should be received by the Commission by 5:30 p.m. on June 5, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov*.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov*. Applicants: Carmine Lekstutis, *carmine.lekstutis@jpmorgan.com;* Rajib Chanda, *rajib.chanda@stblaw.com*; Ryan P. Brizek, *ryan.brizek@stblaw.com*.

FOR FURTHER INFORMATION CONTACT: Shayna Gilmore, Senior Counsel, or Terri G. Jordan, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' second amended and restated application, dated March 29, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at, at *http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html*. You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–10366 Filed 5–15–23; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 12073]

Listening Session on Modernizing the Columbia River Treaty Regime

ACTION: Notice of meeting.

SUMMARY: The Department of State will hold a virtual listening session on May 31, 2023, to provide an update after the May 16–17 round of negotiations on the modernization of the Columbia River Treaty (CRT) regime.

DATES: The session will be held on Wednesday, May 31, 2023, from 8:00 p.m.–9:30 p.m. ET (5:00 p.m.–6:30 p.m. PT).

ADDRESSES: The session will be held virtually.

FOR FURTHER INFORMATION CONTACT: Office of Canadian Affairs, Department of State, *ColumbiaRiverTreaty@state.gov,* (202) 647–2170.

SUPPLEMENTARY INFORMATION: This listening session is part of the Department's public engagement on the modernization of the CRT regime. (Per 22 U.S.C. 2651a and 2656.) The session is open to the public. To register, go to: *https://statedept.zoomgov.com/webinar/register/WN_Fi-b75OnSTKRJZ242xcMGA.* Requests for reasonable accommodation should be made to the email listed above, on or before May 21, 2023. The Department will consider requests made after that date, but might not be able to accommodate them. For more information about the meeting, and to submit questions in advance, please contact *ColumbiaRiverTreaty@state.gov.*

Authority: 22 U.S.C. 2651a, 2656; 5 U.S.C. 552.

Jennifer L. Savage,

Director, Office of Canadian Affairs, Department of State.

[FR Doc. 2023–10389 Filed 5–15–23; 8:45 am]

BILLING CODE 4710–29–P

SUSQUEHANNA RIVER BASIN COMMISSION

Grandfathering (GF) Registration Notice

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists Grandfathering Registration for projects by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: April 1–30, 2023.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists GF Registration for projects described below, pursuant to 18 CFR part 806, subpart E, for the time period specified above:

1. Mountaintop Regional Water Authority—Public Water Supply System, GF Certificate No. GF–202304249, Burnside Township, Centre County, Pa.; Big Sterling Spring; Issue Date: April 7, 2023.
2. Triple G Farms Inc.—Foxchase Golf Club, GF Certificate No. GF–202304250, East Cocalico Township, Lancaster County, Pa.; Cocalico Creek and consumptive use; Issue Date: April 7, 2023.
3. Willow Valley Associates, Inc., GF Certificate No GF–202304251, West Lampeter Township, Lancaster County, Pa.; Irrigation Pond and Unnamed Tributary to Mill Creek; Issue Date: April 7, 2023.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806 and 808.

Dated: May 11, 2023.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2023–10402 Filed 5–15–23; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists Approvals by Rule for projects by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: April 1–30, 2023.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22 (e) and (f) for the time period specified above.

Water Source Approval—Issued Under 18 CFR 806.22(e)

1. BEST BEV, LLC; Pad ID: Waverly Canning Facility; ABR–202304001; Barton Town, Tioga County, NY; Consumptive Use of Up to 0.1000 mgd; Approval Date: April 7, 2023.
2. Bottling Group, LLC; Pad ID: Pepsi Beverages Company; ABR–202304002; Lower Paxton Township, Dauphin County, Pa.; Consumptive Use of Up to 0.4660 mgd; Approval Date: April 14, 2023.

Water Source Approval—Issued Under 18 CFR 806.22(f)

1. Chesapeake Appalachia, L.L.C.; Pad ID: Hanlon; ABR–201303003.R2; McNett Township, Lycoming County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 12, 2023.
2. Chesapeake Appalachia, L.L.C.; Pad ID: J. Brown Drilling Pad; ABR–201303001.R2; Troy Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 12, 2023.
3. Chesapeake Appalachia, L.L.C.; Pad ID: Jes; ABR–201303008.R2; Wilmot Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 12, 2023.
4. Chesapeake Appalachia, L.L.C.; Pad ID: Lasher; ABR–201303010.R2; Auburn Township, Susquehanna County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 12, 2023.
5. Coterra Energy Inc.; Pad ID: MackeyR P1; ABR–201203015.R2; Lathrop Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: April 12, 2023.
6. Coterra Energy Inc.; Pad ID: MolnarM P1; ABR–201303007.R2; Brooklyn Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: April 12, 2023.

7. Repsol Oil & Gas USA, LLC; Pad ID: MONRO (03 142) G; ABR–201803001.R1; Columbia Township, Bradford County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: April 12, 2023.

8. Chesapeake Appalachia, L.L.C.; Pad ID: Waldeisen-Ladd Drilling Pad; ABR–20100699.R2.1; Fox Township, Sullivan County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 12, 2023.

9. Chesapeake Appalachia, L.L.C.; Pad ID: W & L Drilling Pad #1; ABR–201103014.R2.1; Lemon Township, Wyoming County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 12, 2023.

10. Chesapeake Appalachia, L.L.C.; Pad ID: SGL–12 A Drilling Pad; ABR–201407007.R1.1; Overton Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 12, 2023.

11. Chesapeake Appalachia, L.L.C.; Pad ID: PELTON UNIT PAD; ABR–202205001.1; Franklin Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 17, 2023.

12. BKV Operating, LLC; Pad ID: Mazzara; ABR–201103035.R2; Washington Township, Wyoming County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: April 24, 2023.

13. Chesapeake Appalachia, L.L.C.; Pad ID: Lucy; ABR–201304015.R2; Monroe Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 24, 2023.

14. Chesapeake Appalachia, L.L.C.; Pad ID: Sharpe; ABR–201304004.R2; Windham Township, Wyoming County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 24, 2023.

15. Seneca Resources Company, LLC; Pad ID: COP Pad S; ABR–201103029.R2; Lawrence Township, Clearfield County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: April 24, 2023.

16. Seneca Resources Company, LLC; Pad ID: M L Mitchell Trust 554; ABR–201103017.R2; Middlebury Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: April 24, 2023.

17. Seneca Resources Company, LLC; Pad ID: PHC Pad Z; ABR–201103024.R2; Lawrence Township, Clearfield County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: April 24, 2023.

18. Chesapeake Appalachia, L.L.C.; Pad ID: Lathrop Farm Trust Drilling Pad; ABR–201302004.R2; Auburn Township, Susquehanna County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 28, 2023.

19. Chesapeake Appalachia, L.L.C.; Pad ID: McEnaney; ABR–201304001.R2; Terry Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 28, 2023.

20. Chesapeake Appalachia, L.L.C.; Pad ID: Poepperling; ABR–201304017.R2; North Branch Township, Wyoming County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 28, 2023.

21. Chesapeake Appalachia, L.L.C.; Pad ID: SGL 12 C DRILLING PAD; ABR–201703004.R1; Leroy Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 28, 2023.

22. Chesapeake Appalachia, L.L.C.; Pad ID: SGL 36 DRILLING PAD; ABR–201803007.R1; Overton Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: April 28, 2023.

23. Coterra Energy Inc.; Pad ID: CarpenettiR P1; ABR–201303014.R2; Lathrop Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: April 28, 2023.

24. Coterra Energy Inc.; Pad ID: CastrogiovanniA P3; ABR–201303011.R2; Bridgewater Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: April 28, 2023.

25. Coterra Energy Inc.; Pad ID: PritchardD P1; ABR–201304005.R2; Harford Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: April 28, 2023.

26. Coterra Energy Inc.; Pad ID: TsourousA P1; ABR–201703007.R1; Jessup Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: April 28, 2023.

27. Range Resources—Appalachia, LLC; Pad ID: Roaring Run Unit; ABR–201203029.R2; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: April 28, 2023.

28. Seneca Resources Company, LLC; Pad ID: COP Pad N; ABR–201103001.R2; Lawrence Township, Clearfield County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: April 28, 2023.

29. Seneca Resources Company, LLC; Pad ID: DCNR 100 Pad D; ABR–201102002.R2; McIntyre Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: April 28, 2023.

30. Seneca Resources Company, LLC; Pad ID: Kuhl 529; ABR–201102014.R2; Richmond Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: April 28, 2023.

31. Seneca Resources Company, LLC; Pad ID: Salevsky 335; ABR–201103046.R2; Charleston Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: April 28, 2023.

32. SWN Production Company, LLC; Pad ID: DRANN PAD; ABR–201303006.R2; New Milford Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: April 28, 2023.

33. SWN Production Company, LLC; Pad ID: Marichini-Zingieser (Pad 9); ABR–201303012.R2; Herrick Township, Bradford County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: April 28, 2023.

34. SWN Production Company, LLC; Pad ID: McMahon (VW Pad); ABR–201304003.R2; Stevens Township, Bradford County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: April 28, 2023.

35. SWN Production Company, LLC; Pad ID: TI–17 Hoffman; ABR–201803003.R1; Liberty Township, Tioga County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: April 28, 2023.

36. Seneca Resources Company, LLC; Pad ID: Swan 1122; ABR–201104031.R2; Farmington Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: April 29, 2023.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806 and 808.

Dated: May 11, 2023.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2023–10403 Filed 5–15–23; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2022–0040]

Agency Information Collection Activities: Requests for Comments; Clearance of a New Approval of Information Collection: Compliance and Enforcement Actions (CEA) & Voluntary Disclosure Report (VDR)

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 for a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 03, 2022. The collection involves Regulated Entity (RE) users that create and submit Compliance and Enforcement Action (CE) activity and Voluntary Disclosure Report (VDR) submittals to the FAA. The FAA enters and processes this activity and submittals using the Aviation Safety Knowledge Management Environment Compliance and Enforcement Actions (ASKME CEA) application. The information to be collected will be used to support processing CE and VDR processing for ASKME CEA application users and is necessary because it automates the process by which REs may disclose to the FAA potential occurrence of noncompliance to requirements.

DATES: Written comments should be submitted by June 15, 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: Ernie Billingsley by email at: *Ernie.Billingsley@faa.gov*; phone: 405–954–7407.

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.

OMB Control Number: 2120–XXXX.

Title: Compliance and Enforcement Actions (CEA) & Voluntary Disclosure Report (VDR).

Form Numbers: There is no standard form to use for CEA and VDR submissions.

Type of Review: A new information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 03, 2022 (FR Citation 2022–21373). The CEA system supports ASKME users. ASKME users are AIR employees who perform oversight activities of design and manufacturing regulated entities, including production approval holders, design approval holders, and organizational designation authorization holders. REs such as manufacturers, delegated organizations (Organization Designation Authorization) and design holders regulated by the FAA will communicate and exchange information with the FAA. The ASKME CEA is an internal web-based application and provides an more efficient process for CE and VDR activity received from manufacturers, delegated organizations and design holders.

Compliance and Enforcement Actions (CEA)

Title 49 United States Code, Subtitle VII—Aviation Programs encourages the development of civil aeronautics, and promotes safety in air commerce. Sections 44709, 44711 and 44736 allow the Department of Transportation or the Administrator of the Federal Aviation Administration (FAA) to re-inspect and perform oversight activities for civil aircraft, aircraft engine, propeller, appliance, design organization, production certificate holder, and Organization Designation Authorizations. An Organization Designation Authorization or ''ODA'' is an authorization by the FAA under section 44702(d) for an organization composed of 1 or more ODA units to perform approved functions on behalf of the FAA. See 49 U.S.C. 44736

Section 44709 allows the FAA to re-inspect at any time a civil aircraft, aircraft engine, propeller, appliance, design organization, production certificate holder, air navigation facility, or air agency, or reexamine an airman holding a certificate issued under 49 U.S.C. 44703.

Section 44711 prohibitions a person from violating a term of an air agency, design organization certificate, or production certificate or a regulation prescribed or order issued under section 44701(a) or (b) or any of sections 44702–44716 related to the holder of the certificate;

Under section 44736, when overseeing an ODA holder, the Administrator of the FAA shall conduct regular oversight activities by inspecting the ODA holder's delegated functions and taking action based on validated inspection findings. When the FAA officials perform section 44709 re-inspection or oversight activities and discovers violations, they process them using FAA Orders 8000.373B, Federal Aviation Administration Compliance Program, 2150.3C, FAA Compliance and Enforcement Program and AIR–002–035 Aircraft Certification Service (AIR) Compliance and Enforcement Process.

Voluntary Disclosure Report (VDR)

Title 14 Code of Federal Regulations, Part 193 of the Federal Aviation Administration (FAA) regulations provides that certain information submitted to the FAA on a voluntary basis is not to be disclosed. This part implements statutory provision 49 U.S.C. 40123. The purpose of Part 193 is to encourage the aviation community to voluntarily share information with the FAA so that the agency may work cooperatively with industry to identify modifications to rules, policies, and procedures needed to improve safety, security, and efficiency of the National Airspace System. The information collection associated with Part 193 also supports the Department of Transportation's Strategic Goal of Safety and Security.

To encourage people to voluntarily submit desired information, § 40123 was added to Title 49, United States Code, in the Federal Aviation Reauthorization Act of 1996. Section 40123 allows the Administrator, through FAA regulations, to protect from disclosure voluntarily provided information relating to safety and security issues.

The White House Commission on Aviation Safety and Security issued a recommendation [i] on this subject. In Recommendation 1.8, the Commission noted that the most effective way to identify problems is for the people who operate the system to self-disclose the information, but that people will not provide information to the FAA unless it can be protected.

FAA programs that are covered under Part 193 are the Voluntary Safety Reporting Programs (FAA Order 7200.20), Air Traffic and Technical Operations Safety Action Programs (FAA Order 7200.22), Flight Operational Quality Assurance (FAA Order 8000.81), Aviation Safety Action Program (FAA Order 8000.82), and Voluntary Disclosure Reporting Program (FAA Order 8000.89). The AIR ASKME CEA application supports the electronic processing of the three main compliance and enforcement actions as defined by FAA Order 2150.3C, Compliance and Enforcement Program. These actions are Voluntary Disclosure Reports, Compliance Actions and Enforcement Actions.

Respondents: Respondents are aviation design and manufacturing regulated entities, including production

[i] *https://www.hsdl.org/?abstract&did=1839.*

approval holders, design approval holders, and organizational designation authorization holders. Responding to the collection of data is voluntary and will be respond to actions in writing and processed by the FAA through the ASKME CEA application. FAA staff of AIR including Aviation Safety Inspectors (ASIs), Aviation Safety Engineers (ASEs), their supervisors and managers, and Organization Designation Authorization (ODA) Organization Management Team (OMT) members receive information submitted by the regulated entities.

Frequency: As needed.

Estimated Average Burden per Response: These reports require an average of 17 hour each to prepare.

Estimated Total Annual Burden: The total estimated burden hours based on the average Compliance and Enforcement/VDR closed cases activity from the CEA & Boeing Aviation Safety Oversight Office (BASSO) databases annually is 6048.

Issued in Washington, DC, on May 9, 2023.

Ernie Billingsley,

Business Program Manager, AIR–952, Enterprise Business Operations Division and Technology Systems Services Branch.

[FR Doc. 2023–10405 Filed 5–15–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0033]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from 17 individuals for an exemption from the prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a commercial motor vehicle (CMV) to drive in interstate commerce. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: Comments must be received on or before June 15, 2023.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Docket No. FMCSA–2023–0033 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov/,* insert the docket number (FMCSA–2023–0033) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click on the ''Comment'' button. Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2023–0033), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *www.regulations.gov/docket?D=FMCSA-2023-0033.* Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, click the ''Comment'' button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2023–0033) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statutes also allow the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The 17 individuals listed in this notice have requested an exemption from the epilepsy and seizure disorders

prohibition in 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners (MEs) in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The criteria states that if an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the ME in consultation with the treating physician. Before certification is considered, it is suggested that a 6-month waiting period elapse from the time of the episode. Following the waiting period, it is suggested that the individual have a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, then the driver may be qualified.

In those individual cases where a driver has had a seizure or an episode of loss of consciousness that resulted from a known medical condition (*e.g.,* drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has recovered fully from that condition, has no existing residual complications, and is not taking anti-seizure medication.

Drivers who have a history of epilepsy/seizures, off anti-seizure medication, and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for a 5-year period or more.

As a result of MEs misinterpreting advisory criteria as regulation, numerous drivers have been prohibited from operating a CMV in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified ME based on the physical qualification standards and medical best practices.

On January 15, 2013, FMCSA announced in a notice of final disposition titled, ''Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders,'' (78 FR 3069), its decision to grant requests from 22 individuals for exemptions from the regulatory requirement that interstate CMV drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' Since that time, the Agency has published additional notices granting requests from individuals for exemptions from the regulatory requirement regarding epilepsy found in § 391.41(b)(8).

To be considered for an exemption from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), applicants must meet the criteria in the 2007 recommendations of the Agency's Medical Expert Panel (78 FR 3069).

III. Qualifications of Applicants

Gregory Alves

Gregory Alves is a 27-year-old class E license holder in Florida. They have a history of seizure disorder and have been seizure free since 2009. They take anti-seizure medication with the dosage and frequency remaining the same since 2017. Their physician states that they are supportive of Gregory Alves receiving an exemption.

Cadan Asterino

Cadan Asterino is a 22-year-old class D license holder in Arizona. They have a history of generalized epilepsy and have been seizure free since 2014. They take anti-seizure medication with the dosage and frequency remaining the same since 2014. Their physician states that they are supportive of Cadan Asterino receiving an exemption.

Kevin Atwood

Kevin Atwood is a 53-year-old class O license holder in Michigan. They have a history of oligodendroglioma and have been seizure free since September 2013. They take anti-seizure medication with the dosage and frequency remaining the same since March 2015. Their physician states that they are supportive of Kevin Atwood receiving an exemption.

Jon Brandy

Jon Brandy is a 56-year-old class A license holder in Arkansas. They have a history of seizures and have been seizure free since 2013. They take anti-seizure medication with the dosage and frequency remaining the same since 2013. Their physician states that they are supportive of Jon Brandy receiving an exemption.

Sean Duffy

Sean Duffy is a 21-year-old class D license holder in New Jersey. They have a history of seizure disorder and have been seizure free since November 2013. They take anti-seizure medication with the dosage and frequency remaining the same since November 2013. Their physician states that they are supportive of Sean Duffy receiving an exemption.

Arlen Graff

Arlen Graff is a 66-year-old class D license holder in Minnesota. They have a history of seizure disorder and have been seizure free since 2004. They take anti-seizure medication with the dosage and frequency remaining the same since March 2011. Their physician states that they are supportive of Arlen Graff receiving an exemption.

Cody Helmke

Cody Helmke is a 33-year-old class B commercial driver's license (CDL) holder in Ohio. They have a history of generalized epilepsy and have been seizure free since January 2014. They take anti-seizure medication with the dosage and frequency remaining the same since 2015. Their physician states that they are supportive of Cody Helmke receiving an exemption.

Brian Law

Brian Law is a 41-year-old class A CDL holder in Colorado. They have a history of seizures and have been seizure free since 2005. They take anti-seizure medication with the dosage and frequency remaining the same since 2015. Their physician states that they are supportive of Brian Law receiving an exemption.

Thomas Lepley

Thomas Lepley is a 34-year-old class A CDL holder in Pennsylvania. They have a history of provoked seizures and have been seizure free since May 2022. They take anti-seizure medication with the dosage and frequency remaining the same since May 2022. Their physician

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

states that they are supportive of Thomas Lepley receiving an exemption.

Daniel Lozier

Daniel Lozier is a 32-year-old class D license holder in Ohio. They have a history of epilepsy and have been seizure free since 2007. They take anti-seizure medication with the dosage and frequency remaining the same since 2014. Their physician states that they are supportive of Daniel Lozier receiving an exemption.

Kevin Moore

Kevin Moore is a 57-year-old enhanced driver license holder in Washington. They have a history of seizure disorder and have been seizure free since July 2000. They take anti-seizure medication with the dosage and frequency remaining the same since 2001. Their physician states that they are supportive of Kevin Moore receiving an exemption.

Jeffrey Raddatz

Jeffrey Raddatz is a 54-year-old class C license holder in Iowa. They have a history of complex partial epilepsy and have been seizure free since October 2014. They take anti-seizure medication with the dosage and frequency remaining the same since November 2014. Their physician states that they are supportive of Jeffrey Raddatz receiving an exemption.

Sergio Soto

Sergio Soto is a 56-year-old class A license holder in Arizona. They have a history of epilepsy and have been seizure free since September 2013. They take anti-seizure medication with the dosage and frequency remaining the same since September 2013. Their physician states that they are supportive of Sergio Soto receiving an exemption.

Caleb Stinson

Caleb Stinson is a 23-year-old class A CDL holder in Minnesota. They have a history of epilepsy and have been seizure free since March 2013. They take anti-seizure medication with the dosage and frequency remaining the same since 2017. Their physician states that they are supportive of Caleb Stinson receiving an exemption.

Anthony Whitt

Anthony Whitt is a 54-year-old class B CDL holder in Tennessee. They have a history of focal epilepsy and have been seizure free since 1990. They take anti-seizure medication with the dosage and frequency remaining the same since 2017. Their physician states that they are supportive of Anthony Whitt receiving an exemption.

Stephen Wilson

Stephen Wilson is a 41-year-old class C license holder in Pennsylvania. They have a history of partial complex seizures and have been seizure free since 2002. They take anti-seizure medication with the dosage and frequency remaining the same since 2018. Their physician states that they are supportive of Stephen Wilson receiving an exemption.

Jacob Woliver

Jacob Woliver is a 26-year-old class C license holder in California. They have a history of focal epilepsy and have been seizure free since December 2003. They take anti-seizure medication with the dosage and frequency remaining the same since 2008. Their physician states that they are supportive of Jacob Woliver receiving an exemption.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated under the DATES section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–10437 Filed 5–15–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[OCC Charter Number 702849]

Elberton Federal Savings and Loan Association, Elberton, Georgia; Approval of Conversion Application

Notice is hereby given that on May 9, 2023, the Office of the Comptroller of the Currency (OCC) approved the application of Elberton Federal Savings and Loan Association, Elberton, Georgia, to convert to the stock form of organization. Copies of the application are available on the OCC website at the FOIA Reading Room (*https://foia-pal.occ.gov/palMain.aspx*) under Mutual to Stock Conversion Applications. If you have any questions, please contact Licensing Activities at (202) 649–6260.

(Authority: 12 CFR 192.205.)

Dated: May 9, 2023.

By the Office of the Comptroller of the Currency.

Stephen A. Lybarger,

Deputy Comptroller for Licensing.

[FR Doc. 2023–10361 Filed 5–15–23; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request Relating to Probable or Prospective Reserves Safe Harbor

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning the probable or prospective reserves safe harbor.

DATES: Written comments should be received on or before July 17, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov*. Include OMB control number 1545–1861 or Probable or Prospective Reserves Safe Harbor in the subject line.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to Kerry Dennis at (202) 317–5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.L.Dennis@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Probable or Prospective Reserves Safe Harbor.

OMB Number: 1545–1861.

Revenue Procedure Number: 2004–19.

Abstract: Revenue Procedure 2004–19 requires a taxpayer to file an election statement with the Service if the taxpayer wants to use the safe harbor to estimate the taxpayers' oil and gas properties' probable or prospective reserves for purposes of computing cost depletion under § 611 of the Internal Revenue Code.

Current Actions: There are no changes to burden.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 50 hours.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 11, 2023.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2023–10391 Filed 5–15–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request Regarding Statement of Payments Received

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning statement of payments received.

DATES: Written comments should be received on or before July 17, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov*. Include OMB control number 1545–0364 or Statement of Payments Received in the subject line.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis at (202) 317–5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.L.Dennis@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Statement of Payments Received.

OMB Number: 1545–0364.

Form Number: 4669.

Abstract: Form 4669 is used by payors in specific situations to request relief from payment of certain required taxes. A payor who fails to withhold certain required taxes from a payee may be entitled to relief, under sections 3402(d), 3102(f)(3), 1463 or Regulations section 1.1474–4. To apply for relief, a payor must show that the payee reported the payments and paid the corresponding tax. To secure relief as described above, a payor must obtain a separate, completed Form 4669 from each payee for each year relief is requested.

Current Actions: There are no changes to burden.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 85,000.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 21,250 hours.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 11, 2023.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2023–10390 Filed 5–15–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Mandatory Survey of Foreign-Residents' Holdings of U.S. Securities

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of reporting requirements.

SUMMARY: By this Notice the Department of the Treasury is informing the public that it is conducting a mandatory survey of foreign-residents' holdings of U.S. securities, including selected money market instruments, as of June 30, 2023. This mandatory survey is conducted under the authority of the International Investment and Trade in Services Survey Act. This Notice constitutes legal notification to all United States persons (defined below) who meet the reporting requirements set forth in this Notice that they must respond to, and comply with, this survey. Additional copies of the reporting forms SHLA (2023) and instructions may be printed from the internet at: *https://home.treasury.gov/data/treasury-*

international-capital-tic-system-home-page/tic-forms-instructions/forms-shl.

SUPPLEMENTARY INFORMATION:

Definition: A U.S. person is any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency), who resides in the United States or is subject to the jurisdiction of the United States.

Who Must Report: This mandatory survey is conducted under the authority of the International Investment and Trade in Services Survey Act (22 U.S.C. 3101 *et seq.*) and in accordance with 31 CFR 129. The panel for this survey is based primarily on the level of foreign resident holdings of U.S. securities reported on the June 2019 benchmark survey of foreign resident holdings of U.S. securities, and on the Aggregate Holdings of Long-Term Securities by U.S. and Foreign Residents (TIC SLT) report as of December 2022, and will consist mostly of the largest reporters. Entities required to report will be contacted individually by the Federal Reserve Bank of New York. Entities not contacted by the Federal Reserve Bank of New York have no reporting responsibilities.

What to Report: This report will collect information on foreign resident holdings of U.S. securities, including equities, short-term debt securities (including selected money market instruments), and long-term debt securities.

How to Report: Copies of the survey forms and instructions, which contain complete information on reporting procedures and definitions, may be obtained at the website address given above in the Summary, or by contacting the survey staff of the Federal Reserve Bank of New York at (212) 720–6300 or (646) 720–6300, email: *SHLA.help@ny.frb.org.* The mailing address is: Federal Reserve Bank of New York, Data and Statistics Function, 6th Floor, 33 Liberty Street, New York, NY 10045–0001. Inquiries can also be made to the Federal Reserve Board of Governors, at (202) 452–3476, or to Dwight Wolkow, at (202) 923–0518, or by email: *comments2TIC@treasury.gov*

When to Report: Data should be submitted to the Federal Reserve Bank of New York, acting as fiscal agent for the Department of the Treasury, by August 31, 2023.

Paperwork Reduction Act Notice: This data collection has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and assigned control number 1505–0123. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. The estimated average annual burden associated with this collection of information is 486 hours per report for the largest custodians of securities, and 110 hours per report for the largest issuers of securities that have data to report and are not custodians. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Department of the Treasury, Office of International Affairs, Attention Administrator, International Portfolio Investment Data Reporting Systems, Room 1050, Washington, DC 20220, and to OMB, Attention Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Dwight D. Wolkow,

Administrator, International Portfolio Investment Data Reporting Systems.

[FR Doc. 2023–10350 Filed 5–15–23; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF VETERANS AFFAIRS

Notice of Request for Information on the Department of Veterans Affairs; Cytotechnologists Standard of Practice

AGENCY: Department of Veterans Affairs.

ACTION: Request for information.

SUMMARY: Cytotechnologists, also referred to as Cytologists, are certified laboratory professionals performing highly complex laboratory diagnostic testing on human specimens for diagnosis, treatment, or prevention of disease in the specialty of cytopathology. VA is requesting information to assist in developing a national standard of practice for VA Cytotechnologists. VA seeks comments on various topics to help inform VA's development of this national standard of practice.

DATES: Comments must be received on or before July 17, 2023.

ADDRESSES: Comments must be submitted through *www.regulations.gov.* Except as provided below, comments received before the close of the comment period will be available at *www.regulations.gov* for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the 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.* VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages 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. Any public comment received after the comment period's closing date is considered late and will not be considered in a potential rulemaking.

FOR FURTHER INFORMATION CONTACT: Ethan Kalett, Office of Regulations, Appeals and Policy (10BRAP), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, at 202–461–0500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

Authority

Chapters 73 and 74 of 38 U.S.C. and 38 U.S.C. 303 authorize the Secretary to regulate the professional activities of VA health care professions to make certain that VA's health care system provides safe and effective health care by qualified health care professionals to ensure the well-being of those Veterans who have borne the battle.

On November 12, 2020, VA published an interim final rule confirming that VA health care professionals may practice their health care profession consistent with the scope and requirements of their VA employment, notwithstanding any State license, registration, certification, or other requirements that unduly interfere with their practice. 38 CFR 17.419; 85 FR 71838. Specifically, this rulemaking confirmed VA's current practice of allowing VA health care professionals to deliver health care services in a State other than the health care professional's State of licensure, registration, certification, or other State requirement, thereby enhancing beneficiaries' access to critical VA health care services. The rulemaking also confirmed VA's authority to establish national standards of practice for its health care professionals that would standardize a health care

professional's practice in all VA medical facilities.

The rulemaking explained that a national standard of practice describes the tasks and duties that a VA health care professional practicing in the health care profession may perform and may be permitted to undertake. Having a national standard of practice means that individuals from the same VA health care profession may provide the same type of tasks and duties regardless of the VA medical facility where they are located or the State license, registration, certification, or other State requirement they hold. We emphasized in the rulemaking and reiterate here that VA will determine, on an individual basis, that a health care professional has the necessary education, training and skills to perform the tasks and duties detailed in the national standard of practice and will only be able to perform such tasks and duties after they have been incorporated into the individual's privileges, scope of practice, or functional statement. The rulemaking explicitly did not create any such national standards and directed that all national standards of practice would be subsequently created via policy.

Need for National Standards of Practice

As the Nation's largest integrated health care system, it is critical that VA develops national standards of practice to ensure beneficiaries receive the same high-quality care regardless of where they enter the system and to ensure that VA health care professionals can efficiently meet the needs of beneficiaries when practicing within the scope of their VA employment. National standards are designed to increase beneficiaries' access to safe and effective health care, thereby improving health outcomes. The importance of this initiative has been underscored by the Coronavirus Disease 2019 (COVID–19) pandemic. With an increased need for mobility in our workforce, including through VA's Disaster Emergency Medical Personnel System, creating a uniform standard of practice better supports VA health care professionals who already frequently practice across State lines. In addition, the development of national standards of practice aligns with VA's long-term deployment of a new electronic health record (EHR). National standards of practice are critical for optimal EHR implementation to enable the specific roles for each health care profession in EHR to be consistent across the Veterans Health Administration (VHA) and to support increased interoperability between VA and the Department of Defense (DoD). DoD has historically standardized practice for certain health care professionals, and VHA closely partnered with DoD to learn from their experience.

Process To Develop National Standards of Practice

Consistent with 38 CFR 17.419, VA is developing national standards of practice through policy. There will be one overarching national standard of practice directive that will generally describe VHA's policy and have each individual national standard of practice as an appendix to the directive. The directive and all appendices will be accessible on VHA Publications website at: *https://vaww.va.gov/vhapublications/* (internal) and *https://www.va.gov/vhapublications/* (external) once published.

To develop these national standards, VA is using a robust, interactive process that is consistent with the guidance outlined in Executive Order (E.O.) 13132 to preempt State law. The process includes consultation with internal and external stakeholders, including State licensing boards, VA employees, professional associations, Veterans Service Organizations, labor partners and others. For each identified VA occupation, a workgroup comprised of health care professionals conducts State variance research to identify internal best practices that may not be authorized under every State license, certification, or registration, but would enhance the practice and efficiency of the profession throughout the agency. The workgroup is comprised of VA employees who are health care professionals in the identified occupation; they may consult with internal stakeholders at any point throughout the process. If a best practice is identified that is not currently authorized by every State, the workgroup determines what education, training and skills are required to perform such task or duty. The workgroup then drafts a proposed VA national standard of practice using the data gathered during the State variance research and incorporates internal stakeholder feedback to date.

The proposed national standard of practice is internally reviewed, to include by an interdisciplinary workgroup consisting of representatives from Quality Management; Field Chief of Staff; Academic Affiliates; Field Chief Nursing Officer; Ethics; Workforce Management and Consulting; Surgery; Credentialing and Privileging; Field Chief Medical Office; and EHR Modernization.

Externally, the proposed national standard of practice is provided to our partners in DoD. In addition, VA labor partners are engaged informally as part of a pre-decisional collaboration. Consistent with E.O. 13132, a letter is sent to each State board and certifying organization that includes the proposed national standard and an opportunity to further discuss the national standard with VA. After the States and certifying organization have received notification, the proposed national standard of practice is published to the **Federal Register** for 60 days to obtain feedback from the public, including professional associations and unions. At the same time, the proposed national standard is published on an internal VA site to obtain feedback from VA employees. Feedback from State boards, professional associations, unions, VA employees and any other person or organization who informally provides comments through the **Federal Register** will be reviewed. VA will make appropriate revisions in light of the comments, including those that present evidence-based practice and alternatives that help VA meet our mission and goals, and that are better for Veterans or VA health care professionals. We will publish a collective response to all comments at *https://www.va.gov/standardsofpractice.*

After the national standard of practice is finalized, approved and published in VHA policy, VA will implement the tasks and duties authorized by that national standard of practice. Any tasks or duties included in the national standard will be incorporated into an individual health care professional's privileges, scope of practice, or functional statement following any training and education necessary for the health care professional to perform those functions. Implementation of the national standard of practice may be phased in across all medical facilities, with limited exemptions for health care professionals as needed.

National Standard for Cytotechnologists

The proposed format for national standards of practice when there are State licenses and a national certification is as follows. The first paragraph provides general information about the profession and what the health care professionals can do. The second paragraph references the education and certification needed to practice this profession at VA. The third paragraph confirms that this profession follows the standard set by the national certifying body. A final statement explains that while VA only requires a

national certification, some States also require licensure for this profession. The standard includes information on which States offer an exemption for Federal employees and where VA will preempt State laws, if applicable.

We note that the proposed standards of practice do not contain an exhaustive list of every task and duty that each VA health care professional can perform. Rather, it is designed to highlight whether there are any areas of variance in how this profession can practice across States and how this profession will be able to practice within VA notwithstanding their State license, certification, registration and other requirements.

VA qualification standards require Cytotechnologists to have an active, current, full and unrestricted Cytologist (CT) or Specialist in Cytology (SCT) certification from the American Society for Clinical Pathology. VA reviewed whether there are any alternative registrations, certifications, or State requirements that could be required for a Cytotechnologist and found that nine States require a license. Of those, six States exempt Federal employees from their State license requirements. The standards set forth in the licensure requirements for all nine States are consistent with what is permitted under the national certifications. Therefore, there is no variance in how Cytotechnologists practice in any State.

VA proposes to adopt a standard of practice consistent with the national certifications; therefore, VA Cytotechnologists will continue to follow the same standard as set by their national certifications. The standard for the certifications can be found here: *https://www.ascp.org/content/docs/default-source/policy-statements/ascp-pdft-pp-personnel-standards.pdf?sfvrsn=2.*

Because the practice of Cytotechnologists is not changing, there will be no impact on the practice of this occupation when this national standard of practice is implemented.

Proposed National Standard of Practice for Cytotechnologist

Cytotechnologists are certified laboratory professionals performing highly complex laboratory diagnostic testing on human specimens for diagnosis, treatment, or prevention of disease in the specialty of cytopathology. Cytotechnologists are responsible for reporting the microscopic interpretation of normal gynecological cytology smear tests used to detect cervical cancer; providing preliminary interpretation of specimens from other body sites; and collaborating with pathologists to diagnose benign and infectious processes, precancerous lesions and malignant diseases.

Cytotechnologists in VA possess the education and certification required by VA qualification standards, as more specifically described in VA Handbook 5005, Staffing, dated February 4, 2022.

This national standard of practice confirms that Cytotechnologists practice according to the CT or SCT standards from the American Society for Clinical Pathology (ASCP) available at: *www.ascp.org.* As of March 2022, all Cytotechnologists in VA follow this national certification.

Although VA only requires a certification, nine States require a State license in order to practice as a Cytotechnologist in that State: California, Florida, Hawaii, Louisiana, Montana, Nevada, New York, Tennessee and West Virginia. Of these, the following States exempt Federal employees from their State license requirements: Florida, Louisiana, Montana, New York, Tennessee and West Virginia. As of October 2022, there is no variance in how VA Cytotechnologists practice in any State.

Request for Information

1. Are there any required trainings for the aforementioned practices that we should consider?

2. Are there any factors that would inhibit or delay the implementation of the aforementioned practices for VA health care professionals in any States?

3. Is there any variance in practice that we have not listed?

4. What should we consider when preempting conflicting State laws, regulations, or requirements regarding supervision of individuals working toward obtaining their license or unlicensed personnel?

5. Is there anything else you would like to share with us about this national standard of practice?

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on April 14, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2023–10426 Filed 5–15–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Notice of Request for Information on the Department of Veterans Affairs; Histopathology Technologists Standard of Practice

AGENCY: Department of Veterans Affairs.

ACTION: Request for information.

SUMMARY: The Department of Veterans Affairs (VA) is requesting information to assist in developing a national standard of practice for VA Histopathology Technologists. VA seeks comments on various topics to help inform VA's development of this national standard of practice.

DATES: Comments must be received on or before July 17, 2023.

ADDRESSES: Comments must be submitted through *www.regulations.gov.* Except as provided below, comments received before the close of the comment period will be available at *www.regulations.gov* for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the 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.* VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages 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. Any public comment received after the comment period's closing date is considered late and will not be considered in a potential rulemaking.

FOR FURTHER INFORMATION CONTACT: Ethan Kalett, Office of Regulations, Appeals and Policy (10BRAP), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, 202–461–0500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

Authority

Chapters 73 and 74 of 38 U.S.C. and 38 U.S.C. 303 authorize the Secretary to regulate the professional activities of VA health care professions to make certain that VA's health care system provides safe and effective health care by qualified health care professionals to ensure the well-being of those Veterans who have borne the battle.

On November 12, 2020, VA published an interim final rule confirming that VA health care professionals may practice their health care profession consistent with the scope and requirements of their VA employment, notwithstanding any state license, registration, certification or other requirements that unduly interfere with their practice. 38 CFR 17.419; 85 FR 71838. Specifically, this rulemaking confirmed VA's current practice of allowing VA health care professionals to deliver health care services in a state other than the health care professional's state of licensure, registration, certification or other state requirement, thereby enhancing beneficiaries' access to critical VA health care services. The rulemaking also confirmed VA's authority to establish national standards of practice for its health care professionals which would standardize a health care professional's practice in all VA medical facilities.

The rulemaking explained that a national standard of practice describes the tasks and duties that a VA health care professional practicing in the health care profession may perform and may be permitted to undertake. Having a national standard of practice means that individuals from the same VA health care profession may provide the same type of tasks and duties regardless of the VA medical facility where they are located or the state license, registration, certification or other state requirement they hold. We emphasized in the rulemaking and reiterate here that VA will determine, on an individual basis, that a health care professional has the necessary education, training and skills to perform the tasks and duties detailed in the national standard of practice and will only be able to perform such tasks and duties after they have been incorporated into the individual's privileges, scope of practice or functional statement. The rulemaking explicitly did not create any such national standards and directed that all national standards of practice would be subsequently created via policy.

Need for National Standards of Practice

As the Nation's largest integrated health care system, it is critical that VA develop national standards of practice to ensure beneficiaries receive the same high-quality care regardless of where they enter the system and to ensure that VA health care professionals can efficiently meet the needs of beneficiaries when practicing within the scope of their VA employment. National standards are designed to increase beneficiaries' access to safe and effective health care, thereby improving health outcomes. The importance of this initiative has been underscored by the Coronavirus Disease, 2019 pandemic. With an increased need for mobility in our workforce, including through VA's Disaster Emergency Medical Personnel System, creating a uniform standard of practice better supports VA health care professionals who already frequently practice across state lines. In addition, the development of national standards of practice aligns with VA's long-term deployment of a new electronic health record (EHR). National standards of practice are critical for optimal EHR implementation to enable the specific roles for each health care profession in EHR to be consistent across the Veterans Health Administration (VHA) and to support increased interoperability between VA and the Department of Defense (DoD). DoD has historically standardized practice for certain health care professionals, and VHA closely partnered with DoD to learn from their experience.

Process To Develop National Standards of Practice

Consistent with 38 CFR 17.419, VA is developing national standards of practice via policy. There will be one overarching national standard of practice directive that will generally describe VHA policy and have each individual national standard of practice as an appendix to the directive. The directive and all appendices will be accessible on the VHA Publications website at: *https://vaww.va.gov/vhapublications/* (internal) and *https://www.va.gov/vhapublications/* (external) once published.

To develop these national standards, VA is using a robust interactive process that is consistent with the guidance outlined in Executive Order (E.O.) 13132, Federalism, to preempt state law. The process includes consultation with internal and external stakeholders, including state licensing boards, VA employees, professional associations, Veterans Service Organizations, labor partners and others. For each identified VA occupation, a workgroup comprised of health care professionals conducts state variance research to identify internal best practices that may not be authorized under every state license, certification or registration, but would enhance the practice and efficiency of the profession throughout the agency. The workgroup is comprised of VA employees who are health care professionals in the identified occupation, and they may consult with internal stakeholders at any point throughout the process. If a best practice is identified that is not currently authorized by every state, the workgroup determines what education, training and skills are required to perform such a task or duty. The workgroup then drafts a proposed VA national standard of practice using the data gathered during the state variance research and incorporates internal stakeholder feedback to date.

The proposed national standard of practice is internally reviewed, and which includes review by an interdisciplinary workgroup consisting of representatives from Quality Management; Field Chief of Staff; Academic Affiliates; Field Chief Nursing Officer; Ethics; Workforce Management and Consulting; Surgery; Credentialing and Privileging; Field Chief Medical Office; and EHR Modernization.

Externally, the proposed national standard of practice is provided to our partners in DoD. In addition, VA labor partners are engaged informally as part of a pre-decisional collaboration. Consistent with E.O. 13132, a letter is sent to each state board and certifying organization that includes the proposed national standard and an opportunity to further discuss the national standard with VA. After the states and certifying organization have received notification, the proposed national standard of practice is published to the **Federal Register** for 60 days to obtain feedback from the public, including professional associations and unions. At the same time, the proposed national standard is published on an internal VA site to obtain feedback from VA employees. Feedback from state boards, professional associations, unions, VA employees and any other person or organization who informally provides comments via the **Federal Register** will be reviewed. VA will make appropriate revisions in light of the comments, including those that present evidence-based practice and alternatives that help VA meet its mission and goals, and that are better for Veterans or VA health care professionals. We will publish a collective response to all comments at *https://www.va.gov/standardsofpractice.*

After the national standard of practice is finalized, approved, and published in VHA policy, VA will implement the tasks and duties authorized by that national standard of practice. Any tasks or duties included in the national standard will be incorporated into an individual health care professional's privileges, scope of practice or functional statement following any training and education necessary for the health care professional to perform those functions. Implementation of the

national standard of practice may be phased in across all medical facilities, with limited exemptions for health care professionals as needed.

National Standard for Histopathology Technologists

The proposed format for national standards of practice when there are state licenses and a national certification is as follows: The first paragraph provides general information about the profession and what the health care professionals can do. The second paragraph references the education and certification needed to practice this profession at VA. The third paragraph confirms that this profession follows the standard set by the national certifying body. A final statement explains that while VA only requires a national certification, some states also require licensure for this profession. The standard includes information on which states offer an exemption for Federal employees and where VA will preempt state laws, if applicable.

We note that the proposed standards of practice do not contain an exhaustive list of every task and duty that each VA health care professional can perform. Rather, it is designed to highlight whether there are any areas of variance in how this profession can practice across states and how this profession will be able to practice within VA notwithstanding their state license, certification, registration and other requirements.

Histopathology technologists, also referred to as histotechnologists, are highly skilled medical laboratory professionals who are responsible for the preanalytical processing of human tissue and body fluid specimens. VA qualification standards require histopathology technologists to have an active, current, full and unrestricted histotechnologist (HTL) certification from the American Society for Clinical Pathology. VA reviewed whether there are any alternative registrations, certifications or state requirements that could be required for histopathology technologists and found that eight states require a license to practice as a histopathology technologist in that state. Of those, six states exempt Federal employees from their state license requirements. The standards set forth in the licensure requirements for all eight states are consistent with what is permitted under the national certification. Therefore, there is no variance in how histopathology technologists practice in any State.

VA proposes to adopt a standard of practice consistent with the national certification. Therefore, VA histopathology technologists will continue to follow the same standard as set by their national certification. The standard for the certification can be found here: *https://www.ascp.org/content/docs/default-source/policy-statements/ascp-pdft-pp-personnel-standards.pdf?sfvrsn=2.*

Because the practice of Histopathology Technologists is not changing, there will be no impact on the practice of this occupation when this national standard of practice is implemented.

Proposed National Standard of Practice for Histopathology Technologist

Histopathology technologists are highly skilled medical laboratory professionals who are responsible for the preanalytical processing of human tissue and body fluid specimens. Through the utilization of a broad range of specialized techniques and procedures, both manual and automated, histopathology technologists preserve and prepare specimens for pathologist review, interpretation, evaluation and diagnosis of patient conditions or disease.

Histopathology technologists in VA possess the education and certification required by VA qualification standards, as more specifically described in VA Handbook 5005, Staffing, dated February 4, 2022.

This national standard of practice confirms that histopathology technologists practice according to the HTL certification standards from the American Society for Clinical Pathology (ASCP), available at: *www.ascp.org.* As of March 2022, all histopathology technologists in VA follow this national certification.

Although VA only requires a certification, the following eight States require a State license in order to practice as a histopathologist in that State: Florida, Louisiana, Montana, Nevada, New York, Puerto Rico, Tennessee, and West Virginia. Of these, the following States exempt Federal employees from their State license requirements: Florida, Louisiana, Montana, New York, Tennessee and West Virginia. As of October 2022, there is no variance in how VA Histopathology Technologists practice in any State.

Request for Information

1. Are there any required trainings for the aforementioned practices that we should consider?

2. Are there any factors that would inhibit or delay the implementation of the aforementioned practices for VA health care professionals in any States?

3. Is there any variance in practice that we have not listed?

4. What should we consider when preempting conflicting State laws, regulations, or requirements regarding supervision of individuals working toward obtaining their license or unlicensed personnel?

5. Is there anything else you would like to share with us about this national standard of practice?

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on April 28, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2023–10424 Filed 5–15–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; Matching Program

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice of a new matching program.

SUMMARY: This re-established Computer Matching Agreement (CMA) sets forth the terms, conditions, and safeguards under which the Internal Revenue Service (IRS) will disclose return information, relating to unearned income, to the Department of Veterans Affairs (VA), Veterans Benefits Administration (VBA) for the Disclosure of Information to Federal, State and Local Agencies (DIFSLA). The purpose of this CMA is to make available to VBA certain return information needed to determine eligibility for, and amount of benefits for, VBA applicants and beneficiaries of needs-based benefits, and to adjust income-dependent benefit payments, as prescribed by law. Currently, the most cost effective and efficient way to verify annual income of applicants, and recipients of these benefits, is through a computer match.

DATES: Comments on this matching program must be received no later than June 15, 2023. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by VA, the new agreement will become effective a

minimum of 30 days after date of publication in the **Federal Register**. If VA receives public comments, VA shall review the comments to determine whether any changes to the notice are necessary. This matching program will be valid for 18 months from the effective date of this notice.

ADDRESSES: Comments may be submitted through *www.Regulations.gov* or mailed to VA Privacy Service, 810 Vermont Avenue NW, (005X6F), Washington, DC 20420. Comments should indicate that they are submitted in response to IRS, DIFSLA CMA. Comments received will be available at *regulations.gov* for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT: Gary Hodge, Lead Program Analyst, Pension and Fiduciary Service (21P), Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420, 202–461–8394.

SUPPLEMENTARY INFORMATION: CMA between VA and IRS DIFSLA, expires June 30, 2023. VBA has a legal obligation to reduce the amount of pension and of parents' dependency and indemnity compensation by the amount of annual income received by the VBA beneficiary. VA will use this information to verify the income information submitted by beneficiaries in VA's needs-based benefit programs and adjust VA benefit payments as prescribed by law. By comparing the information received through the matching program between VBA and IRS, VBA will be able to timely and accurately adjust benefit amounts. The match information will help VBA minimize overpayments and deter fraud and abuse. The legal authority to conduct this match is 38 U.S.C. 5106, which requires any Federal department or agency to provide VA such information as VA requests for the purposes of determining eligibility for benefits or verifying other information with respect to payment of benefits. The VA records involved in the match are in ''Compensation, Pension, Education, and Vocational and Rehabilitation and Employment Records—VA (58 VA 21/22/28),'' a system of records which was first published at 41 FR 9294 (March 3, 1976), amended and republished in its entirety at 77 FR 42593 (July 19, 2012). The IRS records consist of information from the system records identified as will extract return information with respect to unearned income of the VBA applicant or beneficiary and (when applicable) of such individual's spouse from the Information Return Master File (IRMF), Treasury/IRS 22.061, at 80 FR 54081– 082 (September 8, 2015). In accordance with the Privacy Act, 5 U.S.C. 552a(o)(2) and (r), copies of the agreement are being sent to both Houses of Congress and to the Office of Management and Budget. This notice is provided in accordance with the provisions of Privacy Act of 1974 as amended by Public Law 100–503.

Participating Agencies: The Internal Revenue Service (IRS) and Department of Veterans Affairs (VA), Veterans Benefits Administration (VBA).

Authority for Conducting the Matching Program: The Internal Revenue Code (IRC), 26 U.S.C. 6103(l)(7)(B), authorizes the IRS to disclose return information with respect to unearned income to VBA.

Purpose(s): To provide VBA with certain IRS return information needed to determine eligibility for and amount of benefits for VBA applicants and beneficiaries of needs-based benefits and to adjust income-dependent benefit payments as prescribed by law.

Categories of Individuals: Veterans and beneficiaries who apply for VA income benefits.

Categories of Records: VBA will furnish the IRS with records in accordance with the current IRS Publication 3373, DIFSLA Handbook. The requests from VBA will include: The Social Security Number (SSN) and name Control (first four characters of the surname) for each individual for whom unearned income information is requested. IRS will provide a response record for each individual identified by VBA. The total number of records will be equal to or greater than the number of records submitted by VBA. In some instances, an individual may have more than one record on file. When there is a match of individual SSN and name control, IRS will disclose the following to VBA: Payee account number; payee name and mailing address; payee Taxpayer Identification Numbers (TIN); payer name and address; payer TIN; and income type and amount.

System(s) of Records: VBA records involved in this match are in ''VA Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records—VA'' (58 VA 21/22/28), a system of records that was first published at 41 FR 9294 (March 3, 1976), amended and republished in its entirety at 77 FR 42593 (July 19, 2012). IRS will extract return information with respect to unearned income of the VBA applicant or beneficiary and (when applicable) of such individual's spouse from the IRMF, Treasury/IRS 22.061, as published at 80 FR 54081–082 (September 8, 2015).

Signing Authority

The Senior Agency Official for Privacy, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John Oswalt, Chief Privacy Officer and Chair of the Data Integrity Board, Department of Veterans Affairs approved this document on May 4, 2023 for publication.

Dated: May 10, 2023.

Amy L. Rose,

Program Analyst, VA Privacy Service, Office of Information Security, Office of Information and Technology, Department of Veterans Affairs.

[FR Doc. 2023–10367 Filed 5–15–23; 8:45 am]

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Part II

Department of Homeland Security

8 CFR Part 208

Department of Justice

Executive Office for Immigration Review

8 CFR Parts 1003 and 1208
Circumvention of Lawful Pathways; Final Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[CIS No. 2744–23; Docket No: USCIS 2022–0016]

RIN 1615–AC83

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1208

[A.G. Order No. 5660–2023]

RIN 1125–AB26

Circumvention of Lawful Pathways

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule; request for comments on expanded applicability in maritime context.

SUMMARY: The Department of Homeland Security (''DHS'') and the Department of Justice (''DOJ'') are issuing a final rule in anticipation of a potential surge of migration at the southwest border (''SWB'') of the United States following the termination of the Centers for Disease Control and Prevention's (''CDC'') public health Order. The rule encourages migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in another country through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain. The rule does so by introducing a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel. In the absence of such a measure, which would apply only to those who enter at the southwest land border or adjacent coastal borders during a limited, specified date range, the number of migrants expected to travel without authorization to the United States would be expected to increase significantly, to a level that risks undermining the Departments' continued ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system, in the face of exceptionally challenging circumstances. Coupled with an expansion of lawful, safe, and orderly pathways into the United States, the Departments expect the rule to lead to a reduction in the number of migrants who seek to cross the SWB without authorization to enter, thereby reducing the reliance by migrants on dangerous human smuggling networks, protecting against extreme overcrowding in border facilities, and helping to ensure that the processing of migrants seeking protection in the United States is done in an effective, humane, and efficient manner. In addition, the Departments are requesting comment on whether applicability of the rebuttable presumption should be extended to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at a maritime border.

DATES:

Effective date: This rule is effective on May 11, 2023.

Comment period for solicited comments: Comments on expanded applicability in maritime context identified in Section V of this preamble must be submitted on or before June 15, 2023. The electronic Federal Docket Management System will accept comments before midnight eastern time at the end of that day.

ADDRESSES:

Docket: To view comments on the proposed rule that preceded this rule, search for docket number USCIS 2022–0016 on the Federal eRulemaking Portal at *https://www.regulations.gov.*

Comment period for solicited additional comments: You may submit comments on the specific issue identified in Section V of this preamble via the electronic Federal Docket Management System at *https://www.regulations.gov,* to DHS Docket Number USCIS 2022–0016. Follow the website instructions for submitting comments. Comments submitted in a manner other than the one listed above, including emails or letters sent to the Departments' officials, will not be considered comments on the rulemaking and may not receive a response from the Departments. Please note that the Departments cannot accept any comments that are hand-delivered or couriered. In addition, the Departments cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs or USB drives. The Departments are not accepting mailed comments at this time. If you cannot submit your comment by using *https://www.regulations.gov,* please contact the Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 (not a toll-free call) for alternate instructions.

FOR FURTHER INFORMATION CONTACT:

For DHS: Daniel Delgado, Director, Border and Immigration Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security; telephone (202) 447–3459 (not a toll-free call).

For Executive Office for Immigration Review (''EOIR''): Lauren Alder Reid, Assistant Director, Office of Policy, EOIR, Department of Justice, 5107 Leesburg Pike, Falls Church, VA 22041; telephone (703) 305–0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to submit comments on the specific issue identified in Section V of this preamble by submitting relevant written data, views, or arguments. To provide the most assistance to the Departments, comments should explain the reason for any recommendation and include data, information, or authority that supports the recommended course of action. Comments must be submitted in English, or an English translation must be provided. Comments submitted in a manner other than those listed above, including emails or letters sent to the Departments' officials, will not be considered comments on the rulemaking and may not receive a response from the Departments.

Instructions: If you submit a comment, you must submit it to DHS Docket Number USCIS 2022–0016. All submissions may be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to the Departments. The Departments may withhold information provided in comments from public viewing that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at *https://www.regulations.gov.*

II. Executive Summary

A. Purpose of Action

Economic and political instability around the world is fueling the highest

levels of migration since World War II, including in the Western Hemisphere. Analysis by the DHS Office of Immigration Statistics (''OIS'') found that even while CDC's Title 42 public health Order[1] has been in place, encounters at our SWB[2]—referring to the number of times U.S. officials encounter noncitizens[3] attempting to cross the SWB of the United States without authorization to do so—reached an all-time high in 2022, driven in large part by an unprecedented exodus of migrants at different times from countries such as Brazil, Colombia, Cuba, Ecuador, Haiti, Nicaragua, Peru, and Venezuela.[4] The U.S. Border Patrol (''USBP'') completed 221,710 encounters between ports of entry in December 2022, second only to May 2022 (224,371 encounters) for the most monthly encounters since at least Fiscal Year (''FY'') 2000 (the period for which detailed records are available), and very likely the most ever.[5] Daily encounters between Ports of Entry (''POEs'') averaged 7,152 for December 2022 and exceeded 8,000 per day 11 times during the month, as compared to average daily encounters of 1,977 for all of 2000–2019 and average daily encounters of 1,265 in the immediate pre-pandemic period, 2014–2019.[6] Smuggling networks enable and exploit this unprecedented movement of people, putting migrants' lives at risk for smugglers' financial gain.[7] Meanwhile, the current asylum system—in which a high number of migrants are initially determined eligible to pursue their claims, even though most ultimately are not granted asylum in the subsequent EOIR removal proceedings[8]—has contributed to a growing backlog of cases awaiting review by asylum officers (''AOs'') and immigration judges (''IJs''). The practical result of this growing backlog is that those with meritorious claims may have to wait years for their claims to be granted, while individuals who are ultimately denied protection may spend years in the United States before being issued a final order of removal.[9] As the demographics of border encounters have shifted in recent years to include larger numbers of non-Mexicans—who are far more likely to assert asylum claims—and as the time required to process and remove noncitizens ineligible for protection has grown (during which individuals may become eligible to apply for employment authorization), the deterrent effect of apprehending noncitizens at the SWB has become more limited.[10]

While the CDC's Title 42 public health Order has been in effect, migrants who do not have proper travel documents have generally not been processed into the United States; they instead have been expelled to Mexico or to their home countries under the Order's authority without being processed under the authorities set forth in Title 8 of the United States Code, which includes the Immigration and Nationality Act (''INA'' or ''the Act''). When the Order is lifted, however, the United States Government will process all migrants into the United States under Title 8 authorities, as required by statute. At that time, the number of migrants seeking to cross the SWB without authorization is expected to increase significantly, unless other policy changes are made. Such challenges were evident in the days following the November 15, 2022, court decision that, had it not been stayed on December 19, 2022, would have resulted in the lifting of the Title 42 public health Order effective December 21, 2022.[11] Leading up to the expected termination date, migrants gathered in various parts of Mexico, including along the SWB, waiting to cross the border once the Title 42 public health Order was lifted.[12] According to internal Government sources, smugglers were also expanding their messaging and recruitment efforts, using the expected lifting of the Title 42 public health Order to claim that the border was open, thereby seeking to persuade would-be migrants to participate in expensive and dangerous human smuggling schemes. In the weeks between the November 2022 announcement that the Title 42 public health Order would be lifted, and the December 19, 2022, stay order that kept the Title 42 public health Order in place, encounter rates jumped from an average of just under 7,700 per week (early November) to nearly 8,800 per

[1] *See* Public Health Determination and Order Regarding Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 87 FR 19941, 19941–42 (Apr. 6, 2022) (describing the CDC's recent Title 42 public health Orders, which ''suspend[ ] the right to introduce certain persons into the United States from countries or places where the quarantinable communicable disease exists in order to protect the public health from an increased risk of the introduction of COVID–19'').

[2] United States Government sources refer to the U.S. border with Mexico by various terms, including ''SWB,'' ''the southern border,'' ''U.S.-Mexico border,'' or ''the land border with Mexico.'' In some instances, these differences can be substantive, referring only to portions of the border, while in others they simply reflect different word choices. The ''southern border'' is both a land and maritime border extending from beyond California to the west to beyond Florida to the east. This rule applies along the entirety of the U.S. land border with Mexico, referred to in the regulatory text as the ''southwest land border,'' but the Departments use different terms in the preamble to describe the border. This is in large part to reflect the source material supporting the rule, but the Departments believe that the factual circumstances described in the preamble call for applying the rule across the entirety of the U.S. land border with Mexico, referred to throughout as the ''SWB.'' As discussed in greater detail below, the Departments believe that the factual circumstances described in this preamble call for applying the rule to coastal borders adjacent to that land border as well; accordingly, this final rule applies to those who enter the United States from Mexico, whether at the southwest land border or adjacent coastal borders.

[3] For purposes of this discussion, the Departments use the term ''noncitizen'' to be synonymous with the term ''alien'' as it is used in the Immigration and Nationality Act. *See* INA 101(a)(3), 8 U.S.C. 1101(a)(3); *Barton* v. *Barr,* 140 S. Ct. 1442, 1446 n.2 (2020).

[4] OIS analysis of OIS Persist Dataset based on data through March 31, 2023; OIS analysis of historic U.S. Border Patrol data.

[5] OIS analysis of OIS Production data based on data through March 31, 2023.

[6] OIS analysis of OIS Production data for fiscal year (''FY'') 2000–March 2023 and OIS Yearbook data for FY 1925–FY 1999. As discussed further below, daily encounters between ports of entry fell sharply in January 2023 following the launch of the Cuba, Haiti, and Nicaragua parole processes, and daily encounters between ports of entry at the SWB averaged just over 5,200 a day the 30 days ending April 10, 2023. OIS analysis of Unified Immigration Portal (UIP) data pulled on April 13, 2023.

[7] Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business,* N.Y. Times, July 25, 2022, *https://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html.*

[8] *See* EOIR, Executive Office for Immigration Review Adjudication Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim (Jan. 16, 2023), *https://www.justice.gov/eoir/page/file/1062976/download.* The EOIR adjudication outcome statistics report on the total number of cases originating with credible fear claims resolved on any ground in a FY, without regard to whether an asylum claim was adjudicated. The asylum grant rate is a percentage of that total number of cases.

[9] OIS analysis of EOIR data as of March 31, 2023.

[10] For noncitizens encountered at the SWB in FY 2014–FY 2019 who were placed in expedited removal, nearly 6 percent of Mexican nationals made fear claims that were referred to U.S. Citizenship and Immigration Services for adjudication, compared to nearly 57 percent of people from Northern Central America (*i.e.,* El Salvador, Guatemala, and Honduras), and just over 90 percent of all other nationalities. OIS analysis of Enforcement Lifecycle data as of December 31, 2022. Of note, according to OIS analysis of historic EOIR and CBP data, there is a clear correlation since FY 2000 between the increasing time it takes to complete immigration proceedings, which results in a lower share of noncitizens being removed, and the growth in non-Mexican encounters at the SWB. Both trends accelerated in the 2010s, as non-Mexicans became the majority of border encounters, and they have accelerated further since FY 2021, as people from countries other than Mexico and Northern Central America now account for the largest numbers of border encounters.

[11] *See Huisha-Huisha* v. *Mayorkas,* No. 21–100, 2022 WL 16948610 (D.D.C. Nov. 15, 2022), *cert. and stay granted, Arizona* v. *Mayorkas,* 143 S. Ct. 478 (2022).

[12] *See, e.g.,* Leila Miller, *Asylum Seekers Are Gathering at the U.S.-Mexico Border. This Is Why,* L.A. Times, Dec. 23, 2022, *https://www.latimes.com/world-nation/story/2022-12-23/la-fg-mexico-title-42-confusion.*

week (mid-December), a change not predicted by normal seasonal effects.[13]

While a number of factors make it particularly difficult to precisely project the numbers of migrants who would seek to cross the SWB without authorization or present at a U.S. POE without documents sufficient for admission after the lifting of the Title 42 public health Order, DHS encounter projections and planning models from early April suggest that encounters could rise to 11,000 per day, absent policy changes and absent a viable mechanism for removing Cuban, Haitian, Nicaraguan, and Venezuelan (''CHNV'') nationals who do not have a valid protection claim.[14] As discussed in greater detail below, data indicate that recently announced enforcement processes, as applied to CHNV nationals, which couple new parole processes with prompt returns of those who attempt to cross the SWB without utilizing these processes, are effectively deterring irregular migration[15] from those countries to the United States, thus yielding a substantial decrease in encounter numbers for nationals of CHNV countries.[16]

However, DHS will no longer have a means to promptly expel migrants without a legal basis to stay in the United States following the termination of the Title 42 public health Order, which means that an important disincentive associated with the parole processes would no longer be present. In addition, there are a number of factors that could contribute to these gains being erased after the lifting of the Title 42 public health Order, including the presence of several large diaspora populations in Mexico and elsewhere in the hemisphere, the unprecedented recent growth in migration from countries of origin not previously typical, the already large number of migrants in proximity to the SWB, and the general uncertainty surrounding the expected impact of the termination of the Title 42 public health Order on the movement of migrants. Thus, the high end of the estimated encounter rate remains a possibility for which the Departments need to prepare. In the absence of the policy changes included in the rule, most non-Mexicans processed for expedited removal under Title 8 would likely establish credible fear and remain in the United States for the foreseeable future despite the fact that many of them will not ultimately be granted asylum,[17] a scenario that would likely incentivize an increasing number of migrants to the United States and further increase the likelihood of sustained, high encounter rates.

A sustained, high encounter rate risks overwhelming the Departments' ability to effectively process, detain, and remove, as appropriate, the migrants encountered. This would put an enormous strain on already strained resources, risk overcrowding in already crowded USBP stations and border POEs in ways that pose significant health and safety concerns, and create a situation in which large numbers of migrants—only a small proportion of whom are likely to be granted asylum—are subject to exploitation and risks to their lives by the networks that support their movements north.

In response to this urgent and extreme situation, the Departments are issuing a rule that—

- incentivizes migrants to use lawful, safe, and orderly means for noncitizens to enter the United States to seek asylum and other forms of protection;
- provides core protections for noncitizens who would be threatened with persecution or torture in other countries; and
- builds upon ongoing efforts to share the responsibility of providing asylum and other forms of protection to eligible migrants with the United States' regional partners.

At the same time, the rule addresses the reality of unprecedented migratory flows, the systemic costs those flows impose on the immigration system, and the ways in which increasingly sophisticated smuggling networks cruelly exploit the system for financial gain. Specifically, this rule establishes a presumptive condition on asylum eligibility for certain noncitizens who fail to take advantage of the existing and expanded lawful pathways[18] to enter the United States, including the opportunity to schedule a time and place to present at a POE, and thus seek asylum or other forms of protection in a lawful, safe, and orderly manner, or to seek asylum or other protection in one of the countries through which they travel on their way to the United States.

This effort draws, in part, on lessons learned from the successful Venezuela parole process,[19] as well as the similar processes for Cubans, Haitians, and Nicaraguans,[20] under which DHS

[13] Month over month change from November to December for all of FY 2013–FY2022 averaged negative 2 percent. OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[14] OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023. The complexity of international migration limits the Department's ability to precisely project border encounters under the best of circumstances. The current period is characterized by greater than usual uncertainty due to ongoing changes in the major migration source countries (*i.e.,* the shift from Mexico and Northern Central America to new countries of origin, discussed further below), the growing impact of climate change on migration, political instability in several source countries, the evolving recovery from the COVID–19 pandemic, and uncertainty generated by border-related litigation, among other factors.

OIS leads an interagency SWB Encounter Projections Working Group that generates encounter projections every two to four weeks, with ongoing refinements to the model based on feedback from the working group and model diagnostics. The enterprise encounter projection utilizes a mixed method blended model that combines a Bayesian structural time series statistical model produced by OIS with subject matter expert input to account for real-time policy developments and pending litigation, among other factors, that are not captured by the statistical model. The blended model is run through a standard statistical process (Monte Carlo simulations) to generate 68 percent and 95 percent confidence intervals for each of 33 separate demographic groupings. In light of the greater-than-usual uncertainty at the current time, the Departments' planning models are designed to prepare the Departments for all reasonably likely eventualities, and therefore focus on the upper bounds of the blended model's 68 and 95 percent confidence intervals. As noted in Section IV.B.2 of this preamble, in the current context, the Departments must focus their planning efforts on the high and moderately high planning models rather than plan to an optimistic scenario that could leave enforcement efforts badly under-resourced and harm efforts to provide a safe and orderly process.

[15] In this preamble, ''irregular migration'' refers to the movement of people into another country without authorization.

[16] In the week prior to the announcement of the parole processes (ending October 12, 2022, for Venezuela and January 6, 2023, for Cuba, Haiti, and Nicaragua), the daily average of CHNV encounters was nearly 2,000 between POEs. A month after the parole announcements, daily encounters of CHNV nationals averaged just under 300 encounters. In the most recent seven days ending April 10, 2023, CHNV daily encounters averaged 195. OIS analysis of OIS Persist dataset based on data through March 31, 2023, and OIS analysis of CBP UIP data downloaded April 13, 2023.

[17] See Section III.C of the preamble to the notice of proposed rulemaking, Circumvention of Lawful Pathways, 88 FR 11704, at 11715–11716 (Feb. 23, 2023). Overall, 63 percent of non-Mexicans placed in expedited removal from 2014–2019 made fear claims, and 85 percent of those claiming fear (54 percent of all those placed in expedited removal) established fear or were otherwise placed in section 240 removal proceedings as a result of their fear claim. These rates are likely to be higher after May 11, 2023, because of the growing prevalence of extra-regional nationals (*i.e.,* noncitizens not from Mexico or Northern Central America), who are more likely than those from Northern Central American countries to make fear claims and to establish fear. OIS analysis of OIS Enforcement Lifecycle data based on data through February 28, 2023.

[18] The terms ''lawful pathways'' and ''lawful, safe, and orderly pathways,'' as used in this preamble, refer to the range of pathways and processes by which migrants are able to enter the United States or other countries in a lawful, safe, and orderly manner and seek asylum and other forms of protection as described in this rule.

[19] *See* DHS, Press Release, *DHS Announces New Migration Enforcement Process for Venezuelans* (Oct. 12, 2022), *https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans; see also* DHS, Implementation of a Parole Process for Venezuelans, 87 FR 63507 (Oct. 19, 2022).

[20] *See* DHS, Press Release, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and*

coupled a mechanism for noncitizens from these countries to seek entry into the United States in a lawful, safe, and orderly manner, with the imposition of new consequences for those who cross the border without authorization to do so—namely returns to Mexico.[21] Prior to the implementation of these processes, the Government of Mexico had not been willing to accept the return of such nationals; the Government of Mexico's independent decision to allow such returns was predicated, in primary part, on the implementation of these processes.

A week before the announcement of the Venezuela parole process on October 12, 2022, Venezuelan encounters between POEs at the SWB averaged over 1,100 a day from October 5–11. About two weeks after the announcement, Venezuelan encounters averaged under 200 per day between October 18 and 24.[22] U.S. Customs and Border Protection (''CBP'') encountered an average of 106 Venezuelans between POEs per day in March 2023, about one-tenth the number of encounters prior to the announcement of the parole process.[23] Similarly, the number of Cuban, Haitian, and Nicaraguan (''CHN'') nationals encountered between POEs dropped significantly in the wake of the introduction of the new processes, which coupled a lawful, safe, and orderly way for such nationals to seek parole in the United States with consequences (in the form of prompt returns to Mexico) for those who crossed the SWB without authorization. Between the announcement of these processes on January 5, 2023, and January 21, 2023, the number of daily encounters between POEs of CHN nationals dropped from 928 to 73, a 92 percent decline.[24] CHN encounters between POEs continued to decline to an average of fewer than 17 per day in March 2023.[25] DHS estimates that the drop in CHNV encounters in January through March was almost four times as large as the number of people permitted entry under the parole processes.[26]

This rule, which draws on these successful processes, and which will apply only to those who enter during a limited, specified date range at the southwest land border or adjacent coastal borders, will discourage irregular migration by encouraging migrants to use lawful, safe, and orderly pathways and allowing for swift returns of migrants who bypass such pathways, even after the termination of the Title 42 public health Order. It responds to the expected increase of migrants seeking to cross the SWB following the termination of the Title 42 public health Order that would occur in the absence of a policy shift by encouraging reliance on lawful, safe, and orderly pathways, thereby shifting the incentives that otherwise encourage migrants to make a dangerous journey to the SWB. It is also responsive to the requests of foreign partners that have lauded the sharp reductions in irregular migration associated with the aforementioned process for Venezuelans and have urged that the United States continue and build on this kind of approach, which couples processes for individuals to travel directly to the United States with consequences at the land border for those who do not avail themselves of these processes. The United States has, as noted above, already extended this model to Cuba, Haiti, and Nicaragua, and the Government of Mexico and the United States recently announced a set of additional measures on migration, including the United States' continued commitment to welcoming CHNV nationals under these parole processes and Mexico's commitment to continue to accept back migrants on humanitarian grounds after May 11, 2023.[27] The Departments assess that continuing to implement and build on this approach is critical to the United States' ongoing engagements with regional partners, in particular the Government of Mexico, regarding migration management in the region.[28]

Consonant with these efforts, over the past two years, the United States has taken significant steps to expand safe and orderly options for migrants to lawfully enter the United States. The United States has, for example, increased and will continue to increase—

- refugee processing in the Western Hemisphere;
- country-specific and other available processes for individuals seeking parole for urgent humanitarian reasons or significant public benefit on a case-by-case basis; and
- opportunities to lawfully enter the United States for the purpose of seasonal employment.

In addition, once the Title 42 public health Order is terminated, the United States will expand implementation of the CBP One™ mobile application (''CBP One app''),[29] an innovative mechanism for noncitizens to schedule a time to arrive at POEs along the SWB, to allow an increasing number of migrants who may wish to claim asylum to request an available time and location to present and be inspected and processed at certain POEs, in accordance with operational limitations at each POE.[30] Use of this app keeps

Orderly Processes (Jan. 5, 2023), *https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.*

[21] While the Title 42 public health Order has been in place, those returns have been made under Title 42. As noted below, after the Title 42 public health Order is lifted, affected noncitizens may instead be subject to return or removal to Mexico under Title 8. *See* The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023), *https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/02/mexico-and-united-states-strengthen-joint-humanitarian-plan-on-migration/* [hereinafter The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023)]; Government of Mexico, *México y Estados Unidos fortalecen Plan Humanitario Conjunto sobre Migración* (May 2, 2023), *https://www.gob.mx/presidencia/prensa/mexico-y-estados-unidos-fortalecen-plan-humanitario-conjunto-sobre-migracion?state=published.*

[22] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[23] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[24] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[25] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[26] In December 2022, prior to the announcement of the CHN parole processes, the OIS Enterprise Encounter Projection predicted 273,000 total encounters of CHNV nationals in January through March 2023, a projection equivalent to 265,000 unique encounters given CHNV repeat encounter rates. During that same period, following the enactment of the CHN parole processes, unique SWB encounters (excluding scheduled arrivals via the CBP One app) of CHNV nationals was 20,204–245,000 fewer unique encounters than had been predicted. By comparison, a total of 61,967 CHNV nationals entered the United States pursuant to the CHNV parole processes during the same period. OIS analysis of OIS Persist Dataset based on data through March 31, 2023, and of CBP OFO CHNV Advance Travel Authorization reports.

[27] The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023).

[28] *See also* The White House, *Joint Statement by President Biden and Prime Minister Trudeau* (Mar. 24, 2023), *https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/24/joint-statement-by-president-biden-and-prime-minister-trudeau/* (reaffirming commitment of United States and Canada to a collaborative regional approach to migration centered on expanding legal pathways and humane border management, including deterrence of irregular migration).

[29] The Departments note that unless otherwise specified, references to the CBP One app refer to usage of the CBP One tool, which can be accessed via the smartphone application. Although there is a desktop version of the CBP One app, it does not currently allow users to submit their information in advance. CBP is developing the capability to use the desktop version for this purpose.

[30] As of January 12, 2023, this mechanism is currently available for noncitizens seeking to cross SWB land POEs to request a humanitarian exception from the Title 42 public health Order. *See* CBP, *Fact Sheet: Using CBP One™ to Schedule an Appointment* (last modified Jan. 12, 2023), *https://www.cbp.gov/document/fact-sheets/cbp-one-fact-sheet-english.* Once the Title 42 public health Order is terminated, and the POEs open to all migrants who wish to seek entry into the United States, this mechanism will be broadly available to migrants in central and northern Mexico, allowing them to

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migrants from having to wait in long lines of unknown duration at the POEs, and enables the POEs to manage the flows in a safe and efficient manner, consistent with their footprint and operational capacity, which vary substantially across the SWB. Once present in the United States, those who use this mechanism can make claims for asylum and other forms of protection and are exempted from this rule's rebuttable presumption on asylum eligibility. They are vetted and screened, and assuming no public safety or national security concerns, may be eligible to apply for employment authorization as they await resolution of their cases.[31]

Moreover, on April 27, 2023, DHS and the Department of State announced several new measures to further reduce irregular migration across the Western Hemisphere, significantly expand lawful pathways for protection, and facilitate the safe, orderly, and humane processing of migrants.[32] These new measures include—

- creating family reunification parole processes for El Salvador, Guatemala, Honduras, and Colombia, as well as modernizing the longstanding Haitian Family Reunification Parole process and the Cuban Family Reunification Parole process;
- committing to referring for resettlement thousands of additional refugees per month from the Western Hemisphere, with the goal of doubling the number of refugees the United States committed to welcome as part of the Los Angeles Declaration on Migration and Protection (''L.A. Declaration'');
- establishing regional processing centers in key locations throughout the Western Hemisphere to reduce irregular migration;
- launching an aggressive anti-smuggling campaign targeting criminal networks in the Darién Gap and combating smuggler misinformation;
- surging AOs to complete credible fear interviews at the SWB more quickly; and
- ramping up coordination between state and local officials and other federal agencies to provide resources, technical assistance, and support.[33]

These measures will be implemented in close coordination with regional partners, including the governments of Mexico, Canada, Colombia, and Guatemala, as well as the government of Spain.[34]

Available pathways provide lawful, safe, and orderly mechanisms for migrants to enter the United States and make their protection claims. Consistent with the CHNV processes, this rule also imposes consequences on certain noncitizens who fail to avail themselves of the range of lawful, safe, and orderly means for entering the United States and seeking protection in the United States or elsewhere. Specifically, this rule establishes a rebuttable presumption that certain noncitizens who enter the United States without documents sufficient for lawful admission are ineligible for asylum, if they traveled through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, unless they were provided appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process; presented at a POE at a pre-scheduled time or demonstrate that the mechanism for scheduling was not possible to access or use due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or sought asylum or other protection in a country through which they traveled and received a final decision denying that application. Unaccompanied children (''UC'') are excepted from this presumption.[35] This presumption may be rebutted, and would necessarily be rebutted if, at the time of entry, the noncitizen or a member of the noncitizen's family with whom they are travelling had an acute medical emergency, faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder,[36] or satisfied the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11(a). The presumption also may be rebutted in other exceptionally compelling circumstances.

The rebuttable presumption is a ''condition[ ]'' on asylum eligibility, INA 208(b)(2)(C) and (d)(5)(B), 8 U.S.C. 1158(b)(2)(C) and (d)(5)(B), that applies in affirmative and defensive asylum application merits adjudications, as well as during credible fear screenings. Individuals who are subject to and do not rebut the presumption remain eligible for statutory withholding of removal and protection under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT'').[37]

With the ability to schedule a time and place to arrive at POEs and the availability of other orderly and lawful pathways, this system is designed to (1) protect against an unmanageable flow of migrants arriving at the SWB; (2) further ongoing efforts to share the responsibility of providing asylum and other forms of protection with the United States' regional partners; (3) ensure that those with valid asylum claims have an opportunity to seek protection, whether in the United States or elsewhere; (4) enable the Departments to continue administering the immigration laws fairly and effectively; and (5) reduce the role of exploitative transnational criminal organizations and smugglers.

The rule applies to noncitizens who enter the United States without authorization from Mexico at the southwest land border or adjacent coastal borders on or after the date of termination of the Title 42 public health Order and before a specified date, 24 months from the rule's effective date. However, the rule will continue to apply to such noncitizens who entered the United States during the 24-month time frame in their Title 8 proceedings and in any subsequent asylum applications, except for those applications filed after the two-year period by those who entered the United

request an available time and location to present and be inspected and processed at certain POEs.

[31] Under current employment authorization regulations, there is no waiting period before a noncitizen parolee in this circumstance may apply for employment authorization, except where the noncitizen is in expedited removal proceedings, including after a positive credible fear determination, and paroled from custody. *See* 8 CFR 274a.12(c)(11), 235.3(b)(2)(iii), (b)(4)(ii).

[32] *See* DHS, Fact Sheet, *U.S. Government Announces Sweeping New Actions to Manage Regional Migration* (Apr. 27, 2023), *https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration* [hereinafter DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023)].

[33] *See id.*

[34] *See id.; see also* The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023) (committing to increase joint actions to counter human smugglers and traffickers, address root causes of migration, and continue to combine expanded lawful pathways with consequences for irregular migration).

[35] The term ''unaccompanied child'' as used in this rule is the same as ''unaccompanied alien child,'' which is defined at 6 U.S.C. 279(g)(2) to mean ''a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.''

[36] The term ''imminent'' refers to the immediacy of the threat; it makes clear that the threat cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer poses an immediate threat. The term ''extreme'' refers to the seriousness of the threat; the threat needs to be sufficiently grave, such as a threat of rape, kidnapping, torture, or murder, to trigger this ground for rebuttal.

[37] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114.

States as minors and who apply as principal applicants. The Departments intend that the rule will be subject to review to determine whether the entry dates provided in 8 CFR 208.33(a)(1)(i) and 1208.33(a)(1)(i) should be extended, modified, or remain as provided in the rule.

B. Effective Date

Issuance of this rule is justified in light of the migration patterns witnessed in recent months, and the concern about the possibility of a surge in irregular migration upon, or in anticipation of, the lifting of the Title 42 public health Order. The Departments seek to underscore that migrants will not be able to cross the border without authorization to enter without consequence upon the eventual lifting of the Order. Under this rule, the Departments will use their Title 8 authorities to process, detain, and remove, as appropriate, those who enter the United States from Mexico at the southwest land border or adjacent coastal borders without authorization and do not have a valid protection claim.

The Departments are issuing this rule without the 30-day delayed effective date typically required by the Administrative Procedure Act (''APA'') [38] because the Departments have determined that it is necessary to implement the rule when the Title 42 public health Order is lifted. The lifting of the Order could occur as a result of several different litigation and policy developments, including the vacatur of the preliminary injunction entered in *Louisiana* v. *CDC,* 603 F. Supp. 3d 406 (W.D. La. 2022), *appeal pending,* No. 22–30303 (5th Cir. June 15, 2022); the lifting of the stay entered by the Supreme Court in *Arizona* v. *Mayorkas,* 143 S. Ct. 478 (2022); or ''the expiration of the Secretary of HHS' declaration that COVID–19 constitutes a public health emergency,'' Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 FR 42828, 42829 (Aug. 5, 2021). The expiration of the declaration by the Secretary of Health and Human Services (''HHS'') that COVID–19 constitutes a public health emergency is expected to occur on May 11, 2023, in light of the recent announcement that ''[a]t present, the Administration's plan is to extend'' the public health emergency to May 11 and then allow it to expire ''on that date.'' [39] The Departments have thus sought to move as expeditiously as possible, while also allowing sufficient time for public comment.

C. Changes From Proposed Rule to Final Rule

On February 23, 2023, the Departments issued a notice of proposed rulemaking (''NPRM'' or ''proposed rule'') [40] in anticipation of a potential surge of migration at the SWB following the eventual termination of the CDC's public health Order. Following careful consideration of public comments received, the Departments have made modifications to the regulatory text proposed in the NPRM, as described below. The rationale for the proposed rule and the reasoning provided in the proposed rule preamble remain valid, except as distinguished in this regulatory preamble.

1. Removing Provisions Implementing the Proclamation Bar IFR and the TCT Bar Final Rule

Consistent with the proposed rule, Circumvention of Lawful Pathways, 88 FR 11704, 11727–28 (Feb. 23, 2023), the Departments have added amendatory instructions to remove provisions enacted to implement the bars to asylum eligibility established in an interim final rule (''IFR'') entitled, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018) (''Proclamation Bar IFR''), and a final rule entitled, Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (''TCT Bar Final Rule'').[41]

To remove the provisions enacted to implement the Proclamation Bar IFR and TCT Bar Final Rule, the Departments have made the following changes:

- removed and reserved paragraphs 8 CFR 208.13(c)(3) and 1208.13(c)(3), which previously included the requirements for the Proclamation Bar IFR's applicability;
- removed and reserved paragraphs 8 CFR 208.13(c)(4) and 1208.13(c)(4), which previously included the requirements for the TCT Bar Final Rule's applicability;
- removed and reserved paragraphs 8 CFR 208.13(c)(5) and 1208.13(c)(5), which provided that determinations made with regard to whether an applicant met one of the exceptions to the TCT Bar Final Rule would not bind Federal departments or agencies with respect to certain later adjudications;
- amended 8 CFR 208.30(e)(5) to remove paragraphs (ii) and (iii), which regard application during credible fear of the Proclamation Bar IFR and TCT Bar Final Rule, respectively;
- removed reference to 8 CFR 208.30(e)(5)(ii) through (iv) from what was previously (i) and redesignated (i) as (e)(5);
- amended 8 CFR 1003.42(d) to remove paragraphs (1) and (2) and redesignated paragraph (3) as (d) because paragraphs (d)(1) and (2) provided the standard of review for Proclamation Bar and TCT Bar determinations made during credible fear screenings; and
- removed and reserved 8 CFR 1208.30(g)(1), which provided instructions to IJs regarding the application of the Proclamation Bar and the TCT Bar during credible fear reviews.

2. Applicability of Rebuttable Presumption After the Two-Year Period

The rule applies to certain noncitizens who enter during the two-year period in any asylum application they submit, regardless of when the application is filed or if the noncitizen makes subsequent entries. *See* 8 CFR 208.13(f) (''For applications filed by aliens who entered the United States between May 11, 2023, and May 11, 2025, also refer to the provisions on asylum eligibility described in § 208.33.''); 8 CFR 1208.13(f) (same); 8 CFR 208.33(a)(1), 1208.33(a)(1) (providing that the rebuttable presumption applies to noncitizens who enter the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission between the effective date and a date 24-months later and after the end of implementation of the Title 42 public health Order with certain exceptions).

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[38] *See* 5 U.S.C. 553(d). The Departments further address this requirement in Section VI.A of this preamble.

[39] Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy (Jan. 30, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf; see also* HHS, *Fact Sheet: COVID–19 Public Health Emergency Transition Roadmap* (Feb. 9, 2023), *https://www.hhs.gov/about/news/2023/02/09/fact-sheet-covid-19-public-health-emergency-transition-roadmap.html* (''Based on current COVID–19 trends, the Department of Health and Human Services (HHS) is planning for the federal Public Health Emergency (PHE) for COVID–19, declared under Section 319 of the Public Health Service (PHS) Act, to expire at the end of the day on May 11, 2023.'').

[40] 88 FR 11704.

[41] The TCT Bar Final Rule amended an earlier IFR on the same topic. *See* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). The IFR was vacated prior to the issuance of the TCT Bar Final Rule. Additionally, where the Departments refer to the ''Proclamation Bar'' or ''TCT Bar'' without including ''IFR'' or ''Final Rule,'' the Departments are referring to the bars as applied and not to the rulemaking documents that implemented them.

To remove any potential ambiguity regarding the ongoing applicability of the lawful pathways rebuttable presumption, the final rule makes the presumption's ongoing applicability explicit in 8 CFR 208.33(c)(1) and 1208.33(d)(1) by stating that the lawful pathways condition on eligibility shall apply to ''any asylum application'' that is filed by a covered noncitizen ''regardless of when the application is filed and adjudicated.''

The Departments have exempted from this ongoing application of the rebuttable presumption certain noncitizens who enter the United States during the two-year period while under the age of 18 and who later seek asylum as principal applicants after the two-year period. In the NPRM, the Departments requested comment on ''[w]hether any further regulatory provisions should be added or amended to address the application of the rebuttable presumption in adjudications that take place after the rule's sunset date.'' 88 FR at 11708. After reviewing comments raising concerns about the impact of the rule on children who arrive as part of a family unit and who are thus subject to the decision-making of their parents, the Departments have decided to adopt a provision excepting such children from the rule in certain circumstances after the two-year period ends. *See* 8 CFR 208.33(c)(2), 1208.33(d)(2). The Departments recognize that children who enter with their families are generally traveling due to their parents' decision-making. Exempting children from the rebuttable presumption entirely would mean, under the rule, that all family units that include minor children would also be exempted, which could incentivize families who otherwise would not make the dangerous journey to do so. And if the rule were amended to only exempt the child, it could inadvertently lead to the separation of a family in many cases because every child would have to be treated separately from their family during the credible fear screening as they would not be subject to the rebuttable presumption but their parents could be.

Although accompanied children remain subject to the rebuttable presumption generally, the Departments have determined that the presumption should not apply to them in any application for asylum they file after the two-year period, but only if they apply as a principal (as opposed to a derivative) applicant. The Departments believe this exception to the general applicability provision balances the interest in ensuring the rebuttable presumption has an impact on behavior, while at the same time recognizing the special circumstance of children who enter in a manner that triggers the rebuttable presumption, likely without intending to do so or being able to form an understanding of the consequences. Specifically, if the Departments were to extend this exception to all children after the two-year period, even if they applied only as a derivative, the Departments would risk incentivizing families to seek to prolong their proceedings to file their asylum applications after the two-year period expires, undermining the Departments' interest in efficient adjudications. In addition, any family that did so would be able to avoid the applicability of the presumption entirely, by virtue of the rule's family unity provision. The Departments have decided not to include such a broad exemption, in light of the urgent need to disincentivize a further surge in irregular migration.

3. Expansion of Applicability to Adjacent Coastal Borders

As proposed in the NPRM, the rule would apply to certain noncitizens who enter the United States at the SWB—that is, ''along the entirety of the U.S. land border with Mexico.'' 88 FR at 11704 n.1. The Departments received comments that applying the rule only to those who enter the United States from Mexico across the U.S.-Mexico land border would inadvertently incentivize noncitizens without documents sufficient for lawful admission to circumvent the land border by making a hazardous attempt to reach the United States by sea. In this final rule, the Departments have decided to modify 8 CFR 208.33(a)(1) and 8 CFR 1208.33(a)(1) to provide that the rule's rebuttable presumption of ineligibility for asylum applies to noncitizens who enter the United States from Mexico at ''adjacent coastal borders.'' The term ''adjacent coastal borders'' refers to any coastal border at or near the U.S.-Mexico border. This modification therefore means that the rule's rebuttable presumption of ineligibility for asylum applies to noncitizens who enter the United States at such a border after traveling from Mexico and who have circumvented the U.S.-Mexico land border.

This modification mirrors the geographic reach of the CDC's Title 42 public health Order, which likewise applied—as relevant here—to certain covered noncitizens traveling from Mexico who would otherwise be introduced into a congregate setting ''at or near the U.S. land and adjacent coastal borders.'' *See* 86 FR at 42841. Because the Title 42 public health Order did not define the phrase ''adjacent coastal borders,'' its meaning was developed during the public health Order's implementation. Specifically, as implemented by CBP, the term ''adjacent coastal borders'' was interpreted to apply to the same population as the Amended CDC Order issued in May 2020, which first introduced the concept of ''coastal'' application. The Amended Order applied to ''persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land or coastal POE or Border Patrol station at or near the U.S. border with Canada or Mexico, subject to exceptions.'' [42] With regard to persons traveling from Mexico, in line with the interpretation above, CBP implemented the Title 42 public health Order as covering any coastal border adjacent to the U.S.-Mexico border reached by an individual traveling from Mexico and landing within the United States having circumvented the U.S.-Mexico land border. Applying the same geographic reach that has been applied by CBP for the past three years to this rule will avoid the risk that smugglers would exploit what could be perceived as a new ''loophole'' following the lifting of the Title 42 public health Order to persuade migrants to make a perilous crossing to the United States from Mexico by sea. In DHS's experience, that risk may well materialize, as smugglers routinely prey on migrants using perceived changes in U.S. immigration law.[43] Any such campaign by smugglers to persuade more migrants to circumvent the land border would result in life-threatening risks for migrants and DHS personnel, given the elevated danger associated with maritime crossings. As just one example of how dangerous such attempts can be, the Departments note that in March 2023, two suspected human smuggling boats from Mexico capsized and eight

[42] *See* Amendment and Extension of Order Under Sections 362 and 365 of the Public Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 FR 31503 (May 26, 2020); CBP, CBP COVID–19 Response: Suspension of Entries and Imports Concept of Operations 1–3 (May 20, 2020), *https://www.cbp.gov/document/foia-record/title-42.*

[43] *See* Tech Transparency Project, *Inside the World of Misinformation Targeting Migrants on Social Media* (July 26, 2022), *https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media* (''A review of social media groups and pages identified by migrants showed . . . dubious offers of coyote or legal services, false claims about conditions along the route, misinformation about points of entry at which officials waive the rules, and baseless rumors about changes to immigration law.'').

people died off the coast near San Diego, California.[44] This incident, as well as the increases in maritime migration over the past few years, as discussed further in Section V of this preamble, and commenters' concerns that the NPRM would have encouraged migration by sea, as discussed further in Section IV.B.8.i of this preamble, have led the Departments to extend the rebuttable presumption to the adjacent coastal borders. Specifically, in the interest of ensuring that this rule is not used to encourage intending migrants to undertake attempts that could end in similar tragedies, the Departments believe it is important that the text of 8 CFR 208.33(a)(1) and 8 CFR 1208.33(a)(1) make clear that the rule's presumption applies equally to noncitizens who arrive from Mexico on coasts adjacent to the southwest land border.

4. Clarification of Meaning of ''Final Decision''

As was proposed in the NPRM, the rule excepts from the rebuttable presumption noncitizens who sought asylum or other protection in another country through which they traveled and received a ''final decision'' denying that application. *See* 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). The Departments have amended this paragraph to further define what constitutes a ''final decision'' for the purposes of this exception. With this change, the final rule specifies that a ''final decision includes any denial by a foreign government of the applicant's claim for asylum or other protection through one or more of that government's pathways for that claim.'' *Id.* The provision further states that a ''final decision does not include a determination by a foreign government that the noncitizen abandoned the claim.'' *Id.* The Departments have made this change in response to comments, as discussed below, and to provide clarity that a noncitizen must in fact pursue the claim since a denial based on abandonment would be insufficient.

5. Exception for Unaccompanied Children

The NPRM provided that ''[u]naccompanied alien children, as defined in 6 U.S.C. 279(g)(2), are not subject to paragraph (a)(1) of this section.'' *See* 88 FR at 11750–51 (proposed 8 CFR 208.33(b), 1208.33(b)). The Departments have modified the proposed language to explicitly state that this exception applies to noncitizens who were UCs at the time of entry.[45] 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i).

This added language makes clear that the UC exception aligns with other exceptions in this rule, which are based upon conditions at the time of a noncitizen's presentation at a POE, *see* 8 CFR 208.33(a)(2), 1208.33(a)(2), and more closely aligns the regulatory text with the Departments' stated purpose in the NPRM that ''unaccompanied children would be categorically excepted from the rebuttable presumption,'' 88 FR at 11724.

6. Expansion of Family Unity Provision

The NPRM provided that where a principal applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the presumption, and where an accompanying spouse or child does not independently qualify for asylum or other protection from removal, the presumption shall be deemed rebutted as an exceptionally compelling circumstance. *See* 88 FR at 11752 (proposed 8 CFR 1208.33(d)). Commenters raised concerns that excluding asylum applicants who travel without their families may inadvertently incentivize families to engage in irregular migration together so as not to risk that the principal applicant would be prevented from later applying for their family members to join them. This could involve making a dangerous journey with vulnerable family members, such as children. Accordingly, as discussed in Section IV.E.7.ii of this preamble, in response to these comments, the Departments have expanded the provision to also cover principal asylum applicants who have a spouse or child who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A). *See* 8 CFR 1208.33(c).

7. Other Changes

In addition to the changes this final rule makes to the NPRM detailed above, this final rule also makes other changes to the regulatory text set out in the NPRM.

First, the Departments have reorganized and made other edits to proposed 8 CFR 208.33(a) and 1208.33(a) to improve clarity for noncitizens, counsel appearing before the Departments, other members of the public, and adjudicators. For example, the Departments added the exception for unaccompanied children to 8 CFR 208.33(a)(2)(i) and 1208.33(a)(2)(i) rather than maintaining it as a standalone paragraph at 8 CFR 208.33(b) and 1208.33(b). Similarly, the Departments added headings and additional guideposts within 8 CFR 208.33(a) and 1208.33(a). Second, the Departments revised 8 CFR 208.33 and 1208.33 to move instructions from 8 CFR 208.33 to 8 CFR 1208.33 regarding IJ review that are better placed in EOIR's regulations. For example, the Departments removed the sentence at proposed 8 CFR 208.33(c)(2)(ii) stating that noncitizens may apply for asylum, withholding of removal, and protection under the CAT in removal proceedings and included that at new 8 CFR 1208.33(b)(4). These revisions do not change the meaning of those provisions.

D. Rule Provisions

The rule contains the following key provisions:

- The rule imposes a rebuttable presumption of ineligibility for asylum upon certain noncitizens who enter the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission as described in INA 212(a)(7), 8 U.S.C. 1182(a)(7). *See* 8 CFR 208.33(a)(1), 1208.33(a)(1). The rebuttable presumption applies to only those noncitizens whose entry was (1) between May 11, 2023 and May 11, 2025; (2) subsequent to the end of implementation of the Title 42 public health Order; and (3) after the noncitizen traveled through a country other than the noncitizen's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (''Refugee Convention'') or 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 (''Refugee Protocol''). *See* 8 CFR 208.33(a)(1)(i) through (iii), 1208.33(a)(1)(i) through (iii).

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[44] *See* Karen Kucher et al., *8 Reported Dead After 2 Suspected Smuggling Boats Crash at Black's Beach in San Diego,* L.A. Times, Mar. 12, 2023, *https://www.latimes.com/california/story/2023-03-12/8-reported-dead-after-2-suspected-smuggling-boats-crash-at-blacks-beach-in-san-diego;* Wendy Fry, *An Endless Fight: As Border Infrastructure on Land Improves, Smugglers Take to the Water,* San Diego Tribune, Nov. 6, 2019, *https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-11-06/an-endless-fight-as-border-infrastructure-on-land-improves-smugglers-take-to-the-water.*

[45] Numerous commenters recognized that the NPRM proposed an exception for UCs, but did not indicate a clear understanding of whether this exception applied to those who were UCs at the time of entry or at the time of adjudication.

- The rule excepts from the rebuttable presumption any noncitizen who is an unaccompanied child as defined in 6 U.S.C. 279(g)(2). *See* 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i).
- The rule also excepts from the rebuttable presumption a noncitizen if the noncitizen or a member of the noncitizen's family with whom the noncitizen is traveling (1) was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process; (2) presented at a POE, pursuant to a pre-scheduled time and place, or presented at a POE without a pre-scheduled time and place, if the noncitizen demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or (3) sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application. *See id.* 208.33(a)(2)(ii), 1208.33(a)(2)(ii).
- The rule allows a noncitizen to rebut the presumption by demonstrating by a preponderance of the evidence that exceptionally compelling circumstances exist. A noncitizen necessarily rebuts the presumption if they demonstrate by a preponderance of the evidence that the noncitizen, or a member of the noncitizen's family with whom the noncitizen is traveling, (1) faced an acute medical emergency; (2) faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or (3) satisfied the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11(a). *See id.* 208.33(a)(3), 1208.33(a)(3). In addition, as a measure to ensure family unity, the rule provides that in removal proceedings pursuant to section 240 of the INA, 8 U.S.C. 1229a (''section 240 removal proceedings''), where a principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the rebuttable presumption, and where an accompanying spouse or child does not independently qualify for asylum or other protection from removal or where the principal asylum applicant has a spouse or child who would be eligible to follow to join them if they are granted asylum, as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), the presumption is deemed rebutted as an exceptionally compelling circumstance. *See* 8 CFR 1208.33(c).
- The rule establishes procedures, applicable in the expedited removal context, under which AOs will determine whether the noncitizen has made a sufficient showing that the rebuttable presumption does not apply or that they meet an exception to or can rebut the presumption. *See id.* 208.33(b). If the AO determines that the rebuttable presumption does not apply or the noncitizen falls within an exception or has rebutted the presumption, the general procedures in 8 CFR 208.30 apply. *See id.* 208.33(b)(1)(ii). On the other hand, if the AO determines that the rebuttable presumption does apply and no exception or rebuttal ground applies, the AO will consider whether the noncitizen has established a reasonable possibility of persecution or torture with respect to the identified country or countries of removal. *See id.* 208.33(b)(1)(i), 208.33(b)(2).
- The rule provides that an AO's adverse determination as to the applicability of the rebuttable presumption, whether an exception applies or the presumption has been rebutted, and whether the noncitizen has established a reasonable possibility of persecution or torture, are all subject to de novo IJ review. *See id.* 208.33(b)(2)(iii) through (v), 1208.33(b). The noncitizen must request such review by so indicating on a Record of Negative Fear Finding and Request for Review by Immigration Judge. *See id.* 208.33(b)(2)(iv) and (v), 1208.33(b)(1).
- The rule establishes procedures for such IJ review. Specifically, if the IJ determines that the noncitizen has made a sufficient showing that the rebuttable presumption does not apply to them or that they meet an exception to or can rebut the presumption, and that the noncitizen has established a significant possibility of eligibility for asylum, statutory withholding of removal, or CAT withholding, the IJ issues a positive credible fear finding and the case proceeds under existing procedures at 8 CFR 1208.30(g)(2)(iv)(B). *See id.* 208.33(b)(2)(v)(A), 1208.33(b)(2)(i). If the IJ determines that the rebuttable presumption applies and has not been rebutted and no exception is applicable, but the noncitizen has established a reasonable possibility of persecution or torture with respect to the identified country or countries of removal, the IJ will issue a positive credible fear finding and DHS will issue a Form I–862, Notice to Appear, to commence section 240 removal proceedings. *See id.* 208.33(b)(2)(v)(B), 1208.33(b)(2)(ii). And finally, if the IJ issues a negative credible fear determination, the case is returned to DHS for removal of the noncitizen. *See id.* 208.33(b)(2)(v)(C), 1208.33(b)(2)(ii). In such a circumstance, the noncitizen may not appeal the IJ's decision or request that U.S. Citizenship and Immigration Services (''USCIS'') reconsider the AO's negative determination, although USCIS may, in its sole discretion, reconsider a negative determination. *See id.* 208.33(b)(2)(v)(C).
- The rule provides that a noncitizen who is found to be subject to the lawful pathways condition during expedited removal proceedings may, if placed in section 240 removal proceedings, apply for asylum, statutory withholding of removal, or CAT protection, or any other form of relief or protection for which the noncitizen is eligible during those removal proceedings. *See id.* 1208.33(b)(4).
- The rule declines to adopt the Proclamation Bar IFR on a permanent basis and removes the language effectuating the Proclamation Bar. Specifically, the rule removes and reserves paragraphs 8 CFR 208.13(c)(3) and 1208.13(c)(3), which previously included the requirements for the bar's applicability.
- The rule removes regulatory provisions implementing the TCT Bar Final Rule. The rule removes and reserves paragraphs 8 CFR 208.13(c)(4) and 1208.13(c)(4), which previously included the requirements for the TCT Bar Final Rule's applicability. The rule also removes and reserves paragraphs 8 CFR 208.13(c)(5) and 1208.13(c)(5), which provided that determinations made with regard to whether an applicant met one of the exceptions to the TCT Bar Final Rule would not bind Federal departments or agencies with respect to certain later adjudications. Given the removal of the TCT Bar Final Rule and its implementing provisions, these provisions are no longer necessary.
- The rule also amends the CFR to remove provisions implementing the Proclamation Bar IFR and TCT Bar Final Rule during the credible fear process. The rule removes 8 CFR 208.30(e)(5)(ii) and (iii), which implemented the Proclamation Bar IFR and TCT Bar Final Rule, respectively. The rule also removes reference to (ii) though (iv) from what was previously (i) and redesignates (i) as (e)(5). Similarly, the rule also amends provisions relating to IJ standard of review for Proclamation Bar and TCT Bar determinations by removing 8 CFR 1003.42(d)(2) and (3), and redesignates 8 CFR 1003.42(d)(1) as paragraph (d). Finally, the rule removes and reserves 8 CFR 1208.30(g)(1), which provided instructions to IJs regarding the application of the Proclamation Bar

and the TCT Bar during credible fear reviews.

- The rule contains a special provision providing that the rebuttable presumption does not apply to an asylum application filed after May 11, 2025, if the noncitizen was under the age of 18 at the time of entry, and the noncitizen is applying for asylum as a principal applicant. *See id.* 208.33(c)(2), 1208.33(d)(2).
- The rule contains a severability clause reflecting the Departments' intention that the rule's provisions be severable from each other in the event that any aspect of the new provisions governing the rebuttable presumption is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance. *See id.* 208.33(d), 1208.33(e).

III. Legal Authority

The Secretary and the Attorney General jointly issue this rule pursuant to their shared and respective authorities concerning asylum, statutory withholding of removal, and CAT determinations. The Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135, as amended, created DHS and transferred to it many functions related to the administration and enforcement of Federal immigration law while maintaining many functions and authorities with the Attorney General, including concurrently with the Secretary.

The INA, as amended by the HSA, charges the Secretary ''with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens,'' except insofar as those laws assign functions to other agencies. INA 103(a)(1), 8 U.S.C. 1103(a)(1). The INA also grants the Secretary the authority to establish regulations and take other actions ''necessary for carrying out'' the Secretary's authority under the immigration laws, INA 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3); *see also* 6 U.S.C. 202.

The HSA charges the Attorney General with ''such authorities and functions under [the INA] and all other laws relating to the immigration and naturalization of aliens as were [previously] exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to [EOIR].'' INA 103(g)(1), 8 U.S.C. 1103(g)(1); *see also* 6 U.S.C. 521. In addition, under the HSA, the Attorney General retains authority to ''establish such regulations, . . . issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out'' his authorities under the INA. INA 103(g)(2), 8 U.S.C. 1103(g)(2).

Under the HSA, the Attorney General retains authority over the conduct of section 240 removal proceedings. These adjudications are conducted by IJs within DOJ's EOIR. *See* 6 U.S.C. 521; INA 103(g), 8 U.S.C. 1103(g). With limited exceptions, IJs within DOJ adjudicate asylum, statutory withholding of removal, and CAT protection applications filed by noncitizens during the pendency of section 240 removal proceedings, including asylum applications referred by USCIS to the immigration court. INA 101(b)(4), 8 U.S.C. 1101(b)(4); INA 240(a)(1), 8 U.S.C. 1229a(a)(1); INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 1208.2(b), 1240.1(a); *see also Dhakal* v. *Sessions,* 895 F.3d 532, 536–37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). The Board of Immigration Appeals (''BIA''), also within DOJ, in turn hears appeals from IJ decisions. *See* 8 CFR 1003.1(a)(1) and (b)(3); *see also Garland* v. *Ming Dai,* 141 S. Ct. 1669, 1677–78 (2021) (describing appeals from IJ to BIA). In addition, the INA provides that the ''determination and ruling by the Attorney General with respect to all questions of law shall be controlling.'' INA 103(a)(1), 8 U.S.C. 1103(a)(1).

In addition to the separate authorities discussed above, the Attorney General and the Secretary share some authorities. Section 208 of the INA, 8 U.S.C. 1158, authorizes the ''Secretary of Homeland Security or the Attorney General'' to ''grant asylum'' to a noncitizen ''who has applied for asylum in accordance with the requirements and procedures established by'' the Secretary or the Attorney General under section 208 if the Secretary or the Attorney General determines that the noncitizen is a refugee. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). Section 208 thereby authorizes the Secretary and the Attorney General to ''establish[ ]'' ''requirements and procedures'' to govern asylum applications. *Id.* The statute further authorizes them to ''establish,'' ''by regulation,'' ''additional limitations and conditions, consistent with'' section 208, under which a noncitizen ''shall be ineligible for asylum.'' INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see also* INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B) (authorizing the Secretary and the Attorney General to ''provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with [the INA]'').[46] The INA also provides the Secretary and Attorney General authority to publish regulatory amendments governing their respective roles regarding apprehension, inspection and admission, detention and removal, withholding of removal, deferral of removal, and release of noncitizens encountered in the interior of the United States or at or between POEs. *See* INA 235, 236, 241, 8 U.S.C. 1225, 1226, 1231.

The HSA granted DHS the authority to adjudicate asylum applications and to conduct credible fear interviews, make credible fear determinations in the context of expedited removal, and to establish procedures for further consideration of asylum applications after an individual is found to have a credible fear. INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* 6 U.S.C. 271(b) (providing for the transfer of adjudication of asylum and refugee applications from the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services, now USCIS). Within DHS, the Secretary has delegated some of those authorities to the Director of USCIS, and USCIS AOs conduct credible fear interviews, make credible fear determinations, and determine whether a noncitizen's asylum application should be granted. *See* DHS, Delegation to the Bureau of Citizenship and Immigration Services, No. 0150.1 (June 5, 2003); 8 CFR 208.2(a), 208.9, 208.30.

The United States is a party to the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention. Article 33 of the Refugee Convention generally prohibits parties to the Convention from expelling or returning (''refouler'') ''a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'' 120%

Congress codified these obligations in the Refugee Act of 1980, creating the precursor to what is now known as statutory withholding of removal.[47] The Supreme Court has long recognized that the United States implements its non-refoulement obligations under Article 33 of the Refugee Convention (via the

[46] Under the HSA, the references to the ''Attorney General'' in the INA also encompass the Secretary, either solely or additionally, with respect to statutory authorities vested in the Secretary in the HSA or subsequent legislation, including in relation to immigration proceedings before DHS. 6 U.S.C. 557.

[47] Public Law 96–212, 94 Stat. 102 (''Refugee Act'').

Refugee Protocol) through the statutory withholding of removal provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), which provides that a noncitizen may not be removed to a country where their life or freedom would be threatened on account of one of the protected grounds listed in Article 33 of the Refugee Convention.[48] *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); *see also* 8 CFR 208.16, 1208.16. The INA also authorizes the Secretary and the Attorney General to implement statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). *See* INA 103(a)(1) and (3), (g)(1) and (2), 8 U.S.C. 1103(a)(1) and (3), (g)(1) and (2).

The Departments also have authority to implement Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). The Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA'') provides the Departments with the authority to ''prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.'' Public Law 105–277, div. G, sec. 2242(b), 112 Stat. 2681, 2681–822 (8 U.S.C. 1231 note). DHS and DOJ have implemented the United States' obligations under Article 3 of the CAT in the CFR, consistent with FARRA. *See, e.g.,* 8 CFR 208.16(c) through 208.18, 1208.16(c) through 1208.18; Regulations Concerning the Convention Against Torture, 64 FR 8478 (Feb. 19, 1999), as corrected by 64 FR 13881 (Mar. 23, 1999).

This rule does not change the eligibility requirements for statutory withholding of removal or CAT protection. As further discussed below, the rule applies a ''reasonable possibility'' standard in screenings for statutory withholding of removal and CAT protection in cases where the presumption of asylum ineligibility is applied and not rebutted. While the application of this standard is a change from the prior practice in the expedited removal context, it is the same standard used in protection screenings in other contexts and is consistent with both domestic and international law. *See* 8 CFR 208.31.

[48] *See INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 426–27 (1999); *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 440–41 (1987) (distinguishing between Article 33's non-refoulement prohibition, which aligns with what was then called withholding of deportation and Article 34's call to ''facilitate the assimilation and naturalization of refugees,'' which the Court found aligned with the discretionary provisions in section 208 of the INA, 8 U.S.C. 1158). The Refugee Convention and Protocol are not self-executing. *E.g., Al-Fara* v. *Gonzales,* 404 F.3d 733, 743 (3d Cir. 2005) (''The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.'').

IV. Public Comments and Responses

The Departments received 51,952 comments on the proposed rule, the majority of which expressed opposition to the proposal. A range of governmental and non-governmental entities, public officials, and private persons submitted comments. The Departments summarize and respond to the public comments below.

A. General Support

1. General Support

Comment: Many commenters stated their support for the rule overall. Commenters emphasized the importance of border security, stating that the Government must do what is necessary to both manage workloads at the border and stop migrants from entering the United States without permission.

Response: Promulgation of this rule is needed because, once the Title 42 public health Order is lifted, the number of migrants traveling to the United States without authorization is expected to increase significantly, to a level that risks undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. Such a surge would also place additional pressure on States, local communities, and non-governmental organization (''NGO'') partners both along the border and in the interior of the United States.

To address these issues, the rule imposes a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States outside of safe, orderly, and lawful pathways and without first seeking protection in a third country they have traveled through en route to the SWB, during a designated period of time. The rule (1) incentivizes the use of multiple existing lawful, safe, and orderly means for noncitizens to enter the United States to seek asylum and other forms of protection; (2) continues to provide core protections for noncitizens who would be threatened with persecution or torture in other countries; and (3) builds upon ongoing efforts to share the responsibility of providing asylum and other forms of protection to deserving migrants with the United States' regional partners.

The successful implementation of the CHNV parole processes has demonstrated that an increase in lawful pathways, when paired with consequences for migrants who do not avail themselves of such pathways, can incentivize the use of such pathways and undermine transnational criminal organizations, such as smuggling operations. The rule, which is fully consistent with domestic and international legal obligations, provides the necessary consequences to maintain this incentive under Title 8 authorities. In short, the Departments expect the rule, coupled with an expansion of lawful, safe, and orderly pathways, to reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States.

The benefits of reducing the number of encounters include protecting against overcrowding in border facilities; allowing for the continued effective, humane, and efficient processing of noncitizens at and between ports of entry; and helping to reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain. Even where the rule applies, the presumption against asylum eligibility may be rebutted in certain circumstances, such as where, at the time of the noncitizen's entry into the United States, they or a family member with whom they are traveling are experiencing an acute medical emergency or an extreme and imminent threat to life or safety, or are a victim of a severe form of trafficking. Moreover, DHS will still screen migrants who cannot overcome the rebuttable presumption to determine if the migrant has established a reasonable possibility of persecution for the purposes of statutory withholding of removal or a reasonable possibility of torture for the purposes of protection under the regulations implementing the CAT. *See* 8 CFR 208.33(b)(2)(i). Should a migrant receive a negative credible fear determination, they can also seek review of the determination by an IJ. *See* 8 CFR 208.33(b)(2)(iii) through (v). Those who are found to have credible fear due to a reasonable possibility of persecution or torture will then have the opportunity for further consideration of their protection claims via a section 240 removal proceeding. *See* 8 CFR 208.33(b)(2)(ii).

2. Need, Effectiveness, and Rationale for the Rule

Comment: Commenters described the rule as a common-sense approach to managing migration at the border and

discouraging illegal migration, while others stated that the rule would contribute to the ''rule of law'' at the border. Other commenters noted that a change such as that made by this rule is necessary, as it is simply impossible to admit all migrants who want to enter the United States. Some commenters stated that the rule is a reasonable solution until Congress can take legislative action to address the issue. Other commenters supported the rule's encouragement for migrants to first seek protection in third countries they pass through before requesting asylum at the SWB and asserted that such a requirement is standard in international law; commenters further stated that the rule would discourage ''asylum shoppers.'' Commenters stated that allowing migrants to cross multiple countries en route to the United States before claiming asylum defeats the true purpose of asylum. Some commenters stated that migrants know that claiming asylum allows them entry into the United States, and thus take advantage of the process.

Response: As noted above, the Departments have designed this rule in response to the number of migrants expected to travel without authorization to the United States after the lifting of the Title 42 public health Order, absent a policy change such as this one. In that case, the circumstances likely to occur include the following: an additional number of migrants anticipated to arrive at the border; the severe strain on resources that this influx of migrants would cause DHS; and a substantial resulting impact on U.S. Government operations, as well as local communities. DHS's successful Uniting for Ukraine (''U4U'') and CHNV parole processes—under which DHS coupled a mechanism for noncitizens from these countries to seek entry to the United States in a lawful, safe, and orderly manner with the imposition of new consequences for those who cross the SWB without authorization—have demonstrated that an increase in the availability of lawful pathways paired with consequences for migrants who do not avail themselves of such pathways can incentivize the use of lawful pathways and undermine transnational criminal organizations, such as smuggling operations. The Departments expect similar benefits from this rule, especially a reduced number of encounters at the border, which will help to protect against overcrowding in border facilities; allow for the continued effective, humane, and efficient processing of noncitizens at and between ports of entry; and reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain.

The Departments designed the rule to strike a balance that maintains safe and humane processing of migrants while also including safeguards to protect especially vulnerable individuals. The rule provides exceptions to the rebuttable presumption and allows migrants to rebut the presumption in exceptionally compelling circumstances. These exceptions and opportunities for rebuttal are meant to ensure that migrants who are particularly vulnerable, who are in imminent danger, or who could not access the lawful pathways provided are not made ineligible for asylum by operation of the rebuttable presumption. Those who are not excepted from and are unable to rebut the presumption of ineligibility may still pursue statutory withholding of removal and protection under the CAT. In addition, to further aid migrants, the Departments plan to continue to work with foreign partners to expand lawful pathways for migration, as well as expand the Departments' mechanisms for lawful processing. Thus, the rule will disincentivize irregular migration and instead incentivize migrants—including those intending to seek asylum—to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel.

3. Mitigate Irregular Migration and the Associated Impacts

Comment: Many commenters expressed support for the rule for a variety of reasons. Commenters supported the change in policy, noting that this rule would result in a more efficient use of government resources at the border. Commenters also supported the proposed rule's use of a formal process for asylum applicants. Some commenters stated their support for the rule because the journey to the SWB is dangerous due to harsh conditions and smugglers, and this rule would weaken smugglers and transnational criminal enterprises and reduce their exploitation of migrants. Commenters also stated that incentivizing migrants to present themselves at POEs would reduce their risk of exploitation by human traffickers or other harm when attempting to cross between POEs. Commenters commended the Departments for prioritizing safe and orderly processing methods for those seeking refuge. Some commenters indicated that border security is critical and expressed concerns that malicious actors could enter the United States more easily during a surge in migration.

Response: The Departments recognize these commenters' support for the rule and agree that maintaining border security is critical. The Departments agree that irregular migration is dangerous and can lead to increased strain on SWB operations and resources, increased illegal smuggling activity, and increased pressure on communities along the SWB. The United States has taken several measures to meet the influx of migrants crossing the SWB and is taking new steps to address increased flows throughout the Western Hemisphere.[49]

However, the anticipated increase in the number of migrants following the lifting of the Title 42 public health Order threatens to exceed the Departments' capacity to safely and humanely process migrants. By coupling the rule with additional lawful pathways and allowing migrants to schedule their arrival at a SWB POE, currently via the CBP One app, the rule will reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States. This reduction will protect against overcrowding in border facilities; allow for the continued effective, humane, and efficient processing of noncitizens at and between ports of entry; and help to reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain. The Departments expect that this rule will result in decreased strain on border states, local communities, and NGOs and, accordingly, allow them to better absorb releases from CBP border facilities and provide support to the migrant community. Ultimately, this rule will disincentivize irregular migration and instead incentivize migrants to use safe, orderly, and lawful pathways to the United States or to seek protection in third countries.

4. Positive Impacts on Operations and Resources

Comment: Commenters supported the rule, stating that allowing migrants to remain in the United States at the government's expense while waiting for their asylum claim to be adjudicated is a waste of government resources. Commenters said that the rule—specifically when coupled with the expanded use of the CBP One app and the ability for migrants to schedule appointments—would allow for more efficient processing at the SWB. Commenters stated that, by decreasing

[49] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

the number of migrants seeking asylum, the Departments would adjudicate asylum claims much faster and decrease the amount of time migrants must wait in the United States before receiving a final decision in their case.

Response: The Departments recognize these commenters' support and agree that the rule will have benefits for both those granted asylum and the U.S. immigration system. The rule encourages noncitizens to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule is designed to channel the high numbers of migrants expected to seek protection in the United States following the termination of the Title 42 public health Order into lawful, safe, and orderly pathways and ensure they can be processed in an effective, humane, and efficient manner. In addition, the Departments anticipate that the use of the CBP One app—the current scheduling mechanism that provides migrants with a means to schedule a time and place to present themselves at a SWB POE—will allow CBP to streamline the processing of noncitizens at POEs on the SWB and process significantly more individuals in a safe and orderly manner.

Adjudication on the merits of an asylum claim for those who establish credible fear and are placed into removal proceedings can be a long process. Thirty-eight percent of all noncitizens who entered along the SWB, received a positive credible fear determination, and were placed into proceedings before EOIR between FY 2014 and FY 2019 remained in EOIR proceedings as of December 31, 2022.[50] Further, almost half (47 percent) of those in EOIR cases who received positive credible fear determinations resulting from FY 2019 encounters (referrals to EOIR) remained in proceedings as of December 31, 2022.[51] Excluding *in absentia* orders, the mean completion time for EOIR cases in FY 2022 was 3.7 years.[52] Thus, those who have a valid claim to asylum in the United States often wait years for a final relief or protection decision; likewise, noncitizens who will ultimately be found ineligible for asylum or other protection—which occurs in the majority of cases—often have spent many years in the United States prior to being ordered removed.

[50] *See* OIS analysis of OIS Enforcement Lifecycle data based on data through December 31, 2022.

[51] *Id.*

[52] *See* OIS analysis of DOJ EOIR data based on data through March 31, 2023.

This lengthy adjudications process means that migrants who can establish credible fear can expect to remain in the United States for an extended period regardless of whether they will ultimately obtain asylum status at an EOIR hearing on the merits. Allowing a migrant to remain in the United States for years before ultimately determining the migrant is ineligible for asylum or other protection is inefficient, risks creating a pull factor for other intending migrants, and runs counter to principles of judicial fairness, including the swift adjudication of claims. As discussed in the NPRM, *see* 88 FR at 11737, and below at Section IV.B.2 of this preamble, the Departments have determined that this rule will lead to increased efficiencies in the asylum adjudications process so that claims can be adjudicated without a lengthy delay.

5. Other Support

Comment: Commenters agreed that the Departments have the legal authority to restrict asylum eligibility based on a migrant's failure to seek protection in a third country that they have traveled through on route to the SWB and that such a policy is consistent with both domestic and international law. Commenters stated that the rule was necessary because most migrants do not have legitimate asylum claims, noting low grant rates by EOIR, and are instead seeking economic opportunities in the United States. Other commenters expressed general support for the rule and stated a belief that asylum seekers do not have legitimate claims because they may be coached by NGOs or other organizations.At least one commenter stated that if a migrant traveled through a third country with a legitimate asylum process on their way to the United States, DHS should assume that the migrant is not really in fear for their life; otherwise, the U.S. asylum system would be used for economic migration, the demand for which should be addressed by other means. Another commenter said that the proposed rule encourages asylum-seekers to use the ''front door'' by presenting at POEs and fulfills domestic and international legal obligations by removing eligibility for asylum for those who fail to do so while maintaining access to statutory withholding of removal and protection under the CAT. The commenter noted that countries are within their rights to limit access to asylum. The commenter also stated that many individuals are barred from asylum eligibility for reasons such as fraud, criminal convictions, and illegal reentry, and that the proposed rule would add those who do not avail themselves of asylum in the nearest country and do not apply at a POE to this list, which should limit further unlawful entries and use of government resources. Some commenters supported the rule and suggested that the Government disseminate information about the rule in other countries to ensure migrants planning to seek asylum are aware of both the asylum process and the consequences of non-compliance.

Response: As discussed further below in Section IV.B.D, the Departments agree that the rule is consistent with U.S. obligations under both domestic and international law, including the INA; the Refugee Convention; the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention; and the CAT. While the Departments appreciate these commenters' support for the rule, the Departments emphasize that this rule is necessary to prevent the expected increase in the number of migrants who would otherwise seek to travel without authorization to the United States after the termination of the Title 42 public health Order, which would risk undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. In other words, the Departments do not rely on the alternative goals or bases of support for the rule expressed in the comments summarized above.

The Departments appreciate the importance of disseminating information about the rule to the public, including intending migrants, and are planning a robust communication effort in conjunction with and immediately following the publication of this rule.

B. General Opposition

1. General Opposition

Comment: The Departments received many comments expressing general opposition to the rule. Some commenters expressed opposition to the rule and encouraged the Administration to withdraw it, without further explanation. Commenters also stated, without explanation, that the rule would allow future administrations the ability to decide which nationalities are afforded protections, instead of making protections available for everyone in need. Other commenters stated the rule creates barriers, not pathways, for asylum seekers.

Response: The Departments take seriously the concerns expressed by commenters who generally oppose the rule. Because some of these comments failed to articulate specific reasoning underlying the general opposition, the

Departments are unable to provide a more detailed response to those comments. In general, the Departments emphasize that this rule is necessary to ensure that, after the lifting of the Title 42 public health Order, protection claims made by noncitizens encountered at the SWB can be processed in a manner that is effective, humane, and efficient. The rule is also designed to reduce overcrowding at DHS facilities and reduce migrants' reliance on exploitive smuggling networks. The Departments intend this rule to work in conjunction with other initiatives that expand lawful pathways to enter the United States, and thereby incentivize safe, orderly, lawful migration over dangerous, irregular forms of migration. Although some lawful pathways, which exist separate from this rule, are available only to particular nationalities, this rule does not deny protection on the basis of nationality. A noncitizen of any nationality may avoid the rebuttable presumption by, for instance, presenting at a POE pursuant to a pre-scheduled time and place. As discussed in the NPRM and further below, the rule's presumption against asylum eligibility only applies to those who enter during a 2-year period, is rebuttable, and contains multiple exceptions to prevent undue harm to noncitizens with meritorious protection claims.

2. Need, Effectiveness, and Rationale for the Rule

Comment: Commenters asserted that the Departments' concerns about a future surge of migration after the end of the Title 42 public health Order are speculative and unsupported. One commenter said that the surge numbers were unreliable at best, that entries between POEs were higher two decades ago, and that the surge could in part be the result of attempted suppression of normal migration. Some commenters questioned the Departments' planning projection of the number of border encounters it expects when the Title 42 public health Order is lifted as a valid justification of the NPRM. Another commenter stated that the numbers of unauthorized unique individuals detained at the border are far from an all-time high or a record, and that attempts to enter the country undetected have plummeted. One commenter stated that the Title 42 public health Order increased the percentage of individuals attempting repeated crossings at the border, which has artificially inflated CBP's border apprehension statistics, and thereby overstated the scale of the problem at the border. Some commenters stated that the public is unable to properly evaluate the Departments' data used to justify the rule because the ''DHS SWB Encounter Planning Model generated January 6, 2023'' cited in the NPRM, *e.g.,* 88 FR at 11705 n.11, does not have a link to the model and it does not provide information on methodology, data sources, and alternative figures.

Response: The Departments strongly disagree that the concerns stated in the NPRM regarding an ongoing and potential further surge of migration are speculative or unsupported. As noted in the NPRM, for the 30 days ending December 24, 2022, total daily encounters along the SWB consistently fluctuated between approximately 7,100 and 9,700 per day, averaging approximately 8,500 per day, with encounters exceeding 9,000 per day on 12 different occasions during this 30-day stretch.[53] 88 FR at 11704–05. While commenters are correct that the Title 42 public health Order has increased the percentage of repeat crossing attempts relative to the 2010s, since 2022 over 97 percent of extra-regional migrants (*i.e.,* migrants not from Mexico or Northern Central America [54])—the people representing the greatest processing challenge—are unique encounters.[55] Encounter totals reached an all-time high in FY 2022, and they remain at historically high levels even as encounters of CHNV nationals have fallen in recent months.[56]

OIS leads an interagency working group that produces a roughly bi-weekly SWB encounter projection used for operational planning, policy development, and short-term budget planning. The model used to produce encounter projections every two to four weeks is a mixed-method approach that combines a statistical predictive model with subject matter expertise intended to provide informed estimates of future migration flow and trends. The mixed methods approach blends multiple types of models through an ensemble approach of model averaging.[57] The model includes encounter data disaggregated by country and demographic characteristics going back to FY 2013, data on apprehensions of third country nationals by Mexican enforcement agencies, and economic data. DHS uses the encounter projection to generate a range of planning models, including ''moderately-high'' planning models that are based on the 68 percent upper bound of the forecast interval and ''high'' planning models based on the 95 percent upper bound of the forecast interval.

Encounter projections are, of course, subject to some degree of uncertainty. International migration is an exceedingly complex process shaped by family and community networks, labor markets, environmental and security-related push factors, and rapidly evolving criminal smuggling networks, among other factors. Recent unprecedented changes in migration flows have further complicated the task of predicting future migration flows with precision. As recently as the 2000s, unauthorized migration to the SWB consisted almost entirely of single adults from Mexico.[58] Families and UCs accounted for increasing shares of unauthorized migrants in the 2010s, as did migrants from Northern Central America; and ''extra-regional'' migrants have driven increased flows in the 2020s, accounting for an absolute majority of encounters in FY 2023

[53] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[54] Northern Central America refers to El Salvador, Guatemala, and Honduras.

[55] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[56] Concrete data on unique versus repeat encounters are only available since 2010. During that period, for the years prior to the implementation of Title 42 expulsions, the percentage of encounters that were unique increased each year from 2010–2019. OIS analysis of OIS Persist Dataset based on data through March 31, 2023. While specific data on numbers of unique encounters are not available prior to 2010, it is widely accepted that the years before the 2010, and particularly the years before 2000, were characterized by much larger numbers of repeat encounters, as most encounters were of Mexican nationals who were permitted to return to Mexico without being subject to formal removal proceedings or other enforcement consequences. *See also* DHS, *FY 2021 Border Security Metrics Report* (Apr. 27, 2022), *https://www.dhs.gov/immigration-statistics/border-security/border-security-metrics-report.*

[57] Blending multiple models and basing predictions on prior data has been understood to improve modeling accuracy. *See, e.g.,* Spyros Makridakis et al., *Forecasting in Social Settings: The State of the Art,* 36 Int'l J. Forecasting 15, 16 (2020) (noting that it has ''stood the test of time [that] combining forecasts improves [forecast] accuracy''); The Forecasting Collaborative, *Insights into the Accuracy of Social Scientists' Forecasts of Societal Change,* Nat. Hum. Behaviour, Feb. 9, 2023, *https://doi.org/10.1038/s41562-022-01517-1* (comparing forecasting methods and suggesting that forecasting teams may materially improve accuracy by, for instance, basing predictions on prior data and including scientific experts and multidisciplinary team members).

[58] According to historic OIS Yearbooks of Immigration Statistics, Mexican nationals accounted for 97 percent of all administrative arrests by the legacy Immigration and Nationality Service from 1981–1999. According to OIS Production data, Mexican nationals also accounted for 97 percent of SWB encounters from 2000–2003. Mexico's share of SWB border encounters fell to 94 percent in 2004, an all-time low, then averaged 91 percent for the remainder of the 2000s. OIS analysis of OIS Yearbook on Immigration Statistics, 1981–1999; OIS Production Data, 2000–2009.

YTD.[59] The OIS working group takes these recent changes in migration flows into account in preparing its roughly bi-weekly encounter projection models.

Demographic changes in migration flows have introduced new challenges in the field of border enforcement. For decades the challenge was to detect and interdict Mexican nationals seeking to evade detection and to return them to Mexico, which generally was cooperative in accepting back its nationals across the land border. Today's set of challenges is broader; the United States Government must humanely process family units and UCs and consider tens of thousands of asylum claims, granting relief or protection where appropriate and imposing enforcement consequences (such as removal or return, and in some cases criminal charges), all with limited processing resources and challenges relating to barriers to repatriations for nationals from certain countries. These changes have significant implications, requiring substantial resources from CBP, ICE, USCIS, EOIR, and HHS.

An additional consideration in how the Departments utilize encounter projections for operational planning and budgeting is that it takes weeks or months to put new enforcement resources in place, while removing such resources takes much less time. For this reason, DHS generally must be conservative in its enforcement planning because the failure to have adequate resources in place at the start of a migration surge risks vicious cycles in which inadequate capacity to implement critically needed tools to disincentivize irregular migration, coupled with persistent and strong ''push factors,'' contribute to cascading adverse effects as the enforcement system becomes overwhelmed. Such effects include overcrowding in DHS facilities (which can endanger both migrants and DHS personnel), more noncitizens being released into the interior pending immigration proceedings, and additional flows of migrants. In the current context of added uncertainty in the encounter projection and evolving enforcement challenges, DHS focuses its operational planning efforts on the high and moderately-high planning models rather than planning for an optimistic scenario that could leave enforcement efforts badly under-resourced. As for this policymaking effort, the Departments believe the policies in this rule are justified ''in light of the migration patterns witnessed in late November and December of 2022, and the concern about the possibility of a surge in irregular migration upon, or in anticipation of, the eventual lifting of the Title 42 public health Order.'' 88 FR at 11708.

With respect to the suggestion that the Departments should have subjected the OIS planning model to more detailed review by commenters, the Departments respectfully disagree. In addition to the Departments' description of the planning model in the NPRM, *see* 88 FR at 11705 n.11, the Departments presented a range of the underlying data clearly demonstrating the scope of the problem the Departments face. *See, e.g.,* 88 FR at 11704–05 (''For the 30 days ending December 24, 2022, total daily encounters along the SWB consistently fluctuated between approximately 7,100 and 9,700 per day, averaging approximately 8,500 per day, with encounters exceeding 9,000 per day on 12 different occasions during this 30-day stretch''); *id.* at 11708–14 (describing the historically unique nature of current migratory trends and the role of shifting demographics and other factors on these trends). Although the Departments did not describe the planning models in minute detail, the data make clear the basis for the proposed rule and no commenters submitted data suggesting that the Departments do not currently face, and will not imminently face, an urgent circumstance requiring a policy response.

Comment: One commenter stated that concerns that NGOs and shelter networks have or are close to reaching their ''outer limit'' of capacity are unfounded, because according to the commenter, none of the $800 million newly allocated for humanitarian reception had been distributed as of the NPRM's publication in late February of this year. The commenter wrote that there are numerous ways that the Administration can work with Congress and NGO partners to continue to build shelter capacity and effectively respond to the needs of arriving migrants and asylum seekers. Similarly, a commenter noted that the Government pays private, for-profit detention facilities $320/day to detain noncitizens, but only pays shelters $25 for a single bed. The commenter wrote that they had been asking the Government for more than two years to provide more funding to shelters and increase cooperation with NGOs, to no avail.

Response: The Departments acknowledge commenters' concerns about funds dedicated for NGOs and shelter networks as they work to respond to migratory flows and note that one expected effect of this rule is to disincentivize irregular migration, which may in turn result in reduced demand for certain NGO and shelter services. With respect to grant funding generally, as noted in the NPRM, the Federal Emergency Management Agency (''FEMA'') spent $260 million in FYs 2021 and 2022 on grants to non-governmental and state and local entities through the Emergency Food and Shelter Program—Humanitarian (''EFSP–H'') to assist migrants arriving at the SWB with shelter and transportation. *See* 88 FR at 11714. In November 2022, FEMA released $75 million through the program, consistent with the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023.[60] In addition, the Bipartisan Year-End Omnibus, which was enacted on December 29, 2022, directed CBP to transfer $800 million in funding to FEMA to support sheltering and related activities for noncitizens encountered by DHS. The Omnibus authorized FEMA to utilize this funding to establish a new Shelter and Services Program and to use a portion of the funding for the existing EFSP–H, until the Shelter and Services Program is established.[61] On February 28, 2023, DHS announced a $350 million funding opportunity for EFSP–H.[62] This is the first major portion of funding that is being allocated for humanitarian assistance under the Omnibus funding

[59] Families and unaccompanied children accounted for an estimated 11 percent of SWB encounters in 2013, rising to 62 percent in 2019, and have averaged 30 percent from 2020 through March 2023. Data on unaccompanied children were first collected in 2008 and data on other family statuses were first collected in 2013, but not universally collected until 2016. Mexican nationals accounted for an average of 57 percent of SWB encounters from 2013–2015, fell to an all-time low of 24 percent in 2019 (when Northern Central Americans accounted for 64 percent of the total), and have averaged 35 percent of encounters from 2021 through March 2023. Extra regional nationals accounted for an average of 9 percent of SWB encounters from 2013–2018, 12 percent from 2019–2020, and account for 52 percent in the first six months of FY 2023. OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[60] Public Law 117–180, Division A, Sec. 101(6), Continuing Appropriations Act, 2023.

[61] Public Law 117–328, Division F, Title II, Security Enforcement, and Investigations, U.S. Customs and Border Protection, Operations and Support.

[62] *See* DHS, Press Release, *The Department of Homeland Security Awards $350 Million for Humanitarian Assistance Through the Emergency Food and Shelter Program* (Feb. 28, 2023), *https://www.dhs.gov/news/2023/02/28/department-homeland-security-awards-350-million-humanitarian-assistance-through;* DHS Grant Opportunity DHS–23–DAD–024–00–03, Fiscal Year 2023 Emergency Food and Shelter National Board Program—Humanitarian (EFSP) ($350M) (Feb. 28, 2023), *https://www.grants.gov/web/grants/view-opportunity.html?oppId=346460.*

approved in December.[63] For the new Shelter and Services Program, FEMA and CBP have held several public listening sessions and are developing plans to release a Notice of Funding Opportunity prior to September 2023 for the second major portion of funding allocated by Omnibus to assist migrants encountered by DHS.

The Departments emphasize that the reference to an ''outer limit'' in the NPRM was a prediction that the expected increase in migration at the border following the end of the Title 42 public health Order, without any other policy changes, could exceed the capacity of the Department of State, local governments, and NGOs to provide assistance to migrants. 88 FR at 11715. While commenters are correct that the $800 million in funding approved in the recent Omnibus is still being distributed and allocated, the Departments disagree that this ongoing funding conflicts with the statement in the NPRM. In other words, funding allocated to date, and funding slated for further allocation under the Omnibus funding approved in December, is insufficient to address the impending further surge of migration expected after the termination of the Title 42 public health Order.

Comment: Multiple commenters stated their opposition to ''deterrence-oriented'' rules. At least one commenter stated the NPRM makes clear the Administration wants to make the asylum system ''cumbersome and difficult to navigate'' to deter potential asylum seekers from coming to the United States, stating Vice President Harris' comment of ''do not come'' in 2021 was a message that those fleeing danger should not seek protection in the United States. Another commenter stated the proposed rule would not be an effective deterrent because of its similarity to the Migrant Protection Protocols (''MPP'') and the Title 42 public health Order in the past, which the commenter claimed ''outsourced and exacerbated the situation'' by leaving thousands of individuals in dangerous conditions in Mexican border cities waiting to see if, or when, they will get into the United States. Another commenter stated the rule does not serve as a deterrent, as evidenced by the growing numbers of asylum seekers at the border.

Some commenters disagreed that the rule would reduce arrivals at the SWB. Commenters disagreed with the premise underlying the proposed rule—that the rebuttable presumption would disincentivize migrants from entering the United States except through a lawful and orderly pathway and lead to a reduction in encounters at the SWB. Another commenter argued that the rule is providing an opportunity to smuggling organizations and also providing an additional tool for extortion for noncitizens seeking to enter the United States. Another commenter stated that there is no evidence that the NPRM will deter asylum seekers from crossing the border and suggested that arrivals at the border would increase due to suppression of entries at POEs.

Response: The Departments disagree that the rule generally seeks to discourage asylum seekers from coming to the United States. Rather, the rule seeks to strike a balance: It is intended to reduce the level of irregular migration to the United States, but also to preserve sufficient avenues for migrants with valid claims to apply for asylum or other protection, either in the United States or in third countries through which they travel. This rule is also intended to disincentivize the use of smugglers. To those ends, the rule encourages those with meritorious claims to either apply for asylum or other protection in the first safe country they reach or pursue available lawful pathways to the United States as set forth in the rule.

The Departments also disagree with the comparison some commenters made between this rule and certain past policies, including MPP and application of the Title 42 public health Order. The rule's operation as a rebuttable presumption, and the rule's operation in conjunction with multiple available lawful pathways, are two of the multiple ways in which this rule differs from certain past policies, including MPP or expulsions under the Title 42 public health Order. As it relates to MPP in particular, the purpose and effect of this rule is not to return noncitizens to Mexico pending their removal proceedings. *See* INA 235(b)(2)(C), 8 U.S.C. 1225(b)(2)(C). Instead, it is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. Although some migrants may wait for some period of time in Mexico before obtaining a CBP One app appointment and before attending that appointment, the purpose and duration of such a stay would be different than under MPP. Absent this rule, DHS anticipates that its ability to process noncitizens at POEs, as well as continue to facilitate regular travel and trade, would be adversely impacted by the shifting of resources and personnel from POEs to help process individuals encountered between POEs.

The Departments disagree with commenters' claim that this rule will not reduce entries and that it will incentivize irregular migration. The Departments have shown that an increase in the availability of lawful pathways, paired with immediate consequences for irregular migration, can incentivize the use of lawful pathways and thus reduce irregular migration. *See* 88 FR at 11705–06. Furthermore, the Departments disagree with commenters' assertion that the rule will push individuals away from POEs to cross between POEs. The rule incentivizes noncitizens who might otherwise attempt to enter without inspection between POEs to take advantage of expanded lawful pathways. The availability of lawful pathways, such as the ability to schedule an appointment through the CBP One app and the DHS-approved parole processes, and the rule's operation as a rebuttable presumption are two of the multiple ways in which this rule differs from certain efforts of the past Administration.

Comment: Commenters raised concerns with Departmental data cited in the NPRM. For example, commenters referred to two of the Departments' statements in the NPRM: (1) that 83 percent of the people who were subject to expedited removal and claimed to have a credible fear of persecution or torture from 2014 to 2019 were referred to an IJ for section 240 proceedings, but only 15 percent of those cases that were completed were granted asylum or some other form of protection, *see* 88 FR at 11716; and (2) while only 15 percent of all case completions result in relief or protection, OIS estimates that 28 percent of cases decided on their merits are grants of relief, 88 FR at 11716 n.97. Commenters stated that the 15 percent figure is misleading, because it is based on the total percentage of completed removal cases, and not the total percentage of cases decided on the merits of the asylum claim. Commenters claim that this method artificially deflates the asylum grant rate and creates the false impression that many asylum seekers were ineligible for asylum even where there was no decision on their asylum claim. Commenters also stated that the 28 percent figure itself was too low because, as described by the Departments, this figure excludes

[63] DHS, Press Release, *The Department of Homeland Security Awards $350 Million for Humanitarian Assistance Through the Emergency Food and Shelter Program* (Feb. 28, 2023), *https://www.dhs.gov/news/2023/02/28/department-homeland-security-awards-350-million-humanitarian-assistance-through.*

withholding of removal, deferral of removal, cancellation of removal, and claimed status reviews.

Commenters also claimed that asylum policies of the previous Administration artificially deflated asylum grant rates. Other commenters stated that it is logical that the percentage of cases passing the credible fear interview stage is far higher than the cases that eventually qualify for asylum, given that the credible fear process is supposed to have a low bar for passage. Another commenter stated that, by the Departments' logic, no asylum applicant should be entitled to an initial credible fear determination and full asylum merits hearing because their claims will probably be denied given the low approval rating of asylum.

Response: The Departments cited relevant Departmental statistics—which date back to 2014, prior to the implementation of any policies of the prior Administration—to demonstrate the general point that there is a significant disparity between positive credible fear determinations and ultimate relief in section 240 removal proceedings. *See* 88 FR at 11716. Whether one uses the 15-percent figure or the 28-percent figure, ultimately, the number of individuals who are referred to an IJ at the beginning of the expedited removal process greatly exceeds the number who are granted asylum or some other form of relief or protection.

Comment: A commenter stated that numerous factors beyond merit impact whether an asylum seeker's case is ultimately granted (*e.g.,* access to counsel, availability of experts, changing regulations and procedures, and backlogs that affect the availability of evidence). Another commenter noted that many who seek asylum in the United States ultimately lose their cases not due to a lack of merit but instead because of ''our convoluted and dysfunctional'' immigration system, which the commenter claimed is difficult for asylum seekers to navigate and results in denial of many asylum claims on bases unrelated to the merits of the claim. One commenter asserted that modifying the legal requirements for asylum will not stop migrants from fleeing armed conflict, poverty or other dangers, because many are unaware of their right to apply for asylum. Another commenter stated that the number of migrants arriving is irrelevant to the merits of their asylum claims; the commenter also argued that the rule would screen out asylum seekers regardless of the merit of their case.

Response: The Departments acknowledge commenters' concerns that factors unrelated to the merits of the claim, such as access to counsel and unfamiliarity with the asylum process, could affect the ultimate determination of an asylum claim, but disagree that these potential issues are exacerbated by the rule. As discussed in more detail later in Section IV.B.5 of this preamble, this rule does not deprive noncitizens of access to counsel during credible fear proceedings. Additionally, all AOs are trained to conduct interviews in a non-adversarial manner and elicit relevant testimony from noncitizens. Specific training for implementation of this rule will include training on eliciting testimony related to whether a noncitizen can establish an exception or rebut the presumption of asylum ineligibility; therefore, noncitizens are not required to be familiar with the rule to remain eligible for asylum. The Departments emphasize that in all credible fear determinations, a noncitizen's credible testimony may be sufficient to overcome or establish an exception to the presumption against asylum ineligibility in this rule. INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). As discussed later in Section IV.D.1.iii of this preamble, the Departments note that the overall standard of proof for rebutting or establishing an exception to the presumption of asylum ineligibility during credible fear proceedings remains the ''significant possibility'' standard; that standard must be applied in conjunction with the standard of proof required for the ultimate determination (*i.e.,* preponderance of the evidence that an exception applies or that the presumption has been rebutted).

As discussed throughout the NPRM, the lawful pathways condition, and the related modification of the withholding and CAT screening standard applied to noncitizens subject to the condition, would improve overall asylum processing efficiency by increasing the speed with which asylum claims are considered. *See* 88 FR at 11737. By encouraging noncitizens seeking to travel to the United States, including those seeking asylum, to pursue lawful pathways and processes, the rule promotes orderly processing and reduces the number of individuals who would be placed in lengthy section 240 removal proceedings and released into the United States pending such proceedings. *Id.* at 11736. Moreover, by reducing the number of noncitizens permitted to remain in the United States despite failing to avail themselves of a safe and lawful pathway to seek protection, the rule reduces incentives for noncitizens to cross the SWB, thus reducing the anticipated further surge that is expected to strain DHS resources. The Departments reiterate that the rule is not being promulgated to generally prevent noncitizens from seeking asylum in the United States but to strike a balance—reducing the level of irregular migration to the United States while providing sufficient avenues for migrants with valid claims to apply for asylum or other protection. The rule is needed because, absent this rule, after the termination of the Title 42 public health Order, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system.

Comment: One commenter asserted that the real purpose of the rule is to incentivize an increasing number of migrants to use the CBP One app to make fraudulent asylum claims. The same commenter also stated ''that the proposed rule and the CBP One app will incentivize increased rates of illegal immigration into the United States.'' The commenter further stated that because there is insufficient capacity to process all of the asylum claims of those using the CBP One app, the rule will simply increase the number of individuals who are paroled into the United States, incentivizing further illegal immigration. Another commenter argued that current migration levels result from the current Administration's actions to ''weaken border security, promote the influx of illegal immigration, and to remove integrity from the administration of both the legal immigration process (including asylum and credible fear measures) and overall enforcement of the laws.'' Similarly, another commenter stated that the root cause of this crisis was ''the Administration's reckless open borders policies.''

Response: While the Departments acknowledge the commenters' concerns about increased rates of unauthorized immigration into the United States, the Departments disagree that the rule and use of the CBP One app will incentivize noncitizens to enter the United States to make fraudulent asylum claims. If anything, by adding a rebuttable presumption of ineligibility, this rule creates a strong disincentive for irregular migration relative to the status quo. The Departments note that no commenter submitted data suggesting that the rule will result in an increase in fraud or misrepresentation. As explained in Section IV.B.5.iii of this

preamble, the Departments are confident that AOs have the training, skills, and experience needed to assess credibility and appropriately determine whether a noncitizen has met an exception to or rebutted the presumption of ineligibility for asylum codified in the rule. Regarding commenters' concerns that use of the CBP One app will increase the number of individuals who are paroled into the United States and thus incentivize irregular migration, the Departments note that the rule does not provide for, prohibit, or otherwise set any policy regarding DHS's discretionary authority to make parole determinations for those who use the CBP One app. Even so, as outlined in the NPRM and later in Section IV.E.3.ii of this preamble, the expanded use of the CBP One app is expected to create efficiencies that will enable CBP to safely and humanely expand its ability to process noncitizens at POEs, including those who may be seeking asylum. *See* 88 FR at 11719. Notably, the rule, coupled with an expansion of lawful, safe, and orderly pathways, is expected to reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States. Additionally, the United States is undertaking a range of efforts to address irregular migration, including, for instance, working with partner countries to address the causes of migration, significantly increasing the availability of H–2 temporary worker visas and refugee processing in the Western Hemisphere, successfully implementing the CHNV parole processes, and addressing the pernicious role of human smugglers. *See* 88 FR at 11718–21.

The Departments strongly disagree with commenters who assert that the current migration levels are a result of any action by the Departments to ''weaken'' security at the border. Rather, as noted in the NPRM, economic and political instability around the world is fueling the highest levels of migration since World War II, including in the Western Hemisphere. *See* 88 FR 11704. Additionally, even while the Title 42 public health Order has been in place, the total number of encounters at the SWB reached an all-time high in FY 2022, and they remain at historically high levels even as encounters of CHNV nationals have fallen in recent months.[64] *See id.* at 11704–05. During this time, the United States has been working to build on a multi-pronged, long-term strategy with countries throughout the region to support conditions that would decrease irregular migration while continuing efforts to increase immigration enforcement capacity and streamline processing of asylum seekers and other migrants. *See* 88 FR at 11720–23. This rule ensures that the United States meets its obligations under both U.S. and international law while ensuring that vulnerable populations are able to seek asylum or other protection through lawful, safe, and orderly pathways.

Comment: Commenters stated that the rule is unnecessary because the goals of discouraging migrants from seeking asylum and swiftly removing migrants are invalid. These commenters further stated that immigration is good; there is no need to quickly remove asylum seekers, regardless of backlogs; and that overwhelmed immigration facilities are problems created by the Government that would be solved by welcoming migrants rather than treating them as a problem or as dangerous. A few commenters critiqued the need for the rule, writing that the proposed rule is unnecessary and the Administration should take responsibility for actions that have created an overloaded immigration system. Other commenters questioned whether restrictive border measures and quickly removing individuals actually reduce migratory flows. At least one commenter did not understand how this rule was a ''good thing'' that would change immigration policy in the United States, which the commenter described as a ''disaster.'' A commenter stated that the proposed rule is not needed and instead recommended implementing practical and humane solutions, including funding and coordinating with civil society organizations on the border and throughout the country. Another commenter stated that she lives within 100 miles of the border and does not feel threatened by the influx of migrants to her community, and thus the rule is unnecessary.

One commenter stated that the U.S. immigration system is not broken but the current laws need to be strictly enforced, while another commenter stated that DHS should be strengthened so it can address each case instead of lumping people into categories. At least one commenter stated that there is no reason why DHS cannot process applicants more quickly, noting that the United States received a significant number of migrants in the early 1900s with far less technology, so the government should be able to do so much more efficiently now with the sophisticated technology, medical equipment, fingerprinting, and other means available now. Another commenter stated that the rule would not fix backlogs in immigration court, while a number of commenters suggested that it would actually increase the backlogs.

A commenter questioned the need for the rule because the Departments had not demonstrated that they had considered other options. Another commenter requested that the Departments expressly consider a range of factors, such as the U.S. economic outlook and the role of other external variables (such as climate change) in driving migration. The commenter suggested that such factors may influence migration patterns to such a degree that the rule is unnecessary or likely to be ineffective.

Response: The Departments disagree that the rule is unnecessary. The Departments reiterate that the goal of the rule is not to generally discourage migrants with valid claims from applying for asylum or other protection, but rather to encourage the use of lawful, safe, and orderly pathways into the United States. The Departments agree that the United States' historical openness to immigration has enriched our culture, expanded economic opportunities, and enhanced our influence in the world. However, the U.S. immigration system has experienced extreme strain with a dramatic increase of noncitizens attempting to cross the SWB in between POEs without authorization, reaching an all-time high of 2.2 million encounters in FY 2022.[65] The Departments believe that without a meaningful policy change, border encounters could dramatically rise to as high as 11,000 per day after the Title 42 public health Order is lifted.[66] As described in the NPRM, DHS does not currently have the resources to manage and sustain the processing of migratory flows of this scale in a safe and orderly manner, even with the assistance of modern technology. *See* 88 FR at 11712–13. In response to this urgent situation, the rule will establish a rebuttable presumption of asylum ineligibility for certain noncitizens who fail to take advantage of the existing and expanded lawful pathways to enter the United States, including the opportunity to schedule a time and place to present at a SWB POE, where they may seek asylum or other forms of protection, in a lawful, safe, and orderly manner, or to seek asylum or other protection in one of the countries through which they

[64] OIS analysis of OIS Persist Dataset based on data through March 31, 2023; OIS analysis of historic USBP data.

[65] OIS analysis of historic USBP data.

[66] OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023.

travel on their way to the United States. *See id* at 11706. The Departments believe that this rule is necessary to address the anticipated surge in irregular migration.

The Departments also believe the rule is necessary to improve the overall functioning and efficiency of the immigration system. *See* INA 208(b)(2)(C) and (d)(5)(B), 8 U.S.C. 1158(b)(2)(C) and (d)(5)(B). Specifically, the rule would efficiently and fairly provide relief to noncitizens who are in the United States and are eligible for relief, while also efficiently denying relief and ultimately removing those noncitizens who are determined to be ineligible for asylum and do not qualify for statutory withholding of removal or protection under the regulations implementing the CAT. The Departments acknowledge that despite the protections preserved by the rule and the availability of lawful pathways, the rebuttable presumption adopted in the rule will result in the denial of some asylum claims that otherwise may have been granted, but the Departments believe that the rule will generally offer opportunities for those with valid claims to seek protection. Moreover, the Departments have determined that the benefits to the overall functioning of the system, including deterrence of dangerous irregular migration and smuggling, justify the rule. In sum, the rule permissibly pursues efficient asylum processing while preserving core protections, which is within the Departments' authority conferred by section 208 of the INA, 8 U.S.C. 1158.

The Departments acknowledge commenters' support for enforcing existing immigration laws. However, the Departments do not believe that current laws and regulations are sufficient to address the current levels of migratory flows and the anticipated increase in the number of migrants who will attempt to enter the United States following the lifting of the Title 42 public health Order. Likewise, a policy is necessary to ensure lawful, safe, and orderly processing of those migrants. Absent further action, POEs will be congested, migrants will be forced to wait in long lines for unknown periods of time, and once processed they will be released into local communities that are already at or near their capacity to absorb them. *See* 88 FR at 11715. By incentivizing noncitizens to use lawful pathways, this rule aims to encourage migrants to either pursue options that would allow them to avoid making the journey to the SWB, or to schedule in advance a time for arrival at a POE, which will alleviate additional strain on DHS resources. The Departments believe it would be inappropriate to elect inaction on the basis of conjecture regarding U.S. economic outlook and similar factors and the potential effects of such factors on the impending surge of irregular migration.

In response to comments asserting that the Departments did not consider other options before promulgating this final rule, the Departments note that alternative approaches for managing the expected surge in migration were discussed in the NPRM and the Departments ultimately assessed, and continue to assess, that the rule is the best option for responding to the current situation at the border and the expected surge in migration after the lifting of the Title 42 public health Order. *See* 88 FR at 11730–32. Concerns regarding backlogs, government resources and funding are addressed in Sections IV.B.5.iv and IV.C.2 of this preamble.

The Departments acknowledge commenters' suggestion that DHS ''strengthen'' its resources to respond to the anticipated surge in migrants to the SWB. The Departments note that they have already deployed additional personnel, technology, infrastructure, and resources to the SWB and that continuing this ''strengthening'' of the SWB would require additional congressional actions, including significant additional appropriations, which are outside of the scope of this rulemaking.

i. Concerns Regarding the Sufficiency of the Lawful Pathways

Comment: Commenters stated that in general, the available lawful pathways are insufficient to meet the significant demand for migration to the United States. Commenters stated that increasing legal pathways for some should not come at the expense of restricting access for asylum seekers seeking protection. Commenters stated that the existing lawful pathways are ''extremely narrow and unavailable to many people,'' and that it is fundamentally unjust to fault individuals for seeking safety and stability in the only way possible. Commenters stated that migrants who seek asylum in the United States rather than another country are doing so rationally and intentionally and they would seek asylum in a closer country if it was truly safe.

Multiple commenters stated that H–2 temporary worker visas are insufficient substitutes for asylum. One commenter stated that the Administration is ''misguided'' in touting its efforts in the proposed rule to expand two of the most ''exploitative and troubled U.S. work visa programs—H–2A and H–2B'' because these programs are ''deeply flawed and in desperate need of reform.'' The same commenter stated that expanding temporary work visa programs like H–2B and H–2A makes little sense for those seeking asylum because they do not provide a permanent pathway to remain in the United States and would put migrants in danger by returning them to dangerous situations after the visa certification expires. Similarly, other commenters stated that the H–2 programs do not provide or guarantee safety for migrants because they are not permanent or durable solutions and they do not allow for family unity in the United States.

Response: The United States is both a nation of immigrants and a nation of laws. The Departments are charged with enforcing those laws and endeavor to do so humanely. The rule is needed because, absent this rule, after the termination of the Title 42 public health Order, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. The rule, coupled with an expansion of lawful, safe, and orderly pathways, is expected to reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States.

Though the Departments acknowledge that existing lawful pathways may not be available to every migrant, the Departments disagree with comments stating that the existing lawful pathways are extremely narrow. The United States Government has been working to significantly expand access to lawful pathways and processes for migrants since January 2021. In addition to the new processes DHS has implemented for CHNV nationals, which are discussed at length in the NPRM, DHS has been working with other Federal departments and agencies to increase access to labor pathways; restart, streamline, and expand family reunification parole programs; and significantly rebuild and expand refugee processing in the region. *See* 88 FR at 11718–23.[67]

For example, DHS has worked with the Department of State and the Department of Labor (''DOL'') to significantly expand access to the H–2A and H–2B temporary agricultural and nonagricultural worker visas in order to

[67] *See also* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

help address labor shortages and provide safe and orderly pathways for migrants seeking economic opportunity in the United States. On December 15, 2022, DHS and DOL jointly published a temporary final rule increasing the total number of noncitizens who may receive an H–2B nonimmigrant visa by up to 64,716 for the entirety of FY 2023. *See* Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking to Change Employers, 87 FR 76816 (Dec. 15, 2022). In particular, the number of H–2 visas issued to nationals of El Salvador, Honduras, and Guatemala has increased by 250 percent between FYs 2020 and 2022: in FY 2022, the Department of State issued 19,295 H–2 visas to those three countries, compared to just 5,439 in FY 2020.[68] The Departments disagree that expanding use of these programs is misguided; although improvements are possible, these programs are established features of the immigration system and an appropriate mechanism to support lawful, safe, and orderly travel to the United States. Moreover, these programs represent two of several available lawful pathways, some of which provide protection that is not temporary and does allow for derivative protection for family members. For example, the United States Government has restarted the Central American Minors Refugee and Parole Program, which provides certain qualified children who are nationals of El Salvador, Guatemala, and Honduras, as well as certain family members of those children, an opportunity to apply for refugee status and possible resettlement in the United States.[69]

The United States Government also provides durable solutions for humanitarian protection through the U.S. Refugee Admissions Program for qualifying applicants. In 2022, concurrent with the announcement of the L.A. Declaration, the United States announced that it intends to refer for resettlement at least 20,000 refugees from Latin America and the Caribbean in FY 2023 and FY 2024, which would put the United States on pace to more than triple refugee admissions from the Western Hemisphere this fiscal year alone.[70] On April 27, 2023, DHS announced that it would commit to welcoming thousands of additional refugees per month from the Western Hemisphere—with the goal of doubling the number of refugees the United States committed to welcome as part of the L.A. Declaration.[71] The United States Government also continues to work with our partners to expand access to refugee resettlement more broadly throughout the Western Hemisphere. For instance, Canada recently announced that it will take significant steps to expand safe and orderly pathways for migrants from the Western Hemisphere to enter Canada lawfully. Building on prior commitments, Canada will provide an additional 15,000 migrants from Latin America and the Caribbean with access to legal pathways to Canada; and enter into arrangements with the United States and like-minded countries to promote lawful labor mobility pathways.[72]

Comments asserting insufficiencies associated with the CHNV parole processes and other lawful pathways identified in the rule are further addressed in Section IV.3 of this preamble.

The rule will not impact those who use these lawful pathways that the United States is offering for migrants to obtain entry into the United States. Additionally, the rule will not apply to noncitizens who enter the United States with documents sufficient for admission. Instead, the rule is meant to promote the use of these lawful pathways and disincentivize irregular migration.

ii. Similarity to Actions of Past Administration

Comment: Many commenters stated that the proposed rule is functionally indistinguishable from prior asylum-related rules that were issued by the prior Administration, particularly the TCT Bar IFR and Final Rule, which have been enjoined, or would cause similar harm to asylum seekers. At least one commenter criticized that the addition of the ''rebuttable presumption'' in this rule is not enough to distinguish it from previous rules. For example, commenters described the rule as ''resurrect[ing] Trump-era categorical bans on groups of asylum seekers.'' Similarly, some commenters stated that this rule is similar to the ''asylum bans'' the past Administration attempted to advance. Another commenter asserted that this rule operates similarly to rules from the prior Administration because it would operate as a ban for asylum seekers based on factors that do not relate to their fear of return and would result in asylum denials for all who are unable to establish that they qualify for exceptions the commenter characterized as extremely limited. A commenter claimed that while the Departments repeatedly assert throughout the NPRM that the rebuttable presumption is distinguishable from the TCT Bar, the opportunity to rebut the presumption would occur only under the most extreme scenarios and in excess of what would ordinarily be sufficient to claim asylum. Another commenter predicted that the proposed rule would revive attempts to ''rig the credible fear process.'' While comparing the rebuttable presumption standards to the non-refoulement screening standard used under MPP, the commenter argued that the proposed rule would impose a ''more likely than not'' screening standard that far exceeds the standard for an asylum grant. The commenter further stated that the ''deficient'' non-refoulement screenings carried out during MPP foreshadow the dangers asylum seekers would face under the proposed rule if finalized.

In comparing this rule to those issued by the prior Administration, commenters stated that the previous rules led to asylum denials, prolonged detention for many with bona fide claims, and family separations. At least one commenter stated that a recent congressional investigation found that not one person sent to Guatemala under the prior Administration's Asylum Cooperative Agreements received asylum; instead, migrants were forced to return to their originating country. A commenter also stated that the rule attempts to differentiate itself from prior policies via exceptions and alternative pathways to asylum but that the exceptions are insufficient because they would fail to protect the most vulnerable. Several commenters stated that asylum bans have been proven to be ineffective at deterring noncitizens from seeking safety. One commenter stated that calling the rule a ''rebuttable presumption'' was merely a semantic difference from prior asylum bans, which had narrow exceptions.

Response: The Departments acknowledge these commenters'

[68] *See* Department of State, *H–2 Visa Data for El Salvador, Guatemala, and Honduras, FY 2015–FY2023 Mid-Year* (last reviewed Feb. 24, 2023).

[69] *See* USCIS, Central American Minors (CAM) Refugee and Parole Program, *https://www.uscis.gov/CAM* (last visited Apr. 5, 2023).

[70] *See* The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables* (June 10, 2022) (''L.A. Declaration Fact Sheet''), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/.*

[71] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[72] *See* DHS, Press Release, *United States and Canada Announce Efforts to Expand Lawful Migration Processes and Reduce Irregular Migration* (Mar. 24, 2023), *https://www.dhs.gov/news/2023/03/24/united-states-and-canada-announce-efforts-expand-lawful-migration-processes-and.*

concerns but disagree that the final rule is indistinguishable from asylum-related rulemakings and policies issued by the prior Administration. The TCT Bar IFR and Final Rule and the Proclamation Bar IFR, for instance, categorically barred covered individuals from certain types of relief. While the TCT Bar Final Rule only allowed limited exceptions to its eligibility bar, including for trafficking victims and other grounds, this rule includes a number of broader exceptions and means for rebutting the presumption. A noncitizen can rebut the presumption by, for example, demonstrating exceptionally compelling circumstances by a preponderance of the evidence during a full merits hearing. *See* 8 CFR 208.33(a)(3); 8 CFR 1208.33(a)(3). A noncitizen can rebut the presumption if they establish that they or a member of their family with whom the noncitizen is traveling meet any of the three per se grounds for rebuttal, which provide that, at the time of entry: (1) they faced an acute medical emergency; (2) they faced an imminent and extreme threat to their life or safety; or (3) they were a ''victim of a severe form of trafficking in persons'' as defined in 8 CFR 214.11. In addition to the per se grounds for rebuttal, a noncitizen could also rebut the presumption in other exceptionally compelling circumstances. One exceptionally compelling circumstance recognized by the rule is included specifically to avoid family separations. *See* 8 CFR 1208.33(c). Protecting against family separation is one example of how this rule includes appropriate safeguards for vulnerable populations. Depending on individual circumstances, AOs and IJs may find that certain especially vulnerable individuals meet the exceptionally compelling circumstances standard.

The Departments acknowledge concerns about opportunities to rebut the presumption but disagree that the rule would impose a higher standard for rebutting the presumption than the standard to establish asylum eligibility. The ''significant possibility'' standard is the overall assessment applied during credible fear screenings; that standard must be applied in conjunction with the standard of proof required for the ultimate determination (*i.e.,* preponderance of the evidence that the presumption has been rebutted or an exception established). As discussed below in Section IV.E.1 of this preamble, a noncitizen can satisfy their burden of proof through credible testimony alone; the rule does not require any particular evidence to rebut or establish an exception to the presumption under 8 CFR 208.33(a)(3), 1208.33(a)(3). *See* INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii); INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Accordingly, the Departments believe that the means of rebutting or establishing an exception to the presumption are not unduly burdensome.

The Departments have considered the approaches taken in multiple rulemaking efforts of the last few years and now believe that the more tailored, time-limited approach in this final rule is better suited to address the increased migrant flows into the United States expected after the Title 42 public health Order terminates. *See* 88 FR at 11728. This rule encourages use of lawful, safe, and orderly pathways to enter the United States and, unlike those prior rulemakings, retains a noncitizen's ability to be found eligible for asylum should they enter through an enumerated lawful pathway or otherwise overcome the condition imposed by this rule. The Departments believe that the rule's more balanced approach renders the TCT Bar Final Rule and the Proclamation Bar IFR unnecessary, and that those rules conflict with the approach taken in this rule.[73] As proposed in the NPRM and discussed at Sections IV.E.9 and IV.E.10 of this preamble, the Departments have decided to remove those prior rules from the CFR. *See* 88 FR at 11728.

The Departments disagree with some commenters that this final rule will cause harms similar to those attributed to the TCT Bar Final Rule and the Proclamation Bar IFR, which commenters allege include asylum denials, prolonged detention, and family separation. This rule's scope and effect are significantly different from the TCT Bar Final Rule. Unlike the TCT Bar Final Rule, the presumption would not completely bar asylum eligibility based on the availability of protection in a third country. First, while this rule takes into account whether individuals sought asylum or other forms of protection in third countries while traveling to the United States, the rule would not require that all noncitizens make such an application to be eligible for asylum, unlike the TCT Bar Final Rule. For example, if the noncitizen received authorization to travel to the United States to seek parole or scheduled an appointment through the CBP One app to present themselves at a POE, then the condition on asylum eligibility would not apply to that noncitizen regardless of whether the noncitizen sought protection in a third country. Second, while the TCT Bar Final Rule only allowed limited exceptions to its eligibility bar, including for trafficking victims and other grounds, this rule includes a number of exceptions and means for rebutting the presumption, including an exception for trafficking victims. This rule encourages noncitizens to use orderly, lawful pathways to enter the United States, and it will only become relevant whether the noncitizens applied for protection in a third country through which they traveled in cases in which noncitizens do not avail themselves of one of the pathways.

The Departments acknowledge commenters' concerns with the effectiveness of Safe Third Country Agreements (''STCA'') or asylum cooperative agreements. The Departments acknowledge that negotiating such agreements is a lengthy and complicated process that depends on the agreement of other nations. *See* 88 FR at 11732. The Departments note that the only such agreement in effect is the Canada-U.S. STCA. *See generally* Implementation of the 2022 Additional Protocol to the 2002 U.S.-Canada Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 88 FR 18227 (Mar. 28, 2023). The rule does not implement or change the framework for negotiating STCAs, which involves extensive diplomatic negotiations. As discussed more in Section IV.E.3.iv of this preamble, the safe-third-country provision in section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), indicates that a noncitizen may be removed, pursuant to ''a safe-third-country agreement,'' and the noncitizen may not apply for asylum ''unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.'' This rule operates differently. Under this rule, noncitizens may apply for asylum and other protection in the United States. While the rule would create a rebuttable presumption, it specifies circumstances in which that presumption is necessarily rebutted as well as other exceptions. By encouraging noncitizens seeking to travel to the United States, including those intending to seek asylum, to use lawful pathways and processes, the Departments expect the rule to promote orderly processing, reduce the anticipated surge that is expected to strain DHS resources, reduce the number of individuals who would be placed in lengthy removal proceedings pursuant to section 240 of

[73] Both the TCT Bar Final Rule and the Proclamation Bar IFR are discussed further in Sections IV.E.9 and IV.E.10 of this preamble.

the INA and released into the United States pending such proceedings, allow for the expeditious removal of noncitizens who failed to avail themselves of a safe and lawful pathway to seek protection, and reduce incentives for noncitizens to cross the border using dangerous smuggling networks. *See* 88 FR at 11736. Regarding comments about the ineffectiveness of the rule to deter migrants from seeking safety, the rule does not discourage migrants with valid claims from applying for asylum or other protection. The rule encourages those with meritorious claims to either apply for asylum or other protection in the first safe country they find or pursue available lawful pathways, such as the U4U and CHNV parole processes—which early data indicate are deterring irregular migration from those countries, *see* 88 FR at 11706—or presenting at a POE at a pre-scheduled time and place.

Comment: Some commenters noted the rise in recidivist encounters following the end of the prior Administration despite many efforts to restrict asylum access and stated that removals under this rule would increase rates of recidivism.

Response: The Departments disagree that removals under this rule will increase the rate of recidivism. The Departments note that a range of external considerations (such as the COVID–19 pandemic, litigation resulting in injunctions or vacatur of those rules prior to or during initial stages of their implementation,[74] and differences in the operation of the Title 42 public health Order and this rule) prevent the Departments from drawing any firm conclusions applicable to this rulemaking based solely on recidivism numbers following the end of the prior Administration. The application of the Title 42 public health Order at the border has had unpredictable impacts on migration. Because Title 42 expulsions have no consequence, aside from the expulsion itself, DHS has seen a substantial increase in recidivism for individuals processed under Title 42 as compared to those processed under Title 8 authorities. In March 2023, for example, 26 percent of encounters at the SWB involved individuals who had at least one prior encounter during the previous 12 months, compared to an average 1-year re-encounter rate of 14 percent for FYs 2014–2019.[75]

Overall, since the start of the pandemic and the initiation of Title 42 expulsions, 39 percent of all Title 42 expulsions have been followed by a re-encounter of the same individual within 30 days versus a 9 percent 30-day re-encounter rate for Title 8 repatriations.[76] Similarly, the 12-month re-encounter rates are 51 percent for Title 42 expulsions versus 20 percent for Title 8 repatriations.[77] While a portion of the overall gap between Title 42 and Title 8 re-encounter rates is likely explained by the fact that many Title 42 expulsions are to Mexico and almost all Title 8 repatriations are to individuals' countries of citizenship, it is notable that a large gap between Title 42 and Title 8 re-encounter rates is also observed in the case of Mexican nationals, all of whom are repatriated to Mexico.[78]

This gap is likely, in part, because a removal under Title 8 carries with it at least a five-year bar to admission, among other legal consequences. As a result, it is the Departments' assessment that a return to Title 8 processing of all noncitizens will likely reduce recidivism at the border. Moreover, the Departments believe it would be unwarranted to conclude that, based on recidivist apprehensions while the Title 42 public health Order has been in place, conditions on asylum eligibility do not discourage attempts to enter the United States unlawfully. This rule, which will take effect upon the lifting of the Title 42 public health Order, anticipates that those who receive negative credible fear determinations will be removed upon issuance of final orders of removal and be subject to at least a five-year bar on admission in addition to having the rebuttable presumption apply to any subsequent asylum application the noncitizen may file in the future.

iii. Unnecessary Given the Asylum Processing IFR

Comment: Some commenters questioned why this proposed rule is necessary given that the Asylum Processing IFR was adopted less than one year ago. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078 (Mar. 29, 2022) (''Asylum Processing IFR''). In referencing the Asylum Processing IFR, one commenter noted that this rule is an ''abrupt change in reasoning from less than a year ago,'' which, according to the commenter, indicates that the rule is ''political'' rather than based on reasoned decision making. Some commenters noted that in the Asylum Processing IFR, the Departments explained that applying the TCT Bar Final Rule at the credible fear stage as proposed by the past Administration was inefficient and consumed considerable resources so there is ''no basis to suddenly reverse course again.'' A commenter argued that the proposal would depart from conclusions DHS reached within the last year in the Asylum Processing IFR recommitting agencies to the statutory ''significant possibility'' standard for asylum claims. One commenter asserted that while the proposed rule is premised on the idea that applying a higher ''reasonable possibility'' standard can weed out non-meritorious asylum cases, the Departments recently acknowledged in the Asylum Processing IFR that the higher standard is not effective at screening out such claims. The same commenter expressed concern that the Government's ''abrupt about-face'' is not based on new data, but rather on the lack of evidence that the reasonable possibility standard is not effective in the context in which it is currently used. Another commenter similarly wrote that the application of the reasonable possibility standard at the credible fear screening stage represents a ''stark reversal'' from DHS's position in the Asylum Processing IFR that asylum eligibility bars should not be applied at the initial screening stage and

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[74] Federal courts have either vacated or enjoined the Departments from implementing the TCT Bar IFR and Final Rule, Procedures for Asylum and Bars to Asylum Eligibility, 85 FR 67202 (Oct. 21, 2020) (''Criminal Asylum Bars Rule''), and Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020) (''Global Asylum Rule''). *See, e.g., Capital Area Immigrants' Rights Coal.* v. *Trump,* 471 F. Supp. 3d 25 (D.D.C. 2020) (vacating the TCT Bar IFR); *E. Bay Sanctuary Covenant* v. *Garland,* 994 F.3d 962 (9th Cir. 2020) (''*East Bay I*'') (affirming injunction of the TCT Bar IFR); *E. Bay Sanctuary Covenant* v. *Barr,* 519 F. Supp. 3d 663 (N.D. Cal. 2021) (''*East Bay II*'') (enjoining the TCT Bar Final Rule); *Pangea Legal Servs.* v. *DHS,* 501 F. Supp. 3d 792 (N.D. Cal. 2020) (enjoining the Criminal Asylum Bars Rule) (''*Pangea I*''); *Pangea Legal Servs.* v. *U.S. Dep't of Homeland Sec.,* 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021) (''*Pangea II*'') (preliminarily enjoined the Departments ''from implementing, enforcing, or applying the [Global Asylum Rule] . . . or any related policies or procedures.''); *E. Bay Sanctuary Covenant* v. *Biden,* 993 F.3d 640, 681 (9th Cir. 2021) *(''East Bay III''); see O.A.* v. *Trump,* 404 F. Supp. 3d 109 (D.D.C. 2019) (recounting the history of the litigation over the Proclamation Bar IFR and vacating it).

[75] Including CBP enforcement encounters at or between ports of entry. OIS Persist based on data through March 31, 2023.

[76] Title 8 repatriation, as used here, refers to both removals (noncitizen required to depart based on a removal order) and returns (noncitizen required to depart leaves without a formal order of removal).

[77] OIS analysis of OIS Enforcement Lifecycle based on data through December 31, 2022.

[78] For Mexican nationals, since the start of the pandemic, the 30-day re-encounter rates are 44 percent for Title 42 expulsions versus 15 percent for Title 8 repatriations, and the 12-month re-encounter rates are 55 percent for Title 42 expulsions versus 26 percent for Title 8 repatriations. OIS analysis of OIS Enforcement Lifecycle based on data through December 31, 2022.

that the ''significant possibility'' standard should be applied when screening for all protection claims (*i.e.,* asylum, withholding of removal, and CAT protection). A commenter stated that the proposed rule introduces conflict with the Asylum Processing IFR and expressed concern that implementation of the new rule would be difficult for AOs. One commenter stated that the Departments should make greater use of the recent 2022 asylum merits interview process, which would provide a solution to the problems the Departments asserted in the NPRM.

Response: The Departments recognize that under the Asylum Processing IFR issued in March 2022, certain noncitizens determined to have a credible fear are referred to an AO, in the first instance, for further review of the noncitizen's asylum application. *See* 87 FR at 18078. For noncitizens subject to that IFR, following a positive credible fear determination, AOs conduct an initial asylum merits interview instead of referring the case directly for removal proceedings pursuant to section 240 of the INA. If USCIS does not grant asylum, the individual is referred to EOIR for streamlined removal proceedings pursuant to section 240. In issuing the Asylum Processing IFR, the Departments concluded that protection determinations during the expedited removal process could be made more efficient. *See* 87 FR at 18085. The purpose of the Asylum Processing IFR was to simultaneously increase the promptness, efficiency, and fairness of the process by which noncitizens who enter the United States without appropriate documentation are either removed or, if eligible, granted relief or protection. *Id.* at 18089. Additionally, the Asylum Processing IFR enables meritorious cases to be resolved more quickly, reducing the overall asylum system backlog, and using limited AO and IJ resources more efficiently. *Id.* at 18090. The entire process is designed to take substantially less time than the average of over four years it takes to adjudicate asylum claims otherwise. *See* 88 FR at 11716. This final rule builds upon this existing system while implementing changes, namely that AOs will apply the lawful pathways rebuttable presumption during credible fear screenings.

The Departments disagree with commenters' suggestion that the proposed rule was political and not based on reasoned decisions. Rather, the rule's primary purpose is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule establishes procedures for AOs and IJs to follow when determining whether the rebuttable presumption applies to a noncitizen and, if it does, whether the noncitizen has established any exceptions to or rebutted the presumption. *See* 8 CFR 208.33(b). In addition, for noncitizens found to be ineligible for asylum under 8 CFR 208.33, the rule establishes procedures for AOs to further consider a noncitizen's eligibility for statutory withholding of removal or protection under the regulations implementing the CAT. *See* 8 CFR 208.33(c)(2). Individuals subject to the lawful pathways condition will still be placed into removal proceedings under section 240 if they meet the ''reasonable possibility'' of persecution or torture standard. One of the goals of the Asylum Processing IFR is to streamline the expedited removal process, and this rule is complementary to that goal, but is also necessary to incentivize lawful, safe, and orderly migratory flows. This rule does not foreclose processing noncitizens through the process established by the Asylum Processing IFR.

The Departments acknowledge that the approach in this rule is different in certain respects from that articulated in the Asylum Processing IFR issued in March 2022. However, the Departments believe the current and impending situation on the ground along the SWB warrants departing in some respects from the approach generally applied in credible fear screenings. *See* 88 FR at 11742. The Asylum Processing IFR was designed for non-exigent circumstances. However, as noted in the NPRM, encounters of non-Mexican nationals at the SWB between POEs have reached a 10-year high of 1.5 million in FY 2022,[79] driven by smuggling networks that enable and exploit this unprecedented movement of people. This heightened migratory flow has overburdened the current asylum system, resulting in a growing backlog of cases awaiting review by AOs and IJs. *See* 88 FR at 11705. The exigent circumstances giving rise to this rule arose after the Asylum Processing IFR was issued and require departing from the general approach in the Asylum Processing IFR in specific ways—*i.e.,* applying the condition on eligibility during credible fear screenings, applying the ''reasonable possibility'' standards to individuals who cannot show a ''significant possibility'' of eligibility for asylum based on the presumption established in the rule, requiring an affirmative request for IJ review of a negative credible fear determination, and limiting requests for reconsideration after IJ review and instead providing for reconsideration based only on USCIS's discretion.

The Departments believe that the condition on eligibility and this rule's departures from the Asylum Processing IFR are reasonable and necessary for the reasons discussed in the NPRM. *See* 88 FR at 11744–47. The rule will help achieve many of the goals outlined in the Asylum Processing IFR, including improving efficiency; streamlining the adjudication of asylum, statutory withholding of removal, and CAT protection claims; and reducing the strain on the immigration courts by screening out and removing those with non-meritorious claims more quickly. *See* 87 FR 18078.

The Departments note that the rule does not apply a higher ''reasonable possibility'' standard to asylum claims; rather, the rule applies the statutory ''significant possibility'' standard to asylum claims, as explained elsewhere in this preamble. The rule only applies the ''reasonable possibility'' standard to statutory withholding and CAT claims, and only if a noncitizen is subject to and has not established an exception to or rebutted the presumption at the credible fear screening. Additionally, the Asylum Processing IFR did not conclude that the higher standard was ''not effective'' at screening out non-meritorious statutory withholding and CAT claims, but rather made a policy determination that the higher standard was inefficient given the circumstances of that particular rule. *See* 87 FR at 18092. The Departments reached a different policy conclusion after the Asylum Processing IFR was issued and believe that this rule is necessary to address the current and exigent circumstances described throughout the NPRM. *See* 88 FR at 11744–47.

The Departments appreciate commenters' support for the asylum merits interview process, but the Departments reiterate the discussion from the NPRM that the asylum merits interview process should not be used for noncitizens subject to the presumption. *See* 88 FR at 11725–26. This is because each such proceeding, in which the noncitizen would only be eligible for forms of protection that the AO cannot grant (withholding of removal or CAT protection), would have to ultimately be adjudicated by an IJ. Further, the Departments note that the processes relating to management of those who have already established a credible fear

[79] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

are different from the processes for migrants seeking entry into the United States who are making an initial claim of fear.

iv. Unnecessary Given Parole Processes

Comment: Some commenters objected that although the Departments stated that they anticipate a surge in CHNV individuals claiming fear at the SWB after the termination of the Title 42 public health Order, the proposed rule also claims that the parole processes for these populations are working to limit irregular migration from these countries.

Response: In an effort to address the significant increase in CHNV migrants at the SWB, the United States has taken significant steps to expand safe and orderly processes for migrants from these countries to lawfully come to the United States. Specifically, these processes provide a lawful and streamlined way for eligible CHNV nationals and their family members to apply to come to the United States without having to make the dangerous journey to the SWB.[80] Individuals can request an advance authorization to travel to the United States to be considered on a case-by-case basis for a grant of temporary parole by CBP. Noting the success of the CHNV parole processes coupled with enforcement measures in limiting irregular migration of CHNV nationals, the Departments also recognize that there are a number of factors that could prevent the same level of success after the lifting of the Title 42 public health Order absent additional policy changes. *See* 88 FR at 11706. These factors include the presence of large CHNV populations already in Mexico and elsewhere in the hemisphere as a result of past migratory flows and the already large number of migrants from these countries in the proximity of the SWB after they were expelled to Mexico under the Title 42 public health Order. *See id.* In addition, as the Departments noted in the NPRM, the incentive structure created by the CHNV parole processes relies on the availability of an immediate consequence, such as the application of expedited removal under this rule, for those who do not have a valid protection claim or lawful basis to stay in the United States. *See* 88 FR at 11731. The parole processes thus work with this rule in a complementary manner to address the expected surge in migration after the Title 42 public health Order is lifted.

v. Unnecessary Given Lack of Access to Asylum

Comment: Some commenters stated that the rule would not succeed at meeting its goal of deterring irregular immigration since migrants are already aware, even without the rule, that there is a low chance of actually receiving asylum in the United States.

Response: The Departments reiterate that the rule's primary goal is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule is intended to reduce the level of irregular migration to the United States without discouraging migrants with valid claims from applying for asylum or other protection. Even assuming migrants are aware of the relative likelihood of success of their asylum claims, the Departments do not believe the low ultimate approval rate for asylum and other forms of protection, which has long been the status quo, has served as a strong disincentive against making protection claims given the comparatively high chance of receiving a positive credible fear determination (83 percent for FYs 2014–19, *see* 88 FR at 11716) after which migrants are able to wait in the United States to present their claims, the multi-year backlog of immigration court cases,[81] and the fact that many migrants who are denied asylum are not ultimately removed, *see id.* Additionally, many noncitizens who are encountered at the border and released pending their immigration proceedings will spend years in the United States, regardless of the outcome of their cases. *See id.* Indeed, most noncitizens who receive a positive credible fear determination will be able to live and work in the United States for the duration of their removal proceedings—which, on average, take almost 4 years.[82] This reality provides a powerful incentive for noncitizens to make protection claims. Therefore, a low approval rate for asylum applications does not necessarily offer much disincentive against making protection claims.

vi. Ineffective Without Changes to Withholding of Removal or CAT Adjudications

Comment: Some commenters stated that if the process for applying for statutory withholding of removal or CAT protection stays the same, the rule would not be an effective deterrent for people who do not have a meritorious claim for asylum who are seeking to delay their removal from the United States. One commenter suggested that because those subject to the rule can seek protection through statutory withholding of removal and CAT, even with this rule in place, they will likely continue to arrive without using a lawful pathway. The commenter further stated that people fleeing unlivable conditions at home, the overwhelmingly majority of whom have no real knowledge of U.S. immigration law, are unlikely to carefully dissect the rule's subtle changes to eligibility standards. And as long as migrants know there is the possibility of protection in the United States—no matter whether through asylum or another form of relief—they will likely continue to make the dangerous trek to the border, where they will then cross.

Response: The Departments note that the rule would implement changes to the existing credible fear screening process. Specifically, if noncitizens cannot make a sufficient showing that the lawful pathways condition on eligibility for asylum is inapplicable or that they are subject to an exception or rebuttal ground, then the AO will screen the noncitizen for statutory withholding of removal and protection under the CAT using the higher ''reasonable possibility'' standard. *See* 8 CFR 208.33(b)(2)(i). This ''reasonable possibility'' standard is a change from the practice currently applied for statutory withholding of removal and CAT protection in the credible fear process. As explained in the NPRM, the Departments have long applied—and continue to apply—the higher ''reasonable possibility'' of persecution or torture standard in reasonable-fear screenings because this standard better predicts the likelihood of succeeding on the ultimate statutory withholding of removal or CAT protection application than does the ''significant possibility'' of establishing eligibility for the underlying protection standard, given the higher burden of proof for statutory withholding of removal and CAT protection. *See* 88 FR at 11746–47. The Departments also assess that applying the ''reasonable possibility'' of persecution or torture standard where the lawful pathways condition renders

[80] *See* DHS, Press Release, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), *https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.*

[81] *See* TRAC, *Immigration Court Asylum Backlog through February 2023, https://trac.syr.edu/phptools/immigration/asylumbl/* (last visited Mar. 14, 2023) (average 1,535 days from I–589 filing to merits hearing).

[82] OIS analysis of DOJ EOIR data based on data through March 31, 2023.

the noncitizen ineligible for asylum will result in fewer individuals with non-meritorious claims being placed into removal proceedings under section 240 of the INA, and more such individuals being quickly removed. The Departments believe that using the "reasonable possibility" standard to screen for statutory withholding and CAT protection in this context, and quickly removing individuals who do not have a legal basis to remain in the United States, may serve as a disincentive for migrants who would otherwise make the perilous journey to the United States without first attempting to use a lawful pathway or seeking protection in a country through which they travel.

vii. Ineffective Because Exceptions Will Swallow the Rule

Comment: Some commenters raised concerns that the rebuttable presumption of ineligibility could be too easily overcome or perceived as easy to overcome, due to the number of exceptions and means of rebuttal. One commenter referred to the proposed rule as "a facially stricter threshold" than under current practice and said that the rebuttable presumption was "a tougher standard in name only." Another commenter opined that the proposed rule would be largely ineffective and urged the Departments to eliminate exceptions to the presumption against asylum eligibility, which they said are overbroad, easy to exploit, and threaten to swallow the rule. Similarly, other commenters stated that there should be no exceptions to the condition on asylum. Commenters stated that migrants would quickly learn the various exceptions to the presumption and how to fraudulently claim them to obtain asylum. One commenter alleged, without evidence, that various NGOs and legal organizations coach people on which "magic words" they must utter to gain entry into the United States. One commenter stated that noncitizens may falsely claim to be Mexican nationals to circumvent the rule.

One commenter proposed that the rule's exceptions be limited to (1) those who received a final judgment denying them protection in at least one country through which they transited; (2) victims of a severe form of trafficking; (3) those who have transited only through countries that are not parties to the Refugee Convention, the Refugee Protocol, or CAT; and (4) UCs. Another commenter proposed that the Departments should eliminate the CBP One app exception and should apply the presumption to UCs. One commenter stated that the rule should require, not encourage, migrants to use lawful, safe, and orderly pathways.

Response: The Departments acknowledge these concerns but believe it is necessary to maintain the exceptions to and means of rebutting the presumption of ineligibility for asylum to prevent undue hardship. The Departments have limited the means of rebutting the presumption to "exceptionally compelling circumstances," where it would be unreasonable to require use of the DHS appointment scheduling system or pursuit of another lawful pathway. The rule lists three examples of exceptionally compelling circumstances that would be considered at both the credible fear and merits stages: acute medical emergencies, imminent and extreme threats to life or safety, and victims of severe forms of human trafficking. *See* 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). AOs and IJs will assess the noncitizen's testimony, along with any other evidence in the record, to determine whether the noncitizen meets an exception to or rebuts the presumption against asylum eligibility. INA 208(b)(1)(B), 8 U.S.C. 1158(b)(1)(B); INA 240(c)(4)(B), 8 U.S.C. 1229a(c)(4)(B); 8 CFR 208.30.

The Departments do not believe that the rule creates significant incentive for migrants to falsely pose as Mexican nationals. Even if successful, this would only be a plausible strategy for migrants who are hoping to voluntarily return to Mexico instead of being placed in expedited removal. Once in expedited removal, any incentive to pose as a Mexican national dissipates quickly. It will likely be difficult for the noncitizen to establish a credible fear of persecution or torture in Mexico, a country with which they are less familiar than their actual country of nationality. The noncitizen will not be able to seek any assistance from their consulate without disclosing their true country of nationality. And it will become very difficult for the noncitizen to qualify for asylum or other protection before an IJ, where they will need to prove identity.[83] Noncitizens who falsify their nationality could face serious consequences, as any such false pretenses would be likely to have an adverse effect on their credibility and could result in a permanent bar from all future immigration benefits.[84]

3. Concerns Related to Impacts on Asylum Seekers or Conflicts With Humanitarian Values

i. Belief That the Rule Is Motivated by Unlawful Intent and Inconsistent With U.S. Values

Comment: Some commenters generally asserted that the rule targets certain nationalities, groups, or types of claims and that it was motivated by racial animus; that it has discriminatory effects; and that it was intended to address political issues or to mollify those harboring racial animus. Commenters stated that issuing this rule would advance the agendas of anti-immigration groups. At least one commenter stated that the proposed rule could fuel existing anti-immigrant and anti-Latinx sentiments in the United States by sensationalizing immigration. Another commenter expressed opposition to the proposed rule stating that it would continue to uphold an "ableist, xenophobic, and white supremacist" notion of accessibility into the United States. One commenter urged DHS to consider the impact that previous white supremacist and race-based policies have had on the U.S. immigration system. Furthermore, a commenter opposed the rule concluding that it continues a "legacy of structural racism" in U.S. immigration policy.

Commenters compared the rule to race-based historical immigration laws in the United States, such as the Chinese Exclusion Act and other past immigration actions, including actions of the prior Administration. Another commenter compared the rule to nationality-based quotas instituted by the Immigration Act of 1924 and stated that the rule serves a similar purpose of excluding "undesirable" migrant populations, while others compared the rule to limits on migration before, during, and after World War II, including turning away Jewish refugees seeking protection on the ship the St. Louis. At least one commenter stated that asylum seekers from countries located geographically further away would have a higher burden for no reason beyond their national origin. Further, commenters stated that differentiating between the "types" of people admitted to the United States or

[83] *See Matter of O–D–*, 21 I&N Dec. 1079, 1081 (BIA 1998) ("A concomitant to such claim is the burden of establishing identity, nationality, and citizenship."); INA 208(d)(5)(A)(i), 8 U.S.C. 208(d)(5)(A)(i) ("[A]sylum cannot be granted until the identity of the applicant has been checked."); 8 CFR 1003.47 (Identity, law enforcement, or security investigations or examinations relating to applications for immigration relief, protection, or restriction on removal).

[84] *See* INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii) (credibility determinations in asylum proceedings); INA 208(d)(6), 8 U.S.C. 1158(d)(6) (frivolous asylum applications); 8 CFR 1003.47(g) (preventing IJs from granting asylum applications until they can consider complete and current identity, law enforcement, and security investigations).

detained at the border is akin to authoritarian regime policies that have prohibited entry to ''undesirables'' and ''other inconvenient group[s].''

Some commenters stated that the proposed rule is inhumane, xenophobic, and against everything the current Administration is supposed to stand for. Other commenters noted that the rule would only affect migrants seeking to enter at the SWB, but that migrants crossing the northern border from Canada are excluded, which the commenter called ''inequitable'' and evidence of racism. Some commenters stated that limiting who to help in the time of a ''global crisis'' is ''shameful'' because the United States is one of the richest countries in the world. Some commenters stated that with all the terrible things happening in the world we should be making it easier and not harder to seek asylum. An advocacy group expressed further concern that the rule may instead reinforce a notion that immigrants are unwelcome or otherwise do not belong in the United States. Another advocacy group expressed disappointment that words like ''surge'' in the NPRM could frame asylum seekers as a problem that needs to be mitigated or reduced. Some commenters stated that the rule was only written in response to political pressure by political opponents to address the situation at the SWB, thus placing migrants in danger for the sake of a political agenda. One commenter stated that they expected the United States to ''treat migrants as human beings rather than playing pieces that could affect political outcomes.''

Response: The Departments reject these commenters' claims concerning the Departments' basis for promulgating the rule. As explained in the NPRM, 88 FR at 11704, the Departments are promulgating the rule to address the following considerations. First, the reality of large numbers of migrants crossing the SWB has placed a substantial burden on the resources of Federal, State, and local governments. *See* 88 FR 11715. While the United States Government has taken extraordinary steps to address this burden, the current level of migratory movements and the anticipated increase in the numbers of individuals seeking entry into the United States following the lifting of the Title 42 public health Order, without policy changes, threaten to exceed the capacity to maintain the safe and humane processing of noncitizens who cross the SWB without authorization. *See id* at 11704. Second, this reality allows pernicious smuggling networks to exploit migrants—putting migrants' lives at risk for the smugglers' financial gain. Finally, the unprecedented migratory flow of non-Mexican migrants, who are far more likely to apply for protection,[85] has contributed to a growing backlog of cases awaiting review by AOs and IJs. As a result, those who have a valid claim to asylum may have to wait years for their claims to be granted, while individuals who will ultimately be found ineligible for protection may spend years in the United States before being ordered removed. None of these considerations are racially motivated, inhumane, or xenophobic.

The Departments reiterate that the United States Government has implemented, and will continue to implement, a number of measures designed to enhance and expand lawful pathways and processes for noncitizens who may wish to apply for asylum to come to the United States. DHS has recently created new processes for up to 30,000 CHNV nationals per month to apply for advance authorization to seek parole into the United States, enabling them to travel by air to the United States.[86] DHS and its interagency partners have also increased H–2B nonimmigrant visa availability and refugee processing for countries within the Western Hemisphere. *See* 88 FR at 11718. Noncitizens who are not eligible for these pathways can schedule an appointment to present at a southwest land border POE through the CBP One app and be exempted from the rule. Finally, the rule does not apply to migrants crossing into the United States from Canada because, as discussed in more detail below, the STCA between the United States and Canada, along with the Additional Protocol of 2022, announced March 24, 2023, already enable sufficient management of migration from Canada.[87] The Additional Protocol expands the STCA to apply to migrants who claim asylum or other protection after crossing the U.S.-Canada border between POEs, thus providing another disincentive for irregular migration.[88]

Comment: Other commenters stated that there is a disconnect between President Biden's remarks in Poland in February 2023 regarding accepting and welcoming refugees and this rule. Some commenters stated that the proposed rule is not in line with the American value of welcoming refugees and asylum seekers. Many commenters referenced the Statue of Liberty and the American tradition of welcoming the poor and other vulnerable immigrants and quoted Emma Lazarus' poem. Commenters stated that the ability to seek asylum is a legally recognized right and that the proposed rule would effectively deny that right to many asylum seekers, as well as that the United States should instead live up to its legal responsibilities and ideals. Commenters stated that the need to reduce strain at the border is an insufficient reason to support the reduction in asylum access that would result from the rule.

Response: The Departments acknowledge that the United States has a long tradition of accepting and welcoming refugees and note that in the past two years, the United States Government has taken steps to significantly expand refugee admissions from Latin America and the Caribbean. However, simply welcoming migrants into the United States without a policy in place to ensure lawful, safe, and orderly processing of those migrants would exceed DHS's already limited resources and facilities—especially given the anticipated increase in the numbers of migrants who will attempt to enter the United States following the lifting of the Title 42 public health Order.

The Departments underscore that the rebuttable presumption will not apply to noncitizens who availed themselves of safe, orderly, and lawful pathways to enter the United States or sought asylum or other protection in a third country and were denied. The rule lists three per se grounds for rebuttal: if a noncitizen demonstrates that, at the time of entry, they or a member of their family as described in 8 CFR 208.30(c) with whom the noncitizen is traveling faced an acute medical emergency; faced an imminent and extreme threat to their life or safety; or were a ''victim of a severe form of trafficking in persons'' as defined in 8 CFR 214.11. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). The rule also

[85] For noncitizens encountered at the SWB in FYs 2014–2019 who were placed in expedited removal, 6 percent of Mexican nationals made fear claims that were referred to USCIS for adjudication compared to 57 percent of people from Northern Central America and 90 percent of all other nationalities. OIS analysis of Enforcement Lifecycle data as of December 31, 2022.

[86] *See* 87 FR 63507 (Oct. 19, 2022); DHS, Implementation of a Parole Process for Haitians, 88 FR 1243 (Jan. 9, 2023); DHS, Implementation of a Parole Process for Nicaraguans, 88 FR 1255 (Jan. 9, 2023); DHS, Implementation of a Parole Process for Cubans, 88 FR 1266 (Jan. 9, 2023).

[87] *See* DHS, Press Release, *United States and Canada Announce Efforts to Expand Lawful Migration Processes and Reduce Irregular Migration* (Mar. 24, 2023), *https://www.dhs.gov/news/2023/03/24/united-states-and-canada-announce-efforts-expand-lawful-migration-processes-and.*

[88] *See* 8 CFR 208.30(e)(6); 8 CFR 1003.42(h); Implementation of the 2022 Additional Protocol to the 2002 U.S.-Canada Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 88 FR 18227 (Mar. 25, 2023).

contains a specific exception to the rebuttable presumption for unaccompanied children. *See* 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i). Noncitizens who are subject to the lawful pathways condition on eligibility for asylum and who do not qualify for an exception or rebut the presumption of the condition's applicability, remain eligible to apply for CAT protection or for statutory withholding of removal, which implements U.S. non-refoulement obligations under the 1967 Protocol. *See, e.g., Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *Cazun* v. *U.S. Att'y Gen.,* 856 F.3d 249, 257 n.16 (3d Cir. 2017).

Exceptionally compelling circumstances will also be found if, during section 240 removal proceedings, the noncitizen is found eligible for statutory withholding of removal or CAT withholding, they would be granted asylum but for the presumption against asylum, and their accompanying spouse or child does not independently qualify for asylum or other protection against removal or the noncitizen has a spouse or child who would be eligible to follow to join them as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), if they were granted asylum. *See* 8 CFR 1208.33(c). As discussed in the NPRM, the Departments have determined that applying the lawful pathways condition on eligibility for asylum is necessary to ensure the Departments' continued ability to safely, humanely, and effectively enforce and administer U.S. immigration laws and to reduce the role of exploitative and dangerous smuggling and human trafficking networks.

Comment: Many commenters stated that if the United States cannot be a safe place for people being persecuted, then it is not living up to constitutional and moral values. A commenter stated that anyone not of Native American ancestry is here because our relatives came here for a better life for themselves and their family. Some commenters stated that America is a nation of immigrants, while others stated that we should remember our ancestors, as many were immigrants too, and invoked their family's migration to the United States as examples. A commenter stated that it is inherently evil to ignore, mistreat, or in any way harm desperate people fleeing their homes because they would likely suffer or even die if they stay. Commenters described the rule as inhumane, not in alignment with Christian or Judeo-Christian morals, and immoral and contrary to American values. A commenter stated that the use of the term ''humane'' in connection with the proposed rule was cynical and cruel. Another commenter stated that the rule would inevitably lead to unnecessary harm and death. One commenter stated that the rule would cause survivors and victims of crime to distrust systems.

Many commenters cited the harms resulting from the United States' failure to provide protection for those fleeing Nazi persecution, which commenters said led to the development of the modern asylum system. Multiple commenters stated that, as a wealthy country that claims to be a leader in democracy, the United States has a special obligation to make it easy to seek asylum here, and that the proposed rule would put barriers in the way of desperate people. Commenters stated that the Departments should not forget the contributions of immigrants to the United States' workforce and diversity and should not deny protection to people in need. Some commenters stated that the asylum seekers who would be denied under the rule would be contributing members of society that the country needs. One commenter stated the rule conflicts with the American tradition of ''innocent until proven guilty,'' another protested ''the presumption of guilt of undocumented immigrants which underlies this proposed rule,'' and others stated that refugees should not be treated as criminals. At least one commenter stated that the rule would amount to ''cruel and unusual punishment'' and other commenters described it as ''cruel'' or ''wrong'' and ''un-American.'' One commenter stated that the rule imposes an arbitrary punishment on the very individuals whom the asylum laws were intended to protect. At least one commenter stated that the rule should have a presumption in favor of applicants. Another commenter said that one of America's principles is that ''all men are created equal,'' noting that it says ''men'' and does not refer to U.S. citizens only.

Response: The Departments disagree that this rule is inhumane or contrary to morals and values. For decades, U.S. law has protected vulnerable populations from return to a country where they would be persecuted or tortured. The Departments note that the rule is designed to safely, effectively, and humanely process migrants seeking to enter the United States, and to reduce the influence and role of the lawless and pernicious human smuggling organizations that put migrants' lives in peril for profit. *See* 88 FR at 11713–14. The Departments considered the dangerous journeys made by migrants who put their lives at risk trying to enter the United States without authorization. The rule is designed to disempower criminal enterprises that seek to take advantage of desperate migrants, leading to untold human suffering and far too many tragedies. *See id.* The rule pursues this goal by encouraging migrants to seek protection in other countries in the region and to use lawful pathways and processes to access the U.S. asylum system, including pathways and processes that do not require them to take a dangerous journey. In order to ensure that particularly vulnerable migrants are not unduly affected by the rule, the Departments have included exceptions and multiple ways that migrants may rebut the presumption and thereby remain eligible for asylum, as well as access to other protection. A noncitizen who seeks to apply for asylum can also schedule their arrival at a land border POE through the CBP One app and be exempted from the rule.

Regarding comments stating that the rule conflicts with ''innocent until proven guilty,'' or that the rule attaches a presumption of guilt to migrants, or that the rule amounts to ''cruel and inhumane treatment,'' the Departments note that this rule is not intended to ascribe guilt or innocence or punishment to anyone but rather to encourage the use of lawful, safe, and orderly pathways to enter the United States. The rule also does not subject anyone to ''cruel and inhumane treatment,'' and indeed ensures that individuals who fear torture or persecution can seek statutory withholding of removal or CAT protection. Similarly, the Departments disagree with comments recommending a presumption in the rule that favors eligibility for asylum. The Departments note that asylum eligibility requirements set forth in section 208(b)(1) of the INA place the burden on the noncitizen. Creating a presumption in the rule to favor eligibility for asylum would remove that burden from the noncitizen and would not achieve the Departments' goals of disincentivizing migrants from crossing the SWB without authorization. Finally, as explained in Section IV.D.1.ii of this preamble, the rule is fully consistent with the Departments' legal authority and obligations on asylum eligibility pursuant to section 208 of the INA, 8 U.S.C. 1158.

Comment: Commenters described this rule as a ''broken promise'' to fix the asylum system and stated that President Biden had criticized the Title 42 public health Order and indicated that he would pursue policies that reflect the United States' commitment to asylum seekers and refugees. A commenter urged the Departments to withdraw the

rule, reasoning that it would contravene the Biden Administration's values by putting vulnerable migrants at greater risk for violence without shelter or protection. Another commenter expressed concern that the proposed rule would be antithetical to President Biden's prior promises to reduce migrants' reliance on smuggling networks, to reduce overcrowding in migrant detention facilities, and to provide effective humane processing for migrants seeking protections in the United States. Other commenters stated that the rule would contravene President Biden's promise to uphold U.S. laws humanely and to preserve the dignity of ''immigrant families, refugees, and asylum seekers.'' One commenter stated that during the presidential election, President Biden campaigned to ''restore the soul of America'' and cutting off asylum seekers is not part of that promise. Another commenter urged that President Biden be held accountable for the ''promises he made before his election.'' A commenter likewise stated that the proposed rule would fail to uphold the Biden Administration's commitments to promote regional cooperation and shared migration management.

Response: Political and economic instability, coupled with the lingering adverse effects of the COVID–19 global pandemic, have fueled a substantial increase in migration throughout the world. This global increase is reflected in the trends on the SWB, where the United States has experienced a sharp increase in encounters of non-Mexican nationals over the past two years, and particularly in the final months of 2022. *See* 88 FR at 11708. DHS was encountering an average of approximately 8,800 noncitizens per day during the first ten days of December 2022—a new record—and expects that encounter numbers could increase to 11,000 per day following the termination of the Title 42 public health Order.[89] The rule is a response to the even more urgent situation that the Departments could face after the lifting of the Title 42 public health Order. The Departments believe that these circumstances warrant this policy, which will encourage those migrants who wish to seek asylum to avail themselves of lawful, safe, and orderly pathways into the United States.

Consistent with the principle of establishing a fair, orderly, and humane asylum system, the United States Government has implemented a multi-pronged approach to managing migration throughout North and Central America. The United States Government is working closely with international organizations and the governments in the region to establish a comprehensive strategy for addressing the causes of migration in the region; build, strengthen, and expand Central and North American countries' asylum systems and resettlement capacity; and increase opportunities for vulnerable populations to apply for protection closer to home. *See* E.O. 14010, Creating a Comprehensive Regional Framework to Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 FR 8267, 8270 (Feb. 2, 2021). These commitments were further enshrined and expanded beyond Central and North America in the June 2022 L.A. Declaration endorsed by the United States and 19 nations in the Western Hemisphere.[90] Indeed, the L.A. Declaration specifically outlines ''the need to promote the political, economic, security, social, and environmental conditions for people to lead peaceful, productive, and dignified lives in their countries of origin'' and states that ''addressing irregular international migration requires a regional approach.'' [91] At the same time, the United States is expanding efforts to protect refugees by increasing refugee admissions and expanding refugee processing within the Western Hemisphere. In fact, on April 27, 2023, DHS announced that it would commit to welcoming thousands of additional refugees each month from the Western Hemisphere—with the goal of doubling the number of refugees the United States committed to welcome as part of the L.A. Declaration.[92] Therefore, the United States is enhancing lawful pathways for migration to this country while improving efficiencies within the U.S. asylum system.

Comment: Commenters stated that the United States should welcome and not punish asylum seekers because the United States is responsible for creating the conditions and other problems that have caused many of the migrants seeking asylum to leave their countries, such as through American military, intelligence, political, or economic actions. Commenters also stated that the United States should not limit access to asylum for migrants coming from countries where the United States Government supported a regime change that created the circumstances that the migrants are fleeing. For example, one commenter referenced the United States' support in prior conflicts in Guatemala and El Salvador and the current support for the controversial leadership in El Salvador as reasons the commenter believed the United States was the cause of migration. One commenter stated that the United States has played a role in creating the political instability that cause many Central American refugees to flee and seek asylum in the United States. Other commenters expressed a belief that many migrants are fleeing because of climate change, to which the United States has greatly contributed, or because of challenging conditions in some countries, including Haiti. Another commenter argued that the U.S. war on drugs has contributed to the circumstances from which migrants are fleeing to seek asylum at the SWB.

Response: The Departments recognize commenters' concerns that numerous factors may have contributed to migrants seeking asylum. As noted in the preceding comment response, political and economic instability, coupled with the lingering adverse effects of the COVID–19 global pandemic, have fueled a substantial increase in migration throughout the world. This global increase is reflected in the trends on the SWB, where the United States has experienced a sharp increase in encounters of non-Mexican nationals over the past two years, and particularly in the final months of 2022. *See* 88 FR at 11708. This rule addresses the Departments' continued ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system, in anticipation of a potential further surge of migration at the SWB, regardless of any factors that may have contributed to migration flows. The Departments have sought to address this situation by increasing lawful pathways while also imposing consequences for not using those pathways. The Departments further note that the United States has worked closely with its regional partners to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration, including taking measures to address the root causes of migration, expand access to lawful pathways, improve the U.S. asylum system, and address the pernicious role of smugglers. For

[89] *See* DHS Post-Title 42 Planning Model generated April 18, 2023; *see also* OIS analysis of CBP UIP data downloaded January 13, 2023.

[90] The White House, *Los Angeles Declaration on Migration and Protection* (June 10, 2022), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/.*

[91] *Id.*

[92] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

instance, the United States Government has implemented new parole processes for CHNV nationals that have created a strong incentive for these individuals to wait where they are to access an orderly process to come to the United States.[93] Additionally, the United States has expanded refugee processing in the region which provides another orderly option for refugees to lawfully enter the United States. *See* 88 FR at 11719. Consistent with these processes, this rule would further incentivize noncitizens to avail themselves of other lawful, safe, and orderly means for seeking protection in the United States or elsewhere.

Comment: Some commenters stated that the United States is applying inconsistent policy by ending expulsions of noncitizens under the Title 42 public health Order while simultaneously creating new restrictions on asylum. Commenters stated that the United States Government should not use the end of the Title 42 public health Order as an excuse to resurrect asylum restrictions. Commenters stated that the United States has expelled individuals from ''Central America, Haiti, and . . . Venezuela,'' nearly 2.5 million times while the Title 42 public health Order has been in place, which, according to commenters, has led to increasing numbers of deaths along the border. One commenter stated that it is ''ludicrous'' that the Government has acted as if the pandemic is over except in the context of welcoming asylum seekers. Conversely, some commenters stated that the ending of Title 42 is within the Administration's control and is not a necessary justification for the rule, and further critiqued the recent actions of the Departments to prepare for the termination as causative of the recent border crisis.

Response: The Departments respectfully disagree that this action is inconsistent with the lifting of the Title 42 public health Order. It is important to note that the CDC's April 2022 decision to terminate the Title 42 public health Order and HHS's separate decision to not renew the public health emergency after May 11, 2023, resulting in the impending termination of the Title 42 public health Order, were based on considerations of public health, not immigration policy. HHS and CDC exercise authority under Title 42 of the U.S. Code to make public health determinations for a range of purposes. *See* 42 U.S.C. 265, 268; section 319 of the Public Health Service Act; 42 CFR 71.40. Throughout the COVID–19 pandemic, DHS and DOJ have relied and will continue to rely on the public health expertise of CDC and HHS, and DHS will implement relevant CDC orders to the extent that they remain in effect.

After the Title 42 public health Order is lifted, migrants will be subject to Title 8 processing. The Departments anticipate that in the absence of this rulemaking, a significant further surge in irregular migration would then occur. Such a surge would risk (1) overwhelming the Departments' ability to effectively process, detain, and remove, as appropriate, the migrants encountered; and (2) placing additional pressure on States, local communities, and NGO partners both along the border and in the interior of the United States. This rule will disincentivize irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in a third country.

ii. Ports of Entry Should Be Open to Anyone To Make an Asylum Claim

Comment: Commenters stated that everyone escaping persecution should be able to seek safety in the United States by presenting at a POE, and that migrants should not be required to make appointments to present themselves or to seek asylum in third countries where they may face harm. Another commenter stated that the rule would limit asylum to the ''privileged and connected'' despite longstanding legal precedent holding that individuals should be able to access asylum regardless of manner of entry. One commenter stated that even if migrants have a relatively low chance of approval, they have a right to enter the United States and apply for asylum, because some claims will be successful. Commenters stated that the United States denies visas to many people who face persecution, so those same people should not be denied asylum for failing to travel with a visa. For example, at least one commenter stated that an average person from Central America would struggle to get a tourist, student, or other visa. Another commenter stated that everyone, regardless of manner of entry, manner of transit, nationality, or other arbitrary restriction, should have the right to seek asylum in the United States.

Response: As discussed in more detail in Section IV.D.1 of this preamble, this rule does not deny anyone the ability to apply for asylum or other protection in the United States; instead, the Departments have exercised their authority to adopt additional conditions for asylum eligibility by adopting a rebuttable presumption of ineligibility for asylum in certain circumstances. The Departments acknowledge and agree that any noncitizen who is physically present in the United States may apply for asylum, but note that there is no freestanding right to enter or to be processed in a particular manner. *See U.S. ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 357, 452 (1950) (''At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government''). Importantly, under this rule, any noncitizen will be able to present at a POE, and no individual—regardless of manner of entry into the United States—will be turned away or denied the opportunity to seek protection in the United States under this rule. Noncitizens who lack documents appropriate for admission to the United States are encouraged and incentivized, but not required, to make an appointment using the CBP One app to present themselves at a POE for inspection.

The use of the CBP One app will contribute to CBP's efforts to expand its SWB POE migrant processing capacity well beyond the 2010–2016 daily POE average,[94] resulting in increased access for noncitizens to POEs. Those who arrive at a POE without an appointment via the CBP One app may be subject to longer wait times for processing at the POE depending on daily operational constraints and circumstances. And this rule does not preclude such noncitizens, or other noncitizens who cross the southwest land border or adjacent coastal borders, from filing an asylum application. Indeed, in all cases, any noncitizen who is being processed for expedited removal may express or indicate a fear of return during the expedited removal process, and will be referred to USCIS for a credible fear interview, as appropriate. *See* INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). Also, noncitizens in section 240 removal proceedings have the opportunity to present information asserting fear or concern of potential removal. *See* INA 240(c)(4), 8 U.S.C. 1229a(c)(4). Although such individuals

[93] *See* DHS, Press Release, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), *https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.*

[94] *See* CBP STAT Division, *U.S. Customs and Border Protection (CBP) Enforcement Encounters—Southwest Border (SBO), Office of Field Operations (OFO) Daily Average* (internal data report, retrieved Apr. 13, 2023).

may be presumptively ineligible for asylum under this rule, they may seek to establish that they are subject to an exception or to rebut that presumption, and they may also still seek statutory withholding of removal and CAT protection in the United States, as outlined in Section IV.E.8 of this preamble. The Departments also note that a purpose of this rule is to facilitate safe and orderly travel to the United States. Individuals who lack a visa are generally inadmissible to the United States, *see* INA 212(a)(7), 8 U.S.C. 1182(a)(7), and will remain so under this rule.

iii. Belief That the Rule Will Result in Denial of Valid Asylum Claims

Comment: Commenters stated that the rule would result in the denial of valid asylum claims and described the right to seek asylum as a human right. One commenter emphasized that, when Congress created the credible screening process, the premise of the screening was for adjudicators to err on the side of protection. Multiple commenters expressed concern that implementing the proposed rule would increase the likelihood that asylum seekers would be refouled or migrants returned to harmful conditions. One commenter said that denying a bona fide asylum claim and putting a would-be applicant at risk of danger is a greater mistake than making a positive credible fear determination that does not result in asylum. At least one commenter disagreed with the proposed rule's assertion that noncitizens who forgo certain lawful or orderly procedures are less likely to have a well-founded fear than those who do and stated that this assertion is unsupported.

Commenters stated that the rule imposes conditions on noncitizens' access to asylum that have nothing to do with the merits of their asylum claims and merely puts up bureaucratic hurdles. One commenter stated that people often have no control or choice in how they get to the United States, which is a matter of survival. Another commenter stated that rushed procedure created by this rule would result in what the commenter describes as false negatives, as asylum seekers subjected to this process would be disoriented from their days in CBP's holding facilities, especially after undergoing a harrowing journey to the United States that likely included violence, persecution, and trauma. Commenters stated that instead of filtering out migrants with weak asylum claims, the rule would stop the most vulnerable from being able to apply for asylum. One commenter stated that it may be necessary for asylum seekers to cross the border by unscrupulous means to escape their persecutors and that this bolsters their case for asylum rather than detracts. Commenters stated that the exceptions to the proposed rule do little to provide meaningful safeguards for asylum seekers and would result in erroneous denials and forced return to countries where the noncitizen would face danger. Commenters stated that asylum seekers who are otherwise eligible for asylum but banned by the rule would likely be deported to danger. Other commenters stated that the framework of the rebuttable presumption would have negative effects and de facto be dispositive of asylum eligibility before noncitizens have a ''fair shot at making their case.'' One commenter wrote that, concerning the one-year asylum filing deadline, numerous reports have shown the impact of such bars on returning individuals to harm.

Response: The Departments disagree that the rule creates an unwarranted risk of denial of valid asylum claims. The U.S. asylum system is governed by statute and implementing regulations. To receive asylum, noncitizens must establish that (1) they meet the definition of a ''refugee,'' under section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), (2) they are not subject to a bar to applying for asylum or a bar to the granting of asylum, and (3) they merit a favorable exercise of discretion. *See* INA 208(a)(2), 8 U.S.C. 1158(a)(2); INA 208(b)(1), 8 U.S.C. 1158(b)(1); INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A); 8 CFR 1240.8(d); *see also Moncrieffe* v. *Holder,* 569 U.S. 184, 187 (2013) (describing asylum as a form of ''discretionary relief from removal''); *Delgado* v. *Mukasey,* 508 F.3d 702, 705 (2d Cir. 2007) (''Asylum is a discretionary form of relief . . . . Once an applicant has established eligibility . . . it remains within the Attorney General's discretion to deny asylum.''). Because asylum is a discretionary form of relief from removal, the assumption that this rule will result in the risk of denial of valid asylum claims is incorrect because the noncitizen bears the burden of showing both eligibility for asylum and why the Attorney General or Secretary should exercise the discretion to grant relief. *See* INA 208(b)(1), 8 U.S.C. 1158(b)(1); INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A)(ii); 8 CFR 1240.8(d); *Romilus* v. *Ashcroft,* 385 F.3d 1, 8 (1st Cir. 2004).

The Departments acknowledge that despite the protections preserved by the rule and the availability of lawful pathways, the rebuttable presumption adopted in the rule will result in the denial of some asylum claims that otherwise may have been granted, but the Departments believe that the rule will generally offer opportunities for those with valid claims to seek protection through asylum, statutory withholding of removal, or protection under the CAT. Moreover, the Departments have determined that the benefits to the overall functioning of the system, including deterrence of dangerous irregular migration and smuggling, justify the rule.

The rule encourages those with meritorious claims to either apply for asylum or other protection in the first safe country they reach or pursue available lawful pathways as set forth in the rule. Noncitizens who apply for and are denied protection in a third country are not barred from asylum eligibility under this rule. The rule will preserve core asylum protections by permitting noncitizens subject to the presumption of asylum ineligibility to rebut it by showing exceptionally compelling circumstances that excuse their failure to pursue lawful pathways or processes. Furthermore, under the rule, noncitizens who are ineligible for asylum due to the lawful pathways condition remain eligible for protections from persecution and torture. Indeed, noncitizens who establish a reasonable possibility of persecution or torture are placed in section 240 removal proceedings where they can apply for asylum, statutory withholding of removal, and protection under CAT. 8 CFR 1208.33(b)(2)(ii), (b)(4). Thus, the rule does not prevent noncitizens from pursuing asylum nor does the rule create an unwarranted risk of denial of valid asylum claims.

iv. Belief That the Rule Will Increase Smuggling or Trafficking

Comment: Commenters agreed that human trafficking is a serious concern, but asserted that this rule would make the problem worse. Commenters stated the proposed rule will not result in asylum seekers relying less on smuggling networks, but will actually increase their reliance on smugglers and increase their vulnerability to trafficking. One stated that desperate people turn to traffickers because they fear being turned away by authorities, and that the most effective way to remove traffickers' leverage is to open safe and legal pathways for immigration. Another commenter stated that the United States should make it easier to legally enter for work as a way to discourage trafficking by smugglers rather than implement the proposed rule. Some commenters stated human smuggling and trafficking were

problems of the Government's own making, and by discouraging migrants from coming to the border in a legal manner, the rule would increase the interactions between migrants and smugglers, as well as increasing the number of noncitizens without lawful immigration status in the United States. Commenters also stated that closing off the SWB and trapping migrants in dangerous parts of Mexico for a prolonged time exposes them to greater violence, exploitation, and other dangers, and heightens their risk of being trafficked. One commenter stated that in the event that people are unable to get an appointment through the CBP One app and are blocked from access to asylum, smuggling operations and organized crime in Mexico will only gain more power, take individuals on more treacherous routes to evade detection, and cause USBP to invest more resources to detain individuals. Another commenter stated that the rule would further embolden organized crime, corrupt state actors, and criminals, making migrants even more of a target and placing them at greater risk of being trafficked. One commenter stated, without evidence, that the TCT Bar Final Rule advantaged drug cartels and criminal organizations that target vulnerable populations, and asserted that this rule would have the same result.

Commenters said that technical difficulties associated with the CBP One app have opened new avenues for exploitation; for example, traffickers claiming an ability to obtain appointments, or scams charging fees for completing a CBP One app registration. Similarly, one commenter said that individuals who lack access to stable Wi-Fi may seek Wi-Fi in dangerous places, including cities controlled by cartels. Another commenter wrote that the need for migrants to borrow a smartphone from a third party could create an opportunity to take advantage of migrants trapped at the U.S.-Mexico border to target them for extortion, sexual violence, or other harm. In contrast, based on its field monitoring, a different commenter stated that the CBP One app has led to a reduction in instances of fraud and abuse of migrants who previously relied on local actors to get on lists to request an exception to the Title 42 public health Order.

Another commenter expressed concern that the proposed rule may discourage migrants from contacting U.S. law enforcement for fear of deportation, increasing the likelihood of trafficking and smuggling. One comment stated that the rule would continue the Administration's shameful legacy of facilitating mass trafficking and smuggling of vulnerable noncitizens because it is ''all bark and no bite'' due to its ''numerous loopholes and exceptions,'' unlike the TCT Bar rulemaking, which the commenter described as part of a multi-pronged strategy to secure the border.

Response: The Departments acknowledge the commenters' concerns about smuggling and trafficking, but disagree with the either/or approach urged by some commenters. To prevent migrants from falling victim to smugglers and traffickers, the Departments believe it is necessary to both increase the availability of lawful pathways for migration and discourage attempts to enter the United States without inspection. The Departments anticipate that the newly expanded lawful pathways to enter the United States, in conjunction with the rule's condition on asylum eligibility for those who fail to exercise those pathways, will ultimately decrease attempts to enter the United States without authorization, and thereby reduce reliance on smugglers and human traffickers.

DHS has recently created alternative means for migrants to travel to the United States via air through the CHNV parole processes, increased refugee processing in the Western hemisphere, and increased admissions of nonimmigrant H–2 workers from the region. 88 FR at 11718–20. DHS also recently announced that it plans to create new family reunification parole processes for nationals of El Salvador, Guatemala, Honduras, and Colombia, and to modernize the existing Haitian Family Reunification Parole process and the Cuban Family Reunification Parole process.[95] In addition, noncitizens' use of the CBP One app to schedule appointments to present at land border POEs is expected to enhance DHS's ability to process such individuals in a safe, orderly manner. As discussed later in Section IV.E.3.ii.a of this preamble, CBP anticipates processing several times more migrants each day at SWB POEs than the 2010–16 daily average,[96] including through the use of the CBP One app. While the CBP One app provides noncitizens access to schedule arrivals at a POE, no CBP officer will dissuade or prevent any noncitizen who lacks a scheduled appointment from applying for admission to the United States. *See* INA 235(a)(4), U.S.C. 1225(a)(4); 8 CFR 235.1, 235.4 (decision to withdraw application for admission must be made voluntarily).

The Departments disagree that the CBP One app or accessibility issues associated with the CBP One app will increase reliance on smugglers and traffickers. The CBP One app is a free, public-facing application that can be downloaded on a mobile phone. 88 FR at 11717. As noted in the received comments, the International Organization for Migration (''IOM'') has, during its recent field monitoring, observed that the CBP One app has led to a reduction in instances of fraud and abuse of migrants who previously relied on local actors to get on lists to request an exception to the Title 42 public health Order, and recommended that CBP further develop the CBP One app to prevent glitches and incorporate improvements suggested by IOM and other stakeholders. CBP is continuing to improve the CBP One app and engage with stakeholders on potential improvements. The rule also contains an exception for situations where it was not possible to access or use the app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. 8 CFR 208.33(a)(2)(B), 1208.33(a)(2)(B).

The Departments also disagree with the assertion that, due to its exceptions and means of rebuttal, the rule will facilitate mass trafficking and smuggling of vulnerable noncitizens. The recently expanded lawful pathways are designed to allow migrants to travel directly to the United States without having to travel through Central America, where they might rely on smugglers or traffickers. In addition, some of the specific examples of exceptionally compelling circumstances are designed to protect victims or those at risk of trafficking. *See* 8 CFR 208.33(a)(3)(i)(B) and (C), 1208.33(a)(3)(i)(B) and (C).

Finally, the Departments do not believe that the rule will discourage migrants from contacting U.S. law enforcement due to fear of deportation, and thereby place them at further risk of trafficking and smuggling. Migrants who enter the United States without inspection or apprehension by CBP are already subject to removal, *see* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A), and victims of severe forms of trafficking or other crimes may be eligible to apply for

[95] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[96] *See* CBP STAT Division, *U.S. Customs and Border Protection (CBP) Enforcement Encounters—Southwest Border (SBO), Office of Field Operations (OFO) Daily Average* (internal data report, retrieved Apr. 13, 2023); Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), *https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf.*

T or U nonimmigrant status, *see* INA 101(a)(15)(T) and (U), 8 U.S.C. 1101(a)(15)(T) and (U).

4. Negative Impacts and Discrimination Against Particular Groups

i. General Comments on Discrimination

Comment: Commenters raised concerns that the proposed rule could have a disproportionate impact on certain populations that may be vulnerable, including those without legal representation, those with limited English proficiency (''LEP''), families and children, victims of domestic and gender-based violence, victims of human trafficking, women, the LGBT community, those with mental impairments and associated competency issues, elderly individuals, those with limited technological literacy, those with physical disabilities, those with health problems or who are otherwise in need of medical attention, people of color, indigenous groups, survivors of persecution or torture, and those with post-traumatic stress disorder (''PTSD''), among others.

For example, commenters stated that those without legal representation or with limited English proficiency may have difficulty understanding and complying with the process proposed by the rule, which commenters claimed requires access to technology, technological proficiency, and an understanding of the requirements prior to attempting entry at the SWB. Likewise, commenters suggested that groups including survivors of persecution or torture, the LGBT community, victims of domestic and gender-based violence, women, and noncitizens with mental impairments and associated competency issues may have difficulty applying for relief in a third country, as those countries may not have sufficiently robust humanitarian-relief systems to accommodate the particular issues faced by these and similar groups. For instance, many such individuals may have difficulty recounting the harms they suffered in their home countries without specialized procedures, and some third countries may not recognize their harms as qualifying for asylum in the same way that U.S. asylum law does. Similarly, commenters stated, some groups may also face particular discrimination or violence in third countries based on the same immutable characteristics for which they were persecuted in their home countries. Other commenters highlighted anecdotally that membership in one group has often intersected with membership in another, compounding the harm noncitizens have experienced in transit.

Response: The Departments are committed to the equal treatment of all persons. This rule is intended to promote lawful, safe, and orderly pathways to the United States and is intended to benefit particularly vulnerable groups by removing the incentive to make a dangerous irregular migration journey and reducing the role of exploitative transnational criminal organizations and smugglers. *See* 88 FR at 11707. As detailed in the NPRM, irregular migration journeys can be particularly fraught for vulnerable groups, including those discussed in the following sections. *See* 88 FR at 11713 (explaining that women and children are ''particularly vulnerable to attack and injury'' as well as illness along an important migratory route). The incentivizing of the lawful pathways described in the NPRM is intended in part to encourage vulnerable groups to avoid such journeys while simultaneously preserving their ability to apply for asylum consistent with existing law and regulations. *See, e.g.,* 88 FR at 11718 (explaining that the United States has taken ''meaningful steps'' to enhance lawful pathways for migrants to access protection). In addition, depending on individual circumstances, AOs and IJs may find that certain especially vulnerable individuals meet the exceptionally compelling circumstances standard.

ii. Children and Families

Comment: Commenters raised concerns about the proposed rule's impact on children and families. In general, commenters stated that the United States has a legal and moral obligation to act in the best interest of children by preserving family unity and should be doing whatever it can to protect children seeking asylum, especially after prior family separation policies at the border. Commenters generally asserted that the proposed rule would expose children and families to continued violence and danger, limit their right to seek asylum, and deny children the opportunity to be safe and protected. Commenters provided anecdotal examples of migrant families and children who had been harmed or killed while waiting at the border to secure an appointment through the CBP One app or while attempting to travel to POEs with available appointments. Commenters asserted that the proposed rule would prevent accompanied children from presenting their own asylum claims independent of a claim presented by their parent or guardian. Commenters were concerned that the asylum ineligibility presumption would encourage families to separate at the SWB and prevent noncitizens from petitioning for their eligible derivatives, which commenters claimed would be a form of family separation, and described potential attendant negative consequences for children and families, such as trauma, familial instability, developmental delays, vulnerability to harm and exploitation, detention, placement in orphanages, and detention in inhumane conditions.

Further, commenters asserted that all children, because of their unique needs and challenges, deserve additional procedural protections and child-sensitive considerations not included in the proposed rule. Commenters highlighted the vulnerability of children, the fact that children process trauma differently than adults do, and children's varied ability to understand complex immigration requirements, stating that the law recognizes the need for additional protections for children and to account for their best interests. Commenters also suggested that the proposed rule and any detention that it may require would re-traumatize children who have already experienced trauma, including trauma from their journey to the SWB. Other commenters suggested that any required detention may have serious ramifications on a child's well-being, mental health, and development.

Additionally, commenters posited that the proposed rule could incentivize entire families to make a potentially dangerous journey to the United States together. Commenters stated that prior to the proposed rule, one family member might have journeyed alone to the United States to seek asylum with the understanding that they would be able to petition for family members upon being granted asylum. But under the proposed rule, those commenters stated, many families may be incentivized by what commenters consider a lack of asylum availability to undertake an unsafe journey to the SWB together rather than risk permanent family separation. Relatedly, commenters indicated that children compelled to wait at the SWB with a member of their family, so as not to be subject to the NPRM's condition on eligibility, may be deprived of access to other forms of status for which they may be eligible in the United States, such as Special Immigrant Juvenile classification. Commenters urged the Departments to prioritize processing family unit applications to keep families together and expressed that families deserve a chance to live together in the

United States to escape violence in their home countries.

One commenter stated that children have little control over whether their parents can pre-schedule their arrival at a POE or choose to apply for protection in transit countries, but the proposed rule would condition asylum eligibility for the child on whether their parent did so. Similarly, other commenters stated that the proposed rule failed to consider or make an exception for the fact that children and young people generally have less control and choice with respect to their movement and may depend on the assistance of a parent, who may have been jailed or killed by persecutors, or who may themselves have harmed the child or young person, to apply and be approved for a visa.

Response: The Departments share commenters' concerns about the vulnerability of children and note that UCs are entitled to special protections under the law. *See* 88 FR at 11724 (citing INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E) (providing that safe-third-country bar does not apply to UCs); INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C) (stating that an AO has initial jurisdiction over the asylum claims of UCs); and 8 U.S.C. 1232(d)(8) (''Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.'')). The Departments also recognize commenters' concerns that children may be at risk for exploitation by criminal actors at and around the SWB, and the Departments note that UCs are of particular concern.

Because of UCs' unique vulnerability and the special protections granted to them by law, the rule contains a provision categorically excepting UCs from the rebuttable presumption of ineligibility for asylum. 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i). Accordingly, because UCs will not be subject to the rebuttable presumption of ineligibility for asylum created by this rule, the Departments emphasize that UCs do not need to wait, potentially vulnerable, in Mexico before seeking entry to the United States or rely on smugglers to undertake a potentially dangerous journey across the SWB. Further, the Departments expect that the rule, by creating efficiencies and freeing up resources due to non-UC migrants pre-scheduling their arrival at SWB POEs, will allow for faster, smoother processing of UCs presenting at the SWB. *See* 88 FR at 11719–20 (describing anticipated efficiencies from implementation of pre-scheduling through the CBP One app). The Departments believe that the rule sufficiently recognizes the unique situation of UCs and provides appropriate safeguards. For discussion of the exception to the condition on asylum eligibility for UCs, and comments suggesting a similar exception for accompanied children, please see Section IV.E.3.v of this preamble.

The Departments acknowledge commenter concerns that children may not have the autonomy to make decisions about their transit or manner of entry into the United States. With those important realities in mind, the Departments have amended the language proposed in the NPRM to ensure that the presumption of asylum ineligibility will not apply to certain noncitizens who entered as children and who file asylum applications after the date range set forth in 8 CFR 208.33(a)(1)(i) and 1208.33(a)(1)(i)—specifically, those who are applying as principal applicants. *See* 8 CFR 1208.33(d)(2). Further, the Departments recognize that some children could be traveling with an adult but still meet the definition of UC at 6 U.S.C. 279(g)(2), for example, where the adult is not the child's parent or legal guardian. Such children would also be excepted from the presumption against asylum eligibility as UCs. *See* 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i). The Departments believe that the aforementioned provisions of the rule prevent those who entered as children from facing a continuing impact on asylum eligibility based upon decisions that others likely made for them.

As discussed in more detail in Section IV.E.3.ii.b of this preamble, the Departments emphasize that family units traveling together should schedule their appointments together through the CBP One app. Families or groups traveling together who do not register together on one CBP One app account may not be accommodated at the same POE or date. Further, as stated in the NPRM, when family units are subject to a credible fear screening, USCIS will find that the entire family passes the screening if one family member establishes a credible fear. 88 FR at 11724; *see* 8 CFR 208.30(c). Likewise, when the reasonable possibility standard applies, USCIS will continue to process claims from family units in this way. 88 FR at 11724 (''USCIS will continue to process family claims in this manner even when applying the reasonable possibility standard.'').

The Departments also acknowledge commenter concerns related to the impact that any potential detention may have on children and families, as well as the effects of trauma on children. However, this rule neither addresses nor expands detention policies, and therefore specific concerns related to detention are outside the scope of this rule. Further, with respect to the effects of trauma on children and concerns about re-traumatization, the Departments are confident in the ability of AOs and IJs to follow appropriate safeguards available for children in processing with USCIS and the immigration courts and note that adjudicators receive training and guidance related to special considerations in cases involving children.[97]

However, the Departments disagree with commenters' contention that children waiting for an appointment to present at a POE together with their family unit will be deprived of Special Immigrant Juvenile classification. Whether a noncitizen enters alone or with a family unit is not dispositive to the statutory definition of a ''special immigrant.'' *See* INA 101(a)(27)(J), 8 U.S.C. 1101(a)(27)(J) (defining ''special immigrant,'' in part, as an immigrant who is present in the United States ''who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States,'' and whose reunification with one or both of the immigrant's parents ''is not viable due to abuse, neglect, abandonment, or a similar basis found under State law''). Further, the Departments highlight that nothing in this rulemaking prevents a noncitizen child from obtaining Special Immigrant Juvenile classification after entering the United States, provided that they are otherwise eligible for such status.

Moreover, the Departments disagree with the characterization of this rule as contributing to family separation rather

[97] *See, e.g.,* Department of Justice, EOIR, *OPPM 17–03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017), *https://www.justice.gov/eoir/file/oppm17-03/download* (recognizing unique circumstances presented by immigration cases involving children and providing guidance for those cases); USCIS, RAIO Directorate—Officer Training: Children's Claims (last revised Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf* [hereinafter USCIS, *Children's Claims*] (providing guidelines for adjudicating children's claims).

than focusing on family unity. The Departments drafted this rule with the goal of eliminating the risk of separating families. As explained above, the rule has several provisions to ensure that family units are processed together. For example, if any noncitizen in a family unit traveling together meets an exception to, or is able to rebut, the asylum ineligibility presumption, the presumption will not apply to anyone in the family unit traveling together. 8 CFR 1208.33(a). Similarly, the rule contains an explicit family unity provision applicable in removal proceedings. *Id.* 1208.33(c). The provision states that if a principal applicant for asylum is eligible for statutory withholding of removal or withholding of removal under the CAT and would be granted asylum but for the rebuttable presumption created by this rule, the presumption ''shall be deemed rebutted as an exceptionally compelling circumstance'' where an accompanying spouse or child does not independently qualify for asylum or other protection or the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), if the applicant were granted asylum. *Id.* This provision is intended to prevent the separation of families. Additionally, this provision is intended to avoid incentivizing families to engage in irregular migration together, so as not to risk that the principal applicant be prevented from later applying for their family members to join them. This may involve making a dangerous journey with vulnerable family members such as children.

Further, the rule incentivizes families, as well as individuals traveling without their families, to take advantage of the lawful pathways outlined in this rule, rather than rely on smugglers or criminal organizations to facilitate a potentially dangerous journey. The rebuttable presumption is intended to disincentivize making such irregular journeys. *See, e.g.,* 88 FR at 11730 (''The proposed rule aims to achieve that shift in incentives by imposing a rebuttable presumption of asylum ineligibility.''). The Departments believe that the meaningful pathways detailed in the rule, combined with the exceptions and rebuttals to the presumption, provide sufficient opportunities for individuals to meet an exception to or rebut the presumption, which could preclude asylee status and the ability to later petition for eligible derivatives. Finally, commenter concerns related to placing separated children in orphanages are outside the scope of this rulemaking, but the Departments emphasize that nothing in this rule would authorize such a process.

For additional discussion of concerns related to due process, see Section IV.B.5 of this preamble. For more discussion of the family unity provision applicable in removal proceedings, please see Section IV.E.7.ii of this preamble.

iii. Individuals With LEP

Comment: Commenters expressed the belief that the proposed rule would function as a complete ban on asylum for noncitizens who are not sufficiently proficient or literate in the languages they would need to use to successfully navigate available lawful pathway options. As a foundational issue, commenters voiced the opinion that due to language and literacy barriers, many noncitizens, particularly those who speak rare languages and those with limited literacy in their native languages, would not be able to understand what lawful pathways are available to them or the consequences that may result from not pursuing a lawful pathway under the proposed rule. For example, some commenters stated that many asylum seekers who are unfamiliar with U.S. immigration law may not know what steps to take to preserve their eligibility for asylum.

Commenters also indicated that many noncitizens would be unable to meaningfully access the CBP One app due to inadequate proficiency or literacy in the app's supported languages and therefore would be unable to pre-schedule their appearance at a POE, making them subject to the rule's presumption of asylum ineligibility. Commenters provided examples of individuals who they asserted would be disproportionately impacted by the rule and face particular challenges, including those who speak an Afghan dialect of the Persian language, monolingual speakers of indigenous languages, and members of the Asian-Pacific Islander community whose primary languages do not utilize the Latin script.

Response: Due to the safeguards crafted into the rule and the success of similar, recently implemented parole processes, the Departments disagree with commenters' contentions that language and literacy barriers will prevent many noncitizens from foundationally understanding what lawful pathway options are available to them.

The Departments acknowledge commenters' concerns that some noncitizens who wish to use the lawful pathway of pre-scheduling their arrival may have language and literacy-related difficulty with accessing and using the CBP One app. Accordingly, the rule provides an exception to application of the rebuttable presumption of asylum ineligibility for noncitizens who present at a POE without a pre-scheduled appointment who can demonstrate through a preponderance of the evidence that, because of a language barrier or illiteracy, it was not possible for them to access or use the DHS scheduling system to pre-schedule an appointment. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). AOs will follow established procedures for interviewing individuals to determine applicability of this exception. Similarly, IJs will follow established procedures for soliciting testimony and developing the record, as appropriate.

The Departments also believe the processes highlighted in this rulemaking will be navigable for noncitizens—regardless of language spoken—as evidenced by the success of the recent, similar U4U and CHNV parole processes, both of which are offered to noncitizens from countries where the primary language is one other than English. *See, e.g.,* 88 FR at 11706–07 (noting that the U4U and CHNV parole processes resulted in vastly fewer irregular border crossings, demonstrating that noncitizens from Ukraine, Cuba, Haiti, Nicaragua, and Venezuela were able to take advantage of the U4U and CHNV parole processes). The success of the U4U and CHNV parole processes suggests that these noncitizens are broadly aware of changes to U.S. immigration processes, that such information is being communicated to noncitizens outside the United States, and that noncitizens are changing migration behaviors in response. In addition, the Departments intend to engage in robust regional public awareness campaigns to promote understanding of the rule, building on ongoing efforts to encourage intending migrants to avail themselves of lawful pathways and publicize the perils of irregular migration. Therefore, the Departments believe that, irrespective of language spoken, noncitizens outside of the United States will become apprised of the lawful pathway options laid out in this rule.

iv. Individuals With Mental Impairments and Associated Mental Competency Issues

Comment: Commenters raised concerns about the proposed rule's effect on noncitizens who have mental impairments and associated mental competency issues. Commenters stated

that some mental impairments result in symptoms that would impact an individual's ability to apply for asylum under any circumstances, especially if access to medical services is unavailable. Moreover, commenters stated that downloading, registering for, and using the CBP One app may be too difficult for some noncitizens with mental impairments and associated mental competency issues. Thus, commenters recommended exempting such persons from the rule.

Response: The Departments recognize the difficulties faced by noncitizens with mental impairments and associated competency issues. Under this rule, AOs and IJs may consider, on a case-by-case basis, whether a noncitizen's or accompanying family member's mental impairments or associated competency issues presented an ''ongoing and serious obstacle'' to accessing the DHS scheduling system. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). In addition, depending on the noncitizen's or accompanying family member's particular circumstances, any serious mental impairments or associated competency issues may qualify as an ''exceptionally compelling circumstance'' sufficient to rebut the presumption of ineligibility for asylum. 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). Notably, the ''acute medical emergency'' ground for rebutting the presumption of asylum ineligibility is not limited to physical medical ailments but could include mental health emergencies. 8 CFR 208.33(a)(3)(i)(A), 1208.33(a)(3)(i)(A).

Procedurally, DHS has discretion to place noncitizens in expedited removal proceedings or refer noncitizens to EOIR for section 240 removal proceedings. *Matter of E–R–M- & L–R–M,* 25 I&N Dec. 520 (BIA 2011). Therefore, DHS may choose to refer noncitizens who exhibit indicia of mental incompetency to EOIR for removal proceedings under section 240 of the INA, where an IJ may more fully consider whether the noncitizen shows indicia of incompetency and, if so, which safeguards are appropriate. *See, e.g., Matter of M–A–M-,* 25 I&N Dec. 474 (BIA 2011).

v. Low-Income Individuals

Comment: Commenters asserted that the proposed rule discriminates against noncitizens who cannot afford to arrive in the United States by air or sea and favors individuals with more financial resources. In general, commenters stressed that a noncitizen's method of arrival in the United States—whether by land, air, or sea—should not dictate their eligibility for asylum and stated that asylum laws should not have a ''wealth test'' for access to protection from persecution. Pointing to the fact that the proposed rule would only apply to noncitizens arriving by land at the SWB, commenters said that the proposed rule would have a disparate impact on individuals, particularly working-class, non-white migrants, who do not have the economic means to purchase a plane ticket or obtain a visitor visa or passport and may not have existing supportive relationships within the United States. Commenters stated that the lawful pathways identified in the proposed rule—including parole programs and use of DHS scheduling technology—prioritize individuals with financial means over those who are indigent.

At least one commenter stated that the proposed rule would cause migrants financial hardship, as not all migrants have the financial resources to travel to a third country to seek asylum before attempting to cross the SWB. Commenters also suggested that the proposed rule would privilege migrants with the economic means to maintain a working smartphone capable of operating the CBP One app and either pay for data roaming capability or remain in an area with internet access. Commenters also stated that the proposed rule unfairly benefits wealthier noncitizens who are more likely to be able to use an approved parole process because such noncitizens may be immediately eligible for employment authorization while low-income noncitizens who are not able to use such a parole process remain without immediate employment authorization. Commenters concluded that the proposed rule would amount to a de facto ban on asylum that targets economically disadvantaged noncitizens without options other than arriving at the SWB.

Response: As explained in the NPRM, the Departments are issuing this rule specifically to address an anticipated surge of migration at the SWB following the lifting of the CDC's Title 42 public health Order. 88 FR at 11704. Through this rule, the Departments have decided to address such a surge one step at a time, beginning with the SWB, where the Departments expect a surge to focus most intensely and immediately. So, tailoring the rule to apply exclusively to migrants arriving from Mexico at the southwest land border or adjacent coastal borders [98] who meet certain conditions but not to migrants arriving via other means is appropriate based on existing and anticipated conditions at the SWB, many of which the Departments outlined in the NPRM. *See id.* at 11705–07. Where conditions necessitate, the Departments can reevaluate the scope of the rule. *Cf. FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 522, 129 S. Ct. 1800, 1815 (2009) (stating that ''[n]othing prohibits federal agencies from moving in an incremental manner''); *City of Las Vegas* v. *Lujan,* 891 F.2d 927, 935 (D.C. Cir. 1989) (explaining that ''agencies have great discretion to treat a problem partially'' including through a ''step toward a complete solution''). Indeed, as stated above, the Departments intend that the rule will be subject to review to determine whether the entry dates provided in 8 CFR 208.33(a)(1)(i) and 1208.33(a)(1)(i) should be extended, modified, or remain as provided in the rule.

Commenters who expressed concerns that this rule would cause financial hardship to migrants by requiring them to travel to a third country to seek asylum before arriving at the SWB misunderstand the terms of this rule. The rule does not require any migrant to travel to a third country to overcome the rebuttable presumption—indeed, the rebuttable presumption does not apply to those who did not travel through a third country—and seeking protection in a third country is merely one of several means to qualify for an exception to or rebut the presumption. Moreover, this rule is intended in part to address existing conditions impacting low-income individuals by reducing opportunities for smugglers to recruit migrants to participate in ''expensive and dangerous human smuggling schemes.'' 88 FR at 11705.

Further, except for those for whom Mexico is their country of nationality or last habitual residence, individuals arriving at the southwest land border or adjacent coastal borders, whether they have traveled by land, air, or sea, to arrive there, necessarily travel through another country—and, often, more than one other country—en route to the United States. Also, while individuals traveling from their country of nationality or last habitual residence to the United States may arrive directly in the United States without transiting another country, they generally are not permitted to board an aircraft or vessel to a U.S. location without first demonstrating that they have the travel documents required for entry into the United States. *See, e.g.,* INA 211, 8 U.S.C. 1181 (setting forth requirements for immigrant admission); *see also* INA

[98] As explained in Section II.C.3 of this preamble, the Departments have decided to apply this rule to migrants arriving from Mexico not only at the southwest land border but also at ''adjacent coastal borders,'' which matches the geographic scope of the CDC's Title 42 public health Order.

217, 8 U.S.C. 1187 (visa waiver requirements); INA 221 through 224, 8 U.S.C. 1201 through 1204 (visas); INA 231, 8 U.S.C. 1221 (establishing air and vessel manifest requirements including mandating the collection of passport numbers); *see also* 8 CFR 212.5(f) (providing that DHS may issue ''an appropriate document authorizing travel'' for those seeking to travel to the United States without a visa).

This rule does not intend to penalize migrants based on economic status, a lack of travel documents, lack of phone or internet access, or exigent circumstances, nor does it do so in effect. Indeed, the Departments recognize that many individuals are only able to enter the United States via the SWB due to just such circumstances and, in recognition of this reality, have identified several pathways and processes through which such individuals may travel to the SWB in a safe and orderly fashion and, once present, seek asylum or other protection. One such pathway or process includes pre-scheduling their arrival, which at this time can be accomplished via the CBP One app. Without a pre-scheduling system, migrants seeking to travel to the SWB may have to wait for an indeterminate amount of time for CBP to have resources available to process them. *See* 88 FR at 11720. Pre-scheduling provides noncitizens seeking to present at a SWB POE with a clear understanding of when CBP expects to process them, which allows them to plan for safer transit and reduces opportunities for smugglers and criminal organizations. *See id.* at 11707. Moreover, the rule excepts from application of the condition on asylum eligibility those noncitizens who presented at a POE and can establish, based on the preponderance of the evidence, that it was not possible for them to access or use the DHS scheduling system, including because they had insufficient phone or internet access. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B) (providing the presumption does not apply ''if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to . . . significant technical failure, or other ongoing and serious obstacle'').

In response to commenters' concerns about differences in eligibility for employment authorization depending on whether a migrant entered the United States following use of the CBP One app, a DHS-approved parole process, or some other means, the Departments acknowledge that the employment authorization rules may vary depending on the pathway that a noncitizen uses to enter the United States and how the noncitizen is processed. This has always been the case, and although this rule recognizes certain lawful pathways as a basis to avoid the rebuttable presumption, such pathways would exist irrespective of this rulemaking. The Departments also note that individuals in expedited removal proceedings, including those determined to have a credible fear who are then paroled from custody, remain ineligible to apply for employment authorization on the basis of this exercise of parole. 8 CFR 235.3(b)(2)(iii), (b)(4)(ii). The NPRM did not propose to revise any regulations governing employment authorization eligibility, and the final rule does not make any such changes either.

vi. Allegations of Discrimination on Race, Ethnicity, or Nationality Grounds

Comment: Commenters raised concerns that the proposed rule would have a discriminatory impact based on nationality and effectively deny protection to migrants from certain countries. For example, commenters alleged that the proposed rule would have a disproportionately negative impact on noncitizens from countries in Africa, the Caribbean, Central America, and Latin America who do not currently fall under any large-scale parole initiatives and are more likely to seek asylum via arrival at the SWB, with some commenters describing the rule as a de facto ban for these populations. Commenters also stated that noncitizens from China specifically, and Asia more generally, would be disproportionately impacted by the rule as a result of lasting effects from reduced refugee admissions under the prior Administration, which, commenters said, increased the number of individuals from these countries seeking entry to the United States at the SWB. Likewise, commenters noted that noncitizens from Afghanistan would be disproportionately impacted by the rule due to potential danger in third countries.

Further, commenters noted that the Administration has created special immigration programs for citizens of certain countries—including Cuba, Haiti, Nicaragua, Ukraine, and Venezuela—in response to various political and humanitarian conditions in those countries, but has not done so for citizens of certain other countries. Commenters questioned why citizens from these countries are offered special programs to enter the United States while citizens from other countries do not have the same opportunities, which commenters claimed was discriminatory and raised equal protection concerns.

Commenters also raised equal protection concerns because noncitizens subject to the rule's rebuttable presumption would be treated differently from those not subject to the rule based on the date, location, and manner of their entry into the United States. As a result, commenters argued that the rule would have a disparate impact on asylum applicants from less affluent countries, who do not have easy access to air travel or nonimmigrant visas.

Additionally, commenters asserted that the rule discriminates based on race and ethnicity and would have a disproportionate impact on persons of certain races and ethnicities for equal protection purposes. Commenters pointed to the Government's response to Ukrainian refugees as evidence that the United States is capable of accepting asylum seekers and refugees and stated that the difference in treatment between Ukraine and other countries was racially motivated.

Lastly, commenters suggested that it was facially discriminatory to require migrants from countries other than Mexico to first apply for asylum in transit countries, as it would result in their quick removal and force them to wait for a number of years before they could reapply for asylum in the United States.

Response: The rule does not classify noncitizens based on race, ethnicity, nationality, or any other protected trait. Nor, as elaborated below, are the Departments issuing the rule with discriminatory intent or animus. As the Departments explained in the NPRM, the rule is intended to address an anticipated increase in migrants arriving at the SWB following the lifting of the Title 42 public health Order and the resultant strain the anticipated surge would put on DHS and DOJ resources. *See* 88 FR at 11728. As such, the rule's scope and applicability are intended to address this anticipated migration surge. *See generally id.*

Additionally, although the rule imposes a rebuttable presumption of ineligibility if noncitizens seek to enter the United States at the SWB outside of an established lawful pathway and do not seek protection in a third country through which they travel en route to the United States, that presumption does not constitute a ''de facto ban'' on asylum for noncitizens of any race, ethnicity, or nationality, given the opportunities to avoid the presumption and, for those unable to do so, to establish an exception to or rebut it. Irrespective of race, ethnicity, or

nationality, noncitizens will not be subject to the presumption if they apply for and are denied asylum or other protection in a third country they transit while en route to the United States, but no noncitizen is required to do so. *See* 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). Likewise, regardless of race, ethnicity, or nationality, noncitizens will not be subject to the presumption if they schedule an appointment to present at a POE using the CBP One app. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). In addition, irrespective of race, ethnicity, or nationality, noncitizens who are subject to the rule's presumption will have the opportunity to rebut it in certain circumstances, including if at the time of their entry they or a family member with whom they traveled was experiencing an acute medical emergency, an imminent and extreme threat to life or safety, a severe form of trafficking, or another exceptionally compelling circumstance. 8 CFR 208.33(a)(3), 1208.33(a)(3). Further, noncitizens of every race, ethnicity, and nationality may apply for other relevant immigration processes that are applicable to them. The rule's approach balances the needs to address current and expected circumstances at the SWB, to avoid unduly negative consequences for noncitizens, to avoid unduly negative consequences for the U.S. immigration system, and to provide ways for individuals to seek protection in the United States and other countries in the region. 88 FR at 11730.

The Departments disagree that the rule violates the Equal Protection Clause [99] to the extent that the rule applies to noncitizens who arrive in the United States at a particular location, by a particular method, or after a particular date. Noncitizens who utilize a lawful pathway, meet an exception to the rule's presumption, or rebut the presumption will not be subject to the rule's condition on eligibility, irrespective of their country of origin or the method by which they arrive. The ability to afford a plane ticket or qualify for a visa is not a requirement to meet an exception to or rebut the presumption of ineligibility under the rule. And with respect to concerns about dates of entry, the Departments note that Federal immigration laws, including regulations that impose conditions on asylum, routinely apply to migrants who arrive or file their application for relief after, but not before, a particular effective date. *See, e.g.,* INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B); 8 CFR 208.4(a) (imposing filing deadline on asylum applications filed after April 1, 1997, and tying that deadline to the applicant's date of arrival in the United States); 8 CFR 208.13(b)(3), 1208.13(b)(3) (2020) (imposing conditions related to internal relocation, applied per 8 CFR 208.1(a) to applications filed after the regulatory effective date of April 1, 1997).[100]

Further, as detailed in the NPRM, the United States previously has, and is still, committed to taking significant steps to expand pathways and processes for migrants to enter the country in a safe and lawful way. 88 FR at 11718–20. In addition to creating parole processes for citizens of certain countries, the United States has announced ''significant increases to H–2 temporary worker visas and refugee processing in the Western Hemisphere'' and worked closely with other countries in the region ''to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration, including access to international protection for those in need, throughout the Western Hemisphere.'' *Id.* at 11718, 11720. Moreover, the Departments remain committed to continuing to work with foreign partners on expanding their legal options for migrants and expanding the Departments' own mechanisms for processing migrants who lawfully arrive in the United States. *Id.* at 11720, 11722, 11729.

As to certain commenters' concerns that the rule discriminates among noncitizens based on whether their country of nationality has a parole process, the Departments did not promulgate the rule, or design its applicability and scope, with a discriminatory purpose or intent. Instead, the rule is designed to ''encourage migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in countries through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain.'' *Id.* at 11704. As elaborated on later in this preamble, lawful pathways are available to noncitizens from all countries, and country-specific processes are available without regard to race or ethnicity. *See, e.g., id.* at 11704, 11706 (listing and explaining processes and programs). Thus, the existence of special processes and programs for qualifying noncitizens from certain countries does not demonstrate that the rule was promulgated ''for a discriminatory purpose or intent,'' as required to show a violation of the Equal Protection Clause. *United States* v. *Barcenas-Rumualdo,* 53 F.4th 859, 864 (5th Cir. 2022) (citing *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265–66 (1977)). Moreover, Congress regularly makes laws that distinguish among individuals on the basis of nationality; indeed, the ''whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on'' such distinctions. *Mathews* v. *Diaz,* 426 U.S. 67, 78 n.12, 80 (1976). Yet, ''such disparate treatment'' is not by itself '''invidious.''' *Id.* at 80.

vii. Other Underserved or Vulnerable Populations

a. Women, Domestic Violence Survivors, and LGBT Individuals

Comment: Commenters raised concerns that the rule would have a disproportionate impact on certain particularly vulnerable populations, such as women, including domestic violence and sexual assault survivors and younger, pregnant, and indigenous women, as well as the LGBT community, and those noncitizens who are disabled, elderly, or HIV positive, among others. Commenters stated that these populations would face discrimination, violence, extortion, and persecution in transit countries. Commenters also asserted that applying for a parole process and waiting for approval in one's home country may not be a viable option for such groups who need to leave a dangerous situation immediately. As a result, commenters stated that such groups should be exempted from the rule.

Commenters asserted, for example, that women and girls would be at high risk for sexual and gender-based violence in transit countries or if forced to wait in Mexico for their scheduled SWB POE appointments. Similarly, commenters raised concerns that the LGBT community would face persecution, violence, and inadequate

[99] Although the Equal Protection Clause of the Fourteenth Amendment does not apply to the United States Government, the Supreme Court in *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954), held that while '' 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' . . . discrimination may be so unjustifiable as to be violative of due process.'' The Court concluded that ''[i]n view of [its] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.'' *Id.* at 500.

[100] This provision was amended by a prior rulemaking, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274, 80281 (Dec. 11, 2020), which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea II,* 512 F. Supp. 3d at 969–70 (preliminarily enjoining the rule). The district court's order remains in effect, and thus the 2020 version of this provision—the version immediately preceding the enjoined amendment—is currently effective.

access to medical care, among other harms, in transit countries, particularly if required to wait to schedule an SWB POE appointment through the CBP One app or apply for asylum in those countries. Commenters also noted that it is unclear if claims related to persecution based on sexual orientation and gender identity would be recognized in many common transit countries. Additionally, commenters stated that the rule, particularly the family unity provision, would exclude LGBT families, as legal protections such as marriage or LGBT-inclusive family protections are unavailable or inaccessible to LGBT individuals and families in many countries.

Further, commenters noted that many of these groups, including domestic violence survivors, torture survivors, and those with PTSD, may, as a result of psychological trauma, have difficulty recounting traumatic events underlying their claims during credible fear screenings—a difficulty that commenters said would be exacerbated if members of such groups must also present evidence about the rebuttable presumption of asylum ineligibility. As a result, commenters stated that traumatized noncitizens would not have sufficient time to gather their thoughts or collect relevant evidence. Moreover, commenters stated that recounting such incidents may risk retraumatizing such individuals. Similarly, commenters asserted that such groups are often reluctant to speak about what happened to them and may not express their fear of return to someone in a third country who could inform them of their right to apply for asylum.

Response: The Departments recognize that certain populations may be particularly vulnerable during transit to the United States. Accordingly, the purpose of the rule is to encourage migrants, including those who may be seeking asylum, to pursue safe, orderly, and lawful pathways to the United States rather than attempt irregular migration journeys, which often subject migrants to dangerous human smuggling networks. *See, e.g.,* 88 FR at 11713–14 (noting that women face particular vulnerabilities along certain portions of the irregular migration route to the SWB). The rule details multiple potential pathways and processes available to many migrants, including those who seek protection, that do not involve a dangerous journey to the United States. *See id.* at 11718–23. Notably, amongst those options, the rule does not require noncitizens to apply for asylum in third countries where they may also face persecution or other harm. Moreover, applying for asylum in a third country is only one of multiple options migrants may pursue. For a more in-depth examination of third-country safety for migrants, please see the further discussion of specific third countries later in this preamble in Section IV.E.3.iv (''Third Countries''). *See also* 88 FR at 11720–23 (NPRM discussing ''Increased Access to Protection and Other Pathways in the Region''). Additionally, the Departments note that the rule provides that its presumption of asylum ineligibility can be rebutted by noncitizens, including those with particular vulnerabilities, who do not utilize a lawful pathway but who face imminent and extreme threats to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder, or who were victims of a severe form of trafficking in persons. *See* 8 CFR 208.33(a)(3)(i)(B) and (C), 1208.33(a)(3)(i)(B) and (C).

The Departments also recognize that migrants' protection claims may be premised on past traumatic events in their home countries, which can be difficult to recount. However, the rule does not change the credible fear process that Congress has instituted, which involves detailing these events to a DHS officer so that the officer can make a credible fear determination. *See generally* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); 8 CFR 208.30(d) and (e). The rule merely adds a condition on asylum eligibility in the form of a rebuttable presumption. During the credible fear screening, noncitizens may demonstrate why they believe that the presumption is inapplicable or an exception or rebuttal ground exists. The rule does not impose an infeasible requirement for noncitizens with meritorious claims to show that the presumption does not apply, or that they qualify for an exception or rebuttal to the presumption, during the credible fear screening process. *See* 8 CFR 208.30(d)(4). In addition, AOs and IJs have conducted credible fear assessments for many years and are well-trained in accounting for any potential trauma that may be relevant.

b. Unrepresented Individuals

Comment: Commenters raised concerns that unrepresented noncitizens would not understand the rule's requirements, particularly the need to take affirmative steps outside of the United States, such as through applying for protection in a third country or scheduling an SWB POE appointment through the CBP One app. Commenters also expressed that the proposed rule did not explain how information about the rule's requirements would be disseminated. Similarly, commenters stated that unrepresented noncitizens may have received little or no information during the screening process and may not understand their rights during the process or the consequences of failing to assert them. Commenters also asserted that unrepresented individuals may not understand the burdens of proof in the rule and may be unable to present a legal argument sufficient to overcome its presumption of ineligibility. Additionally, commenters were concerned that the rule would dramatically increase the likelihood of denials for relief for unrepresented noncitizens who are subject to the asylum ineligibility presumption and stated that individuals with meritorious claims are no less deserving of asylum because they do not have counsel. Further, commenters pointed to various statutory provisions that they claimed showed a recognition by Congress that unrepresented noncitizens need assistance to present their claims. As a result, commenters suggested that unrepresented noncitizens should be exempted from the rule or be provided more resources to navigate the immigration system.

Response: The Departments recognize that unrepresented noncitizens can have additional difficulties navigating the U.S. immigration system, as compared to those with counsel. This is to be expected with respect to any unrepresented individuals in a legal setting. As a general matter, the Departments strongly support efforts for noncitizens to obtain or confer with counsel in immigration proceedings.[101]

However, for those noncitizens who do not retain counsel, the Departments do not believe that the rule presents an overly complicated process for migrants seeking protection, including asylum. The rule does not change the right to confer with a person or persons of the noncitizen's choosing in the existing expedited removal and credible fear screening processes. *See* 8 CFR 208.30(d)(4). Rather, the rule simply adds a determination about the asylum ineligibility presumption to the credible fear screening. As such, the Departments decline to create a wholesale exception from the rule for unrepresented noncitizens, which would significantly reduce the incentives for using the lawful pathways described in the rule, as well as disincentivize obtaining counsel as needed.

[101] *See, e.g.,* EOIR Director's Memorandum (''DM'') 22–01, *Encouraging and Facilitating Pro Bono Legal Services* (Nov. 5, 2021), *https://www.justice.gov/eoir/book/file/1446651/download.*

The rule is intended to provide clear options for migrants, including asylum seekers, to follow, such as applying for asylum in a third country or presenting at an SWB POE at a pre-scheduled time and place. *See generally* 8 CFR 208.33(a)(2), 1208.33(a)(2). Noncitizens may also be able to pursue other pathways to the United States that would not trigger the rule's presumption, such as an employment-based visa or refugee admission through the United States Refugee Admissions Program (''USRAP''). 88 FR at 11719 (describing expansions of labor pathways and increases in USRAP processing). If unrepresented noncitizens choose to forgo such options and instead unlawfully enter the United States, they will be subject to the rule's rebuttable presumption of asylum ineligibility, with an opportunity to establish an exception to or rebut the presumption, including for exceptionally compelling circumstances. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). For instance, such noncitizens who present at a POE without a pre-scheduled appointment may be excepted from the presumption if they can demonstrate that they were unable to access or use the DHS scheduling system due to ongoing and serious obstacles, such as a language barrier, illiteracy, or a significant technical failure. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B).

The Departments believe these processes will be navigable for unrepresented noncitizens based on the significant usage and success of other recent processes for Cuban, Haitian, Nicaraguan, Ukrainian, and Venezuelan nationals. *See, e.g.,* 88 FR at 11706, 11711–12 (explaining, for example, that the Venezuela process has had a ''profound impact'' and that, in one measured period, there was an over 95 percent decrease in SWB unlawful encounters with Venezuelan migrants). These statistics, along with the success of the U4U and CNHV parole processes, show that noncitizens outside the United States are broadly aware of information about changes to U.S. immigration processes and that noncitizens alter migration behaviors accordingly, regardless of their representation status. As for commenters' desire for additional information about how the rule's requirements will be communicated, the Departments note that they have numerous, non-regulatory tools at their disposal that they may use to disseminate information to the public, as appropriate, including press releases,[102] policy memoranda, web-based tools,[103] and other statements in public fora, among others. The Departments further describe their efforts to communicate the rule's requirements to the public in Section IV.B.5.iv of this preamble.

c. Climate Migration

Comment: Commenters noted that global migration is increasingly driven in part by the effects of climate change and that governments of many migrants' home countries are unable to stop or redress such effects. As such, commenters expressed concerns that the proposed rule would unlawfully deny noncitizens from countries disproportionately affected by climate change the right to be meaningfully heard on their asylum claims. Commenters also asserted that ecological disasters resulting from climate change, such as famine and flooding, would prevent noncitizens from countries experiencing such disasters from being able to pursue a lawful pathway so as not to be subject to the rule's rebuttable presumption. As a result, commenters recommended expanding asylum eligibility to account for displacement caused by climate change.

Response: Comments related to climate change are generally outside the scope of this rulemaking, which focuses on incentivizing migrants to use lawful pathways to pursue their claims. To the extent that commenters raised concerns about the effects of climate change—such as a severe environmental disaster—creating a necessity for noncitizens to enter the United States outside of the lawful pathways described in the rule, the Departments note that the rule includes an exception to its asylum ineligibility presumption for ''exceptionally compelling circumstances.'' *See* 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). Evidence of exceptionally compelling circumstances will be considered on a case-by-case basis.[104]

To the extent that commenters argued that the rule's application in the context of the alleged exigencies of climate change migration would violate the due process rights of noncitizens, the Supreme Court has held that the rights of noncitizens applying for admission at the U.S. border are limited to ''only those rights regarding admission that Congress has provided by statute.'' *DHS* v. *Thuraissigiam,* 140 S. Ct. 1959, 1983 (2020).

d. Indigenous People and People of Color

Comment: Commenters raised concerns that the rule would have a particularly detrimental impact on members of indigenous communities and people of color. As a result, commenters recommended exempting these groups from the rule and for the Departments to articulate actions taken to mitigate any disparate impacts on such groups.

Commenters stated that such populations would face discrimination, racism, persecution, prolonged detention, medical neglect, homelessness, erasure of indigenous identity, and other harms in transit countries. Commenters also believed that these groups would face difficulty applying for asylum or related protection in a third country, due to discrimination and insufficiently robust asylum systems, among other reasons. Additionally, commenters asserted that persons from predominantly Black countries had higher rates of visa denials, which limit their lawful pathways when compared to other groups. In support of these contentions, commenters stated that immigration court asylum denial rates increased for these groups while the TCT Bar Final Rule was in effect.

Further, commenters maintained that the proposed rule would disproportionately impact indigenous migrants and people of color because such groups often lack the means or ability to enter the United States other than by land through the SWB and, therefore, would be more likely to be subject to the rule's rebuttable presumption of ineligibility. Relatedly,

[102] *See* EOIR, *Communications and Legislative Affairs Division, https://www.justice.gov/eoir/communications-and-legislative-affairs-division* (last visited Apr. 25, 2023) (''The Communications and Legislative Affairs Division (CLAD) serves as the Executive Office for Immigration Review's liaison with Congress, the news media, and other interested parties by communicating accurate and timely information about the agency's activities and programs.'').

[103] *See, e.g.,* EOIR, *Immigration Court Online Resource, https://icor.eoir.justice.gov/en/* (last visited Apr. 25, 2023) (providing information about immigration processes in Chinese, Haitian Creole, Portuguese, Punjabi, and Spanish).

[104] The Departments note that, to the extent commenters have substantive comments related to the interaction of climate change and immigration or asylum law, such as how adjudicators should consider the effects of climate change in making asylum determinations, commenters may raise those concerns as relevant in response to future potential Departmental rulemakings that address other substantive asylum provisions. *See, e.g.,* Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2022, 88 FR 10966, 11054, 11088–89 (Feb. 22, 2023) (including a future rulemaking addressing particular social groups and related definitions and interpretations for asylum and withholding of removal).

commenters maintained that these populations have disproportionately low access to the technology commenters stated is mandated by the rule, thereby precluding such groups from taking advantage of the available lawful pathways. Similarly, commenters raised a number of concerns with the CBP One app and its use by indigenous migrants and people of color, including language barriers and difficulties experienced by those with darker skin tones in taking valid pictures.

Response: As previously stated, the rule includes various exceptions to the rebuttable presumption—including for instances where noncitizens have been denied asylum or other protection in a third country or show, by a preponderance of the evidence, that it was not possible to access or use the CBP One app—and the rule allows noncitizens to rebut the presumption where they face certain safety issues. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). For additional material addressing commenter concerns about the CBP One app and indigenous migrants and people of color, please see Section IV.E.3.ii.a of this preamble.

Further, if any noncitizens, including members of indigenous communities and people of color, do not believe that they will be able to meaningfully access protection in a third country, then those noncitizens may be excepted from the presumption of ineligibility by availing themselves of other lawful pathways to enter the United States, such as by pre-scheduling an appointment to present themselves at a POE, or by obtaining appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process. *See* 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii). Such noncitizens may also be able to pursue other pathways to entering the United States that would not trigger the rule's application, such as an employment-based visa or refugee admission through USRAP. 88 FR at 11719 (describing expansions of labor pathways and increases in USRAP processing). Accordingly, the Departments believe that the rule provides sufficient flexibility to account for issues identified by commenters as related to indigenous communities and people of color.

5. Due Process and Procedural Concerns

i. General Due Process and Procedural Concerns

Comment: Commenters voiced general concerns that the rule violates due process and is thus unconstitutional or arbitrary. One commenter argued that due process standards for asylum cases should be consistent with criminal procedure in the United States. At least one commenter said that the proposed rule would violate due process in that it would separate families, restrict access to asylum, and prohibit the granting of asylum to those who travel by land through a safe third country. Specifically, one commenter argued that for family members whose asylum cases are connected, separation obstructs family members' opportunities to present necessary corroborating witness testimony or access critical evidence in presenting their claims for relief, which may violate their constitutional and statutory rights to present evidence and can result in inconsistent case timelines and outcomes that permanently sever family relationships. Another commenter said that the rule would make it easier for the United States Government to simply deny entry to asylum seekers and deport migrants without due process. Other commenters stated that no asylum seekers should be prevented from presenting their case to a judge. Further, commenters said that the rule would violate due process by requiring asylum seekers to affirmatively request IJ review of negative credible fear findings and eliminating USCIS reconsideration of such findings. Commenters also stated that due process concerns would be magnified because of the plan to conduct credible fear interviews within days or hours of an asylum seeker's arrival in custody in what commenters characterized as notoriously difficult conditions, such as where they lack food, water, showers, sleep, and access to counsel. Another commenter echoed these concerns regarding conditions for individuals in CBP custody and stated that poor conditions were not conducive to asylum seekers being able to clearly articulate their claims. Commenters asserted that these obstacles are so high as to render success unachievable for most noncitizens, regardless of the merits of their claims. Finally, one commenter stated that the rule would raise the standard from ''credible'' to ''reasonable'' fear and would thereby give rise to a procedural due process violation, as it would alter the intended purpose of the screening interview.

Response: The Departments disagree that the rule would violate the Due Process Clause of the Fifth Amendment or impermissibly restrict access to asylum. With respect to application of the rule in the expedited removal process, the Departments note that the rule does not have any impact on where noncitizens may be detained pending credible fear interviews. Additionally, noncitizens who are encountered in close vicinity to and immediately after crossing the border and are placed in expedited removal proceedings, including those in the credible fear screening process, have ''only those rights regarding admission that Congress has provided by statute.''[105] *Thuraissigiam,* 140 S. Ct. at 1983; *see also Mendoza-Linares* v. *Garland,* 51 F.4th 1146, 1148 (9th Cir. 2022) (concluding that ''an arriving immigrant caught at the border . . . 'has no constitutional rights regarding his application' for asylum'' (quoting *Thuraissigiam,* 140 S. Ct. at 1982)). Regarding arguments by commenters that the due process standards that apply in criminal proceedings should also apply in the context of asylum and credible fear interviews, the Departments first note that Congress has created, by statute, a process applicable to individuals in expedited removal that is significantly different from the process that applies in criminal cases. The Departments decline to use this rule to change the due process rights of noncitizens, and the rule ensures that noncitizens receive a fair process consistent with the law.

As to the allegation that the rule raises the standard in expedited removal proceedings from ''credible'' fear to ''reasonable'' fear, the Departments note that the rule does not change the standard except to the extent that a noncitizen cannot show a significant possibility of establishing eligibility for asylum due to operation of the rule's condition on asylum eligibility. In that circumstance, the AO or IJ will determine whether the noncitizen has a reasonable fear of persecution or torture in the country or countries of removal, as has long been the process for other

[105] Courts also have held that noncitizens do not have an independently cognizable substantive due process interest in the receipt of asylum because asylum is a discretionary form of relief. *See, e.g., Jin* v. *Mukasey,* 538 F.3d 143, 157 (2d Cir. 2008) (holding that ''an alien who has already filed one asylum application, been adjudicated removable and ordered deported, and who has nevertheless remained in the country illegally for several years, does not have a liberty or property interest in a discretionary grant of asylum''); *Ticoalu* v. *Gonzales,* 472 F.3d 8, 11 (1st Cir. 2006) (''Due process rights do not accrue to discretionary forms of relief, . . . and asylum is a discretionary form of relief.''); *Mudric* v. *Att'y Gen.,* 469 F.3d 94, 99 (3d Cir. 2006) (holding that an eight-year delay in processing the petitioner's asylum application was not a constitutional violation because the petitioner ''had no due process entitlement to the wholly discretionary benefits of which he and his mother were allegedly deprived''); *cf. Munoz* v. *Ashcroft,* 339 F.3d 950, 954 (9th Cir. 2003) (''Since discretionary relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process clause.'').

noncitizens who are screened for eligibility for statutory withholding of removal and CAT protection and who are not eligible for asylum, as discussed in more detail in Section IV.D.1.iii of this preamble.

Moreover, although the rule changes some procedures, as discussed throughout the rule, it leaves much of the process unaltered. Individuals in the credible fear process maintain the right to consult with an attorney or other person or persons of their choosing prior to their interview, and such persons may be present for the interview itself. 8 CFR 208.30(d)(4). Asylum seekers also may present evidence relevant to their claim during the interview. *Id.* Additionally, USCIS provides interpreter services to noncitizens who are unable to proceed effectively in English at the agency's expense. 8 CFR 208.30(d)(5). And noncitizens may request review of a negative fear determination before an IJ. *Compare* 8 CFR 208.30(g)(1) (providing the standard process for requesting IJ review in credible fear proceedings), *with* 8 CFR 208.33(b)(2)(iii) through (v) (explaining the process for requesting IJ review for those subject to and unable to rebut the rule's presumption). Although the rule amends the standard process so that noncitizens must affirmatively request such review when asked, rather than the review being granted upon a failure to respond, IJ review remains available in all cases with a negative credible fear determination. INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 208.30(g), 1208.30(g)(2). These procedural safeguards are therefore not undermined by the rule, which is fully consistent with the Departments' legal authority and obligations.

Furthermore, the rule does not violate any procedural due process rights noncitizens may have in section 240 removal proceedings. The rule's condition on eligibility will be litigated in those proceedings before an IJ with all the attendant procedural rights that apply in section 240 removal proceedings. In addition, the rule provides several procedural protections to ensure that asylum applicants receive a full and fair hearing before an IJ and that the condition on eligibility applies only to noncitizens properly within the scope of 8 CFR 208.33(a) and 1208.33(a). If an AO finds a noncitizen is subject to the rule's condition on eligibility, the noncitizen may request review of that determination, and an IJ will evaluate de novo whether the noncitizen is subject to the presumption and, if so, whether the noncitizen has established any exceptions to or rebutted the presumption. 8 CFR 208.33(b)(2)(iii) through (v), 1208.33(b). Furthermore, even where an IJ denies asylum because the presumption applies and has not been rebutted and no exception applies, if the noncitizen has demonstrated a reasonable possibility of persecution or torture in the country or countries of removal, they will have an opportunity to apply for statutory withholding of removal, protection under the CAT regulations, or any other form of relief or protection for which the noncitizen is eligible in section 240 removal proceedings. 8 CFR 208.33(b)(2)(ii) and (v)(B), 1208.33(b)(4). These standards help to ensure—in contrast to commenters' concerns—that the outcome of the process delineated in the rule is not predetermined and that noncitizens potentially subject to the condition on eligibility receive a full and fair hearing that satisfies any due process rights they may have.

To the extent commenters raised due process concerns related to arguments that the rule would result in separation of families, these arguments are addressed above in Section IV.B.4.ii of this preamble. As elaborated there, for example, the rule includes provisions designed to prevent the separation of families. Moreover, to the extent that commenters argued that the rule would separate families and thereby raise due process concerns by preventing individuals from presenting evidence, the Departments note that the rule does not change the provision on the treatment of family units with respect to credible fear screenings, found at 8 CFR 208.30(c), which provides that when family units are subject to a credible fear screening, USCIS will find that the entire family passes the screening if one family member establishes a credible fear. Further, the rule contains provisions to promote family unity both by making exceptions and providing rebuttal grounds applicable to family units traveling together, and by providing a family unity provision for those in removal proceedings. *See* 8 CFR 208.33(a)(2)(ii) and (3)(i), 1208.33(c).

To the extent commenters argued that these concerns implicate the constitutional rights of specific groups of noncitizens, the rule does not deprive any group of the rights that Congress provided by statute, and the rule is one of equal application that does not bar any particular classes of noncitizens from seeking asylum or other protection due to the nature of the harm the noncitizen has suffered or their race, religion, nationality, political opinion, or membership in a particular social group. *See* 8 CFR 208.33(a)(1) through (3), 1208.33(a)(1) through (3) (defining scope of rule's application and creating condition on eligibility and a rebuttable presumption rather than a bar). Additionally, to the extent that commenters claimed there would be due process implications because of the language and certain technical limitations of the CBP One app, the same commenters acknowledged that due process rights are limited to individuals located on U.S. soil. Because users of the CBP One app will, by definition, be located outside of the United States, the commenters' CBP-One-app-related due process concerns are misplaced. Moreover, these commenters provided no specific citations to show that the CBP One app's limited set of foreign languages or technical limitations violate any other Federal law. For instance, the Departments note that Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 FR 50121 (Aug. 11, 2000), ''does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.'' *Id.* at 50121–22.

In addition, notwithstanding the above, the rule contains multiple means for particularly vulnerable noncitizens to potentially overcome the presumption against eligibility for asylum where applicable, depending on the individual's circumstances. To the extent that commenters are concerned about the ability of noncitizens who have a language barrier, disability, mental incompetence, or past trauma to pre-schedule a time and location to appear at a POE, these noncitizens may be able to establish an exception to the presumption if they present at a POE and establish that ''it was not possible to access or use the DHS scheduling system due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.'' *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). And among the ''exceptionally compelling circumstances'' that may rebut the presumption against eligibility, the rule includes acute medical emergencies and other situations where the noncitizen faces an imminent and extreme threat to life or safety at the time of entry. *See* 8 CFR 208.33(a)(3)(i)(A) and (B), 1208.33(a)(3)(i)(A) and (B). Furthermore, the Departments note that even if a noncitizen is found ineligible for asylum, if they fear persecution on account of a protected ground, or torture in another country that has been

designated as a country of removal, they may seek statutory withholding of removal or CAT protection to avoid being returned to that country.

Finally, to the extent that commenters expressed concerns about how the fact of noncitizens' detention, the conditions in DHS facilities, and the timing of credible fear screenings allegedly impact such screenings and the ability of noncitizens to meet their burden to show a credible fear, those concerns are predominantly addressed below in Section IV.D.1.iii of this preamble, where the Departments discuss the nature of the evidence that may be available to the AO during credible fear interviews. As to commenters' concerns about the timing of the credible fear process and where noncitizens are detained pending credible fear interviews, these concerns are misplaced, as the rule does not have any impact on the steps in the credible fear process or where noncitizens may be detained pending credible fear interviews. To the extent that commenters have concerns about detention and conditions in CBP custody, such concerns are beyond the scope of this rule, as discussed further in Section IV.B.5.v of this preamble.

Comment: Commenters expressed a range of other concerns that the rule does not establish sufficient procedural protections for noncitizens subject to the presumption against eligibility for asylum. Some commenters expressed concern that AOs are likely to make errors in assessing whether applicants are subject to the rule's condition on asylum eligibility. Commenters likewise asserted that credible fear interviews are quick screenings, during which individuals usually lack documentary evidence for their claims, and that migrants would not be able to present evidence of country conditions in connection with such interviews. Further, one commenter stated that expedited removal denies children the opportunity to make a claim for protection independent of their parent or legal guardian, and specifically raised concerns about CBP agents questioning children.

Response: The Departments acknowledge the commenters' concerns but disagree that there are insufficient procedural protections for individuals subject to the rule. All AOs are trained in non-adversarial interview techniques to elicit relevant and useful information. 8 CFR 208.1(b). A noncitizen's testimony and evidence available to the AO may be sufficient to establish an exception to or rebut the condition on asylum. AOs are trained to consult country conditions information. *Id.* All credible fear determinations are reviewed by a Supervisory AO. 8 CFR 208.30(e)(8). Those who receive negative determinations may request review from an IJ. *See* 8 CFR 208.33(b)(2)(iii) through (v). If the IJ affirms a negative credible fear determination, USCIS may also reconsider the determination at its own discretion. *See* 8 CFR 208.33(b)(2)(v)(C). For those who are initially found subject to the rule's condition on asylum eligibility but who establish a reasonable possibility of persecution or torture upon removal, the IJ will make a de novo determination of whether the noncitizen is subject to the condition on asylum eligibility during removal proceedings. *See* 8 CFR 208.33(b)(2)(v).

The Departments disagree that the rule denies children the opportunity to make a claim for protection independent of their parent or legal guardian. As explained above, the rule does not change the provision on treatment of family units with respect to credible fear evaluations, found at 8 CFR 208.30(c). The rule further provides at 8 CFR 208.33(c)(2) and 1208.33(d)(2) that its ineligibility presumption does not apply to an asylum application filed by a noncitizen after the two-year period in 8 CFR 208.33(a)(1)(i) and 1208.33(a)(1)(i), if the noncitizen was under the age of 18 at the time of the entry referenced in 8 CFR 208.33(a)(1) and 1208.33(a)(1), respectively, and the noncitizen is applying as a principal applicant.

ii. Concerns Regarding Access to Counsel, Unrepresented Applicants, and the Ability or Time To Obtain Evidence and Prepare

Comment: Some commenters stated that the rule raises serious questions about access to counsel during the credible fear process. In addition to the general comments regarding due process described and addressed above, commenters also expressed specific concerns that the rule violates the Fifth Amendment's Due Process Clause because it allegedly deprives noncitizens of access to counsel or decreases their already limited access to counsel. For instance, some commenters expressed concern that individuals in CBP detention facilities lack meaningful access to counsel to prepare for their credible fear interviews because it takes time to find counsel and the rule will amplify the problems of a fast-tracked removal process, and because there is a lack of free or low-cost attorneys in border areas where credible fear interviews take place. Other commenters stated that individuals awaiting their CBP One app appointments abroad lack meaningful access to counsel to prepare for their credible fear interviews. These commenters stated that attorneys located in the United States face obstacles to representing individuals outside the United States due to ethics concerns and liability insurance coverage, while asylum seekers awaiting appointments would be unable to meet with counsel in person prior to their appointments, allegedly leading to representation deficiencies and difficulty obtaining assistance in navigating the CBP One app. For example, citing data from the Human Trafficking Institute, one commenter wrote that 80 percent of migrants awaiting their asylum hearings in the United States can find representation, compared to 7.6 percent of migrants waiting in Mexico.

Other commenters characterized the rule's provisions as complicated and punitive, making access to counsel even more important and exacerbating the access-to-counsel issues commenters identified above. Commenters who are legal services providers said that the rule would increase the time and resources needed to provide adequate legal advice and representation to asylum seekers, leading to diversion of limited resources and increased pressure on staff. Some commenters recommended that the United States Government increase funding for representation of asylum seekers or provide migrants with legal counsel and release them swiftly rather than detain them, stating that it would assist with backlogs and protect due process rights.

Multiple commenters remarked that a person who could retain an attorney is far more likely to succeed in immigration court. Commenters said concerns relating to fast-tracked immigration proceedings, known as the ''Dedicated Docket,'' would be amplified by the addition of a new evaluation of a rebuttable presumption against asylum eligibility. Commenters claimed that those individuals subject to the rebuttable presumption who pass the heightened ''significant possibility'' screening standard applied under the rule and are placed on the Dedicated Docket during the resulting section 240 removal proceeding would find it even more difficult to obtain counsel because of its accelerated timelines.

Finally, some commenters alleged that the United States Government currently restricts access to counsel for noncitizens in credible fear proceedings. Commenters similarly claimed that EOIR's Immigration Court Practice Manual (''ICPM'') denies asylum seekers

the right to counsel in credible fear review hearings before IJs.

Response: The rule does not deprive noncitizens of access to counsel in violation of the Fifth Amendment's Due Process Clause. As explained above, the Supreme Court has held that the rights of individuals seeking asylum at the border are limited to ''only those rights regarding admission that Congress has provided by statute.'' *Thuraissigiam,* 140 S. Ct. at 1983. And the INA provides only that a noncitizen ''may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General,'' and the statute specifies that ''[s]uch consultation shall be at no expense to the Government and shall not unreasonably delay the process.'' INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv). Thus, due process and the INA do not guarantee that every noncitizen in expedited removal proceedings will have counsel, for example, if a noncitizen involved in such proceedings cannot find an attorney who is willing and able to provide representation. The rule does not bar noncitizens in expedited removal proceedings from exercising their statutory rights under the INA, and therefore cannot violate such noncitizens' rights to due process. *See Guerrier* v. *Garland,* 18 F.4th 304, 313 (9th Cir. 2021) (*Thuraissigiam* clarified that ''the due process rights of noncitizens who have not 'effected an entry' into the [United States] are coextensive with the statutory rights Congress provides'').

Nor does the rule deprive noncitizens of access to counsel in violation of the Fifth Amendment's Due Process Clause insofar as it allegedly creates additional matters for attorneys and noncitizens to discuss prior to a noncitizen's credible fear interview, including when the noncitizen is outside the United States. The statutory right to consult, described above, does not attach until a noncitizen becomes eligible for a credible fear interview. *See* INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv) (''An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General.''). And the regulations that implement expedited removal elaborate that ''[s]uch consultation shall be made available in accordance with the policies and procedures of the detention facility where the alien is detained[.]'' 8 CFR 235.3(b)(4)(ii). ''Read together, the text of these provisions provides noncitizens with a right to consultation while they are detained pending expedited removal, but also plainly establish that the consultation right is subordinate to the expedition that this removal process is designed to facilitate, and that the scope of the right to consult is determined by the facility in which these noncitizens are detained.'' *Las Americas Immigrant Advoc. Ctr.* v. *Wolf,* 507 F. Supp. 3d 1, 25 (D.D.C. 2020) (Jackson, J.). Thus, the INA does not guarantee, and the Constitution does not require, that noncitizens who have not entered the United States must have an opportunity to consult with any other individual concerning an anticipated asylum application.

The Departments decline to amend existing practices with respect to credible fear proceedings around a noncitizen's ability to obtain and consult with counsel, including with regard to the availability of counsel or time it takes to secure counsel in areas near the SWB. The Departments disagree with any implication by commenters that the Departments have control over where free or low-cost immigration attorneys choose to locate their practices within the United States. In any event, nothing in the rule alters a noncitizen's existing ability to consult with persons of their choosing prior to the credible fear interview, *see* INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv), or prior to IJ review of a negative credible fear determination, *see* 8 CFR 1003.42(c). The Departments acknowledge commenters' concerns but do not believe that the rule makes it more challenging for detained noncitizens to access legal representation. To the extent that commenters seek improved access to counsel during the credible fear process in general, that issue lies outside the scope of this rulemaking. Commenters' concerns regarding the Dedicated Docket similarly fall beyond the scope of the rulemaking. As discussed later in Section IV.B.5.iv of this preamble, the Departments do not believe that the rule greatly adds to the complexity of U.S. asylum law or that noncitizens in the credible fear process will require the assistance of an attorney to establish an exception to or rebut the rule's presumption against asylum eligibility. During the credible fear process, AOs will elicit relevant testimony in a non-adversarial manner to determine whether the rebuttable presumption against asylum eligibility applies and, if so, whether the presumption is rebutted or any exception exists.[106] Therefore, noncitizens will not need to be familiar with every aspect of the rule to overcome the presumption.

With regard to commenter claims that EOIR's ICPM restricts the right to counsel during credible fear review, the Departments first note that the contents of the ICPM are outside of the scope of this rulemaking. In any event, the ICPM is consistent with the INA and regulations, all of which make clear that noncitizens have the right to consult with a person or persons of their choosing prior to a credible fear interview and any subsequent review. *See* ICPM, Chapter 7.4(d)(4)(C) (Nov. 14, 2022); INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv); 8 CFR 1003.42(c). Beyond such consultation, any ability of such persons to attend or participate in a credible fear proceeding is fully within the discretion of the IJ. *See* 8 CFR 1003.10(b) (describing IJs' discretion to take any action consistent with their authorities under the INA and regulations that is appropriate and necessary for the disposition of a case).

Comment: Commenters said that represented individuals receive relief more frequently than non-represented individuals, and expressed concern that many asylum seekers who lack counsel would not be able to pass their credible fear screenings. One commenter claimed, without specific evidence, that AOs are less thorough when adjudicating credible fear cases of unrepresented noncitizens. Commenters argued that unrepresented individuals may not receive meaningful notice about the CBP One app, asylum procedures, or the exceptions to the rule's condition on eligibility that may apply in their cases. One commenter wrote that the rule's preponderance of the evidence standard for rebutting the presumption against asylum eligibility would create another hurdle for asylum seekers who lack counsel.

Response: To the extent that commenters expressed concern that unrepresented individuals might face difficulty understanding the credible

[106] *See, e.g.,* USCIS, *RAIO Directorate—Officer Training: Interviewing: Eliciting Testimony* 12 (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Eliciting_Testimony_LP_RAIO.pdf* [hereinafter USCIS, *Eliciting Testimony*] (''In cases requiring an interview, although the burden is on the applicant to establish eligibility, equally important is your obligation to elicit all pertinent information.''); USCIS, *RAIO Directorate—Officer Training: Interviewing: Introduction to the Non-Adversarial Interview* 13 (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Intro_to_the_NonAdversarial_Interview_LP_RAIO.pdf* [hereinafter USCIS, *Non-Adversarial Interview*] (''You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.''); Comment Submitted by National Citizenship and Immigration Services Council 119 at 16 (Mar. 27, 2023), *https://www.regulations.gov/comment/USCIS-2022-0016-12267.*

fear process, the INA provides that ''[t]he Attorney General shall provide information concerning the asylum interview . . . to aliens who may be eligible.'' INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv); 8 CFR 235.3(b)(4)(i). The rule does not change that obligation. As for commenters' concerns that noncitizens may not receive adequate notice regarding the CBP One app or other aspects of the rule, ''the general rules concerning adequacy of notice through publication in the **Federal Register** apply in the immigration context.'' *Williams* v. *Mukasey,* 531 F.3d 1040, 1042 (9th Cir. 2008) (holding that publication of CAT regulations in the **Federal Register** provided notice that due process required).

As discussed earlier and in Section IV.B.5.iv of this preamble, the rule does not affect noncitizens' current access to counsel during credible fear proceedings or significantly increase the complexity of U.S. asylum law, and noncitizens should not require the assistance of an attorney to establish an exception to or rebut the presumption against asylum eligibility. Prior to conducting a credible fear interview, an AO must verify that the noncitizen ''has received in writing the relevant information regarding the fear determination process'' and ''has an understanding of'' that process. 8 CFR 208.30(d)(2); *see also* USCIS, Form M–444, *Information About Credible Fear Interview* (May 31, 2022). AOs are trained to conduct interviews in a non-adversarial manner and elicit relevant testimony,[107] and they will ask relevant questions to determine whether the rebuttable presumption against asylum eligibility applies, so noncitizens need not be familiar with the rule to remain eligible for asylum. Regarding the standard of proof for rebutting the presumption against asylum eligibility during credible fear proceedings, as discussed later in Section IV.D.1.iii of this preamble, the overall standard remains the significant possibility standard, but that standard must be applied in conjunction with the standard of proof required for the ultimate determination on eligibility for asylum (*i.e.,* preponderance of the evidence that an exception to the presumption applies or that the presumption has been rebutted). Other concerns about rebutting the rule's presumption of ineligibility are addressed in Section IV.E.1 of this preamble.

iii. CBP Official, AO, and IJ Conduct and Training

a. CBP Official Conduct and Training

Comment: Some commenters expressed concerns about the actions of CBP officials, including with respect to the use of the CBP One app. Regarding the CBP One app generally, one commenter stated that migrants are often unable to seek asylum at a POE due to metering policies and that migrants have no other option to access safety than to cross the SWB without permission. Another commenter stated that the requirement to use the CBP One app would effectively cap the number of people who may seek asylum based on the number of appointments available. Commenters also stated that the CBP One app equates to another metering system imposed by CBP officials, including causing turnbacks of children, which Federal courts have found to be illegal. In particular, one commenter stated that, even with appointments, some families are not able to cross the border, or they receive appointments at a POE far from their current location, requiring them to travel long distances within Mexico. Various commenters alleged that requiring use of the CBP One app raises concerns that access to the system will be based not on wait time but on luck, technological skills, or resources to secure an appointment. Other commenters similarly stated that the CBP One app has very limited appointment slots and turns asylum access into a lottery. And at least one commenter expressed concern that the CBP One app does not ask if a migrant is seeking asylum in the United States, nor are migrants interviewed by CBP officials upon arrival to determine if they have any vulnerabilities that may show eligibility for asylum.

As for alleged misconduct by CBP officials, one commenter expressed concern that CBP officials at POEs have turned away many asylum seekers without cause, been affirmatively hostile to claims of protection, or only allowed a handful of individuals per day to present themselves for processing. The commenter also suggested that there would not be a meaningful opportunity under the rule for asylum seekers to present themselves and demonstrate that they were unable to use the CBP One app to request an appointment. Similarly, another commenter stated that the rule would allow CBP officers to turn away individuals without a smartphone.

Additionally, commenters alleged that CBP officials regularly fail to protect the rights of individuals in expedited removal proceedings, including through failing to ask questions related to fear claims, failing to refer individuals for credible fear interviews, and subjecting individuals to harassment, directly or indirectly.

Other commenters raised concerns that there are inadequate protections against rogue CBP officer behavior more generally, noting that individuals with appointments in February 2023 were rejected at POEs, including those with Title 42 exception appointments being rejected even though they had valid appointments. One commenter asserted that when families expressed concern about the Title 42 exception process, CBP officials threatened to call Mexican police and urged people to depart. Another commenter noted that CBP officers use abuse, threats and intimidation, coercion, and misrepresentations, make unfounded claims about capacity restrictions, use waitlists, and illegally deny access to the asylum process. Some commenters alleged that CBP officers harassed and physically and sexually abused noncitizens at POEs, stole their documents, and failed to record statements by noncitizens expressing a fear of return. Another commenter expressed concerns that Mexican officials, at the request of the United States Government, improperly intercepted individuals at its own southern border so that those individuals would not come to the United States.

Response: As an initial matter, the Departments note that migrants do not apply for asylum with CBP at a POE. At POEs, CBP is responsible for the inspection and processing of all applicants for admission, including individuals who may intend to seek asylum in the United States. 8 CFR 235.1(a) (concerning all applicants for admission at POEs), 235.3(b)(4) (concerning individuals processed for expedited removal and claiming fear of persecution or torture). CBP's ability to process undocumented noncitizens in a timely manner at land border POEs is dependent on CBP resources, including infrastructure and personnel; CBP is committed to continuing to increase its capacity to process undocumented noncitizens at SWB POEs.[108] The CBP

[107] *See* USCIS, *Non-Adversarial Interview;* USCIS, *Eliciting Testimony;* Comment Submitted by National Citizenship and Immigration Services Council 119 at 16 (Mar. 27, 2023), *https://www.regulations.gov/comment/USCIS-2022-0016-12267.*

[108] Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), *https://www.cbp.gov/sites/*

Continued

One app is one key way that CBP is streamlining and increasing its capacity to process undocumented noncitizens.[109] Noncitizens are able to schedule appointments through the CBP One app at one of eight POEs along the SWB, providing noncitizens with options to choose the POE that works best for them geographically. The app is not a method of seeking asylum in the United States, and CBP officers do not determine the validity of any claims for protection. Noncitizens are not required to make an appointment in the CBP One app to present at a POE, and CBP policy provides that in no instance will an individual be turned away from a POE. All noncitizens who arrive at a POE will be inspected for admission into the United States. *See* 8 CFR 235.1(a). That said, those noncitizens who arrive at a POE without a pre-scheduled appointment will be subject to the rule's presumption of asylum ineligibility unless they establish the applicability of an exception to or a ground for rebutting the presumption.

The Departments disagree that the CBP One app is a ''metering system,'' and CBP and DHS have rescinded all previous metering policies. Following the termination of the Title 42 public health Order, CBP will process noncitizens without documents sufficient for admission who present at an SWB land POE in accordance with its November 2021 memorandum ''Guidance for Management and Processing of Undocumented Noncitizens.'' Moreover, as noted, CBP remains committed to processing as many noncitizens at POEs as is operationally feasible.[110]

To the extent that commenters' reference to metering policies relates to any allegation of misconduct by CBP officers, and with respect to any other commenter concerns about such alleged misconduct, the Departments note that CBP takes allegations of employee misconduct very seriously. Under a uniform system, allegations of misconduct are documented and referred to the DHS Office of Inspector General (''OIG'') for independent review and assessment.[111] Cases are either retained by the DHS OIG for investigation or referred to CBP's Office of Professional Responsibility (''OPR'') for further handling. Allegations of misconduct by a CBP employee or contractor can be sent to CBP OPR's Joint Intake Center via email at *JointIntake@cbp.dhs.gov* or via phone at 1–877–2INTAKE (246–8253) Option 5.[112] Such allegations can also be sent to the DHS OIG Hotline via OIG's website, *https://www.oig.dhs.gov/hotline,* or via phone at 1–800–323–8603. Upon completion of an investigation, CBP management reviews all evidence, the CBP Standards of Conduct, the CBP Table of Offenses and Penalties, and how the agency has handled similar misconduct in the past, in order to determine what, if any, disciplinary action is appropriate.[113]

Commenter concerns about the processing of individuals seeking exceptions to the Title 42 public health Order at POEs are misplaced. As an initial matter, the rule will take effect only once the Title 42 public health Order is lifted, at which time CBP will inspect and process all noncitizens who arrive at a POE under Title 8. Title 42 is a statutory scheme that operates separate from Title 8. Thus, concerns about the Title 42 exception process in and of itself are not relevant to this rulemaking. While noncitizens seeking to enter a POE under Title 8 may experience some wait times, those wait times are not equivalent to rejections; CBP policy provides that in no instance will an individual be turned away or ''rejected'' from a POE.

Comment: One commenter stated that the use of the CBP One app to schedule an appointment to present at a POE conflicts with the inspection requirement in 8 U.S.C. 1225(a)(3), requiring that all applicants for admission be inspected by CBP officers. The commenter specifically referred to the district court's order in *Al Otro Lado, Inc.* v. *McAleenan,* 394 F. Supp. 3d 1168 (S.D. Cal. 2019), holding that this provision applies to migrants who are approaching a POE but have not yet entered the United States. The commenter stated that, because the number of appointments provided does not approach the demand, the CBP One app is functionally a system of metering. Another commenter also asserted that it was not clear whether noncitizens without an appointment who approach a POE would, in fact, be inspected and processed, or whether they would be turned away in violation of CBP's mandatory duty to inspect and process noncitizens at POEs.

Response: The Departments respectfully disagree that the use of the CBP One app to schedule an appointment to present at a POE conflicts with CBP's duties under 8 U.S.C. 1225(a)(3), unlawfully withholds access to the asylum process, or operates as a form of metering (though the Departments maintain that DHS's prior metering policies are lawful). The Departments acknowledge the district court's holding in *Al Otro Lado*—which the Government has appealed—but the use of CBP One app appointments as contemplated by this rule does not implicate that holding. CBP's policy is to inspect and process all arriving noncitizens at POEs, regardless of whether they have used the CBP One app. In other words, the use of the CBP One app is not a prerequisite to approach a POE, nor is it a prerequisite to be inspected and processed under 8 U.S.C. 1225(a)(3). Individuals without appointments will not be turned away. CBP is committed to increasing the number of noncitizens processed at POEs and to processing noncitizens in an expeditious manner.[114]

In addition, any noncitizen who is inspected and processed for expedited removal upon arrival at a POE and who expresses a fear of return, whether or not they use the CBP One app, will be referred to USCIS for a credible fear interview with an AO. *See* INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). The AO will determine whether the presumption applies or whether the individual can rebut or establish an exception to the presumption. CBP officers do not determine or evaluate the merits of any claim of fear, nor do they make determinations on whether the rule's presumption applies. *See id.* (providing that credible fear interviews are conducted by AOs).

default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf.

[109] *See id.*

[110] *See id.*

[111] *See, e.g.,* DHS OIG, Hotline Poster, *https://www.oig.dhs.gov/sites/default/files/DHS_OIG_Hotline-optimized_without_fax.jpg* (last visited Apr. 17, 2023); CBP, DHS/CBP/PIA–044, *Privacy Impact Assessment for the Joint Integrity Case Management System (JICMS)* at 1–2 (July 18, 2017), *https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp044-jicms-july2017.pdf;* CBP, CBP Pub. No. 1686–0322, *Report on Internal Investigations and Employee Accountability—Fiscal Year 2021* at 11–12 (Mar. 2022), *https://www.cbp.gov/sites/default/files/assets/documents/2022-May/fy21-cbp-opr-internal-investigation-accountability_1.pdf.*

[112] CBP, *How to Make a Report, https://www.cbp.gov/about/care-and-custody/how-make-report* (last visited Apr. 17, 2023).

[113] *See* CBP, CBP Pub. No. 1686–0322, *Report on Internal Investigations and Employee Accountability Fiscal Year 2021* at 17 (2022), *https://www.cbp.gov/sites/default/files/assets/documents/2022-May/fy21-cbp-opr-internal-investigation-accountability_1.pdf.*

[114] *See* Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), *https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf.*

b. AO Conduct and Training

Comment: Several commenters expressed concern that the rule would lead to erroneous asylum decisions made by AOs, given alleged deficiencies in AO conduct and training. Commenters asserted that the rule would lead to asylum decisions that are too swift. Multiple commenters also expressed concern that AOs have conducted inadequate credible fear screenings and made erroneous decisions in such screenings, resulting in errors in adjudicating asylum claims. For instance, citing an investigation by the DHS Office for Civil Rights and Civil Liberties, one commenter alleged that AOs have misapplied or failed to apply existing asylum law, ignored relevant portions of asylum seekers' testimony, failed to perform pattern and practice analysis and consider country conditions, failed to ask relevant follow-up questions and develop the record, and failed to take accurate notes. In addition, the same commenter said some AOs can be hostile and belligerent, and even the best trained and most effective AOs have limited time for credible fear interviews. Another commenter stated that AOs are ill-equipped to conduct the additional analysis required by the rule, given alleged deficiencies in the credible fear lesson plan, failure of AOs to apply current legal standards, failure to provide appropriate language interpretation, failure to interview vulnerable populations within agency guidelines, and interference with access to counsel.

Some commenters also stated that AOs are not medical experts and lack the required expertise to evaluate whether something is or is not an acute medical emergency. Another commenter stated that DHS should train all staff who interact with LGBT asylum seekers. Some commenters likewise stated that the rule should explicitly instruct AOs to affirmatively elicit information about whether a person could qualify for an exception to the rule or rebut its ineligibility presumption, such as details about any family or personal medical emergencies, threats of violence, difficulties using the CBP One app, and other matters that bear on the exceptions and grounds for rebuttal.

One commenter expressed concerns that noncitizens who are subject to the rule's rebuttable presumption of asylum ineligibility would be deprived of the right to be meaningfully heard on their claims because adjudicators applying the presumption would understand the rule to favor overall deterrence of asylum seeking, such that decisionmakers would allegedly err on the side of denying asylum or making negative credible fear determinations. This commenter also argued that the expedited removal system leads to a systemic, unjustified skepticism amongst adjudicators toward meritorious claims.

Response: The Departments acknowledge these commenter concerns but disagree that AOs lack the competence, expertise, or training to make determinations on whether the presumption of ineligibility for asylum applies or an exception or rebuttal ground has been established. AOs frequently assess physical and psychological harm when adjudicating asylum applications and are trained to do so in a sensitive manner.[115] AOs already evaluate harm resulting from the unavailability of necessary medical care or specific medications when assessing ''other serious harm'' under 8 CFR 208.13(b)(1)(iii)(B).[116] Additionally, all AOs receive specific training on adjudicating asylum claims of LGBT individuals.[117] As for commenters' requests that the rule explicitly instruct AOs to affirmatively elicit information about the presumption, such an instruction is unnecessary, as AOs conducting credible fear interviews are already required to specifically ask questions to elicit all relevant testimony in a non-adversarial manner.[118] This will necessarily include information related to whether the rule's presumption applies or an exception or rebuttal ground has been established, regardless of whether the noncitizen affirmatively raises these issues.

USCIS takes any allegations of AO misconduct seriously and is aware of the ongoing investigation by the DHS Office of Civil Rights and Civil Liberties cited by commenters. However, the Departments strongly disagree with any claims that AOs systematically exhibit an unjustified skepticism or insensitivity toward asylum claims, that they routinely fail to follow law or procedure, or that they would do so when applying this rule. AOs are career government employees and are selected based on merit. They undergo special training on non-adversarial interview techniques, cross-cultural communication, interviewing children, and interviewing survivors of torture and other severe trauma.[119] While the Departments disagree with the commenters' premise, the Departments also note that government officials are entitled to the presumption of official regularity in the way they conduct their duties. *See United States* v. *Chem. Found., Inc.,* 272 U.S. 1, 14–15 (1926). Commenters failed to provide persuasive evidence of systematic bias or misapplication of the law or procedure by AOs.

c. IJ Conduct and Training

Comment: Several commenters expressed concern with IJ conduct and their training *vis-à-vis* application of the rule's condition on asylum eligibility. One commenter expressed concerns that noncitizens who are subject to the rule's rebuttable presumption of asylum ineligibility would be deprived of the right to be meaningfully heard on their claims because adjudicators applying the presumption would understand the proposed rule to favor overall deterrence, such that IJs would allegedly err on the side of denial or negative credible fear findings. The commenter argued that the expedited removal system and prior hiring practices within EOIR lead to a systemic inclination toward unjustified skepticism among IJs with respect to meritorious claims.

Commenters also averred that IJs are not medical experts with the required expertise to evaluate medical issues implicated by the rebuttable presumption. Commenters stated that a significant number of IJs hired in the past several years lacked prior immigration law experience, yet, as IJs, they make complex legal determinations in brief credible fear proceedings. Commenters also asserted that some IJs have engaged in unprofessional and

[115] For example, AOs adjudicate cases involving forms of persecution like female genital mutilation, forced abortion, or forced sterilization. *See Matter of Kasinga,* 21 I&N Dec. 357 (BIA 1996); INA 101(a)(42)(B), 8 U.S.C. 1101(a)(42)(B); *see also* USCIS, *RAIO Directorate—Officer Training, Gender-Related Claims* at 24–28 (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Gender_Related_Claims_LP_RAIO.pdf.*

[116] *See* USCIS, *RAIO Directorate—Officer Training: Definition of Persecution and Eligibility Based on Past Persecution,* Supp. B at 60 (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf.*

[117] *See generally* USCIS, *RAIO Directorate—Officer Training: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/LGBTI_Claims_LP_RAIO.pdf.*

[118] *See generally* USCIS, *Non-Adversarial Interview;* USCIS, *Eliciting Testimony.*

[119] *See* 8 CFR 208.1(b); *see also* USCIS, *Non-Adversarial Interview;* USCIS, *Eliciting Testimony;* USCIS, *RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors that May Impede Communication at an Interview* (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/CrossCultural_Communication_LP_RAIO.pdf;* USCIS, *Children's Claims;* USCIS, *RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma* (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Survivors_of_Torture_LP_RAIO.pdf* [hereinafter USCIS, *Interviewing Survivors of Torture*].

hostile behavior toward asylum seekers and noted that some IJs have asylum denial rates of 90 percent or higher. Additionally, commenters expressed concern about potential IJ bias or lack of sufficient training for IJs related to, in particular, asylum claims of LGBT individuals.

Response: The Departments respectfully disagree with commenters' concerns about IJs' conduct and training. IJs, like AOs, are career employees who are selected through a competitive process. Likewise, IJs receive ''comprehensive, continuing training and support'' directed at ''promot[ing] the quality and consistency of adjudications.'' 8 CFR 1003.0(b)(1)(vii). Relatedly, the Chief Immigration Judge has the authority to ''[p]rovide for appropriate training of the immigration judges and other OCIJ staff on the conduct of their powers and duties.'' 8 CFR 1003.9(b)(2). Regulations also require IJs to ''resolve the questions before them in a timely and impartial manner consistent with the [INA] and regulations.'' 8 CFR 1003.10(b).

The Departments likewise do not share commenters' concerns regarding newly hired IJs' professional experience or ability to make appropriate legal determinations in the context of credible fear reviews or section 240 removal proceedings. The Departments believe that IJs' diverse professional backgrounds contribute to their ability to address complex legal issues in all cases arising before them. Notably, IJs are selected on merit with baseline qualifications, including possession of a J.D., LL.M., or LL.B. degree; active membership in a State bar; and seven years of experience as a licensed attorney working in litigation or administrative law. Upon entry on duty, new IJs receive extensive training, and throughout their tenure, all IJs receive both annual and periodic training on specialized topics as necessary. IJs are also expected to maintain professionalism and competence in the law.[120]

Moreover, the Departments disagree with commenter concerns about IJs' ability to assess medical records. Nothing in the rule requires adjudicators to make a formal medical diagnosis to determine whether a noncitizen is exempt from or has rebutted the rule's condition on eligibility. Rather, adjudicators will make a factual determination regarding whether certain exigencies, such as an acute medical emergency, caused a noncitizen to enter the United States outside of an available lawful pathway. 8 CFR 208.33(a)(2), 1208.33(a)(2). Given the IJ's role as the finder of fact in proceedings before EOIR, IJs are well-equipped to make such fact-based determinations.

Further, to the extent that commenters' concerns amount to allegations that IJs are biased or fail to comport themselves in a manner consistent with their duties, the Departments note that IJs are attorneys, 8 CFR 1003.10(a), and must comply with all ethical conduct and training requirements for DOJ attorneys. *See, e.g.,* 5 CFR 2635.101.[121] Additionally, as evidenced by the existence and work of EOIR's Judicial Conduct and Professionalism Unit (''JCPU''), ''[a]lleged misconduct by [IJs] is taken seriously by [DOJ] and [EOIR].'' [122] EOIR strives to adjudicate every case in a fair manner and to treat all parties involved with respect. Individuals or groups who believe that an IJ or other EOIR adjudicator has engaged in misconduct may submit a complaint to EOIR's JCPU via mail at Executive Office for Immigration Review, attn.: Judicial Conduct and Professionalism Unit, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041 or via email at *judicial.conduct@usdoj.gov.* Additionally, JCPU may launch its own investigation if information related to potential misconduct comes to JCPU's attention by other means, including through news reports, Federal court decisions, and routine reviews of agency proceedings.[123] JCPU will review all complaints, docket cases alleging judicial misconduct, gather relevant materials, and forward the complaint, relevant documents, and a summary of JCPU's preliminary fact-gathering to the IJ's supervisor for investigation and resolution.[124] Complaints can be resolved by dismissal, conclusion, corrective action, or disciplinary action, and JCPU will provide written notice to the complainant when the matter is closed.[125]

While the Departments disagree with the commenters' premise, moreover, the Departments also note that government officials are entitled to the presumption of official regularity in the way they conduct their duties, *Chem. Found.,* 272 U.S. at 14–15, and commenters failed to provide persuasive evidence of systematic bias amongst IJs.

iv. Concerns Regarding Confusion, Delays, Backlog, and Inefficiencies

Comment: Commenters described the rule as ''convoluted,'' ''elaborate,'' or ''unclear,'' and expressed concerns that it would be confusing to migrants and make it difficult for legal services organizations to advise clients, partner organizations, and the communities that they serve. Commenters said that the proposed rule would impose a two-tier approach and additional fact-intensive queries for credible fear interviews, thereby increasing interview times and complexity of credible fear cases and adding to the burden and confusion of AOs. Additionally, commenters stated that prior asylum policy changes have led to confusion amongst attorneys and migrants and resulted in erroneous deportations. Moreover, one commenter stated that a confusing legal framework does not prevent and sometimes promotes an increase of irregular migration. Another commenter recommended that the Government provide guidance or an FAQ document to accompany and explain the rule's exceptions and means of rebuttal.

In addition, commenters expressed concern that, by adding to the evidentiary requirements, complexity, and length of asylum adjudications, the rule would exacerbate delays and backlogs, inefficiently prolong the asylum process for legitimate asylum seekers, increase erroneous denials, decrease the number of attorneys available to help clear backlogs, and strain limited government resources. Commenters also pointed to previous instances where changes in procedure led to an increased backlog, citing the Citizenship and Immigrant Services Ombudsman 2022 annual report to highlight this dynamic. Another commenter stated that cases wrongly referred to the immigration court by the Asylum Office due to erroneous applications of the rule would unnecessarily add to immigration court backlogs. And commenters stated that the NPRM failed to provide any evidence or explanation that the proposed rule would mitigate backlogs. In response to these efficiency concerns, one commenter suggested that the Departments should pursue alternate solutions for addressing the USCIS and

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[120] *See* EOIR, *Ethics and Professionalism Guide for Immigration Judges* 2 (Jan. 31, 2011), *https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.*

[121] *See also* ICPM, Chapter 1.3(c) (Nov. 14, 2022) (''Immigration judges strive to act honorably, fairly, and in accordance with the highest ethical standards, thereby ensuring public confidence in the integrity and impartiality of immigration court proceedings.'').

[122] *See id.*

[123] *See* EOIR, *Judicial Complaint Process* (Feb. 2023), *https://www.justice.gov/eoir/page/file/1100946/download* (explaining the steps of the judicial complaint process).

[124] *Id.*

[125] *Id.; see also* EOIR, *Statistics and Reports, https://www.justice.gov/eoir/statistics-and-reports* (last visited Apr. 19, 2023) (providing IJ complaint statistics).

EOIR backlogs, such as more dedicated dockets, smarter prioritization of cases, expanded use of administrative closure or deferred action, or establishing an independent immigration court. One commenter likewise maintained that the Departments, in their efforts to help the immigration court system function more efficiently and effectively must still respect the due process rights of asylum seekers.

Response: The Departments do not believe that the rule's provisions are unduly confusing or complex. However, as described in Section II.C.7 of this preamble, the Departments have streamlined the regulatory text significantly to improve clarity, and the Departments believe this final rule publication should provide much of the guidance sought by commenters. Substantively, the rule simply outlines a circumstance in which a noncitizen will be presumed ineligible for asylum, and includes a list of exceptions to and means of rebutting the presumption. As explained in Section IV.B.5.iii.a of this preamble, AOs conducting credible fear interviews will specifically ask questions to elicit all relevant testimony in a non-adversarial manner, including with respect to whether the presumption applies or any exception or rebuttal ground is applicable in a given case, regardless of whether the noncitizen affirmatively raises these issues. Furthermore, noncitizens who are found by an AO to be subject to the condition on eligibility may request review of that determination, and an IJ will evaluate de novo whether the noncitizen is subject to the presumption, and if so, whether the noncitizen has established an exception to or rebutted the presumption. 8 CFR 208.33(b)(1), (2). And even where the presumption applies and no exception or rebuttal ground has been established at the credible fear stage, if the noncitizen has demonstrated a reasonable possibility of persecution or torture, they will have an opportunity to apply for asylum, statutory withholding of removal, CAT protection, or any other form of relief or protection for which the noncitizen is eligible in removal proceedings under section 240 of the INA. *See* 8 CFR 208.33(b)(2)(ii), (b)(2)(v)(B); *id.* 1208.33(b)(4).

In relation to the concern that the rule's provisions are unclear or that additional public-facing materials may be necessary to clarify and raise awareness about provisions of the rule, the Departments intend to execute a robust communications plan to notify and inform the public of the rule's requirements. This plan entails engagement with stakeholders, including NGOs, international organizations, legal services organizations, and others. The Departments also plan to mount communications campaigns as appropriate throughout the Western Hemisphere in coordination with interagency partners and partner governments in order to educate potential migrants about the rule's requirements, including consequences of failing to use available lawful pathways.

These efforts are in addition to preexisting and ongoing communications efforts, including publicization of removal and enforcement statistics, English-, Spanish-, Portuguese-, and Haitian Creole-language interviews with media outlets in the region, and regularly updated Web resources on which the Departments can provide additional information in response to demand from the public.

The Departments acknowledge concerns regarding delays, backlogs, and limited government resources, but believe that these concerns are outweighed by the anticipated benefits of the rule. The rule is expected to ultimately reduce the number of cases pending before the immigration courts and reduce ancillary benefit requests to USCIS. *See* 8 CFR 208.7 (employment authorization for pending asylum applicants). This would also alleviate the burden on ICE of removing non-detained noncitizens who receive final orders of removal at the conclusion of removal proceedings under section 240 of the INA but who do not comply with their orders. *See, e.g.,* 8 CFR 241.4(f)(7) (in considering whether to recommend further detention or release of a noncitizen, an adjudicator must consider ''[t]he likelihood that the alien is a significant flight risk or may abscond to avoid removal''). The Departments also anticipate that the rule will redirect migratory flows towards lawful, safe, orderly pathways in ways that make it easier to process their requests for admission. 88 FR at 11729. The Departments believe that this will ultimately result in fewer credible fear cases than would otherwise be processed, and that these improvements in efficiency would outweigh a potential increase in credible fear interview times. The Departments do not anticipate that the rule will be applied frequently in affirmative asylum cases decided by the Asylum Office, since only a small percentage of these applicants enter the United States from Mexico across the southwest land border or adjacent coastal borders, apart from UCs who are not subject to the rule.[126] When all the effects are considered on balance, this rule will serve one of the key goals of the U.S. asylum system, which is to efficiently and fairly provide protection to noncitizens who are in the United States and have meritorious claims, while also efficiently denying and ultimately removing those who are not deemed eligible for discretionary forms of protection and do not qualify for statutory withholding of removal or protection under the CAT. *See* 88 FR at 11729.

Comments advocating for other immigration policy changes or statutory reforms that could potentially create efficiencies in immigration proceedings are outside the scope of this rulemaking. However, as stated in the NPRM, the Departments note that EOIR has created efficiencies by reducing barriers to access immigration courts. *See* 88 FR at 11717. In that regard, EOIR has expanded the Immigration Court Helpdesk program to several additional courts, issued guidance on using the Friend of the Court model to assist unrepresented respondents, and reconstituted its pro bono liaison program at each immigration court. The above measures promote efficiency as, where a noncitizen is represented, the IJ is less likely to have to engage in time-consuming discussions at hearings to ascertain whether the noncitizen is subject to removal and potentially eligible for any relief. In addition, a noncitizen's counsel can assist the noncitizen in gathering evidence, can prepare the noncitizen to testify, and can work with DHS counsel to narrow the issues the IJ must decide. While critically important, these process improvements are not, on their own, sufficient to respond to the significant resource needs associated with the increase in migrants anticipated following the lifting of the Title 42 public health Order.

To the extent commenters argued that adjudication timeline concerns implicate the due process rights of noncitizens, as explained above, the Supreme Court has held that the due process rights of noncitizens applying for admission at the border are limited to ''only those rights regarding admission that Congress has provided by statute.'' *Thuraissigiam,* 140 S. Ct. at 1983. However, upon referral of a fear

[126] The annual percentage of affirmative asylum applicats who entered between POEs and were not UCs has steadily declined over the past two decades. The percentage for 2020-22 have been 16.00 percent, 14.85 percent, and 13.92 percent, respectively. So far in fiscal year 2023, the percentage has been 9.06 percent. USCIS Data Collection, Apr. 13, 2023.

claim, USCIS seeks to issue credible fear determinations for detained noncitizens in a timely manner. Furthermore, the statute that governs expedited removal provides that upon a noncitizen's request for review of an AO's negative credible fear determination, an IJ will review the determination ''in no case later than 7 days after the date of the determination.'' INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). In any event, because there is no statute guaranteeing any noncitizen that their expedited removal or credible fear process will be completed in a given amount of time, any failure to meet this obligation is not in the nature of a due process violation. *See Thuraissigiam,* 140 S. Ct. at 1983.

Comment: Commenters expressed concerns that a lack of notice about the rule for asylum seekers could lead to confusion and due process violations. Some expressed concern that noncitizens who are traveling to the United States when the rule becomes effective would not have sufficient notice about the CBP One app or the need to schedule an appointment in order to seek asylum without being subject to a rebuttable presumption of ineligibility. Commenters expressed concern that individuals who had contracted with smugglers in transit would receive disinformation from the smugglers about lawful pathways, thereby preventing them from using a lawful pathway to enter the United States. Other commenters said that noncitizens should receive notice of the rebuttable presumption prior to their credible fear interviews.

Response: The Departments believe that comments about lack of notice are misguided for several reasons. First, as just discussed, the rule's requirements are not unduly confusing or complex, and the Departments intend to implement a robust communications plan to notify and inform the public of requirements under the rule, minimizing any potential confusion. Second, the Departments provided advance notice of the potential issuance of this policy by issuing the NPRM on February 23 of this year, and by announcing the impending issuance of such proposed rule in January.[127] Third, any lack of notice would not constitute a violation of the Fifth Amendment's Due Process Clause. As explained above, the Supreme Court has held that the rights of noncitizens applying for admission at the border are limited to ''only those rights regarding admission that Congress has provided by statute.'' *Thuraissigiam,* 140 S. Ct. at 1983. The Departments are aware of no statutory requirement that notice regarding any of the INA's provisions be provided to individuals outside the United States, including those who may be subject to expedited removal provisions or conditions on asylum eligibility upon arrival. Finally, courts have long held that ''ignorance of the legal requirements for filing an asylum application'' is ''no excuse'' for failing to comply with such requirements, particularly where, as here, the enactment of such requirements is published in the **Federal Register**. *Alquijay* v. *Garland,* 40 F.4th 1099, 1103 (9th Cir. 2022) (quotation marks omitted) (citing, *e.g., Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 559 U.S. 573, 581 (2010)); *see Williams* v. *Mukasey,* 531 F.3d 1040, 1042 (9th Cir. 2008).

v. Other Procedural Concerns

Comment: Commenters stated that it would be extremely challenging or impossible for many asylum seekers to show that the rule does not apply to them or to establish an exception to or rebut the presumption of ineligibility, despite having bona fide claims. According to these commenters, the expedited removal process is extremely flawed and rife with erroneous removals due to a number of factors. Asylum seekers are detained in remote areas (in abusive and dangerous conditions of confinement), where attorney access is limited and they have no chance to gather evidence. Credible fear screenings typically occur over the phone (often with poor call quality and sporadic connection, with little or no privacy). The commenters also stated that the lack of privacy during these screenings makes it more difficult and potentially retraumatizing for applicants to share their stories and make their cases. One commenter stated that, although the noncitizen may be in a private room, there is often a lot of noise and commotion in the passageways that can be distracting. One commenter wrote that trauma severely impacts a survivor's ability to coherently and compellingly present an asylum claim by negatively affecting memory and emotional state and causing them to behave in ways that untrained people may read as indicating a lack of credibility. Another commenter stated that credible fear screenings can trigger increased traumatic response, rather than increased disclosure about the circumstances of persecution or torture. The presence of noncitizens' children during the interview can be distracting or deter the person from disclosing sensitive elements of their persecution story. Commenters also stated that language barriers, including English-only availability for written notices, make the process more difficult. One commenter also stated that translators may be unfamiliar with certain dialects and slang. Commenters stated that these alleged factors would worsen if the Administration were to pursue its reported plan to conduct credible fear interviews within days of asylum seekers' arrival in CBP custody, based on the conditions in CBP custody and lack of access to counsel, as shown by the increase in negative credible fear determinations during the Prompt Asylum Case Review (''PACR'') program and the Humanitarian Asylum Review Program (''HARP'').

Response: To the extent commenters argued that conditions in which credible fear interviews take place, such as location, interview procedures, and surrounding circumstances, implicate the due process rights of noncitizens, as explained above, the Supreme Court has held that the due process rights of noncitizens applying for admission at the border are limited to ''only those rights regarding admission that Congress has provided by statute.'' *Thuraissigiam,* 140 S. Ct. at 1983. As further explained above, the statute that governs expedited removal provides only that the noncitizen may ''consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.'' INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv).

In any event, the Departments disagree with these characterizations of credible fear interviews. With regard to commenter concerns about lack of privacy during credible fear interviews, the Departments note that these interviews are conducted ''separate and apart from the general public.'' 8 CFR 208.30(d). The Departments are mindful of their duties under 8 CFR 208.6 and 1208.6 to prevent unauthorized disclosure of records pertaining to any credible fear determination, and AOs are required to explain these confidentiality requirements to noncitizens prior to credible fear interviews.[128] Noncitizens in credible

[127] *See* DHS, Press Release, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), *https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.*

[128] *See* USCIS, *Non-Adversarial Interview; see also* Form M–444, Information About Credible Fear

fear proceedings are also informed that interpreters are sworn to keep their testimony confidential.[129] All AOs receive training on working with interpreters, which includes assessing competency and recognizing other factors that may affect the accuracy of interpretation.[130] Credible fear interviews are conducted ''in a nonadversarial manner, separate and apart from the general public.'' 8 CFR 208.30(d). AOs are trained to elicit all relevant testimony during credible fear interviews,[131] and will not preemptively issue negative credible fear determinations due to phone connectivity issues. All AOs receive training on interviewing survivors of torture and other severe trauma.[132]

Finally, commenters' concerns related to the potential for conducting credible fear interviews while noncitizens are in CBP custody are outside the scope of this rule. This rule does not specify where noncitizens may be held in custody during credible fear proceedings. Any decision to conduct credible fear interviews while the noncitizen is in CBP custody will take into account a range of factors, including operational limitations associated with the facility, staffing, and throughput. Additionally, to the extent that commenters have concerns about conditions in CBP custody, such comments are outside the scope of this rule. DHS notes, however, that it is committed to providing safe, sanitary, and humane conditions to all individuals in custody, and that it is committed to transferring individuals out of CBP custody in an expeditious manner. The Departments further note that one anticipated effect of this rule is to alleviate overcrowding in DHS detention facilities. *See* 88 FR at 11704.

6. Recent Regional Migration Initiatives

Comment: Commenters stated that the rule conflicts with several migration declarations and other compacts into which the United States has recently entered. For example, at least one commenter stated that the rule conflicts with the L.A. Declaration, in which the United States committed ''to promote access to protection and complementary pathways for asylum seekers, refugees, and stateless persons in accordance with national legislation and with respect for the principle of non-refoulement.'' [133] One commenter stated the former presidents of Colombia and Costa Rica object to the proposed rule on the basis that it is not in line with the L.A. Declaration.

Response: The Departments disagree that the rule conflicts with any recent regional migration initiatives. The Departments' rule is fully consistent with the United States' commitments under the L.A. Declaration, including our responsibility as a signatory country to ''manage mixed movements across international borders in a secure, humane, orderly, and regular manner.'' [134] As described in the NPRM, political and economic instability, coupled with the lingering adverse effects of the COVID–19 global pandemic, have fueled a substantial increase in migration throughout the world. *See, e.g.,* 88 FR at 11708–14.

Current DHS encounter projections and planning models suggest that encounters at the SWB could rise to 11,000 encounters per day after the lifting of the Title 42 public health Order.[135] Absent policy changes, most non-Mexicans processed for expedited removal under Title 8 would likely establish credible fear and remain in the United States for the foreseeable future despite the fact that many of them will not ultimately be granted asylum, a scenario that would likely incentivize an increasing number of migrants to the United States and further increase the likelihood of sustained high encounter rates.

The Departments' promulgation of this rule is an attempt to avert this scenario in line with the United States and other signatory nations' responsibility to manage migration responsibly and humanely as described in the L.A. Declaration. Contrary to commenters' assertion, the rule is consistent with the Collaborative Migration Management Strategy (''CMMS'') [136] and the L.A. Declaration's support for a collaborative and regional approach to migration and forced displacement, pursuant to which countries in the hemisphere commit to implementing programs to stabilize communities hosting migrants and asylum seekers, providing increased regular pathways and protections for migrants and asylum seekers who reside in or traveled through their countries, and humanely enforcing existing immigration laws.

The rule works in combination with several other policy actions to secure the SWB while upholding the principles enshrined in the L.A. Declaration. These policy actions include resumption of the Cuban and Haitian Family Reunification Parole Programs, the plans to streamline those programs and extend them to nationals of certain other countries, the establishment of regional processing centers, expansion of refugee resettlement commitments globally and in the region, expansion of labor pathways, including expanded access in the region to H–2B temporary nonagricultural worker visas, creation of the parole processes for CHNV nationals, the Asylum Processing IFR, and other processing improvements geared toward expanding access to lawful pathways. 88 FR at 11716–19.[137] These actions are consistent with the specific goal laid out in the L.A. Declaration to collectively ''[e]xpand access to regular pathways for migrants and refugees.'' Together with the rule, these policy actions will help address unprecedented migratory flows, the systemic costs those flows impose on the immigration system, and the ways in which a network of increasingly sophisticated human smuggling networks cruelly exploit the system for financial gain.

7. Negative Impacts on the Workforce and Economy

Comment: Some commenters stated that the Departments should not enact restrictions on immigration due to current labor shortages and the general benefits of immigration. Commenters stated that the rule will stifle the flow of immigration to American communities, which will suffer because immigrants are central to community development, economic prosperity, and maintaining a strong workforce. A commenter stated that U.S. history has shown that immigrants, even those who

Interview 1 (May 31, 2022) (''U.S. law has strict rules to prevent the government from telling others about what you say in your credible fear interview.'').

[129] Form M–444, Information About Credible Fear Interview 2 (May 31, 2022) (''The interpreter will be sworn to keep the information you discuss confidential.'').

[130] USCIS, RAIO Directorate—*Officer Training, Interviewing—Working with an Interpreter* (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Working_with_an_Interpreter_LP_RAIO.pdf.*

[131] USCIS, *Eliciting Testimony* 12 (''In cases requiring an interview, although the burden is on the applicant to establish eligibility, equally important is your obligation to elicit all pertinent information.''); USCIS, *Non-Adversarial Interview* 13 (''You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.'').

[132] USCIS, *Interviewing Survivors of Torture.*

[133] The White House, *Los Angeles Declaration on Migration and Protection* (June 10, 2022), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/.*

[134] *Los Angeles Declaration.*

[135] OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023.

[136] *See* The White House, *Collaborative Migration Management Strategy* (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf.*

[137] *See also* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

arrive here in the weakest of circumstances, strengthen our country in the long run. Commenters said that the U.S. population is stagnating or shrinking, so the United States should welcome migrants—especially young migrants—who can support the economy, fill jobs, and contribute to Social Security. A commenter stated that beginning in 2019, levels of immigration to the United States dropped significantly, and that by the end of 2021 there were close to 2 million fewer working-age immigrants in the United States than there would have been if pre-pandemic immigration continued unchanged, according to researchers from the University of California, Davis.

Some commenters opposed the proposed rule on the ground that immigrants are willing to work difficult jobs that many already in the United States are not willing to take. Commenters stated that there is currently a severe shortage of certain workers in the United States, such as in the health care, agriculture, and service industries, and that migrants who undertake an arduous overland journey to the United States are likely to work hard and become productive members of U.S. society. One commenter noted that immigrant-owned businesses account for over 8 million jobs and 1.3 trillion dollars in the U.S. economy. Another commenter stated that individuals in the asylum process who are working with work authorization contribute about $11 billion to the economy each year. Commenters also stated that migrants do not have a significant negative impact on the wages of local-born residents and that migrants contribute more to the U.S. economy than the cost of community and government services they use. One commenter stated that the proposed rule improperly restricts asylum seekers being integrated into the workforces of the States and that State-funded services for asylum seekers would be put under strain as a result.

Response: The Departments agree that immigrants make important contributions to the U.S. economy. However, the Departments disagree that the benefits of immigration render this rule unnecessary or invalid. The Departments emphasize that the U.S. immigration system has experienced extreme strain with a dramatic increase of noncitizens attempting to cross the SWB in between POEs without authorization, reaching an all-time high of 2.2 million encounters in FY 2022. Without a meaningful policy change, border encounters could dramatically rise to as high as 11,000 per day after the Title 42 public health Order is lifted,[138] and DHS does not currently have the resources to manage and sustain the processing of migratory flows of this scale in a safe and orderly manner. *See* 88 FR at 11712–13. This rule is therefore designed to incentivize migrants to choose lawful, safe, and orderly pathways to entering the United States over dangerous, irregular pathways.

Over the last several months, DHS has endeavored to promote and expand lawful, safe, and orderly pathways. For instance, in January 2023, DHS implemented new parole processes for CHN nationals that built on the successful process for Venezuelans and created an accessible, streamlined way for eligible individuals to travel to and enter the United States via a lawful and safe pathway. Through a fully online process, individuals can seek advance authorization to travel to the United States and be considered, on a case-by-case basis, for a temporary grant of parole for up to two years. Individuals who are paroled through these processes can apply for employment authorization immediately following their arrival to the United States.[139]

Furthermore, the United States Government has significantly expanded access to the H–2 labor visa programs to address labor shortages and provide safe and orderly pathways for migrants seeking to work in the United States. For example, on December 15, 2022, DHS and the Department of Labor (''DOL'') jointly published a temporary final rule increasing the total number of noncitizens who may receive an H–2B nonimmigrant visa by up to 64,716 for the entirety of FY 2023. 87 FR 76816 (Dec. 15, 2022). In 2022, concurrent with the announcement of the L.A. Declaration, the United States announced that it intends to welcome at least 20,000 refugees from Latin America and the Caribbean in FY 2023 and FY 2024, which would put the United States on pace to more than triple the number of refugee admissions from the Western Hemisphere this fiscal year alone.[140] On April 27, 2023, DHS announced that it would commit to referring for resettlement thousands of additional refugees per month from the Western Hemisphere—with the goal of doubling the number of refugees the United States committed to welcome as part of the L.A. Declaration.[141] The Departments also note that the United States admitted significantly more noncitizens in nonimmigrant status in fiscal year 2022 (96,700,000) than in previous years.[142]

The Departments believe that these new or expanded lawful pathways, and particularly employment-based pathways, are effective ways to address labor shortages and encourage lawful migration. The Departments also believe that, by reducing migrants' incentives to use human smugglers and traffickers to enter the United States, this final rule will reduce the likelihood that newly arrived migrants will be subjected to labor trafficking. The Departments further reiterate that noncitizens who avail themselves of any of the lawful, safe, and orderly pathways recognized in this rule will not be subject to the rebuttable presumption.

8. Other Opposition

i. Encourages Migration by Sea or Other Dangerous Means

Comment: A commenter predicted that the proposed rule may increase the number of migrants seeking to travel to the United States by sea, which is dangerous and could lead to an increase in migrant deaths and drownings, and another suggested that attempted immigration directly by sea would pose a significant burden on Coast Guard and other resources. One commenter expressed concern that the rule would incentivize migrants to avoid detection by CBP, remarking that migrants may attempt to enter the United States by crossing the Rio Grande River or along the Pacific coast, where they face a high risk of drowning.

Commenters stated that the proposed rule would do nothing to stem the flow of migrants to the United States but would instead force people to seek out other means of coming to the United States and leave people with few choices, including the very choices the rule purports to wish to avoid. Some commenters stated that the rule will result in migrants, who are in a desperate humanitarian situations or

[138] OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023.

[139] *See* USCIS, Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans (Mar. 22, 2023), *https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans.*

[140] *See* L.A. Declaration Fact Sheet.

[141] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[142] *Compare* OIS, Legal Immigration and Adjustment of Status Report Fiscal Year 2022, Quarter 4, *https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration*, with OIS, Annual Flow Report: U.S. Nonimmigrant Admissions: 2021 (July 2022), *https://www.dhs.gov/sites/default/files/2022-07/2022_0722_plcy_nonimmigrant_fy2021.pdf*, and OIS, Annual Flow Report: U.S. Nonimmigrant Admissions: 2018 (Oct. 2018), *https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/nonimmigrant_admissions_2018.pdf.*

fear for their lives, resorting to more dangerous routes between POEs to enter the United States. One commenter stated that these dangerous border crossings can result in severe injuries, dehydration, starvation, and drownings as well as kidnappings and other violent attacks by cartels and other organized criminal groups that exert influence at the U.S.-Mexico border. Another commenter claimed that data shows that CBP's ''prior metering program'' increased border apprehensions by 36 percent, which suggests that making the CBP One app mandatory may in fact increase border crossings and make them riskier.

Response: First, the Departments share commenters' concerns that noncitizens seeking to avoid the rebuttable presumption may take dangerous sea routes, leading to migrant deaths and drownings. Because applying the rule only to those who enter the United States from Mexico across the southwest land border would inadvertently incentivize noncitizens without documents sufficient for lawful admission to circumvent that land border by making a hazardous attempt to reach the United States from Mexico by sea, the Departments have determined that it is appropriate to apply the rebuttable presumption to those who enter the United States from Mexico at both the southwest land border and adjacent coastal borders. Similar considerations that led the Departments to pursue this rulemaking with respect to land arrivals at the SWB apply in this specific maritime context, as the anticipated increase in migration by land could lead migrants attempting to avoid the rebuttable presumption to make the final portion of their journey from Mexico by sea. In light of the inherent dangers such attempts could create for migrants and DHS personnel, and to avoid a significant further increase in maritime interdictions and landfall by noncitizens along the adjacent coastal borders as compared to the already significant surge that the Departments have seen in recent years, the Departments have extended the rebuttable presumption to apply to noncitizens who enter the United States from Mexico at adjacent coastal borders. 8 CFR 208.33(a)(1), 1208.33(a)(1).

Extension of the rebuttable presumption to noncitizens who enter the United States from Mexico at adjacent coastal borders is supported by the growing number of migrants taking to sea under dangerous conditions, which puts lives at risk and stresses DHS's resources. The IOM Missing Migrants Project reported at least 321 documented deaths and disappearances of migrants throughout the Caribbean in 2022, signaling the highest recorded number since it began tracking such events in 2014 and a 78 percent overall increase over the 180 documented cases in 2021.[143] Total migrants interdicted at sea by the U.S. Coast Guard (''USCG'') increased by 502 percent between FY 2020 (2,079) and FY 2022 (12,521).[144] Interdictions continued to rise in FY 2023 with 8,822 migrants interdicted at sea through March, almost 70 percent of the total in FY 2022 within six months.[145] Interdictions occurred primarily in the South Florida Straits and the Caribbean Sea.[146] The USCG views its migrant interdiction mission as a humanitarian effort to rescue those taking to the sea and to encourage noncitizens to pursue lawful pathways to enter the United States. By allocating additional assets to migrant interdiction operations and to prevent conditions that could lead to a maritime mass migration, the USCG assumes certain operational risk to other statutory missions. Recently, some USCG assets have been reallocated from other key mission areas, including counter-drug operations, protection of living marine resources, and support for shipping navigation. The Departments expect that the strategy of coupling expanded lawful, safe, and orderly pathways into the United States with this rule's application of the rebuttable presumption to noncitizens who make landfall at adjacent coastal borders after traveling through Mexico, would lead to a reduction in the numbers of migrants who would otherwise undertake a dangerous journey to the United States by sea. By avoiding a further increase in maritime migration, USCG can in turn avoid incurring greater risk to its other statutory missions.

Second, the Departments disagree with commenters' concerns that this rule will incentivize more migrants to use other dangerous means of entering the United States, such as concealment in a vehicle crossing a SWB POE or crossing between POEs at remote locations. As noted in Section IV.B.3.iv of this preamble, the Departments anticipate that the newly expanded lawful pathways to enter to the United States, in conjunction with the rule's condition on asylum eligibility for those who fail to exercise those pathways, will ultimately decrease attempts to enter the United States without authorization, and thereby reduce reliance on smugglers and human traffickers.

The Departments further disagree with the commenter's claims that the use of the CBP One app to schedule an appointment to present at a POE is a ''metering program'' or that use of the CBP One app will increase irregular migration or incentivize riskier irregular migration routes. CBP will inspect and process all arriving noncitizens at POEs, regardless of whether they have used the CBP One app. In other words, the use of the CBP One app is not a prerequisite to approach a POE, nor is it a prerequisite to be inspected and processed under the INA. CBP will not turn away individuals without appointments. CBP is committed to increasing the number of noncitizens processed at POEs and is committed to processing noncitizens in an expeditious manner.[147]

Moreover, the Departments intend for this rule to work in conjunction with other initiatives that expand lawful pathways to enter the United States, and thereby incentivize safe, orderly, lawful migration over dangerous, irregular forms of migration. Noncitizens who enter the United States in vehicles without scheduling an appointment to present at a POE and who are inadmissible under section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), are subject to the rebuttable presumption. Similarly, noncitizens who attempt to cross the southwest land border between POEs are subject to the rebuttable presumption. Likewise, noncitizens who attempt to enter the United States from Mexico at adjacent coastal borders are subject to the rebuttable presumption. Additionally, DHS has changed the respective parole processes for Cubans and Haitians, such that Cubans and Haitians who are interdicted at sea after April 27, 2023, are ineligible for such parole processes. *See* Implementation of a Change to the Parole Process for Cubans, 88 FR 26329 (Apr. 28, 2023); Implementation of a Change to the Parole Process for Haitians, 88 FR 26327 (Apr. 28, 2023). The Departments anticipate that these

[143] Int'l Org. for Migration, *Missing Migrants in the Caribbean Reached a Record High in 2022* (Jan. 24, 2023), *https://www.iom.int/news/missing-migrants-caribbean-reached-record-high-2022.*

[144] OIS analysis of USCG data through March 31, 2023.

[145] *Id.*

[146] Testimony of Jonathan Miller, ''Securing America's Maritime Border: Challenges and Solutions for U.S. National Security'' at 4 (Mar. 23, 2023), *https://homeland.house.gov/media/2023/03/3.23.23-TMS-Testimony.pdf.*

[147] *See* Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), *https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf.*

disincentives, coupled with the newly expanded pathways for lawful migration and the rule's exceptions and means of rebuttal, will ultimately lead fewer noncitizens to attempt to enter the United States in an unsafe manner.

ii. Inconsistent With Actions of Other Countries and Harmful to Foreign Relations

Comment: Commenters stated that the proposed rule would almost completely abandon the United States' commitment to work with other countries to meet growing refugee and asylum seeker protection needs, instead placing the burden on transit countries. Commenters stated that many European countries have opened their borders to millions of immigrants, and that the United States should do the same to help people who are facing desperate situations at home. Commenters observed that other countries in Latin America or the Western hemisphere have taken in many more migrants and taken on a greater burden than the United States. One commenter expressed concern that other countries may seek to follow in the United States' footsteps and enact similar restrictive asylum measures. Another commenter stated the rule will not improve foreign relations with hemispheric partner nations.

Response: The Departments acknowledge the comments and reiterate that the purpose of this rule is to encourage migrants to choose safe, orderly, and lawful pathways of entering the United States, while preserving the opportunity for individuals fleeing persecution to pursue protection-based claims consistent with the INA and international law. The rule is needed because, absent this rule, after the termination of the Title 42 public health Order, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. This rule is one policy within a broad range of actions being implemented to ensure that there is a regional framework for addressing and responding to historic levels of migration within the hemisphere.[148]

The United States Government is expanding its efforts to protect refugees, those seeking asylum, and those fleeing civil conflict. Since FY 2020, the United States has increased its annual refugee admissions ceiling eightfold and expanded refugee processing within the Western hemisphere.[149] On April 27, 2023, DHS and the Department of State announced that they would commit to referring for resettlement thousands of additional refugees per month from the Western Hemisphere—with the goal of doubling the number of refugees the United States committed to welcome as part of the L.A. Declaration.[150] Similarly, DHS and the Department of State recently announced enhancements to the Central American Minors Refugee and Parole Program, which expands eligibility criteria for those who may request USRAP access for qualifying children.[151] DHS has also implemented comprehensive processes to facilitate the lawful, safe, and orderly migration of CHNV nationals by introducing the CHNV parole processes.[152] Additionally, DHS has recently implemented special lawful processes for nationals of Ukraine.[153]

iii. Other

Comment: A commenter stated that the rule would allow noncitizens who entered the United States after lying on a visa petition to remain eligible for asylum while barring those who never submitted false information and objected to this outcome as ''absurd.''

Response: The Departments acknowledge the commenter's concern but reiterate that the purpose of this rulemaking is to address an anticipated further surge of migration at the SWB following the expiration of the CDC's Title 42 public health Order, which may compromise the Departments' ability to process claims for asylum and related forms of protection in a manner that is effective, humane, and efficient. The Departments do not anticipate that noncitizens who attempt to enter on nonimmigrant visas obtained through misrepresentation will contribute to this surge in any substantial way.

In addition, the Departments disagree with the premise of this comment. Willful misrepresentations in connection with a nonimmigrant visa application may affect an applicant's eligibility for asylum or adjustment of status. Prior misrepresentations to immigration officials can affect credibility determinations, *see* INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii), and may be negative discretionary factors in asylum and adjustment of status determinations.[154] Applicants for adjustment of status under section 209(b) of the INA, 8 U.S.C. 1159(b), who have previously sought to obtain immigration benefits through fraud or willful misrepresentation of material fact are inadmissible under section 212(a)(6)(C)(i) of the INA, 8 U.S.C. 1182(a)(6)(C)(i), unless they obtain a discretionary waiver of inadmissibility under section 209(c) of the INA, 8 U.S.C. 1159(c).

Comment: One commenter stated that the application of the presumption against asylum eligibility at the credible fear stage would lead to absurd and irrational results. As an example, the commenter stated a noncitizen may admit to terrorism in their home country and still receive a positive credible fear determination, whereas a noncitizen subject to the rule who fails to rebut the presumption would receive a negative determination.

Response: The Departments strongly dispute the commenter's suggestion that noncitizens who admit to terrorism would receive superior treatment than noncitizens who are subject to the rule. Noncitizens subject to the INA's terrorism-related inadmissibility grounds (''TRIG''), *see* INA 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B), may not be ordered released by an IJ during removal proceedings irrespective of any relief

[148] *See* The White House, FACT SHEET: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System (July 27, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system/;* The White House, FACT SHEET: Update on the Collaborative Migration Management Strategy (Apr. 20, 2022), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/20/fact-sheet-update-on-the-collaborative-migration-management-strategy/;* L.A. Declaration Fact Sheet.

[149] *Compare* Presidential Determination on Refugee Admissions for Fiscal Year 2021, 85 FR 71219 (Nov. 6, 2020) (15,000), *with* White House, Memorandum on Presidential Determination on Refugee Admissions for Fiscal Year 2023 (Sept. 27, 2022), *https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/27/memorandum-on-presidential-determination-on-refugee-admissions-for-fiscal-year-2023/* (125,000).

[150] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[151] Notice of Enhancements to the Central American Minors Program, 88 FR 21694 (Apr. 11, 2023).

[152] *See* USCIS, Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans (Mar. 22, 2023), *https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans.*

[153] *See* DHS, Uniting for Ukraine (Mar. 21, 2023), *https://www.dhs.gov/ukraine;* DHS, Operation Allies Welcome (Mar. 13, 2023), *https://www.dhs.gov/allieswelcomes.*

[154] *See Matter of Pula,* 19 I&N Dec. 467, 473 (BIA 1987) (finding that the circumvention of immigration laws can be considered as a negative discretionary factor in asylum adjudications); USCIS Policy Manual, Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS–PM A.10] (Apr. 21, 2023), *https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10#footnote-31.*

from removal for which they may be eligible. INA 236(c), 8 U.S.C. 1226(c); 8 CFR 1003.19(h)(2)(i)(C); INA 241(a)(2), 8 U.S.C. 1231(a)(2); INA 236A(a), 8 U.S.C. 1226a(a). Noncitizens subject to TRIG are ineligible for asylum, statutory withholding of removal, or withholding of removal under the CAT, absent a discretionary exemption from DHS, INA 208(b)(2)(v), 8 U.S.C. 1158(b)(2)(v); INA 241(b)(3)(B)(iv), 8 U.S.C. 1231(b)(3)(B)(iv); 8 CFR 208.16(d)(2); INA 212(d)(3)(B)(i), 8 U.S.C. 1182(d)(3)(B)(i), as are noncitizens for whom there are reasonable grounds to regard as dangers to the security of the United States, INA 208(b)(2)(iv), 8 U.S.C. 1158(b)(2)(iv); INA 241(b)(3)(B)(iv), 8 U.S.C. 1231(b)(3)(B)(iv); 8 CFR 208.16(d)(2).

Comment: A local government voiced concern that the five-year re-entry ban if the asylum seeker violates the rule creates additional roadblocks for the most vulnerable individuals.

Response: The five-year ground of inadmissibility for those ordered removed following expedited removal proceedings is based on statute, INA 212(a)(9)(A)(i), 8 U.S.C. 1182(a)(9)(A)(i), and cannot be changed through administrative rulemaking. This statute applies equally to noncitizens who are not subject to this rule. Despite prior removal, noncitizens can still seek statutory withholding of removal or protection under the CAT within the five-year period. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 1208.16.

C. Alternatives and Other General or Mixed Feedback

1. Address Root Causes of Migration

Comment: A number of commenters requested additional information on the Administration's ongoing efforts to address the root causes of migration, and suggested that, instead of implementing this rule, the United States should focus on providing economic, social, and political support to the countries from which the migrants are fleeing. Another commenter stated that long-term solutions are needed, such as investing in regional stability and humanitarian aid that contribute to human security, addressing the precursors of forced migration, and diminishing the threats that put vulnerable communities at risk. Some commenters suggested that there should be a comprehensive plan to both improve the conditions in Latin American and Caribbean countries by eliminating U.S. sanctions, as well as ''offering asylum to large groups of refugees'' in the United States.

Commenters also stated that we should devote more resources to helping people from countries such as Haiti, Venezuela, and other Central American countries. Similarly, commenters stated that the United States should provide additional aid to the region and promote democratic values and good governance with an eye towards creating meaningful reforms, particularly in areas that drive irregular migration such as corruption and lack of opportunity. Other commenters stated that in determining eligibility for asylum, the proposed rule would fail to consider significant dangers such as gang violence, starvation, and natural disasters. A commenter expressed further concern that the proposed rule attempts to control the border by reducing the number of USBP encounters with migrants, reasoning that this approach would not address the root cause of increased migration.

One commenter stated that, while deterrence programs may result in temporary dips in the number of people presenting or apprehended at the border, they have no long-term effect because they do not address the root causes forcing people from their homes. Another commenter stated that for many individuals, fleeing their countries in haste and without resources is not optional and they will continue to do so unless the situation in their countries changes. Another commenter stated that the United States should support Latin and Central American governments' capacity to strengthen humanitarian protections and migration management systems by investing in technical assistance and institutional capacity and investing in sustainable infrastructural needs and social safety nets (including education, stable employment, public safety, and economic support) in Mexico and Central America.

Response: The Departments agree that the United States must consistently engage with partners throughout the Western Hemisphere to address the hardships that cause people to leave their homes and come to our border. The migratory trends at the SWB today will persist long into the future if the root causes of migration are not addressed. The United States has been engaging with regional partners to address the root causes of migration, but this rule is nonetheless necessary to address a potential surge of migrants at the SWB in the near term.

In June 2022, the United States partnered with 19 other countries in the Western Hemisphere in endorsing the L.A. Declaration, which asserts ''the need to promote the political, economic, security, social, and environmental conditions for people to lead peaceful, productive, and dignified lives in their countries of origin. Migration should be a voluntary, informed choice and not a necessity.'' [155] In addition, nations including the United States committed to implementing programs to stabilize communities hosting migrants and asylum seekers, providing increased lawful pathways and protections for migrants and asylum seekers residing in or traveling through their countries, and humanely enforcing existing immigration laws.[156]

Earlier, in July 2021, the United States began working closely with countries in Central America to prioritize and implement a strategy that addresses the root causes of irregular migration with the desired end-state being ''a democratic, prosperous, and safe Central America, where people advance economically, live, work, and learn in safety and dignity, contribute to and benefit from the democratic process, have confidence in public institutions, and enjoy opportunities to create futures for themselves and their families at home.'' [157] At the same time, the United States also presented the CMMS, which aims to advance safe, orderly, legal, and humane migration, including access to international protection for those in need throughout North and Central America.[158] On April 27, 2023, DHS and the Department of State announced plans to establish regional processing centers and expand refugee resettlement commitments in the region.[159] Existing high levels of irregular migration, however, make clear that such efforts are, on their own, insufficient in the near term to fundamentally influence migrants' decision-making, to reduce the risks associated with current levels of irregular migration and the anticipated further surge of migrants to the border after the Title 42 public health Order is terminated, or to protect migrants from human smugglers that profit from their vulnerability. *See* 88 FR at 11716. The United States will continue to work with our regional

[155] The White House, Los Angeles Declaration on Migration and Protection (June 10, 2022), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/.*

[156] *Id.*

[157] *See, e.g.,* National Security Council, U.S. Strategy for Addressing the Root Causes of Migration in Central America 5 (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf.*

[158] *See, e.g.,* The White House, Fact Sheet: The Collaborative Migration Management Strategy (July 29, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-the-collaborative-migration-management-strategy/.*

[159] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

partners to manage migration across the Hemisphere.

2. Prioritize Funding and Other Resources

Comment: Many commenters urged the Government to prioritize funding, other resources, or alternative policies, reasoning that these would make border processing and asylum adjudications more effective and efficient. Some commenters focused on funding, suggesting that the Government should request additional funding from Congress, that the Departments should be prioritizing funding and staffing for the HHS, Office of Refugee Resettlement, USCIS, and U.S. immigration courts, or that the Government should prioritize investing in community-based alternatives, including robust funding and expansion of asylum processing at POEs and investment in NGOs and civil society organizations.

Other commenters suggested more generally that the Government devote other resources to immigrant arrivals. For example, one commenter said that DHS should focus on ''increasing the number of resources at the SWB to safely and fairly process the influx of migration at the border itself,'' including creating shelters near the southern border for noncitizens without family and friends to support them while they await processing of their claim. Another commenter, however, instead suggested that asylum seekers be transferred to communities throughout the United States, along with resources to ensure that asylum seekers and receiving communities are supported. One commenter stated that, instead of the proposed rule, DHS should train border officials to identify asylum claims or assess credible fear. Conversely, another commenter stated that more AOs, not CBP officers, are needed to interview asylum seekers. Commenters also stated the Departments should address significant failures in structure, functioning, and processing through staffing, budget review, training for AOs and judges to reduce appeals, training for DHS attorneys about docket management, and other means.

Another commenter requested that DHS consider ''improving border infrastructure for high volume facilities,'' and noted that DHS did not explain why it lacked the infrastructure, personnel, and funding to sustain processing levels of high numbers of migrants. One commenter expressed concern that CBP does not have sufficient resources in sectors along the SWB to patrol the border and detain migrants and expressed concern about the number of migrants who successfully evade USBP and enter the country.

Some commenters suggested alternative policy proposals to pursue instead of the proposed rule. For example, commenters recommended that DHS widely advertise the need for sponsors for asylum seekers and facilitate their applications for sponsorship. One commenter suggested providing additional resources to Mexico and other transit countries to improve their asylum-processing capacities.

Response: The Departments acknowledge commenters' suggestions for increasing resources, both financial and otherwise, to account for migrant arrivals at the SWB. The Departments first note that they have already deployed additional personnel, technology, infrastructure, and resources to the SWB and that additional financial support would require additional congressional actions, including significant additional appropriations, which are outside of the scope of this rulemaking. The Departments agree with commenters that additional resources would provide benefits for managing the border. The Departments have, for example, significantly increased hiring of AOs and IJs over the past decade.[160] AOs and IJs possess experience in handling asylum and related adjudications; receive regular trainings on asylum-related country conditions and legal issues, as well as non-adversarial interviewing techniques; and have ready access to country-conditions experts.[161] However, it is not feasible for the Departments to quickly hire sufficient qualified personnel or increase other resources to efficiently, effectively, and fairly handle the volume of encounters projected by May 2023, when a further surge of migrants to the SWB is expected following the lifting of the Title 42 public health Order.

Furthermore, the Departments note that they are leading ongoing Federal Government efforts to support NGOs and local and state governments as they work to respond to migratory flows impacting their communities. As noted in the NPRM, FEMA spent $260 million in FYs 2021 and 2022 on grants to non-governmental and state and local entities through the EFSP–H to assist migrants arriving at the SWB with shelter and transportation. *See* 88 FR at 11714. In November 2022, FEMA released $75 million through the program, consistent with the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023.[162] In addition, the Bipartisan Year-End Omnibus, which was enacted on December 29, 2022, directed CBP to transfer $800 million in funding to FEMA to support sheltering and related activities for noncitizens encountered by DHS. The Omnibus authorized FEMA to utilize this funding to establish a new Shelter and Services Program and to use a portion of the funding for the existing EFSP–H, until the Shelter and Services Program is established.[163] On February 28, 2023, DHS announced a $350 million funding opportunity for EFSP–H.[164] This is the first major portion of funding that is being allocated for humanitarian assistance under the Omnibus funding approved in December.[165] For the new Shelter and Services Program, FEMA and CBP have held several public listening sessions and are developing plans to release a Notice of Funding Opportunity prior to September 2023 for the second major portion of funding allocated by Omnibus to assist migrants encountered by DHS.

Additionally, on April 27, 2023, DHS announced that it has awarded more than $135 million to communities to date this fiscal year and will award an additional $290 million in the coming weeks.[166] The Departments are also ramping up coordination between state and local officials and other Federal agencies to provide resources, technical assistance, and support, including through regular information sessions with stakeholders to ensure that the program is broadly understood and the funds are accessible.[167] The Departments will continue to mobilize

[160] EOIR, Adjudication Statistics: Immigration Judge Hiring (Jan. 2023), *https://www.justice.gov/eoir/page/file/1242156/download;* Citizenship and Immigration Services Ombudsman, Annual Report 2020 at 45 (June 30, 2020), *https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf.*

[161] *See* 8 CFR 208.1(b).

[162] Public Law 117–180, Division A, sec. 101(6), 131 Stat. 2114, 2115.

[163] Public Law 117–328, Division F, Title II, Security Enforcement, and Investigations, U.S. Customs and Border Protection, Operations and Support.

[164] *See* DHS, Press Release, *The Department of Homeland Security Awards $350 Million for Humanitarian Assistance Through the Emergency Food and Shelter Program* (Feb. 28, 2023), *https://www.dhs.gov/news/2023/02/28/department-homeland-security-awards-350-million-humanitarian-assistance-through;* DHS Grant Opportunity DHS–23–DAD–024–00–03, Fiscal Year 2023 Emergency Food and Shelter National Board Program—Humanitarian (EFSP) ($350M) (Feb. 28, 2023), *https://www.grants.gov/web/grants/view-opportunity.html?oppId=346460.*

[165] *Id.*

[166] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[167] *See id.*

faith-based and non-profit organizations supporting migrants, including those providing temporary shelter, food, transportation, and humanitarian assistance as individuals await the outcome of their immigration proceedings.[168]

With regard to CBP resources at the border, CBP continues to increase facility capacity and to look to new facilities to further expand capacity. *See* 88 FR at 11714. In addition, CBP continues to take steps to facilitate more efficient processing of encountered migrants so that agents are able to remain in the field and patrol the border. For example, USBP has deployed non-uniformed Border Patrol Processing Coordinators (''BPPCs''), who can provide crucial support to USBP facilities, including humanitarian care to individuals in custody, transportation, and processing assistance.[169] As of March 15, 2023, USBP had hired 961 BPPCs, with more individuals in the hiring process.[170] Additionally, CBP has invested in virtual and mobile processing technologies, which enables USBP agents and officers to assist SWB sectors without needing to be physically present in these locations.[171] All of these steps enable USBP agents to return to the field to conduct their law enforcement duties, while ensuring safe conditions for individuals in custody. However, as noted in the NPRM, the increased numbers of migrants entering the United States—and the anticipated surge following the lifting of the Title 42 public health Order—will continue to strain CBP resources. *See* 88 FR at 11706. Thus, the Departments believe that this rule is necessary to disincentivize migrants from attempting to enter the United States without authorization.

The Departments do not agree with commenters' suggestions that alternative policies should be pursued in place of this rule. For example, advertising the need for asylum sponsors would not sufficiently address the anticipated influx of migration at the SWB. The Departments have created, and continue to expand, lawful pathways to enter the United States, which will be available alongside this rule to encourage the use of all lawful pathways and discourage irregular migration to the United States. In contrast, were the Departments to take a hiring-only approach that does not expand lawful pathways or consequences for unlawful entry, the Departments estimate that irregular arrivals would likely increase after the expiration of the Title 42 public health Order, adding to the current backlog of asylum cases. Such a policy would likely have no immediate effect on arrivals at the SWB, necessitating continued surges of DHS resources to POEs and the SWB to support processing.

The Departments note that the rule requires collaboration across the Departments. CBP, USCIS, and DOJ are all part of the whole-of-government approach necessary to address irregular migration and ensure that the U.S. asylum system is fair, orderly, and humane. The Departments acknowledge comments suggesting that CBP officials should be trained to conduct credible fear screenings. The Asylum Processing IFR clarified that a ''USCIS asylum officer'' will conduct the credible fear interview. 8 CFR 208.30(d). This is consistent with the INA, which specifies that only AOs (as opposed to immigration officers) conduct credible fear interviews, *see* INA 235(b)(1)(B)(i), 8 U.S.C. 1225(b)(1)(B)(i); 8 CFR 208.30(d), and make those determinations, *see* INA 236(b)(1)(B)(iii), 8 U.S.C. 1225(b)(1)(B)(iii); *see also* 8 CFR 208.30(c) through (e); 87 FR at 18136. AOs receive training and possess experience in handling asylum and related adjudications; receive regular trainings on asylum-related country conditions and legal issues, as well as non-adversarial interviewing techniques; and have ready access to country conditions experts. *See* 87 FR at 18136. As noted above, hiring of additional AOs is ongoing, and DHS recently announced that it is surging AOs to complete credible fear interviews at the SWB more quickly.[172]

Comment: Some commenters suggested that DHS should better utilize or increase its detention capacity to account for the anticipated migratory flow, as an alternative to the approach adopted in this rule. One commenter suggested that DHS increase its detention capacity to account for the mandatory detention requirements at section 235(b)(1)(B)(ii) of the INA, 8 U.S.C. 1225(b)(1)(B)(ii), and to better use the capacity it has, citing unused detention space in the summer of 2021. The same commenter noted that section 212(d)(5)(A) of the INA, 8 U.S.C. 1182(d)(5)(A), allows DHS to parole noncitizens into the United States in limited circumstances, but claimed that the proposed rule makes parole the default and detention the exception, contrary to statute. The commenter argued that expanded use of detention would serve as a greater deterrent than this rule and objected to a reduction in detention capacity it identified in the Administration's FY 2024 budget. Similarly, another commenter stated that the Departments should request from Congress the resources necessary to expand detention centers' capacity to handle the current migratory flow.

Response: To the extent that the commenters are contending that DHS is capable of obtaining bedspace sufficient for detaining all inadmissible noncitizens predicted to enter the United States who could potentially be subject to detention pursuant to section 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), following the lifting of the Title 42 public health Order, the Departments strongly disagree. DHS's ability to detain an individual on any given day is determined by many different factors, including the availability of appropriated funds; the number and demographic characteristics of individuals in custody, as well as those encountered at or near the border or within the interior of the United States; and the types of facilities with available bedspace. In addition, there are capacity restrictions at individual facilities imposed for a variety of reasons ranging from public health requirements to court-ordered limitations that also constrain the availability of detention space.

The Departments also disagree with the commenter's assertion that this rule makes parole the default. This rule does not address parole or change DHS's detention practices. Rather, this rule creates a rebuttable presumption regarding eligibility for asylum.

3. Further Expand Refugee Processing or Other Lawful Pathways

Comment: Several commenters suggested increasing access to protection and improving processes to encourage noncitizens to seek asylum in lawful and orderly ways, but without imposing a condition on eligibility for asylum for noncitizens who fail to do so. Commenters suggested that the United States should expand regional refugee processing, increase asylum processing and humanitarian programs, and expand and create new lawful pathways, in lieu of pursuing the proposed rule. One commenter said the Administration should use Temporary Protected Status broadly, including for the countries focused on in the proposed rule and other countries

[168] *See id.*

[169] Testimony of Raul Ortiz, ''Failure by Design: Examining Sec'y Mayorkas' Border Crisis'' (Mar. 15, 2023), *https://www.cbp.gov/about/congressional-resources/testimony/Ortiz-CHS-15MAR23.*

[170] *Id.*

[171] *Id.*

[172] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

where safe return is impossible. Others recommended creating viable alternatives to asylum for lawful admission to the United States, including decreasing waits for family-based immigration or increasing and streamlining migration opportunities based on skilled labor, citing the Canadian Federal Skilled Worker Express Entry policy as a successful example. Another commenter stated that the Departments should consider policies facilitating fast-track arrival in the United States, including quickly approved in-country visas and widely available humanitarian parole, and streamlining asylum regulations to more broadly encompass the types of dangers and persecution migrants are fleeing today.

Response: The United States has made and will continue to make extensive efforts to expand refugee processing and lawful pathways generally. *See* Section IV.B.2.i of this preamble. For example, on April 27, 2023, DHS and the Department of State announced they will establish regional processing centers in several countries in the Western Hemisphere, including Guatemala and Colombia, ''to reduce irregular migration and facilitate safe, orderly, humane, and lawful pathways from the Americas.'' [173] Individuals from the region will be able to make an appointment to visit the nearest regional processing center before traveling, receive an interview with immigration specialists, and if eligible, be processed rapidly for lawful pathways to the United States, Canada, and Spain, including USRAP.[174] Existing levels of unlawful migration, however, make clear that such efforts are, on their own, insufficient in the near term to change the incentives of migrants, reduce the risks associated with current levels of irregular migration and the anticipated surge of migrants to the border, and protect migrants from human smugglers that profit from their vulnerability. *See* 88 FR at 11716. The Departments' recent experience has shown that an increase in lawful pathways coupled with consequences for not using such pathways can significantly—and positively—affect behavior and undermine smuggling networks, as described in Section II.A of this preamble. The Departments also note that while they will consider the commenters' specific suggestions for other lawful pathways or alternatives for entry to the United States, this rule does not create, expand, or otherwise constitute the basis for any lawful pathways.

4. Require Migrants To Wait in Mexico or Other Countries

Comment: Some commenters stated that the United States should reimplement the MPP, with one stating that MPP caused a drop in border crossings. A commenter argued that reinstating MPP would have all the benefits that the Departments are seeking to achieve via the proposed rule, but without the rule's downsides, which the commenter argued include increasing incentives for irregular migration. The commenter also stated that the Departments' justifications for ending MPP, including a lack of infrastructure and cooperation from Mexico, are insufficient, arguing that if attempted border crossings are deterred by MPP then many fewer resources will be required, and that the Administration has not sufficiently explained why Mexico would not be willing to cooperate with a reimposition of MPP when it agreed to do so in the recent past. Another commenter suggested that MPP should be restarted and the United States pay for safe housing and food for migrants who are waiting in Mexico during their legal proceedings.

Response: The Departments disagree with commenters' contentions that the explanation given in the NPRM regarding why the Departments are not reinstituting MPP is insufficient. *See* 88 FR at 11731. The Secretary of Homeland Security weighed the full range of MPP's costs and benefits, explaining, among other things, that MPP is not the best tool for deterring unlawful migration; that MPP exposes migrants to unacceptable risks to their physical safety; and that MPP detracts from the Executive's efforts to manage regional migration. Moreover, given the Departments' knowledge and understanding of their own resources and infrastructure constraints, as well as the Government of Mexico's statement on February 6, 2023, affirming its willingness to cooperate in international agreements relating to refugees (including the L.A. Declaration) and endorsing lawful pathways, including the CHNV processes,[175] the Departments continue to believe that promulgation of this rule is the appropriate response to manage and avoid a significant further surge in irregular migration after the Title 42 public health Order is lifted.

As explained in the NPRM, programmatic implementation of the contiguous-territory return authority requires Mexico's concurrence and ongoing support and collaboration. *See* 88 FR at 11731. When DHS was previously under an injunction requiring it to re-implement MPP, the Government of Mexico would only accept the return of MPP enrollees consistent with available shelter capacity in specific regions, and indeed had to pause the process at times due to shelter constraints. Notably, Mexico's shelter network is already strained from the high volume of northbound irregular migration happening today. In February 2023, the Government of Mexico publicly announced its independent decision that it would not accept the return of individuals pursuant to section 235(b)(2)(C) of the INA, 8 U.S.C. 1225(b)(2)(C).[176]

Additionally, the resources and infrastructure necessary to use contiguous-territory return authority at the scale that would be required given current and anticipated flows are not currently available. To employ the contiguous-territory return authority at a scale sufficient to meaningfully address the anticipated migrant flows, the United States would need to rebuild, redevelop, and significantly expand infrastructure for noncitizens to be processed in and out of the United States and attend immigration court hearings throughout the duration of their removal proceedings. This would require, among other things, the construction of substantial additional court capacity along the border. It would also require the reassignment of IJs and ICE attorneys to conduct the hearings and CBP personnel to receive and process those who are corning into and out of the country to attend hearings.

Comment: Other commenters suggested numerous ideas that would require migrants to wait for cases to be heard outside the United States or to create additional opportunities to apply for asylum from outside of the United States. One commenter suggested that the United States allow asylum seekers to present themselves at embassies, refugee camps, or U.S. military bases to make their claims without the need to undertake the dangerous journey to the U.S. border. A commenter suggested setting up a controlled process to allow a fixed number of migrants into the United States this year, managed through embassies abroad, and stated

[173] DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[174] *See id.*

[175] Government of Mexico, *SRE rechaza reimplementación de estancias migratorias en México bajo la sección 235(b)(2)(C) de la Ley de EE.UU.* (Feb. 6, 2023), *https://www.gob.mx/sre/prensa/sre-rechaza-reimplementacion-de-estancias-migratorias-en-mexico-bajo-la-seccion-235-b-2-c-de-la-ley-de-inmigracion-y-nacionalidad-de-eeuu.*

[176] *Id.*

that it is inhumane to allow migrants to travel to the border only to turn them down. The same commenter also stated that such a controlled process would stop trafficking, drugs, and criminals from entering the country.

Commenters suggested implementing remote teleconferencing technology so that credible fear interviews could be conducted over Zoom or another platform from outside the United States in lieu of using the CBP One app to make appointments, with at least one suggesting that if the migrant's credible fear claim is accepted, they be sent an email stating that the migrant can be granted humanitarian parole into the United States for a final asylum hearing. Another commenter suggested that, instead of implementing this rule, DHS should create a virtual application and video hearing system that would allow migrants to apply and be processed for asylum while still abroad. At least one commenter suggested that migrants be given a temporary work card and ID and be required to pay a penalty tax and U.S. taxes to cover the expenses of managing immigration services. At least one commenter suggested creating a single border crossing dedicated to processing asylum claims, similar to the historical practice at Ellis Island.

Response: Pursuant to section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), only noncitizens who are ''physically present in the United States or who arrive[] in the United States'' can apply for asylum. Similarly, the expedited removal provisions in section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), apply only to noncitizens within the United States. Thus, while credible fear interviews may be conducted remotely (*i.e.,* telephonically), such interviews cannot be conducted for those who are abroad and have not—as required for such interviews—entered the United States, been processed for expedited removal, and asserted a fear of persecution or torture or of return to their country or an intention to apply for asylum.[177] In any event, the intent of this rule is to address the expected surge of migration following the lifting of the Title 42 public health Order on May 11, 2023. Commenters' suggestion that the Departments should create opportunities for noncitizens who have not entered the United States to apply for asylum at U.S. embassies, military bases, a virtual application abroad, or other locations, even if legally available, would not be available in the short-term or at the scale that would be required given current and anticipated flows. Similarly, creating a single border crossing dedicated to processing asylum claims, even if legally permissible, would not be operationally feasible, particularly in the short term.

However, as noted elsewhere in this document, USRAP is expanding its operations in the Western Hemisphere, which is the appropriate pathway for noncitizens outside the United States to seek admission as a refugee. *See* INA 207, 8 U.S.C. 1157. On April 27, 2023, DHS and the Department of State announced that the United States Government in cooperation with other countries of the L.A. Declaration will establish regional processing centers in several locations throughout the Western Hemisphere to reduce irregular migration.[178] The United States Government will commit to welcoming thousands of additional refugees per month from the Western Hemisphere—with the goal of doubling the number of refugees the United States as part of the L.A. Declaration.[179] The Departments also note that Congress has provided that asylum applicants may receive employment authorization no less than 180 days subsequent to the filing of their asylum application. *See* INA 208(d)(2), 8 U.S.C. 1158(d)(2). Additionally, it is not within the Departments' authority to impose taxes.

5. Additional Measures

Comment: Commenters suggested that the United States adopt more restrictive measures instead of this rule, such as requiring all SWB arrivals to seek asylum in Mexico first; requiring all migrants to be returned to their country of origin for two years to wait for their cases to be heard; or creating a bar to asylum for those who are denied asylum in other countries. Another commenter recommended that the rule require that a migrant must seek and be denied protection in each country through which they travel, rather than just one country.

One commenter suggested that the President should use the authority provided by section 212(f) of the INA, 8 U.S.C. 1182(f), to suspend the entry of migrants in order to address the border crisis. This commenter also suggested that DHS make efforts to enforce all deportation orders, expand the use of expedited removal to the fullest extent authorized by Congress, and post ICE agents in courtrooms to immediately enforce removal orders.

Another commenter suggested the rule should also apply to the Northern border and the maritime borders of the United States.

Response: The Departments acknowledge the commenters' suggestions but do not believe the alternatives proposed by the commenters are suitable to address operational concerns or meet the Departments' policy objectives.

As an initial matter, a categorical requirement that all individuals arriving at the SWB seek asylum in Mexico first would be inconsistent with the United States' ongoing efforts to share the responsibility of providing asylum and other forms of protection with the United States' regional partners. The United States Government remains committed to working with regional partners to jointly address historic levels of migration in the hemisphere and will continue to engage with the governments of Mexico and other regional partners to identify and implement solutions. Furthermore, there may be individuals for whom Mexico is not a safe alternative.

The Departments disagree with the commenter's suggestion that noncitizens be required to seek and be denied protection in each country through which they travel. Mexico or other countries through which certain individuals travel en route to the United States may not be a safe alternative for particular individuals, as discussed elsewhere in this preamble, *see* Sections IV.B.4.vii and IV.E.3.iv.d–(e). The rule therefore strikes a balance: It provides an exception from its presumption of ineligibility for individuals who seek and are denied protection in a third country, but it recognizes that for some individuals, particular third countries—or even all third countries—may not be a viable option. The rule therefore provides additional exceptions and rebuttal grounds for the presumption of ineligibility it creates.

Additionally, U.S. obligations under international and domestic law prohibit returning noncitizens to a country where their life or freedom would be threatened because of a protected ground, or where they would be subject to torture.[180] DHS cannot remove a

[177] *See* INA 235(b)(1), 8 U.S.C. 1225(b)(1).

[178] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[179] *See id.*

[180] INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 1208.16, 1208.17. The Departments note that 8 CFR 208.16(b)(3), 1208.16(b)(3) were amended by the by Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020), which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea Legal Servs.* v. *U.S. Dep't of Homeland Sec.,* 512 F. Supp. 3d 966, 969–70 (N.D. Cal. 2021) (''*Pangea II*'') (preliminarily enjoining the rule). Similarly, 8 CFR 208.16(e), 1208.16(e) were removed by the Criminal Asylum Bars Rule, Procedures for Asylum and Bars

Continued

noncitizen without first obtaining a removal order and cannot remove a noncitizen to a country about which the noncitizen has expressed fear of return without first determining whether they are entitled to protection pursuant to the withholding of removal statute and the regulations implementing the CAT.

The Departments disagree with the recommendation to establish a bar to asylum for those who are denied asylum in other countries. Those denials may be due to a variety of factors unrelated to the applicant's underlying claim, such as the foreign country's unique restrictions on asylum. Furthermore, such a proposal could discourage asylum seekers from applying for asylum in other countries, since a denial from other countries would result in the harsher consequence of also being ineligible for asylum in the United States.

Regarding the suggestion to suspend entry pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), the Departments note that suspension of entry requires a presidential proclamation, which is beyond the Departments' authorities. With this rule, which is fully consistent with domestic and international legal obligations, the Departments are exercising their authorities to address current and expected circumstances at the SWB, to avoid unduly negative consequences for noncitizens, to avoid unduly negative consequences for the U.S. immigration system, and to provide ways for individuals to seek protection in the United States and other countries in the region. 88 FR at 11730.

Separate from this rulemaking, DHS has been increasing and enhancing the use of expedited removal for those noncitizens who cannot be processed under the Title 42 public health Order.[181] The Departments have been dedicating additional resources, optimizing processes, and working with the Department of State and countries in the region to increase repatriations.[182] On April 27, 2023, DHS announced that the United States, in coordination with regional partners, has dramatically scaled up the number of removal flights per week, which will double or triple for some countries.[183] With this increase in removal flights, migrants who cross the U.S. border without authorization and who fail to qualify for protection should expect to be swiftly removed and subject to at least a five-year bar to returning to the United States.[184] Regarding the suggestion to expand the use of expedited removal, the Departments note that this rule works in conjunction with expedited removal, as the rebuttable presumption will be applied during credible fear interviews for noncitizens placed in expedited removal after claiming a fear. To the extent that the commenter is suggesting that the Secretary should exercise his ''sole and unreviewable discretion'' to extend expedited removal proceedings to certain other categories of noncitizens who have not shown that they have been physically present in the United States for two years, that suggestion lies outside the scope of this rulemaking. *See* INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii).[185] Finally, the Departments note the process for taking noncitizens into custody for the execution of removal orders also is beyond the scope of this rule.

With respect to a commenter's suggestion that the rule apply to the Northern border, the Departments do not currently assess that application of the rebuttable presumption to such entries is necessary at the U.S.-Canada land border. With limited exceptions, these noncitizens are ineligible to apply for asylum in the United States due to the safe-third-country agreement with Canada, *see* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A); 8 CFR 208.30(e)(6), and the United States is implementing other measures to address irregular migration at that border, such as the Additional Protocol of 2022 to the STCA between the United States and Canada. The Additional Protocol expands the STCA to apply to migrants who claim asylum or other protection after crossing the U.S.-Canada border between POEs. Under the STCA, migrants who cross from Canada to the United States, with limited exceptions, cannot pursue an asylum or other protection claim in the United States and are instead returned to Canada to pursue their claim.[186]

With respect to a commenter's suggestion that the rule apply to maritime borders, the Departments have determined it is appropriate to extend the application of the rebuttable presumption not only to the U.S.-Mexico southwest land border, but also to adjacent coastal borders. The term ''adjacent coastal borders'' refers to any coastal border at or near the U.S.-Mexico border. This modification therefore means that the rule's rebuttable presumption of ineligibility for asylum applies to noncitizens who enter the United States at such a border after traveling from Mexico and who have circumvented the U.S.-Mexico land border. Moreover, the Departments are also considering and requesting comment on whether to apply the rebuttable presumption to noncitizens who enter the United States at a maritime border without documents sufficient for lawful admission during the same temporary time period, whether or not they traveled through a third country, *see* Section V of this preamble.

Comment: A commenter also suggested pursuing STCAs with transit countries as an alternative to the rule, stating that the proposed rule's reasoning on that point was insufficient. The commenter noted that the proposed rule stated that STCAs require long negotiations, but that the proposed rule itself is time-limited to noncitizens who enter within a two-year period. The commenter also stated that the proposed rule's claim that STCAs would provide lesser protection to noncitizens failed to account for the costs to states of allowing such noncitizens to have their claims adjudicated in the United States.

Response: The Departments agree that STCAs can be an important tool for managing the border. For example, on March 28, 2023, the Departments announced an update to the preexisting STCA between the United States and Canada. *See* 88 FR at 18227. That rule implemented a supplement to the U.S.-Canada STCA to extend its application to individuals who cross between the POEs along the U.S.-Canada shared border, including certain bodies of water as determined by the United States and Canada, and make an asylum or other protection claim relating to fear

to Asylum Eligibility, 85 FR 67202 (Oct. 21, 2020), which was also preliminarily enjoined. *Pangea Legal Servs.* v. *U.S. Dep't of Homeland Sec.,* 501 F. Supp. 3d 792, 827 (N.D. Cal. 2020). These orders remain in effect, and thus the 2020 version of these provisions—the version immediately preceding the enjoined amendments—are currently effective. The current version of 8 CFR 208.16 is effective with regard to all other provisions of that section.

[181] DHS, Press Release, *DHS Continue to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), *https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.*

[182] *See id.*

[183] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[184] *See id.*

[185] Section 235 of the INA continues to refer to the Attorney General, but the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, transferred immigration enforcement authorities to the Secretary of Homeland Security and provided that any reference to the Attorney General in a provision of the INA describing functions that were transferred from the Attorney General or other Department of Justice officials to DHS by the HSA ''shall be deemed to refer to the Secretary'' of Homeland Security. 6 U.S.C. 557 (codifying HSA sec. 1517); *see also* 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

[186] *See* 8 CFR 208.30(e)(6); 8 CFR 1003.42(h); 88 FR 18227; Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 FR 69480 (Dec. 29, 2004).

of persecution or torture within 14 days after such crossing. *Id.*

However, as noted in the NPRM, development of an STCA is a lengthy process. 88 FR at 11731. The recent supplement to the U.S.-Canada STCA aptly demonstrates this point; the negotiations that led to the supplement began in early 2021, over two years prior to its eventual publication. *Id.* at 18232. For this reason, the Departments find that the enactment of this rule is preferable to pursuing additional STCAs at this time because the Departments need a solution in the immediate short-term to manage the significant increase in the number of migrants expected to travel without authorization to the United States after the termination of the Title 42 public health Order.

Regarding commenters' belief that an STCA could be preferable to this rule because a STCA would prevent affected noncitizens from having their claims adjudicated in the United States, the Departments reiterate that the goal of this rule is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel, and they expect it to reduce the number of noncitizens seeking to cross the SWB without authorization.

Comment: A commenter suggested amending the rule to prioritize the cases of noncitizens who follow the lawful pathways outlined in the NPRM, rather than implementing the rebuttable presumption against those who do not. This commenter argued that doing so would encourage use of lawful pathways but not risk returning noncitizens to countries where they may be persecuted or tortured.

Response: The Departments agree that prioritizing the cases of those noncitizens who follow lawful, safe, and orderly pathways to entering the United States may result in some noncitizens with valid claims to asylum more quickly being granted asylum. However, noncitizens who do not follow such lawful, safe, and orderly pathways, including those noncitizens ultimately found ineligible for asylum or other protection, would continue to wait years for a decision on their claim for asylum or other protection. As previously noted in this preamble, the expectation that noncitizens will remain in the United States for a lengthy period during the adjudication of their claims for asylum or other protection may drive even more migration to the United States. Under this rule, such noncitizens, however, will remain in the United States for less time before a final order is entered in their case. Furthermore, prioritization alone will not address the need for quick processing of those who arrive at the SWB and the lack of resources to do so safely and efficiently. Moreover, the success of the CHNV parole processes demonstrates that the United States can effectively discourage irregular migration by coupling incentives for use of lawful pathways with disincentives to cross the SWB irregularly.

Comment: One commenter recommended the United States advance dissuasive messaging, including announcements of legal action, against relatives, friends, and criminal organizations that may promote and finance migration to the United States. Another commenter recommended that an education and awareness campaign across the Western Hemisphere and a clearer definition of the ''significant possibility'' standard could prove a potent combination of policies to restore the integrity and manageability of the U.S. asylum system at the SWB, while also preserving the country's long-standing commitment to humanitarian values.

Response: The Departments understand and agree with the need for robust messaging relating to the dangers of irregularly migrating to the United States SWB. Strengthening regional public messaging on migration is one of the eight lines of effort outlined in the CMMS.[187] In addition, the Departments regularly publicize law enforcement action and efforts against human trafficking, smuggling, and transnational criminal organizations that profit from irregular migration, often in conjunction with partners in the region.[188] The Departments intend to continue these efforts once the rule is in place.

The Departments acknowledge the commenter's concern regarding the ''significant possibility'' standard but disagree that there is a need for clarifying regulations on the statutory standard at section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v). In the context of the condition established by this rule, however, the Departments have provided additional clarification regarding the ''significant possibility'' standard in Section IV.D.1.iii of this preamble.

[187] The White House, *FACT SHEET: The Collaborative Migration Management Strategy* (July 29, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-the-collaborative-migration-management-strategy/.*

[188] *See, e.g.,* L.A. Declaration Fact Sheet (''The United States will announce a multilateral 'Sting Operation' to disrupt human smuggling networks across the Hemisphere.'').

D. Legal Authority and Background

1. Immigration and Nationality Act

i. Section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1)

Comment: Commenters claim that the proposed rule would violate both the Refugee Act and the INA. Specifically, commenters cited the Refugee Act, which they say both contains principles of non-refoulement and bars any distinction, including based on nationality, for noncitizens who are ''physically present in the United States or at a land border or port of entry.'' Refugee Act of 1980, 94 Stat. at 105. Additionally, commenters stated this proposed rule goes further by adding additional requirements that did not exist in the Refugee Act and do not exist in the INA. While some commenters acknowledge and agree that the proposed rule is within the scope of the Departments' authority and is consistent with the INA, other commenters expressed concern that the proposed rule would be contrary to the plain language of section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), which states, ''Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.'' Commenters asserted that the INA does not require those seeking protection to apply before entering or at a POE or to schedule an appointment through a website or app in order to make an application, but instead allows applications from anywhere along the border. Some commenters described a fundamental right to apply for asylum for anyone inside the United States. Commenters asserted that entering the United States either through a POE or across the SWB and asking for asylum constitutes a ''lawful pathway.'' Another asserted that the proposed rule effectively creates a new legal framework by which to evaluate asylum claims in conflict with the statutory process provided by Congress, while another commenter stated that the proposed rule will cause confusion among asylum seekers. Commenters stated that the proposed rule would result in migrants who seek refuge at the SWB being turned away. At least one commenter asserted that the proposed rule violates the Refugee Act because it violates the right to uniform treatment.

Another commenter described the proposed rule as disparate treatment based on manner of entry, with particular concern for those who entered between POEs. Commenters stated that Congress clearly intended to allow noncitizens to apply for asylum regardless of manner of entry without requiring that a noncitizen first apply for asylum elsewhere while in transit. Commenters further asserted that analyzing an asylum application should focus on the applicant's reasonable fear of persecution rather than their manner of entry. Commenters similarly stated that the Departments should not and cannot categorically deny asylum for reasons unrelated to the merits of the claim itself. Commenters also asserted that, under *Matter of Pula,* 19 I&N Dec. 467 (BIA 1987), manner of entry may not be the dispositive factor in deciding whether a noncitizen is eligible for asylum. Similarly, commenters argued that *Matter of Pula* is binding precedent and precludes consideration of manner of entry over all other factors.

Response: This rule is consistent with U.S. law. As a threshold response, the rule does not require the Departments to turn away migrants at the SWB or to categorically deny all asylum applications filed by migrants who enter the United States from Mexico at the southwest land border or adjacent coastal borders. Nor does the rule prohibit any noncitizen from seeking protection solely because of the manner or location of entry into the United States. Rather, the rule is a lawful condition on eligibility for asylum, as authorized by section 208(b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B).

In response to comments that the rule violates the non-refoulement provision of the Refugee Act, as stated elsewhere in this preamble, the United States has implemented its non-refoulement obligations through section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), and the regulations implementing CAT protections at 8 CFR 208.16(c), 208.17, 208.18, 1208.16(c), 1208.17, 1208.18, and the conditions provided by this rule are not a penalty in violation of international law.

Regarding comments that the Refugee Act and subsequent amendments to the INA provide access to applying for asylum for any noncitizen ''physically present in'' or arriving in the United States, ''whether or not at a designated port of arrival'' and regardless of status, the Departments respond that this rule is not inconsistent. INA 208(a)(1), 8 U.S.C. 1158(a)(1); *see* Refugee Act of 1980, 94 Stat. at 105 (providing that the Attorney General establish ''a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum''); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), Public Law 104–208, 110 Stat. 3009, 3009–690 (amending INA 208(a)(1), 8 U.S.C. 1158(a)(1), to permit any noncitizen ''who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .)'' to apply for asylum ''irrespective of'' the noncitizen's immigration status). Critically, the rule does not prevent anyone from applying for asylum. IIRIRA separated and distinguished the ability to apply for asylum from the conditions for granting asylum. *Compare* INA 208(a)(1), 8 U.S.C. 1158(a)(1), *with* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *see also* INA 208(d)(5)(A), 8 U.S.C. 1158(d)(5)(A) (establishing procedures for consideration of asylum applications). Section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1) retains the ability for most noncitizens who are physically present in the United States to apply for asylum irrespective of whether they arrived in the United States at a POE, except that Congress created three categories of noncitizens who are barred from making an application. INA 208(a)(2)(A) through (C), 8 U.S.C. 1158(a)(2)(A) through (C).[189] Separately, Congress provided ''[c]onditions for granting asylum,'' which include six statutory exceptions to demonstrating eligibility for asylum as well as authority for the Departments to promulgate additional conditions and limitations on eligibility for asylum. INA 208(b)(2)(A)(i) through (vi), (C), 8 U.S.C. 1158(b)(2)(A)(i) through (vi), (C).[190] As some commenters noted, by creating exceptions to who is eligible to receive asylum and by authorizing the Departments to create new exceptions to eligibility, Congress saw nothing inconsistent in barring some individuals who may apply for asylum from receiving that relief.[191] *See R–S–C* v. *Sessions,* 869 F.3d 1176, 1187 (10th Cir. 2017).

Additionally, under this rule and contrary to commenter assertions, manner of entry, standing alone, is never dispositive. *Cf. E. Bay Sanctuary Covenant* v. *Biden* (''*East Bay III*''), 993 F.3d 640, 669–70 (9th Cir. 2021) (enjoining the Proclamation Bar IFR as ''effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress in section 1158(a)''). Rather, the rule provides that a subset of noncitizens seeking asylum—*i.e.,* those who travel through a specified third country, enter the United States during a two-year period after the effective date of the rule, and are not subject to one of four enumerated categories of excepted individuals, including those who use an identified lawful pathway to enter the United States—are subject to a rebuttable presumption of ineligibility. 8 CFR 208.33(a)(1) through (3), 1208.33(a)(1) through (3); 88 FR at 11707. This presumption is not categorical, but rather involves a case-by-case consideration of facts and factors. Indeed, as discussed in Sections IV.B.2.ii and IV.D.2 of this preamble, the narrower application and numerous exceptions and methods of rebutting the presumption demonstrate the differences between the prior, categorical bars that are now enjoined, and one of which is vacated. *See also* Sections IV.E.9 and IV.E.10 of this preamble (removing the TCT Bar Final Rule and the Proclamation Bar IFR from the CFR).

Furthermore, the rule is within the scope of the Departments' authority because it adds a condition on eligibility for asylum permitted under section 208(b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), not a sweeping categorical bar that would preclude a grant of asylum solely based

[189] *See* INA 208(a)(2)(A) through (C), 8 U.S.C. 1158(a)(2)(A) through (C) (enumerating: (A) noncitizens who may be removed to a safe third country pursuant to a bilateral or multilateral agreement; (B) noncitizens who did not file for asylum within one year after arriving in the United States unless they demonstrate the existence of extraordinary or materially changed circumstances; and (C) noncitizens who previously applied for asylum and had that application denied unless they demonstrate the existence of extraordinary or materially changed circumstances).

[190] *See* INA 208(b)(2)(A)(i) through (vi), 8 U.S.C. 1158(b)(2)(A)(i) through (vi) (barring asylum for individuals who: participate in the persecution of others, have been convicted of a particularly serious crime, have committed a serious nonpolitical crime outside the United States, are regarded as a danger to the security of the United States, have engaged in certain terrorism-related activities, or were firmly resettled in another country prior to arriving in the United States).

[191] One important distinction between the exceptions enumerated in subsection 208(a)(2) of the INA, 8 U.S.C. 1158(a)(2), and those enumerated in 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A), is that noncitizens who may apply for asylum but may be ineligible due to a (b)(2)(A) bar on eligibility may seek work authorization while their application is being adjudicated. 8 CFR 208.7(a)(1). A noncitizen who is barred from applying, *i.e.,* someone subject to a subsection (a)(2) bar, cannot obtain work authorization during this time. Because this rule does not create a bar on applying for asylum under section 208(a)(2) of the INA, 8 U.S.C. 1158(a)(2), there is no inconsistency with the provision of immediate work authorization to noncitizens who use one of the provided lawful parole processes to enter the United States and apply for asylum. 88 FR at 11707 n.26.

on manner of entry, which some courts have found to conflict with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1). 88 FR at 11735, 11740. *Cf. East Bay III,* 993 F.3d at 669–70 (concluding that the Proclamation Bar was ''effectively a categorical ban'' on migrants based on their method of entering the United States, and that such a categorical bar is in conflict with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1)). Section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), provides that the Attorney General and Secretary ''may by regulation establish additional limitations and conditions, consistent with [section 208], under which an alien shall be ineligible for asylum.'' Similarly, section 208(d)(5)(B) of the INA, 8 U.S.C. 1158(d)(5)(B), specifies that the Attorney General and Secretary ''may provide by regulation for any other conditions or limitations on the consideration of an application for asylum,'' so long as those conditions or limitations are ''not inconsistent with this chapter.'' *See* INA 208(d)(5), 8 U.S.C. 1158(d)(5) (establishing certain procedures for consideration of asylum applications). As the Tenth Circuit explained, ''carving out a subset of'' noncitizens seeking asylum and placing a condition or limitation on their asylum applications falls within the limitations allowed by section 208(b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), and is not inconsistent with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1). *R–S–C,* 869 F.3d at 1187 n.9. Precluding such a regulation would ''render 1158(b)(2)(C) [and (d)(5)(B)] meaningless, disabling the Attorney General from adopting further limitations while the statute clearly empowers him to do so.'' *Id.*

Consistent with this authority, the Departments have promulgated other limitations or conditions on asylum eligibility, including some provisions that Congress later adopted and codified in the INA. *See* Aliens and Nationality; Refugee and Asylum Procedures, 45 FR 37392, 37392 (June 2, 1980) (imposing firm resettlement bar); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 FR 30674, 30678, 30683 (July 27, 1990) (promulgating 8 CFR 208.14(c) (1990), which provided for mandatory regulatory bars to asylum for those who have been convicted in the United States of a particularly serious crime and who constitute a danger to the security of the United States while retaining a prior regulatory bar to asylum for noncitizens who have been firmly resettled); Asylum Procedures, 65 FR 76121, 76127 (Dec. 6, 2000) (including internal relocation); *see also, e.g., Afriyie* v. *Holder,* 613 F.3d 924, 934–36 (9th Cir. 2010) (discussing internal relocation). Restraining the Departments' authority to promulgate additional limitations and conditions on the ability to establish eligibility for asylum would be contrary to congressional intent. *See Thuraissigiam,* 140 S. Ct. at 1966 (recognizing that the ''theme'' of IIRIRA ''was to protect the Executive's discretion from undue interference by the courts'') (alteration and quotation marks omitted); *R–S–C,* 869 F.3d at 1187 (reasoning that the ''delegation of authority'' in section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), ''means that Congress was prepared to accept administrative dilution'' of section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1)); *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 444–45 (1987); 88 FR at 11740.

Regarding comments that the condition created by the rule is inconsistent with the statute because it does not relate to whether a noncitizen qualifies as a refugee, the Departments respond that bars, limitations, and conditions on asylum do not necessarily and need not directly relate to whether a noncitizen satisfies the definition of a ''refugee'' within the meaning of section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42)(A), but instead can embrace policy considerations that justify a finding of ineligibility. *See, e.g., Zheng* v. *Mukasey,* 509 F.3d 869, 871 (7th Cir. 2007) (noting that IIRIRA enacted several provisions, including the one-year bar, ''intended to reduce delays and curb perceived abuses in removal proceedings''); *Ali* v. *Reno,* 237 F.3d 591, 594 (6th Cir. 2001) (recognizing that asylum law ''was never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives'') (internal marks and quotation omitted); *Matter of Negusie,* 28 I&N Dec. 120, 125 (A.G. 2020) (discussing the history of the persecutor bar, and noting that Congress intended to make ''certain forms of immigration relief,'' including asylum, ''unavailable to persecutors'').

This rule also does not, contrary to commenter concerns, violate the Refugee Act by establishing a non-uniform procedure for applying for asylum. The rule, consistent with the Refugee Act's objective to provide systematic and comprehensive procedures, establishes procedures and conditions to support the lawful, orderly processing of asylum applications. 88 FR at 11704, 11728; *see* Refugee Act, sec. 101(b), 94 Stat. at 102 (''The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.''). To be sure, the rule will not lead to the same result for each noncitizen: For example, the rebuttable presumption will not apply to noncitizens who enter the United States using a lawful pathway but will apply to noncitizens who enter the United States from Mexico at the southwest land border or adjacent coastal borders and do not establish an exception to the presumption or otherwise rebut the presumption. But the rule will apply in a uniform way to all asylum applications filed by noncitizens who are subject to its terms during the applicable time period.

The rule is likewise within the Departments' broad authority, within existing statutory bounds, to establish procedures that are tailored to different situations. INA 208(d)(1), 8 U.S.C. 1158(d)(1) (requiring the Attorney General to ''establish a procedure for the consideration of asylum applications''). Notably, asylum applicants navigate several procedurally different paths depending on their arrival in the United States and timing of their applications; some noncitizens file affirmative applications with USCIS after arriving in the United States, and others file defensive applications after being placed in expedited removal proceedings and found to have a credible fear of persecution. Others submit defensive applications while in section 240 removal proceedings. Contrary to commenter concerns, the lawful pathways to enter the United States outlined in this rule do not eliminate any of these existing procedures or categorically bar any of these applications for asylum.

Furthermore, it is not inconsistent with the INA to provide a lawful pathway that relies on use of the CBP One app. The Departments note that it is not uncommon to implement policies that encourage the use of new technologies as they become available to create efficiencies in processing, including with respect to asylum applications, such as new forms, e-filing, the use of video teleconference hearings, and digital audio recording of hearings.[192] *See, e.g.,* Executive Office

[192] In 1998, Congress passed the Government Paperwork Elimination Act, which requires federal agencies to provide the public with the ability to conduct business electronically, when practicable, with the Federal government. *See* Public Law 105–277, 1701–10, 112 Stat. 2681, 2681–749 to –751

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for Immigration Review Electronic Case Access and Filing System, 86 FR 70708 (Dec. 13, 2021) (implementing EOIR's electronic case management system); Immigration Court Practice Manual, Chapter 4.7 (Apr. 10, 2022) (providing guidance for video teleconference hearings); *id.* at Chapter 4.10(a) (providing for electronic recording of hearings). In this rule, the Departments are implementing a rebuttable presumption of ineligibility that will encourage the use of lawful pathways, including use of the CBP One app, which the Departments expect will enable POEs to manage migratory flows in a safe and efficient manner. Importantly, those who present at a POE without a CBP One appointment and demonstrate that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle will not be subject to the presumption. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Further, using the app is not required in order to qualify for an exception from or to rebut the presumption, such as where a noncitizen applied for asylum or other protection in a third country and received a final decision denying that application or where the noncitizen shows exceptionally compelling circumstances. Thus, although the rule encourages increased use of the CBP One app, which is expected to facilitate more efficient and streamlined processing along the SWB, use of the app is not required.

In response to commenters' assertions that crossing the SWB and applying for asylum is in itself a ''lawful pathway,'' the Departments reiterate that this rule does not bar a noncitizen from entering the United States from Mexico at the southwest land border or adjacent coastal borders and subsequently seeking asylum. 88 FR at 11707. However, crossing the southwest land border or adjacent coastal borders without authorization is not one of the lawful pathways provided to encourage and increase safe, orderly transit to the United States. Thus, noncitizens who choose to cross the southwest land border or adjacent coastal borders without making an appointment to present at a POE during the period covered by this rule, and who do not otherwise qualify for an exception enumerated in 8 CFR 208.33(a)(2), 1208.33(a)(2), will have to address the rebuttable presumption as part of establishing eligibility for relief, but they will nevertheless be able to apply for asylum.

As to commenters' statements that the Departments' reliance on *Matter of Pula* is misplaced, the Departments respond that the rule is consistent with historical consideration of manner of entry as a relevant factor in considering an asylum application. In *Matter of Pula,* the BIA identified—as relevant factors as to whether a noncitizen warrants the favorable exercise of discretion in granting asylum—the noncitizen's ''circumvention of orderly refugee procedures,'' including their ''manner of entry or attempted entry''; whether they ''passed through any other countries or arrived in the United States directly''; ''whether orderly refugee procedures were in fact available to help'' in any transit countries; and whether they ''made any attempts to seek asylum before coming to the United States.'' *Matter of Pula,* 19 I&N Dec. at 473–74. The BIA explained that section 208(a) of the INA, 8 U.S.C. 1158(a), required the Attorney General to establish procedures for adjudicating applications filed by any noncitizen, ''irrespective of such alien's status,'' but the BIA did not preclude consideration of the manner of entry in assessing whether to grant asylum. *Id.* at 472. The BIA also stated that while the manner of entry could ''be a serious adverse factor, it should not be considered in such a way that the practical effect is to deny relief in virtually all cases.'' *Id.* at 473. The BIA cautioned against placing ''too much emphasis on the circumvention of orderly refugee procedures'' because ''the danger of persecution should generally outweigh all but the most egregious of adverse factors.'' *Id.* at 473–74.

The Departments acknowledge that this rule places more weight on manner of entry than the Board did in *Matter of Pula.* 88 FR at 11736. But in line with *Matter of Pula,* the rule also considers factors other than manner of entry, including providing a categorical rebuttal ground for noncitizens who faced an imminent and extreme threat to life or safety at the time of entry. *Id.;* 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). And like *Matter of Pula,* this rule provides for consideration of manner of entry in assessing eligibility for some asylum seekers, but this factor is not considered in ''a way that the practical effect is to deny relief in virtually all cases.'' 19 I&N Dec. at 473. Rather, the manner of entry is only impactful for individuals who do not enter the United States using a lawful pathway, do not establish an exception to the rebuttable presumption, and do not rebut the presumption. 88 FR at 11707, 11735–36.

The Departments also recognize that the specific analysis discussed in *Matter of Pula* (considering manner of entry in the discretionary decision of whether to grant asylum) is distinct from how the rule considers manner of entry (as part of provisions governing eligibility for asylum). *See Matter of Pula,* 19 I&N Dec. at 472. Nevertheless, *Matter of Pula* supports the proposition that it is lawful to consider, and in some cases rely on, manner of entry for asylum applicants. Moreover, adjudicators are not precluded from considering the same facts when evaluating both eligibility and discretion. Indeed, it is possible for a single fact to be relevant to both determinations but dispositive as to only one. *See Kankamalage* v. *INS,* 335 F.3d 858, 864 (9th Cir. 2003) (concluding that a conviction did not render a noncitizen ineligible for asylum, but stating that the Board was ''not prohibited from taking into account Kankamalage's robbery conviction when it decides whether or not to grant asylum as a matter of discretion''); *Matter of Jean,* 23 I&N Dec. 373, 385 (A.G. 2002) (concluding that even a noncitizen who ''qualifies as a 'refugee' '' and whose criminal conviction did ''not preclude her eligibility'' for asylum could nevertheless be ''manifestly unfit for a *discretionary* grant of relief'').

Moreover, the Departments, in exercising their broad discretion to issue regulations adopting additional limitations and conditions on asylum eligibility, are not bound to consider manner of entry only as a factor contributing to whether a particular noncitizen warrants a favorable exercise of discretion. The Departments similarly disagree with the commenter who stated that the Departments are seeking to ''excuse themselves from complying with long-established Board precedent simply because the 'regulatory regime' in place today is different than the regime at the time the Board decided *Matter of Pula.*'' This rule is not in conflict with *Matter of Pula,* which remains the applicable standard for discretionary determinations. And the rule takes *Matter of Pula* as providing support for the proposition that it is lawful to consider, and in some cases rely on, manner of entry for asylum applicants. 88 FR at 11735–36.

In sum, as with other conditions and limitations imposed by section 208(b)(2) of the INA, 8 U.S.C. 1158(b)(2), this rule is grounded in important policy objectives, including providing those

(1998). Similarly, in 2002, Congress passed the E-Government Act of 2002, which promotes electronic government services and requires agencies to use internet-based technology to increase the public's access to government information and services. *See* Public Law 107–347, 116 Stat. 2899 (2002).

with valid asylum claims an opportunity to have their claims heard in a timely fashion, preventing an increased flow of migrants arriving at the SWB that will overwhelm DHS's ability to provide safe and orderly processing, and reducing the role of exploitative transnational criminal organizations and smugglers. 88 FR at 11704. In seeking to enhance the overall functioning of the immigration system and to improve processing of asylum applications, the Departments are, in the exercise of the authority to promulgate conditions and limitations on eligibility for asylum, placing greater weight on manner of entry to encourage migrants to seek protection in other countries in the region and to use lawful pathways and processes to enter the United States and access the U.S. asylum system.

ii. Statutory Bars to Asylum

Comment: Commenters stated that the proposed rule would be inconsistent with the statutory firm-resettlement and safe-third-country bars. *See* INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). Commenters argued that Congress intended for these two bars to be the sole means by which a noncitizen may be denied asylum based on a relationship with a third country. Commenters disagreed with the proposed rule, asserting it would bar asylum for anyone who travels through what the United States deems a ''safe third country.'' Similarly, another commenter stated that the proposed rule would penalize migrants who do not live adjacent to a safe third country to which they could travel directly in order to seek protection.

Response: This rule is within the Departments' broad authority to create new conditions on eligibility for asylum, and the Departments disagree that the rule conflicts with any of the exceptions to a noncitizen's ability to apply for asylum or a noncitizen's eligibility for asylum under sections 208(a)(2) or (b)(2) of the INA, 8 U.S.C. 1158(a)(2) or (b)(2). The INA's safe-third-country provision prohibits a noncitizen from applying for asylum if the noncitizen ''may be removed, pursuant to a bilateral or multilateral agreement'' to a safe third country in which the noncitizen would not be subject to persecution and ''would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.'' INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). The firm-resettlement provision precludes a noncitizen who ''was firmly resettled in another country prior to arriving in the United States'' from demonstrating eligibility for asylum. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); *see also* 8 CFR 208.15 (2020), 1208.15 (2020).[193] The two provisions provide categorical bars to asylum for noncitizens who have available, sustained protection in another country, and help protect against forum shopping. *Sall* v. *Gonzales,* 437 F.3d 229, 233 (2d Cir. 2006) (per curiam) (noting that the policy behind the safe-third-country statutory bar includes the principle that ''[t]he United States offers asylum to refugees not to provide them with a broader choice of safe homelands, but rather, to protect those arrivals with nowhere else to turn.''); *Rosenberg* v. *Yee Chien Woo,* 402 U.S. 49, 55, 56 (1971) (noting that the concept of firm resettlement is historically rooted in the notion of providing ''a haven for the world's homeless people'' while encouraging ''other nations to do likewise.''); *see also Maharaj* v. *Gonzales,* 450 F.3d 961, 988–89 (9th Cir. 2006) (en banc) (O'Scannlain, J., concurring, in part) (recognizing that the firm-resettlement bar protects against forum shopping, an issue ''that our immigration laws have long sought to avoid.''); *United States* v. *Malenge,* 294 F. App'x 642, 645 (2d Cir. 2008) (noting that a purpose of the safe-third-country agreement with Canada was to prevent forum shopping).

The Departments disagree with commenters because the INA permits the Attorney General and Secretary to create new eligibility conditions and does not limit this authority based on the content of the existing statutory conditions. *See Trump,* 138 S. Ct. at 2411–12 (recognizing that the INA ''did not implicitly foreclose the Executive from imposing tighter restrictions'' in ''similar'' areas); *E. Bay Sanctuary Covenant* v. *Garland,* 994 F.3d 962, 979 (9th Cir. 2020) (''*East Bay I*'') (acknowledging that the INA does not limit the Departments' ''authority to the literal terms of the two safe-place statutory bars''); *R–S–C,* 869 F.3d at 1187 (noting that Congress's delegation of authority in section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C) ''means that Congress was prepared to accept administrative dilution'' of the right to seek asylum). Indeed, section 208(b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), provides no subject-matter limit, other than requiring any regulation be ''consistent with'' section 208 of the INA, 8 U.S.C. 1158. *See R–S–C,* 869 F.3d at 1187 n.9. The condition created by this rule is consistent with section 208 of the INA, 8 U.S.C. 1158, as a whole, and it is consistent with the safe-third-country and firm-resettlement bars in particular. 88 FR at 11736.

Critically, unlike the safe-third-country bar, the rule does not consider whether the noncitizen could now safely relocate to a third country, and unlike the firm-resettlement bar, this rule does not categorically preclude a noncitizen from demonstrating eligibility for asylum because they are no longer in flight from persecution. *Cf. Ali,* 237 F.3d at 594 (noting that the firm-resettlement bar does not conflict with Congress's intent in providing for asylum relief ''[b]ecause firmly resettled aliens are by definition no longer subject to persecution'') (marks and citation omitted). Rather, as discussed in the NPRM, the rule encourages use of lawful pathways for migrants seeking to come to the United States, including noncitizens wishing to seek asylum in the United States. 88 FR at 11707. The rule is designed to improve processing of such asylum applications. *Id.* at 11704, 11706–07. Noncitizens will not be subject to the rebuttable presumption if they travel through a third country and seek entry into the United States through a lawful, safe, and orderly pathway. *Id.* at 11707; 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii). They also will not be subject to the rebuttable presumption if they seek and are denied asylum or other protection in a third country. 88 FR at 11707; 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). And unaccompanied children are excepted from the presumption. 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i). Moreover, even if a noncitizen is subject to the presumption of ineligibility under 8 CFR 208.33(a)(1), 1208.33(a)(1), the noncitizen may rebut that presumption in any of several ways that account for protecting the safety of those fleeing imminent harm. 88 FR at 11707; 8 CFR 208.33(a)(3), 1208.33(a)(3). Accordingly, the rule encourages noncitizens seeking to enter the United States, including those seeking asylum who have transited through a third country before arriving in the United States, to enter through lawful, safe, and orderly pathways by imposing an additional condition on the asylum eligibility of individuals who did not avail

[193] These provisions were amended by Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020), which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea Legal Services* v. *U.S. Dep't of Homeland Security* (*Pangea II*), 512 F. Supp. 3d 966, 969–70 (N.D. Cal. 2021). This order remains in effect, and thus the 2020 version of these provisions—the version immediately preceding the enjoined amendment—is currently effective.

themselves of such pathways. 88 FR at 11706–07. The rule does not preclude noncitizens who have transited through third countries without applying for protection in those countries from obtaining asylum in the United States. *Id.* at 11706–07. In addition, the rule expressly accounts for migrants who have been denied a safe haven elsewhere; if an applicant seeks asylum in a third country and is denied, the rebuttable presumption does not apply. 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C).

Comment: Commenters stated that the proposed rule would conflict with the firm-resettlement bar to asylum eligibility or render the firm-resettlement bar superfluous because it would negate the need to determine whether the noncitizen has firmly resettled or whether any potential or obtained status in a third country would not be reasonably available or reasonably retained due to issues such as processing backlogs in the third country. Commenters were also concerned that the proposed rule would not account for the risk of harm that the noncitizen might face in the third country. Commenters stated that the proposed rule would ignore congressional intent that the noncitizen have a more significant relationship with the third country—*i.e.,* be firmly resettled in that country rather than be merely transiting through the country—to be effectively rendered ineligible for asylum. Commenters asserted that requiring individuals to apply for protection in a third transit country would create a new hurdle for them because it could subject them to the firm-resettlement bar.

Response: As discussed above, the INA does not limit the Departments' authority regarding eligibility conditions relating to a noncitizen's conduct in third countries to the boundaries of the firm-resettlement statutory bar. *Trump,* 138 S. Ct. at 2411–12 (recognizing that the INA ''did not implicitly foreclose the Executive from imposing tighter restrictions'' in ''similar'' areas); *see also East Bay I,* 994 F.3d at 979 (noting that the INA does not limit the Departments' ''authority to the literal terms of the two safe-place statutory bars''). The Departments disagree that the rule conflicts with the firm-resettlement bar, which focuses on protecting against forum shopping when a migrant has already found a safe refuge. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); *Bonilla* v. *Mukasey,* 539 F.3d 72, 80 (1st Cir. 2008); *Ali,* 237 F.3d at 594. This rule focuses on encouraging migrants to use safe, orderly, and lawful pathways to enter the United States. 88 FR at 11707, 11736. Accordingly, the relevant facts and analysis for considering firm resettlement and the application of the rebuttable presumption are materially different.

Additionally, the rule does not overlook commenter concerns about the accessibility to or processing times of applications in third countries. Even if noncitizens determine that protection in a third country is inaccessible or would take more time than the noncitizens believe they can wait, the rule provides other ways that the noncitizen can seek protection. Seeking protection in a third country and receiving a denial excepts a noncitizen from the presumption but is not a requirement—the noncitizen may still either enter using a lawful pathway, pre-schedule an appointment to present themselves at a POE, or show one of several other circumstances that allow an individual to be excepted from the rule's rebuttable presumption. 8 CFR 208.33(a)(2), 1208.33(a)(2). The rule also explicitly protects family unity by providing that if one member of a family traveling together is excepted from the presumption of asylum ineligibility or has rebutted the presumption then the other members of the family are similarly treated as excepted from the presumption or having rebutted the presumption. 8 CFR 208.33(a)(2)(ii), (3), 1208.33(a)(2)(ii), (3); 88 FR at 11730. And if during removal proceedings a principal applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the presumption and has either an accompanying spouse or child who would not qualify for asylum or protection from removal or a spouse or child who would be eligible to follow to join them as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), if the principal applicant were granted asylum, the applicant will be deemed to have established an exceptional circumstance that rebuts the presumption. 8 CFR 1208.33(c). Additionally, any principal asylum applicants who enter the United States during the two-year period of the rebuttable presumption while under the age of eighteen and apply for asylum after the two-year period are not subject to the presumption. 8 CFR 208.33(c)(2), 1208.33(d)(2). Furthermore, the rule does not affect a noncitizen's ability to apply for statutory withholding of removal and CAT protection. 88 FR at 11730.

The rule also does not render the firm-resettlement bar superfluous; instead, this rule and the firm-resettlement bar apply independently. The operative firm-resettlement regulations provide that a noncitizen is barred from receiving asylum in the United States if they have received an offer of safe, established permanent resettlement that is not substantially and consciously restricted. 8 CFR 208.15, 1208.15 (2020). The firm-resettlement bar is divorced from any inquiry into how or when a noncitizen enters the United States. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); 8 CFR 208.15, 1208.15 (2020). Put differently, the firm-resettlement bar applies with equal force to noncitizens who enter the United States using an identified lawful pathway and those who do not. *Abdalla* v. *INS,* 43 F.3d 1397, 1400 (10th Cir. 1994) (''The pertinent regulations specifically focus on resettlement status prior to the alien's entry into this country . . . . ''). Conversely, this rule does not turn exclusively on whether the noncitizen received an offer of permanent resettlement in a third country. 88 FR at 11723. Under the rule, a migrant's time in a third country is primarily relevant in two circumstances: (1) when a noncitizen travels through a third country and does not enter the United States through established lawful pathways, or (2) if the noncitizen applied for protection in the third country and was denied. 8 CFR 208.33(a)(1)(iii), (2)(ii)(C), 1208.33(a)(1)(iii), (2)(ii)(C). In the first circumstance, the noncitizen is subject to the rule's condition on asylum eligibility unless they can demonstrate an applicable exception or successfully rebut the presumption. 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). In the second circumstance, the noncitizen is categorically not subject to the rebuttable presumption of asylum ineligibility regardless of whether they entered the United States through established lawful pathways. 8 CFR 208.33(a)(2)(ii)(C),1208.33(a)(2)(ii)(C). But neither circumstance involves determining whether the noncitizen was firmly resettled, as defined in 8 CFR 208.15, 1208.15 (2020), before traveling to the United States.[194] Thus, the firm-resettlement bar and this rule are simply different conditions with different scopes.

In addition, the rule properly accounts for the risk of harm a noncitizen might face in the third country. As at least one commenter in favor of the rule noted, not all migrants

[194] Indeed, the firm-resettlement bar, if applicable to a particular noncitizen, would not be applied by an AO in credible fear proceedings and would be applied only if the noncitizen's application is considered by an IJ in section 240 removal proceedings or an AO during an asylum merits interview. 8 CFR 208.30(e)(5)(i).

who travel through third countries are actively fleeing persecution and some choose to come to the United States for other reasons. But should the noncitizen be fleeing harm, one of the enumerated grounds that will necessarily rebut the presumption of asylum ineligibility is that the noncitizen faced an imminent and extreme threat to life or safety at the time of entry into the United States. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B); 88 FR at 11704, 11707, 11736. In response to the comment that requiring a noncitizen to seek protection in a transit country would add a hurdle to obtaining asylum in the United States insofar as that noncitizen may need to address the firm-resettlement bar, the Departments note that noncitizens subject to the firm-resettlement bar are not in need of protection in the United States. *See Ali,* 237 F.3d at 594 (recognizing that asylum law ''was never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives'' (quoting *Rosenberg* v. *Yee Chien Woo,* 402 U.S. 49, 56 (1971)); *East Bay I,* 994 F.3d at 977 (recognizing ''the 'core regulatory purpose of asylum,' which is 'to protect [refugees] with nowhere else to turn,' because 'by definition' an applicant barred by a safe-place provision has somewhere else to turn'' (quoting *Matter of B–R-,* 26 I&N Dec. 119, 122 (BIA 2013), overruled on other grounds by *Zepeda-Lopez* v. *Garland,* 38 F.4th 315, 326 (2d Cir. 2022)); Constitution of the International Refugee Organization, ch. V, sec. (D)(c), Dec. 15, 1946, 18 U.N.T.S. 20 (determining that a refugee or displaced person ''will cease to be the concern of the Organization . . . when they have . . . become otherwise firmly established''). Likewise, the rule does not deny asylum to a noncitizen who obtained asylum in a third country (and therefore presumably has a cognizable claim to refugee status) but thereafter comes to the United States and seeks asylum. That person may seek to enter through a lawful pathway and file an asylum application like any other migrant, at which point they would likely need to address the firm-resettlement bar. Should they enter the United States from Mexico at the southwest land border or adjacent coastal borders without authorization or at a POE without an appointment and not otherwise be covered by an exception, they, like any other noncitizen in that situation, will be able to address the rebuttable presumption.

Finally, the Departments disagree that the rule ignores congressional intent underlying the firm-resettlement bar. As explained above, this rule has the policy objective of encouraging the use of safe, orderly, and lawful pathways by noncitizens, including those seeking asylum, to enter the United States to present their claims, 88 FR at 11704, 11707, and is distinct from the firm-resettlement bar, which is grounded in the policy objective of protecting against forum shopping by migrants who have already found a safe refuge, *East Bay I,* 994 F.3d at 977; *Bonilla,* 539 F.3d at 80; *Ali,* 237 F.3d at 595.

Comment: Commenters stated that the proposed rule would be inconsistent with or would circumvent the safe-third-country bar to applying for asylum because the safe-third-country bar was intended to ensure that any third country was safe and had a fair procedure for asylum or temporary protection before requiring that a noncitizen avail themselves of protection in that country. Commenters asserted that the proposed rule essentially or implicitly declares Mexico, Guatemala, or other transit countries to be safe third countries without obtaining the requisite bilateral or multilateral agreements. Commenters also claimed that this proposed rule, which would apply regardless of whether the United States has an agreement with the transit country, would not adequately consider or require an individualized determination as to whether a third country is ''safe'' for asylum seekers or has an adequate system for granting protection against persecution and torture. Instead, commenters explained that this proposed rule relies on a third country being a party to specified international accords, which commenters stated are not sufficient to ensure the noncitizen's safety and, therefore, would result in refugees being returned to the countries where they will be persecuted—in conflict with the non-refoulement principles of the Refugee Act. One commenter specified that the asylum structures in Mexico, El Salvador, Honduras, and Guatemala do not meet the international standard for refugee protection and thus cannot constitute a safe third country.

Response: As a threshold matter, the Departments distinguish the categorical safe-third-country bar found in section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), from this rule because this rule, unlike the safe-third-country bar, is neither a categorical bar on the ability to apply for asylum nor does it hinge exclusively on the availability of protection in a third country. 88 FR at 11723, 11736. While the Departments believe that protection is available for many noncitizens in third countries through which they transit before arriving in the United States from Mexico at the southwest land borders or adjacent coastal borders, the Departments have carefully refrained from making asylum eligibility in the United States turn exclusively on whether the noncitizen could have sought protection in any third country. Nor does this rule act as or constitute a third-country agreement for purposes of section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A). 88 FR at 11732. Critically, the purpose behind this rule is to encourage noncitizens to take advantage of existing and expanded safe, orderly, and lawful pathways for noncitizens to enter the United States to present asylum claims. 88 FR at 11704, 11719. And the rule does not, contrary to commenters' suggestions, require a noncitizen to return to or go to a third country without evaluating the safety of that country simply because of their method of entering the United States. *Cf. East Bay I,* 994 F.3d at 977. Rather, the rule is more limited. The rule provides that noncitizens who have traveled through a third country and enter the United States through a provided lawful pathway may seek asylum through an orderly and directed process. 88 FR at 11707, 11723; *see* 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii). Noncitizens who travel through a third country that is a party to the Refugee Convention or Protocol and do not enter the United States through a provided lawful pathway, and who do not first seek (and are denied) protection in that third country, may still present a claim for relief and protection based on fear of persecution—but, in order to be eligible for asylum, they must first establish an exception to or rebut a presumption of ineligibility for asylum. 88 FR at 11707, 11723; *see* 8 CFR 208.33(a)(3), 1208.33(a)(3). And even if the noncitizen is subject to the presumption of ineligibility for asylum, the noncitizen may still seek and be eligible for statutory withholding of removal or CAT protection. 88 FR at 11737; *see* 8 CFR 208.33(b)(2)(i) and (ii), 1208.33(b)(2)(i) and (ii). Simply put, the rule imposes a condition on asylum (and only asylum) eligibility relating to whether the noncitizen availed themselves of a lawful pathway, but the rule does not direct an inquiry as to whether the noncitizen can or should return to a third country. 88 FR at 11737–38.

iii. Expedited Removal

Comment: Some commenters stated that the proposed rule creates a higher standard of proof (preponderance of the evidence) for rebutting the presumption

against asylum, as compared to the ''significant possibility'' standard for establishing a credible fear. Commenters expressed a belief that the rule requires noncitizens ''to actually establish, at their credible fear interview, that they *are* eligible for asylum'' (emphasis in original), not simply that they have a significant possibility of demonstrating eligibility. These commenters expressed concern that the rule could be read to require AOs to make a finding that a noncitizen is ineligible for asylum without assessing the presumption under the ''significant possibility'' standard. These commenters further argued that the touchstone of the ''significant possibility'' standard was whether a noncitizen ''*could* show, after a full hearing with factual development,'' that the presumption does not apply.

Response: The ''significant possibility'' standard is required by statute, and the rule does not impose a different standard during the credible fear process.[195] The INA mandates that, when determining whether a noncitizen has a ''credible fear,'' the AO must determine whether there is a ''significant possibility . . . that the alien could establish eligibility for asylum.'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). When it comes to the rebuttable presumption, the AO will determine whether there is a significant possibility that the noncitizen would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception to or can rebut the presumption. 8 CFR 208.33(a)(2), (3)(i), 1208.33(a)(2), (3)(i). In other words, the ''significant possibility'' standard is the overall assessment applied at the credible fear stage, but that standard must be applied in conjunction with the standard of proof required for the ultimate merits determination. Although the ''significant possibility'' standard applies when determining the presumption's applicability and whether it has been rebutted, the Departments expect that noncitizens rarely would be found exempt from or to have rebutted the presumption for credible fear purposes and subsequently be found not to be exempt from or to have rebutted the presumption at the merits stage. The ''significant possibility'' standard asks a predictive question: whether there is a ''significant possibility'' that the noncitizen ''could establish'' asylum eligibility at a merits hearing. INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). And given the nature of the inquiry under this rule's presumption, the Departments expect that AOs or IJs will almost always be able to determine based on the evidence before them at the credible fear stage whether a noncitizen would be unable to establish asylum eligibility at the merits stage.

First, the evidence necessary to determine whether a person is excepted from or can rebut the presumption should generally be available to the AO at the time of the credible fear interview, whether from the noncitizen or otherwise. Unlike some of the more complex factual inquiries required for other elements of asylum eligibility, such as nexus or particular social group, which often require evidence about country conditions or other evidence, and often regard events that did not happen recently, AOs will—except in exceptional circumstances—be able to assess eligibility for such exceptions or rebuttal circumstances at the credible fear interview through consideration of the noncitizen's credible testimony and available evidence, including government records relating to their circumstances at the time of their entry into the United States.

For instance, a noncitizen should not generally need testimony from a witness in their home country or evidence of country conditions to show that they faced an acute medical emergency at the time of entry or that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. *See* 8 CFR 208.33(a)(2)(ii)(B), (3)(i)(A), 1208.33(a)(2)(ii)(B), (3)(i)(A). In some cases, the absence of documentation and DHS records—such as a record that a noncitizen was provided appropriate authorization to travel to the United States to seek parole—may make it unlikely that the noncitizen could make the requisite showing at a full merits hearing. In other situations, the noncitizen's credible testimony may be sufficient to prove the noncitizen's claims, although AOs also may consider any evidence noncitizens have with them at the time they entered the United States from Mexico at the southwest land border or adjacent coastal borders, and evidence regarding the State in which they were encountered at or near the border. Thus, AOs should have all the necessary evidence before them during the credible fear interview to determine whether a noncitizen will be exempt from or able to rebut the presumption, and additional evidence is not likely to change whether an exception to or rebuttal of the presumption applies.

Second, as with factual determinations, the legal analysis for determining whether a person is exempt from or can rebut the presumption is straightforward because most of the enumerated grounds for those determinations are narrow and clearly defined. There is little gray area in determining whether a noncitizen transited through a third country, and the rule provides clear examples of the types of threats that constitute an imminent and extreme threat to life or safety—that is, an imminent threat of rape, kidnapping, torture, or murder. *See* 8 CFR 208.33(a)(1)(iii), (3)(i)(B), 1208.33(a)(1)(iii), (3)(i)(B). As a result, the question of whether a noncitizen has a ''significant possibility'' of meeting these standards should not require much legal analysis after the AO has considered the evidence before them. That again differs from other questions that may arise during a credible fear inquiry—such as whether the noncitizen is a member of a cognizable particular social group—which can be quite complex; AOs or IJs may reasonably defer such difficult questions by finding credible fear. *See* 8 CFR 208.30(e)(4) (''In determining whether the alien has a credible fear of persecution . . . or a credible fear of torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit a positive credible fear finding . . . in order to receive further consideration of the application for asylum and withholding of removal.''). Hence, in this unique context, applying the ''significant possibility'' standard will almost always

[195] Previous limitations on asylum eligibility have used similar regulatory language that does not explicitly include the phrase ''significant possibility'' while also stating in the rules' preambles that the ''significant possibility'' standard applied to those limitations. *See, e.g.,* Security Bars and Processing, 85 FR 84160, 84175 (Dec. 23, 2020) (''Security Bars Rule'') (explaining that ''[t]he rule does not, and could not, alter the standard for demonstrating a credible fear of persecution, which is set by statute''); Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33837 (July 16, 2019) (''TCT Bar IFR'') (providing that ''[t]he asylum officer will ask threshold questions to elicit whether an alien is ineligible for a grant of asylum pursuant to the third-country-transit bar. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates that there is a significant possibility that he or she can establish eligibility for asylum), then the alien will have established a credible fear.''); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934, 55943 (Nov. 9, 2018) (''Proclamation Bar'') (providing that ''[t]he asylum officer will ask threshold questions to elicit whether an alien is ineligible for a grant of asylum pursuant to a proclamation entry bar. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates sufficient facts pertaining to asylum eligibility), then the alien will have established a credible fear.'').

lead to a similar conclusion as applying the ultimate eligibility standard.

However, the Departments acknowledge that in some rare cases the outcome from applying the ''significant possibility'' standard may differ from application of the ultimate merits standard, such that a noncitizen who is found to have met the ''significant possibility'' standard may ultimately be found after a merits hearing to be subject to the presumption of ineligibility. It is the Departments' expectation that such cases will be rare, and that applying the ''significant possibility'' standard will not differ meaningfully from application of the ultimate merits standard in this context.

Comment: Commenters stated that Congress intended to set a low screening standard for the credible fear process and alleged that the proposed rule raised the screening standard for statutory withholding of removal and CAT protection during this process without providing a justification for doing so. Commenters argued that Congress intended the plain language of the statute, which uses a ''significant possibility'' standard for asylum, to also apply to related fear claims, such as statutory withholding of removal and CAT protection.

Response: As a preliminary matter, this rule does not change the screening standard for asylum claims. Instead, it imposes an additional condition on asylum eligibility: a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel. 88 FR at 11750; INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). AOs will continue to apply the statutory ''significant possibility'' standard to determine credible fear. *Id.* In considering whether a noncitizen can establish a significant possibility of eligibility for asylum, the AO will be required to consider whether the noncitizen has shown a significant possibility that they could establish that the presumption does not apply or that they meet an exception to or can rebut the presumption. 88 FR at 11750. Only after determining that a noncitizen could not demonstrate a ''significant possibility'' of eligibility for asylum would the AO apply the long-established ''reasonable possibility'' standard to assess whether further proceedings on a possible statutory withholding or CAT protection claim are warranted. *Id.* at 11746, 11750.

In contrast to the establishment of a statutory ''significant possibility'' standard to screen for asylum, Congress did not specify a statutory standard for screening statutory withholding of removal or CAT protection claims in expedited removal proceedings. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v) (referencing only ''asylum''). Since 1999, AOs have applied the ''reasonable possibility'' standard to statutory withholding of removal and CAT protection claims in streamlined proceedings for reinstatement and administrative removal where noncitizens are statutorily ineligible for asylum. *See* 8 CFR 208.31, 1208.31 (2020)[196] (implementing the reasonable fear process for noncitizens subject to administrative removal orders); 8 CFR 241.8(e) (implementing the reasonable fear process for noncitizens subject to reinstatement of a prior order of removal). While the ''reasonable possibility'' standard is lower than the ''clear probability'' standard required to demonstrate eligibility for statutory withholding or CAT protection, it is a more demanding standard than the ''significant possibility'' standard used in credible fear proceedings to screen for asylum. Regulations Concerning the Convention Against Torture, 64 FR 8474, 8485 (Feb. 19, 1999). At the time the CAT regulations were implemented, the goal of the reasonable fear process was to ensure that the United States complied with its non-refoulement obligations under the CAT ''without unduly disrupting the streamlined removal processes applicable.'' *Id.* at 8479. The justification for using the reasonable possibility standard was also explained at the time the reasonable fear proceedings were created: ''[b]ecause the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.'' *Id.* at 8485.

For the purpose of this rule, the Departments have judged that, in those cases where an applicant cannot establish a significant possibility of eligibility for asylum due to the lawful pathways condition, the use of the ''reasonable possibility'' standard to assess statutory withholding of removal and CAT claims better reflects the goals of the rule as a whole. As explained in the NPRM, while this is a different judgment than what was made by the Asylum Processing IFR, the application of the heightened standard is in line with the goal of identifying non-meritorious claims at the screening stage, allowing the heavily burdened immigration courts to focus on those claims most likely to warrant protection. 88 FR at 11742. The Departments believe that applying the ''reasonable possibility'' standard, which is tailored to statutory withholding of removal and CAT claims, ''better predicts the likelihood of succeeding'' on an application for statutory withholding of removal or CAT protection because it appropriately accounts for the higher burden of proof. 88 FR at 11746–47. The use of the standard specific to statutory withholding and CAT claims, since its inception, has allowed the United States to meet its obligations under international law while simultaneously balancing the need to expeditiously identify non-meritorious claims. Moreover, as stated in the NPRM, the Departments seek to protect those who have viable claims while also considering the ''downstream effects'' on immigration courts. 88 FR at 11746. The application of standards tailored to the type of relief for which the noncitizen is eligible is designed to accomplish that goal.

2. TCT Bar and Proclamation Bar Litigation

Comment: Several commenters argued that the proposed rule is no different than the TCT Bar Final Rule and the Proclamation Bar IFR. Many commenters submitted only a general reference to precedent issued in litigation regarding the Proclamation Bar IFR and the TCT Bar rules, without any discussion or consideration of the distinctions provided in the proposed rule. Some asserted that the proposed rule conflicts with or violates the injunctions issued regarding those rules, or that the existing injunction should apply to the proposed rule. Commenters also asserted that the proposed rule is similar to the TCT Bar rules and Proclamation Bar IFR and will cause confusion. An organization expressed concern that members of a certified class for purposes of injunctive relief, *see Al Otro Lado, Inc.* v. *McAleenan,* No. 17–CV–02366–BAS–KSC, 2022 WL 3142610 (S.D. Cal. Aug. 5, 2022), would be subject to the rebuttable presumption. The commenter stated that application of the rebuttable presumption to such class members would likely violate the injunction in that case because that injunction

[196] These provisions were amended by the Global Asylum Rule, which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea II,* 512 F. Supp. 3d at 969–70. This order remains in effect, and thus the 2020 version of these provisions—the version immediately preceding the enjoined amendments is currently effective.

requires that the Departments apply ''pre-Asylum Ban practices for processing the asylum applications'' of class members. *See id.*

Response: The Departments reiterate that this rule is materially different from the TCT Bar IFR and Final Rule and Proclamation Bar IFR. 88 FR at 11738–39; *see also* Section IV.B.2.ii of this preamble. And contrary to commenter concerns, there is no risk of confusion because neither the TCT Bar nor the Proclamation Bar is in effect. *Capital Area Immigrants' Rights Coal.* v. *Trump,* 471 F. Supp. 3d 25 (D.D.C. 2020) (vacating the TCT Bar IFR); *East Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832 (9th Cir. 2020) (enjoining the TCT Bar IFR); *E. Bay Sanctuary Covenant* v. *Barr* (''*East Bay II*''), 519 F. Supp. 3d 663, 668 (N.D. Cal. 2021) (enjoining the TCT Bar Final Rule); *East Bay III,* 993 F.3d at 681; *see O.A.* v. *Trump,* 404 F. Supp. 3d 109 (D.D.C. 2019) (recounting the history of the litigation over the Proclamation Bar IFR and vacating it).[197] As discussed later in Sections IV.E.9 and IV.E.10 of this preamble, removal of provisions implementing the TCT Bar Final Rule and the Proclamation Bar IFR is warranted. But even separate from the removal of provisions implementing those rules, the Departments respond that the litigation surrounding those rules does not mean that this distinct rule is invalid, unenforceable, or arbitrary and capricious.

The Departments also disagree with the generalized comparisons between this rule and the Proclamation Bar IFR and the TCT Bar rules. 88 FR at 11736. As stated in the NPRM, this rule is substantively distinct from the eligibility bars in those rules. The TCT Bar rules focused exclusively on the noncitizen's travel prior to entering the United States, *see* 85 FR at 82261–62, and the Proclamation Bar IFR imposed a strict eligibility bar for anyone entering outside a POE, *see* 83 FR at 55935. In comparison, this rule is not a categorical bar on asylum eligibility, but instead is a rebuttable presumption, including several exceptions that are adjudicated on a case-by-case basis, for certain noncitizens who enter the United States without availing themselves of any of numerous lawful pathways during a temporary period of time. 88 FR at 11707, 11739–40; 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). Notably, and contrary to claims by some commenters, the rule does not block access to asylum for those who need it most. *Cf. East Bay I,* 994 F.3d at 980. The rule contains exceptions to and ways to rebut the presumption, including several ways to avoid the presumption that account for protecting the safety of those fleeing imminent harm. In addition, the rule is intended to better manage already-strained resources, thereby protecting against overcrowding in border facilities and helping to ensure that the processing of migrants seeking protection in the United States is done in an effective, humane, and efficient manner. 88 FR at 11704, 11713–16, 11730. In that vein, as discussed in Sections IV.E.9 and IV.E.10 of this rule, the TCT Bar IFR and Final Rule and Proclamation Bar IFR pursued approaches and policies that differ in important respects from this rule. *Compare* TCT Bar IFR, 84 FR at 33831, *and* Proclamation Bar IFR, 83 FR at 55935, *with* 88 FR at 11706–07. Moreover, this rule is designed to address a specific exigency that did not exist when the TCT Bar rules and Proclamation Bar IFR were promulgated. 88 FR at 11705–06.

Second, this rule is not in conflict with or precluded by existing injunctions and court precedent relating to litigation surrounding those rules. *See United States* v. *Cardales-Luna,* 632 F.3d 731, 735 (1st Cir. 2011) (recognizing that ''a decision dependent upon its underlying facts is not necessarily controlling precedent as to a subsequent analysis of the same question on different facts and a different record'') (marks and citation omitted); *Overseas Shipholding Group, Inc.* v. *Skinner,* 767 F. Supp. 287, 296 (D.D.C. 1991) (noting that neither the law of the case nor stare decisis doctrines applied in ''an entirely separate rulemaking process''); *cf. Associated Builders and Contractors, Inc.* v. *Brock,* 862 F.2d 63, 67 (3d Cir. 1988) (considering the adequacy of notice of proposed rulemaking and concluding that an argument was foreclosed because a prior panel ''applied the law'' to facts that had ''not changed''). Procedurally, the injunctions issued against the TCT Bar rules and Proclamation Bar IFR were limited to the specific facts and specific rules at issue in those cases and do not bar the issuance of this materially distinct rule. *See E. Bay Sanctuary Covenant* v. *Barr,* 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019) (enjoining the Departments ''from taking any action continuing to implement'' the TCT Bar IFR), *affirmed by East Bay I,* 994 F.3d at 988; *East Bay II,* 519 F. Supp. 3d at 668 (enjoining the Departments ''from taking any action continuing to implement the [TCT Bar] Final Rule''); *E. Bay Sanctuary Covenant* v. *Trump,* 349 F. Supp. 3d 838, 868 (N.D. Cal. 2018), *affirmed by East Bay III,* 993 F.3d at 680–81; *see also California* v. *Texas,* 141 S. Ct. 2104, 2115 (2021) (noting that remedies ''do not simply operate on legal rules in the abstract'') (quotation marks and citation omitted). Substantively, the opinions in those cases were limited to categorical eligibility bars premised on manner of entry or whether a noncitizen first sought asylum in another country, and this rule creates no such categorical bar. The more nuanced approach in this rule will have different effects and is premised on different factual circumstances and new reasoning, including an increased focus on available lawful pathways. 88 FR at 11739.

Regarding the application of the proposed rule to *Al Otro Lado* injunction class members, as noted in the NPRM, the Departments do not view the permanent injunction in the *Al Otro Lado* litigation—*see Al Otro Lado, Inc.* v. *Mayorkas,* No. 17–CV–02366–BAS–KSC, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022)—which they have appealed to the Ninth Circuit,[198] as limiting the Departments' discretionary authority to apply new asylum limitations conditions consistent with section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), to the injunction class. *See, e.g., Milliken* v. *Bradley,* 433 U.S. 267, 281–82 (1977) (''The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the [alleged wrongful conduct] itself.''); *Meinhold* v. *U.S. Dep't of Def.,* 34 F.3d 1469, 1480 (9th Cir. 1994); *see also, e.g., Thomas* v. *Cty. of Los Angeles,* 978 F.2d 504, 509 (9th Cir. 1992) (reversing injunction that ''fail[ed] to specify the act or acts sought to be restrained as required by'' Federal Rule of Civil Procedure 65(d)).[199] In any

[197] The district court in *O.A.* vacated the Proclamation Bar IFR for similar substantive reasons to those articulated in *East Bay III. O.A.* v. *Trump,* 404 F. Supp. 3d 109 (D.D.C. 2019). *O.A.* v. *Trump* is subject to a pending appeal that is presently held in abeyance. *O.A.* v. *Biden,* No. 19–5272 (D.C. Cir. Oct. 11, 2019). Similarly, in *Al Otro Lado, Inc.* v. *Mayorkas,* No. 17–cv–2366, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022), a different district court issued an injunction relating to application of the TCT Bar rules that the Departments disagree with and have appealed. *Al Otro Lado, Inc.* v. *Mayorkas,* Nos. 22–55988, 22–56036 (9th Cir. Nov. 7, 2022).

[198] *See Al Otro Lado, Inc.* v. *Mayorka*s, Nos. 22–55988, 22–56036 (9th Cir. Oct. 25, 2022)

[199] Further, the commenter's position that the *Al Otro Lado* injunction applies to this rule is inconsistent with *Al Otro Lado* Class Counsel's website: ''[T]he Biden Administration proposed a similar rule in February 2023, but the *Al Otro Lado* v. *Mayorkas court order does not cover the new rule. The court order only applies to the rule*

event, certain injunction class members whose cases are reopened or reconsidered under the *Al Otro Lado* injunction because they were removed following application of the TCT Bar may follow a DHS-established process to request ''appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process,'' as outlined in 8 CFR 208.33(a)(2)(ii)(A), 1208.33(a)(2)(ii)(A), to participate in renewed removal proceedings. Injunction class members who follow those procedures would thus not be subject to the rebuttable presumption.

Comment: Many commenters noted that the courts, in addressing the TCT Bar rules and the Proclamation Bar IFR, held that the Departments could not promulgate a regulation that restricts access to asylum based on manner or location of entry into the United States or transit through a third country. Commenters similarly asserted, citing the Ninth Circuit's decision in *East Bay III,* that the proposed rule is not ''consistent with'' section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), and also violates international law.

Response: The holdings relating to the TCT Bar rules and the Proclamation Bar IFR do not undermine this rule. As discussed in Section IV.D.1.ii of this preamble, this rule does not conflict with the INA's safe-third-country and firm-resettlement bars. 88 FR at 11736; *see R–S–C,* 869 F.3d at 1187 n.9. While the applicability of the rebuttable presumption of ineligibility turns in part on transit through a third country, 8 CFR 208.33(a)(1)(iii), 1208(a)(1)(iii), the ultimate eligibility decision requires case-by-case evaluation of whether an exception applies and whether the noncitizen rebutted the presumption. 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3); *cf. East Bay I,* 994 F.3d at 982–83 (indicating that the Departments cannot rely ''solely'' on a noncitizen's decision not to seek asylum in a third country in denying their asylum application in the United States).

Regarding the Proclamation Bar, *East Bay III* enjoined a categorical entry bar as inconsistent with the statutory provision allowing ''migrants arriving anywhere along the United States's border'' to apply for asylum. 993 F.3d at 669. Unlike the Proclamation Bar IFR, this rule involves a rebuttable presumption that includes consideration of numerous factors unrelated to the manner of entry, including transit through a third country. 88 FR at 11707; 8 CFR 208.33(a)(1)(iii), (2) and (3), 1208.33(a)(1)(iii), (2) and (3). And, as discussed in Section IV.D.1.i of this preamble, the rule is consistent with INA section 208, 8 U.S.C. 1158. *See* 88 FR at 11707, 11740; 8 CFR 208.33(a)(2), 1208.33(a)(2) (providing for exceptions to applicability of the rebuttable presumption); 8 CFR 208.33(a)(3), 1208.33(a)(3) (providing ways to rebut the presumption of ineligibility). The provided lawful pathways, third country transit components, exceptions to the presumption, and the fact-intensive, case-by-case analysis for rebutting the presumption demonstrate that the condition imposed by this rule is distinct from the ''categorical ban'' enjoined in *East Bay III,* 993 F.3d at 669–70. Notwithstanding this distinction, the Departments reiterate that they disagree with the holding in *East Bay III* that the Proclamation Bar IFR was inconsistent with section 208(a) of the INA, 8 U.S.C. 1158(a). 88 FR at 11739; *see E. Bay III,* 993 F.3d at 670; *see also* Section IV.D.1.i of this preamble.

The rule also does not violate the United States' obligations under international treaties. As discussed in Section IV.D.3 of this preamble, the rule is not a penalty based on manner of entry and does not violate treaty commitments regarding non-refoulement. The Departments also disagree with the decision in *East Bay III* on this point as applied to the Proclamation Bar IFR. 88 FR at 11739; *see East Bay III,* 993 F.3d at 672–75. In any event, *East Bay III* does not render this rule unlawful. In *East Bay III,* the Ninth Circuit determined that the Proclamation Bar IFR ''ensure[d] neither'' ''the safety of those already in the United States'' nor ''the safety of refugees,'' which were the purposes behind the asylum bars in the INA and in the Refugee Convention. 993 F.3d at 673. Conversely, as explained in the NPRM, a purpose of this rule is to reduce reliance on dangerous routes to enter the United States used by criminal organizations and smugglers, thus protecting the safety of refugees. 88 FR at 11707. Furthermore, one of the enumerated categories for rebutting the presumption in the rule is demonstrating that the noncitizen faced an imminent and extreme threat to life or safety at the time of entry into the United States. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). The Ninth Circuit's concerns are therefore not present in this rule.

Comment: Relying on cases enjoining the TCT Bar rules and the Proclamation Bar IFR, commenters asserted that the proposed rule is invalid because the condition in the proposed rule is unrelated to the merits of the asylum claim.

Response: The Departments disagree that the cases involving the TCT Bar rules demonstrate that this rule is invalid. As discussed in Section IV.D.1.i of this preamble, the INA provides the Departments with the authority to impose limitations or conditions on asylum eligibility. INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). But the statute neither qualifies what types of limitations or conditions may be imposed—except insofar as such limitations or conditions must be consistent with the INA—nor states that any such limitations or conditions must relate to whether the noncitizen has demonstrated or can demonstrate that they meet the definition of a refugee under section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42)(A). Indeed, several of the statutory restrictions on asylum eligibility are unrelated to whether the noncitizen has established that they are a refugee within the meaning of section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42)(A). *See, e.g.,* INA 208(b)(2)(A)(i), 8 U.S.C. 1158(b)(2)(A)(i) (participating in the persecution of others); INA 208(b)(2)(A)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) (reasonable grounds for considering the noncitizen a danger to the security of the United States). And section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), provides for the promulgation of ''*additional limitations and conditions.*'' (emphasis added). The existence of exceptions and conditions that are unrelated to the refugee definition both demonstrates that it is lawful for the Departments to promulgate this condition on asylum eligibility and undermines the Ninth Circuit's limitation on scope of any regulatory condition. *E. Bay I,* 994 F.3d at 979. There is no basis to assume that Congress intended to circumscribe the scope of limitations or conditions that the Departments can promulgate when the statute does not do so and Congress itself provided for exceptions unrelated to the meaning of ''refugee'' in section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). *R–S–C,* 869 F.3d at 1187 n.9 (rejecting a statutory construction that would circumscribe the type of limitations or conditions promulgated under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), because such restrictions ''would render [section] 1158(b)(2)(C) meaningless, disabling the Attorney General from adopting further

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implemented on July 16, 2019. See American Immigration Council, *Your Rights Under Al Otro Lado* v. *Mayorkas, https://www.americanimmigrationcouncil.org/al-otro-lado-mayorkas* (last visited Apr. 21, 2023).

limitations while the statute clearly empowers him to do so.'').

In addition, the rule is not precluded by either *East Bay I* or *East Bay III.* Neither of these decisions require that a condition on asylum eligibility relate to the definition of refugee under section 101(a)(42)(A), 8 U.S.C. 1158(a)(42)(a). Accordingly, the injunctions and vacatur decisions relating to the TCT Bar rules and the Proclamation Bar do not render this rule unlawful.

3. International Law

Comment: Commenters expressed concern that the NPRM, if finalized, would violate the United States' non-refoulement obligations under international law, including Article 33 of the Refugee Convention, which the commenters generally explained as prohibiting the return of asylum seekers to a country where their lives or freedom would be threatened on account of a protected ground. Specifically, commenters voiced apprehension that the NPRM would ''bar'' most protection-seeking noncitizens from being eligible for asylum, leaving them able to apply only for statutory withholding of removal or CAT protection. Commenters predicted that many noncitizens would not be able to satisfy the comparatively higher standards of proof for statutory withholding and CAT claims and that, in turn, would lead to the refoulement of persons who, if not for the NPRM's ''bar'' to asylum eligibility, would have been granted asylum.

Applying similar reasoning, some commenters raised that the proposed rule may violate Article 3 of the CAT, which prohibits state parties from returning people to a country where there is sufficient likelihood that they would be tortured. One commenter stated that conditioning asylum based on manner of entry would be in violation of the CAT.

Commenters also argued the rule conflicted with other provisions of the Refugee Convention and Protocol. Commenters noted that Article 31 of the Refugee Convention prohibits states from imposing improper penalties for irregular entry, which commenters argued included administrative penalties and limits on access to asylum. Commenters also stated the proposed rule would violate Article 3, which prohibits non-discrimination, and Article 16, which protects refugees' access to the courts. One commenter stated that the proposed rule is more expansive than the Refugee Convention's exclusion for migrants who secured residency or status in another country.

Relatedly, several commenters pointed to United Nations High Commissioner for Refugees (''UNHCR'') statements and guidance interpreting the Refugee Convention and the Refugee Protocol. Specifically, commenters pointed to UNHCR guidance interpreting those documents as providing that asylum seekers are not required to apply for protection in the first country where protection is available. Further, commenters noted that UNHCR interprets those documents as not requiring refugees to be returned to a country through which they transited. Commenters further noted UNHCR's positions that asylum should not be refused only on the basis that it could have been sought in another country and that asylum seekers should not be required to seek protection in a country to which they have no established links. A commenter also noted that UNHCR has repeatedly denounced attempts to impose similar bans, and that such rules undermine international human rights and refugee law, because the right to seek asylum is a human right regardless of the person's origin, immigration status, or manner of arrival at the border.

Several commenters also argued that the rule violated the United States' obligations under other international documents. Some commenters simply made a general assertion that the rule would violate international treaties and degrade the United States' international standing. Several commenters stated that the proposed rule is contrary to the Universal Declaration of Human Rights (''UDHR''). Commenters argued that the UDHR protects the right to seek asylum, and that any restriction or limitation to access asylum is a violation of the letter and spirit of the UDHR. Other commenters stated that the rule violated the United Nations Convention on the Rights of the Child (''CRC'') because it did not provide for a robust, individualized assessment of a child's asylum claim. One commenter stated that the rule would place migrant children and their families at a higher risk of exploitation and trafficking, in contravention of obligations pursuant to the Optional Protocol on the Sale of Children and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (''The Palermo Protocol''). Another commenter contended the rule violates Article 7 of the International Covenant on Civil and Political Rights (''ICCPR''), which forbids subjecting individuals to ''torture or to cruel, inhuman or degrading treatment or punishment,'' and violates Article 12, which confirms the rights of individuals to leave any country. Several commenters claimed that the rule would violate anti-discrimination principles in a variety of agreements and declarations including the ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination (''ICERD''), the American Declaration on the Rights and Duties of Man, Vienna Declaration, and San Jose Action Statement. Another commenter stated the proposed rule violates the right to life, human dignity, and equality before the law in the ICCPR because the proposed rule was ''discriminatory'' and establishes ''great inequality.'' Commenters also claimed conflicts with treaties including Article 6 of the Rome Statute of International Criminal Court, which prohibits genocide, and Article 32 of the Geneva Convention.

Response: This rule is consistent with the United States' obligations under international law. Three primary documents govern the rights of refugees and corresponding obligations of states in international law: the Refugee Convention; the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention; and the CAT. Together, these documents provide a framework for states to provide protection to migrants fleeing persecution or torture and establish the principle of non-refoulement, which prohibits states from returning refugees to territories in specific circumstances. While the United States is a party to the Refugee Protocol and the CAT, these treaties are not directly enforceable in U.S. law. *See INS* v. *Stevic,* 467 U.S. 407, 428 & n.22 (1984); *Al-Fara* v. *Gonzales,* 404 F.3d 733, 743 (3d Cir. 2005) (''The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.''). Instead, the United States has implemented its obligations through domestic legislation and implementing regulations, and the Protocol ''serves only as a useful guide in determining congressional intent in enacting the Refugee Act.'' *Barapind* v. *Reno,* 225 F.3d 1100, 1107 (9th Cir. 2000). The Refugee Convention's non-refoulement obligation is contained in Article 33.1, which prohibits contracting states from returning a refugee to a territory ''where his life or freedom would be threatened'' on account of an enumerated ground. The United States has implemented the non-refoulement provisions of Article 33.1 of the Refugee Convention through the withholding of removal provisions at section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), rather than through the

asylum provisions at section 208 of the INA, 8 U.S.C. 1158. *See Cardoza-Fonseca,* 480 U.S. at 429, 440–41. The CAT's non-refoulement provision is in Article 3, which prohibits the return of a person to a country where there are ''substantial grounds for believing'' the person will be tortured. The United States implemented its obligations under the CAT through regulations. *See* Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, sec. 2242(b), 112 Stat. 2681, 2631–822 (8 U.S.C. 1231 note); 8 CFR 208.16(c), 208.17, 208.18, 1208.16(c), 1208.17, 1208.18. The rule does not change or limit eligibility for statutory withholding of removal or CAT protection. Instead, applicants subject to the rule's rebuttable presumption will be screened for eligibility for statutory withholding of removal and CAT protection under a reasonable possibility standard. As explained earlier in Section IV.D.1.iii of this preamble, the reasonable possibility standard is the same standard that has been used to ensure the United States complies with its non-refoulement obligations under international law in withholding-only proceedings for decades.

The rule's rebuttable presumption will limit asylum eligibility for some noncitizens. But as the Supreme Court has explained, asylum ''does not correspond to Article 33 of the Convention, but instead corresponds to Article 34,'' which provides that contracting countries ''shall as far as possible facilitate the assimilation and naturalization of refugees.'' *Cardoza-Fonseca,* 480 U.S. at 441 (quotation marks omitted). Article 34 ''is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.'' *Id.* Because application of the presumption does not affect eligibility for statutory withholding of removal or protection under the CAT regulations, the rule is consistent with U.S. non-refoulement obligations under the Refugee Protocol (incorporating, inter alia, Article 33 of the Refugee Convention) and the CAT. *See R–S–C,* 869 F.3d at 1188 n.11 (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''); *Cazun* v. *U.S. Att'y Gen.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016).

The Departments agree that asylum is an important protection in international law and acknowledge that the right to seek asylum has been recognized under the UDHR, Art. 14, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). The UDHR is a non-binding human rights resolution of the UN General Assembly, and thus it does not impose legal obligations on the United States. *See Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 734–35 (2004) (''[T]he [UDHR] does not of its own force impose obligations as a matter of international law.''). Instead, the right enshrined in the UDHR—''to seek and to enjoy in other countries asylum from persecution,'' UDHR, Art. 14, G.A. Res. 217A (III), U.N. Doc. A/810 (1948)—is also reflected in the non-refoulement provisions of the Refugee Protocol and the CAT. As previously explained, the rule does not impact eligibility for statutory withholding of removal or CAT protection, and accordingly does not implicate the United States' non-refoulement obligations. Moreover, the rebuttable presumption in the rule does not prohibit any person from seeking asylum, statutory withholding of removal, or CAT protection. Instead, the rule creates a condition on eligibility for asylum by creating a rebuttable presumption of ineligibility for those who neither avail themselves of a lawful pathway to the United States nor apply for asylum or seek other protection, and await a decision thereon, in a country they travel through. The rule similarly does not bar those seeking asylum from procedures that protect them from refoulement. All noncitizens processed for expedited removal who express a fear of return are entitled to a credible fear interview. As with any eligibility criteria, the presumption will apply in some cases to limit eligibility for noncitizens based on the individual circumstances presented, including at the credible fear stage. Even in those cases where the AO determines that the noncitizen cannot demonstrate a significant possibility of being granted asylum because the presumption has not been rebutted, the noncitizen may still demonstrate credible fear by showing a reasonable possibility of persecution or torture. Similarly, after applying for asylum before an IJ, if the presumption has not been rebutted, noncitizens may still demonstrate eligibility for statutory withholding of removal or CAT protection.

The rule is also consistent with the Refugee Convention and the corresponding obligations under international law, including specific provisions cited by commenters. The rule does not violate the non-discrimination requirement in Article 3 of the Refugee Convention. Article 3 prohibits discrimination on the basis of ''race, religion or country of origin.'' The rule does not discriminate on the basis of any of these protected characteristics. Instead, it is a rule of equal application based on the actions of the noncitizen. The application of the rule is limited to those circumstances where the noncitizen who is not excepted from its coverage has neither utilized an available lawful pathway nor sought protection and received a decision denying protection in a country traveled through, and cannot demonstrate that the failure to do was excusable under the rule or otherwise rebut the presumptive ineligibility. For the same reason, the rule does not violate other anti-discrimination requirements in international law, including the ICERD, Dec. 21, 1965, 660 U.N.T.S. 195, 212, and the ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171.

Neither is the rule inconsistent with Article 16 of the Refugee Convention. Article 16 establishes that refugees should be given ''free access to the courts,'' and in the country of a refugee's habitual residence, access should be equivalent to that of a national. This enshrines the right of the refugee to sue and be sued in practice—not merely in name—by removing barriers to participating in court such as access to government-provided counsel (where the government otherwise provides it), ensuring court fees are not higher for refugees than nationals, and prohibiting *cautio judicatum solvi,* the practice of requiring a bond for the costs of litigation as a pre-requisite to filing a complaint. *See* Refugee Convention, Art. 16, Travaux Préparatoires & Commentaries. These rights are not implicated by the rule.

Similarly, the rule is not inconsistent with Article 31 of the Refugee Convention, which prohibits states from ''impos[ing] penalties'' on refugees based on ''illegal entry or presence.'' As the commentary to the Refugee Convention explains, the term ''penalties'' in Article 31 refers ''to administrative or judicial convictions on account of illegal entry or presence, not to expulsion.'' Refugee Convention Art. 31, commentary; *see Cazun* v. *Att'y Gen. U.S.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017) (rejecting argument that the reinstatement bar to asylum was a ''penalty'' within the meaning of Article 31). The rule does not change any rules or policies relating to detention or convictions for unlawful entry or presence. The Departments acknowledge that the Ninth Circuit concluded in *East Bay III,* 993 F.3d at 674, that the bar to asylum at issue in that case violated Article 31 of the

Refugee Convention because it imposed a ''penalty.'' As described in the NPRM, the rule here does not create a categorical bar to asylum, but instead a rebuttable presumption, and *East Bay III* accordingly does not address the lawfulness of this rule. 88 FR at 11739. Moreover, the Ninth Circuit's conclusion was erroneous because the denial of discretionary relief is not a penalty within the meaning of Article 31. *Id.*

Some commenters correctly observed that the Refugee Convention does not require refugees to apply for asylum in the first country they pass through. This rule, however, does not require noncitizens to apply for asylum in the first—or any—country through which they travel. Instead, the rule applies a rebuttable presumption to certain noncitizens who failed to avail themselves of a lawful pathway. One such pathway is to apply for asylum and receive a final denial in a transit country, but it is not the sole lawful pathway available. Noncitizens who fail to avail themselves of a lawful pathway may still rebut the presumption of ineligibility for asylum. Regardless, the Convention does not require the United States to grant asylum to every person who qualifies as a ''refugee'' under the INA; instead, the United States implements the Convention's prohibitions on refoulement through statutory withholding of removal. UNHCR has stated that ''the primary responsibility to provide protection rests with the State where asylum is sought.'' [200] But UNHCR also acknowledges that ''refugees do not have an unfettered right to choose their 'asylum country.' '' [201]

In any event, UNHCR's interpretations of or recommendations regarding the Refugee Convention and Refugee Protocol are ''not binding on the Attorney General, the BIA, or United States courts.'' *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 427 (1999). ''Indeed, [UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status] itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.' '' *Id.* at 427–28 (quoting *Cardoza-Fonseca,* 480 U.S. at 439 n. 22). Such guidance ''may be a useful interpretative aid,'' *id.* at 427, but it does not create obligations for the United States.

The rule similarly does not violate the United States' obligations under other international laws and treaties, including the Geneva Conventions, the Rome Statute, the ICCPR, the CRC, or customary international law. First, the Geneva Conventions, a series of treaties that regulate the conduct of armed conflict, have no bearing on the rule. Commenters pointed to Articles 32 and 33 of the Fourth Geneva Convention, which prohibit corporal punishment or mass punishment against protected persons. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (''Fourth Geneva Convention''), 12 Aug. 1949, 75 UNTS 287. Under Article 4, ''protected persons'' are limited to those who, during a conflict or occupation, are ''in the hands of a Party to the conflict or Occupying Power.'' As the rule does not implicate a conflict or occupation, there is no conflict with the Geneva Conventions. While at least one commenter pointed to the definition of genocide in Article 6 of the Rome Statute, the United States is not a party to and has no obligations pursuant to the Rome Statute. In any event, the rule plainly does not constitute or involve genocide in any way. *See* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998). Similarly, the United States has not ratified the CRC and thus has no obligations under that instrument, 1577 U.N.T.S. 3, reprinted in 28 I.L.M. 1448, 1456 (Nov. 20, 1989).[202] Again, even if considered customary international law—although the United States maintains that it is not—the CRC requires only that States take appropriate measures to protect children who are refugees. *See* CRC, Article 22. The rule accounts for the interests of children through creating robust screening procedures, exempting unaccompanied children from the application of the rule, having a family unity exception, and exempting certain noncitizens who enter as children from ongoing application of the presumption after the two-year period. Additionally, the adjudicator may consider on a case-by-case basis whether the child's situation presents exceptionally compelling circumstances, including considering the circumstances surrounding the child's manner of entry, thus rebutting the presumption.

4. Recent Executive Orders

Comment: Some commenters stated without explanation that the rule is contrary to Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 FR 8277 (Feb. 2, 2021). Other commenters stated that to restore faith in the U.S. asylum system as the Executive Order aims to do, the ''government'' should take various steps, including ''adequately fund[ing] a fair asylum system'' rather than ''wast[e] money on immigration enforcement that separates families, traumatizes children, and tears our communities apart.'' Commenters further stated that the Administration should end the use of expedited removal, increase the scale and pace of refugee admissions, and expand lawful pathways for people ''fleeing from countries with failed government and uncontrolled violence.'' On the other hand, some commenters were critical of the rule because they believed it was not strict enough and, accordingly, averred that the rule is consistent with the Executive Order because it will ''remov[e] barriers to immigration.''

Response: As a threshold matter, Executive Order 14012 does not require DOJ or DHS to adopt any specific policies but rather to (1) identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers; (2) identify any agency actions that fail to promote access to the legal immigration system and recommend steps, as appropriate and consistent with applicable law, to revise or rescind those agency actions; (3) submit a plan describing the steps they will take to advance these policies; and (4) submit reports regarding implementation of those plans. 86 FR 8277. Because Executive Order 14012 does not require the adoption of specific policies, the actions taken here do not violate that Executive Order.

To the extent commenters believe that the rule is inconsistent with Executive Order 14012, the Departments disagree. Consistent with Executive Order 14012's promotion of removing barriers to accessing immigration benefits and access to the legal immigration system, DHS has created multiple parole processes to provide certain migrants with pathways to temporarily enter and remain in the United States. During

[200] UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, para. 3(i) (May 2013), *http://www.refworld.org/docid/51af82794.html.*

[201] UNHCR, Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries, at 1 (Apr. 2018), *https://www.refworld.org/pdfid/5acb33ad4.pdf.*

[202] *See* Status of Ratification, Office of the High Commissioner for Human Rights, *https://indicators.ohchr.org/.*

those periods of stay, those noncitizens may seek asylum and related protection or other benefits for which they may be eligible. The rule furthers the policy discussed in the Executive Order by encouraging noncitizens to use those parole processes, as well as the CBP One app to enter the United States through a safe, orderly process. This rule also discourages unlawful border crossings that overwhelm limited government resources along the SWB. The Departments believe that there will be efficiency gains from having noncitizens pre-register for appointments—saving considerable processing time—and from decreased encounters between POEs with persons who claim a fear of persecution or torture, the processing of whom requires more resources than processing noncitizens who pursue a lawful pathway. It is correct that implementing the rule will increase the duration of some credible fear screenings. However, the Departments expect that fewer individuals with non-meritorious claims will receive positive screening determinations, which will result in a more efficient asylum system overall.

The Departments acknowledge commenters' recommendations to provide additional funding for the asylum system and end expedited removal. Both of those actions are outside the Departments' authority and would require congressional action. Ending the use of expedited removal in the absence of congressional action is outside the scope of this rulemaking. The Departments have considered commenters' recommendation of adding lawful pathways for people leaving countries with failed governments. This rule does not create any lawful pathways and thus the comment is outside the scope of this rulemaking.

Comment: Commenters expressed concern that the rule is inconsistent with Executive Order 14010, 86 FR 8267, because they believe it contradicts the instruction to develop policies and procedures for the safe and orderly processing of asylum claims at the U.S. land borders. Commenters stated that rather than developing policies for the safe and orderly processing of asylum claims, the rule instead would restrict the availability of asylum in a way that would make it impossible for most asylum seekers to access the asylum system. Commenters further asserted that rather than restoring faith in the U.S. asylum system, the rule attempts to ''deport refugees to danger based on manner of entry and transit in circumvention of existing refugee law and treaty obligations.'' Commenters also suggested that the rule resurrects the PACR and HARP programs that the Executive Order ended.

Commenters also criticized the Departments for not following ''the collaborative process called for in'' the Executive Order. Specifically, commenters stated that Departments have failed to ''follow Executive Order 14010's mandate to consult with affected organizations'' as they are unaware of any ''consultation or planning'' that has occurred between when the Executive Order was issued and the publication of the NPRM.

Response: The Departments disagree with these commenters because the rule, as directed by Executive Order 14010, encourages use of lawful pathways to enter the United States, which will foster safe, orderly, and more efficient processing of asylum claims for those individuals seeking asylum, while discouraging unlawful border crossings that overwhelm limited resources and unfairly delay the adjudication of meritorious claims for asylum and other forms of protection. The rule is designed to incentivize noncitizens to avail themselves of a lawful pathway to enter the United States, which allows for more efficient use of DHS resources. By incentivizing the pursuit of lawful pathways, the Departments are promoting safe and orderly processing along the SWB as Executive Order 14010 instructs—processing that seeks to minimize the role of criminal organizations that prioritize profits over migrants' lives.

The Departments disagree with commenters that the rule resurrects PACR and HARP. Those programs were developed by DHS to promptly address credible fear claims of single adults and family units while the noncitizens remained in CBP custody.[203] This rule, in contrast, does not change the timeline for credible fear screenings. Nor does it affect where noncitizens are located during such screenings. Thus, commenters' comparisons to PACR and HARP are misplaced.

Commenters are similarly mistaken regarding DHS's responsibilities under the Executive Order. Commenters are correct that the Executive Order instructed the Secretary and Director of the CDC, ''in coordination with the Secretary of State, . . . [to] promptly begin consultation and planning with international and non-governmental organizations to develop policies and procedures for the safe and orderly processing of asylum claims at United States land borders, consistent with public health and safety and capacity constraints.'' 86 FR at 8269. DHS has worked with NGOs to implement the exceptions to the Title 42 public health Order and continues to seek collaboration through seeking comment on this rule.

Comment: Some commenters stated that the rule violates Executive Order 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 2, 2021), and amounts to the legalization of family separation, in contravention of that Executive Order.

Response: In Executive Order 14011, President Biden announced the creation of a task force to identify children who were separated from their families between January 20, 2017, and January 20, 2021, and, among other things, to the greatest extent possible, facilitate and enable the reunification of those children with their families. 86 FR at 8273. In doing so, President Biden stated that his Administration ''will protect family unity and ensure that children entering the United States are not separated from their families, except in the most extreme circumstances where a separation is clearly necessary for the safety and well-being of the child or is required by law.'' *Id.* The rule is consistent with this policy statement. The rule includes multiple provisions aimed at ensuring that families who enter the United States from Mexico at the SWB or adjacent coastal borders are not inadvertently separated. For example, where an exception or rebuttal circumstance applies to one member of a family, it is applied to all members of the family. *See* 8 CFR 208.33(a)(2)(ii), (3)(i), 1208.33(a)(2)(ii), (3)(i). And where asylum is denied to a noncitizen because of the presumption of ineligibility but one member of the noncitizen's family who traveled with the noncitizen obtains protection from removal through statutory withholding of removal or CAT, the circumstance will be deemed exceptionally compelling for the noncitizen denied such relief, allowing the family to remain together. *See* 8 CFR 1208.33(c). Finally, as described in Section IV.E.7.ii of this preamble, the Departments have expanded the family unity provision to cover spouses and children who would be eligible to follow to join the applicant if that applicant were granted asylum, as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A). 8 CFR 1208.33(c). Such measures were adopted in accordance with Executive Order 14011 to ensure that family units will not be separated as a result of this rule.

[203] *See* Mem. of Law in Opp'n to Pls.'s Mot. for Summ. J. & in Supp. of Defs.' Cross-Mot. for Summ. J. at 8–11, *Las Ams. Immigrant Advoc. Ctr.* v. *Wolf,* No. 19-cv-3640 (D.D.C. Feb. 6, 2020).

Comment: Commenters stated that the Departments should take into account Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (Jan. 20, 2021), and the more recent Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 FR 10825 (Feb. 16, 2023), and stated that the agencies have not considered these underserved populations and that this rule is evidence that these Executive Orders were not considered in the rule-making process. Commenters more broadly criticized the rule as ''betraying promises'' made in the Executive Orders because they believe the rule will have a disproportionate effect on certain groups of noncitizens and argued that the rule is generally out of line with the Executive Orders. Commenters also suggested that ''[o]verly relying on the [CBP One] app . . . will significantly thwart the Biden administration's stated commitment to racial justice and equity.'' Commenters further stated that the rule undermines the commitment in the Executive Orders and ''will endanger Black, Brown, and Indigenous asylum seekers.'' Commenters asserted that the rule ''will perpetuate systemic and institutional racism and injustice,'' noting concerns about the accessibility of the CBP One app for those who speak languages other than English, Spanish, and Haitian Creole; ''the app's widely reported misidentification of people of color''; the exacerbation of ''existing discrepancies in outcome[s] for individuals without legal representation''; and the ''further solidif[ication of] inequities and injustice in our immigration system.''

Response: On President Biden's first day in office, January 20, 2021, he issued Executive Order 13985. On February 16, 2023, he issued Executive Order 14091, which reiterated the policy goals detailed in Executive Order 13985 and discussed the ways in which those policy goals had been furthered since that Executive Order. Both Executive Orders describe President Biden's policy of ''advancing equity for all, including communities that have long been underserved, and addressing systemic racism in our Nation's policies and programs.'' 88 FR at 10825. As discussed throughout this preamble, the Departments have designed the rule to include a tailored rebuttable presumption in order to address a specific problem along the SWB. As discussed in Section IV.B.4.vi of this preamble, the Departments do not have any discriminatory purpose in adopting the rule. The Departments have addressed concerns about the disparate impact of the rule on various communities in Section IV.B.4 of this preamble, the concerns relating to the CBP One app's liveness software are addressed in Section IV.E.3.ii of this preamble, and concerns about pro se individuals are discussed in Section IV.B.5.ii of this preamble. Finally, as discussed in Section IV.E.3 of this preamble, the rule provides an exception to the application of the rebuttable presumption for those who appear at a POE without a pre-scheduled appointment and for whom scheduling an appointment was impossible due to a language barrier. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B).

5. Other Comments on Legal Authority

Comment: One commenter noted that the proposed rule ''is not a legislative act'' and is instead subject to the Administrative Procedure Act, but ''the persons to whom the rule applies are excluded from appearing within the USA to challenge the administrative requirement for exhaustion of remedies.''

Response: The Departments agree that this rule is not a legislative act but instead the promulgation of agency regulations pursuant to the APA. The Departments disagree that the rule implicates or changes the exhaustion requirements in administrative law. The Departments note that the rule does not apply to noncitizens in other countries; the rule only applies to noncitizens who enter the United States and thereafter file applications for asylum. Put differently, it will only apply to noncitizens within the United States, who are not precluded from filing an APA challenge by virtue of being outside of the United States, but who may be limited in the types of challenges they can bring to its application during the credible fear process under section 242(e) of the INA, 8 U.S.C. 1252(e). The Departments further note that noncitizens who avail themselves of a lawful pathway to enter the United States will not otherwise need to address the provisions of this rule, as any subsequently filed asylum application will not be subject to the rebuttable presumption. Any noncitizen subject to the rebuttable presumption will be able to address its application to them and any applicable exceptions or rebuttal grounds before an AO or IJ, and in any available administrative appeal. Thus, the commenter's concern about being able to bring an APA challenge from a foreign jurisdiction are unfounded.

Comment: Commenters stated that litigation over and injunctions against the rule would only exacerbate the confusion at the SWB.

Response: As explained previously in Section IV.D of this preamble, the Departments believe this rule is lawful and that it should not be subject to an injunction or otherwise halted in litigation. To the extent it is possible that the rule will be halted or enjoined, the Departments believe the risks are outweighed by the need to ensure safe and orderly processing at the SWB.

Comment: Commenters stated that the proposed rule was silent as to retroactive applicability and urged the Departments to ''make an affirmative pronouncement'' that the rule will not apply retroactively. Commenters were specifically concerned about the rule applying to ''anyone whose latest entry into the United States was prior to the effective date(s) of the rule,'' which commenters stated is required by section 551(4) of the APA, 5 U.S.C. 551(4). Commenters further raised concerns that application of the rule to those who enter before its effective date would ''infringe upon due process rights.''

Response: As written, the rule will not apply to anyone who enters the United States before the rule is effective. The Departments believe the NPRM's proposed language and the final language in this rule clearly provide that the rebuttable presumption may only be applied to those who enter the United States between the rule's effective date and a date 24 months later. *See* 8 CFR 208.13(f), 208.33(a)(1)(i), 1208.13(f), 1208.33(a)(1)(i). The Departments decline to address the applicability or requirements of due process or the APA in this regard because the rule is explicit that it is only potentially triggered by entries that take place after its effective date.

Comment: A commenter argued that the proposal fails to account for ''refugees''' reliance interests. The commenter wrote that refugees have an interest and right against refoulement and in the United States upholding domestic and international refugee law generally. The commenter argued that the Departments only have ''circumscribed'' discretion in administering asylum, citing INA 208, 8 U.S.C. 1158, and case law on establishing refugee status, and thus that refugees have a cognizable reliance interest in asylum.

Response: As described earlier in Section IV.D.3 of this preamble, the United States implements its non-

refoulement obligations through statutory withholding of removal, not asylum. Thus, it is incorrect to suggest that the non-refoulement obligations can raise a reliance interest in asylum. Additionally, asylum is a discretionary form of relief to which no applicant is entitled. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (''The Secretary of Homeland Security or the Attorney General may grant asylum . . . .''). Although ''longstanding policies may have 'engendered serious reliance interests that must be taken into account,''' *Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 222 (2016) (quoting *Fox Television,* 556 U.S. at 515), the commenter does not explain in what way noncitizens who are outside the United States have relied upon U.S. asylum law. To the extent noncitizens outside the United States have any cognizable reliance interests in the current rules governing asylum, the Departments believe those interests would be outweighed by the interest in incentivizing noncitizens to pursue safe, orderly, and lawful pathways to seek protection, and preventing a potential surge of migration at the southern border that threatens to overwhelm the Departments' ability to process asylum claims in a safe and orderly manner.

Comment: Commenters stated that the rule would violate the *Pangea* injunction. *See Pangea Legal Servs.* v. *DHS,* 512 F. Supp. 3d 966 (N.D. Cal. 2021).

Response: The court's order preliminarily enjoining the implementation of Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020) (''Global Asylum Rule'') and related policies in *Pangea II,* 512 F. Supp. 3d 966, does not prohibit the Departments from issuing this rule or otherwise limit the Departments' discretionary authority to adopt new asylum limitations consistent with section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C). *See, e.g., Milliken* v. *Bradley,* 433 U.S. 267, 281–82 (1974) (''The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the [alleged wrongful conduct] itself.''); *Meinhold* v. *U.S. Dep't of Def.,* 34 F.3d 1469, 1480 (9th Cir. 1994); *see also Thomas* v. *Cty. of Los Angeles,* 978 F.2d 504, 509 (9th Cir. 1992) (reversing injunction that ''fail[ed] to specify the act or acts sought to be restrained as required by'' Federal Rule of Civil Procedure 65(d)).

E. Comments on the Rule Provisions

1. General Feedback on the Rebuttable Presumption of Ineligibility

Comment: Commenters expressed concern that the requirements to overcome the presumption would deprive asylum seekers of a meaningful opportunity to seek protection, subject them to removal if they could not meet the elevated standard for statutory withholding of removal, and put them at risk of violence or other harmful conditions. Commenters said that the proposed rule would require noncitizens to gather evidence and present arguments to rebut the presumption against asylum eligibility, establish an exception, or prove that they are not subject to the rule. Some said it would be difficult or impossible for noncitizens arriving at the SWB to do so, given that most are detained during credible fear proceedings; that they may lack access to supporting documentation; that CBP officers may confiscate their property; and that the determination is made in a single interview. Therefore, commenters stated, the rule would categorically deny relief, bar asylum, or result in ''automatic ineligibility'' for most or all noncitizens who would be subject to it. Commenters stated that noncitizens would be at the mercy of the AOs' credibility assessment and discretion. Some commenters said there was no indication that AOs would have to elicit relevant testimony and suggested this requirement should be included in the rule. One commenter wrote that individuals who have previously experienced any of the per se exemptions for rebuttal may still be experiencing long-lasting effects that limit their ability to rebut the presumption in the present. A commenter stated that children and families would be unable to rebut the presumption due to limited language access, absence of legal counsel, and having their belongings confiscated.

Some commenters said that the grounds for rebutting the presumption against asylum eligibility were too narrow, limited, or extreme and did not relate to the merits of an asylum claim; they recommended that the grounds be expanded. One commenter stated that the current examples of exceptionally compelling circumstances would not protect the vast majority of refugees who would qualify for asylum under U.S. law, including many who enter the United States without an appointment due to safety risks, medical issues, and other protection needs. Some stated that narrow terms like ''exceptionally compelling,'' ''imminent and extreme,'' and ''severe'' made the presumption too difficult to rebut, while others expressed concern about the perceived vagueness of these terms and said the rule provided inadequate guidance on them. One commenter wrote that the nature of the grounds and exceptions make them inherently difficult to corroborate with physical evidence. One commenter expressed concerns that the proposed means of rebuttal do not reference a subjective component, such as where the asylum seeker believed they faced an acute medical emergency or imminent and extreme threat. A legal services provider compared the proposed rule to the one-year deadline to apply for asylum and stated that the one-year deadline allows for even greater opportunities for rebuttal by allowing an individual to show a number of exceptional circumstances beyond those in the NPRM. Some commenters expressed concern about possible lack of clarity in the evidentiary requirements to rebut the presumption against asylum eligibility. Some stated that the lack of definitions and documentary evidence requirements in the NPRM would leave the adjudicator with an inordinate amount of discretion to decide whether the presumption had been rebutted. Some commenters urged the Departments to reverse the presumption or apply a rebuttable presumption of eligibility for torture survivors.

Response: The Departments acknowledge these concerns but disagree with them. As discussed throughout Section IV.B.5 of this preamble, AOs conducting credible fear interviews have an affirmative duty to elicit all testimony relevant to assessing eligibility for protection, which will necessarily include testimony relevant to the rebuttable presumption.[204] Similarly, credible fear review by an IJ ''include[s] an opportunity for the alien to be heard and questioned by the [IJ].'' INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). In section 240 proceedings, IJs have a duty to develop the record, which again will necessarily include facts and testimony relevant to the rebuttable presumption. 8 CFR 1003.10(b) (''[IJs] shall administer oaths, receive evidence, and interrogate, examine, and cross-examine aliens and any witnesses.''); *Quintero* v. *Garland,* 998 F.3d 612, 626 (4th Cir. 2021). A noncitizen may be able to satisfy their burden of proof through credible testimony alone, INA 208(b)(1)(B)(ii), 8

[204] USCIS, *Eliciting Testimony;* USCIS, *Non-Adversarial Interview* 13 (''You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.'').

U.S.C. 1158(b)(1)(B)(ii), and the rule does not require any particular evidence, including documentary evidence, to rebut or establish an exception to the presumption under 8 CFR 208.33(a) and 1208.33(a).

The Departments believe that the exceptions to and means of rebutting the presumption are appropriate in scope and detail and that they need not be expanded by, for example, incorporating means of rebuttal similar to the exceptions to the one-year deadline for applying for asylum. To the extent that, at the time of entry, a noncitizen reasonably believed that they faced an acute medical emergency or imminent and extreme threat to life or safety, the rule permits adjudicators to consider whether this situation may constitute an ''exceptionally compelling circumstance[.]'' 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). As to concerns about disparate application amongst AOs, all credible fear determinations undergo supervisory review to ensure consistency, 8 CFR 208.30(e)(8), and noncitizens can request IJ review of a negative determination, 8 CFR 208.33(b), 1208.33(b). Determinations made by IJs in section 240 proceedings, including determinations about the presumption, are subject to review by the BIA. *See* 8 CFR 1003.1(b). Comments regarding AO and IJ conduct and training are further addressed in Section IV.B.5.iii of this preamble. The Departments decline to ''reverse'' the presumption of ineligibility for certain cases, which would function as an additional exception to the rule and undermine the rule's goal of incentivizing migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States or seek asylum or other protection in another country through which they travel. However, even if ineligible for asylum due to the presumption against asylum eligibility, noncitizens who establish a reasonable possibility of persecution or torture, 8 CFR 208.33(b)(2)(i), 1208.33(b)(2)(ii), remain eligible to apply for statutory withholding of removal and protection under the CAT. 8 CFR 208.16.

Comment: Commenters expressed opposition to the proposed requirement that noncitizens satisfy the preponderance of the evidence standard to rebut the presumption of ineligibility. Commenters stated that using the preponderance of the evidence standard violates section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v), by imposing a different, higher standard than the ''significant possibility'' standard. Citing a 1996 statement from U.S. Senator Orrin Hatch, one commenter stated that the application of the ''preponderance of the evidence'' standard during the credible fear stage was considered and rejected by Congress and that the Departments lack the authority to resurrect and implement that standard through regulation. Some commenters emphasized that the ''significant possibility'' standard is an intentionally low screening standard for credible fear interviews established by Congress. Some commenters stated that the ''preponderance of the evidence'' standard is even higher than the ''reasonable possibility'' standard to show a well-founded fear, which in turn is higher than the ''significant possibility'' standard. Some commenters stated that the ''preponderance of the evidence'' standard imposes too high a burden on noncitizens in credible fear proceedings. Commenters said it would be particularly difficult for detained, unrepresented individuals to satisfy this burden or that the rule would be hardest on disadvantaged noncitizens. One commenter recommended that this heightened standard of proof not be implemented and that the existing standard of proof be revised for consistency with international norms to exclude only cases that are ''manifestly unfounded or clearly abusive.''

Response: Commenters' concerns are based on an incorrect premise. At the credible fear stage, AOs will apply the ''significant possibility'' standard in assessing whether a noncitizen may ultimately rebut the presumption of asylum ineligibility by a preponderance of the evidence during a full merits adjudication. Because the ''significant possibility'' standard is set by statute, *see* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the Departments lack the authority to alter it through rulemaking. For further discussion of this issue, see Section IV.D.1.iii of this preamble.

Comment: Commenters stated that applying the rule's presumption of ineligibility at the credible fear stage is different from how other eligibility bars function in credible fear determinations. Some commenters stated that the complex means of rebuttal would require a lengthy, fact-based interview and ''intensive factual analysis,'' which they claimed are not appropriate for credible fear interviews because those interviews offer insufficient procedural protections. Another commenter stated that the Departments recently recognized due process problems with this approach when they rescinded the requirement that certain mandatory bars to asylum be considered at the credible fear screening stage.

One commenter expressed concern with the perceived discretion of border officials during the proposed rebuttable presumption process, asserting that the NPRM gave no clear indication of how, when, or in front of whom the asylum seeker will have to present their evidence. One commenter stated that DHS has a poor track record of making similar determinations in the past, citing instances where noncitizens were erroneously enrolled in the MPP, and stated that DHS has historically failed to effectively screen asylum seekers for certain characteristics and processes. One commenter stated that, under the NPRM, AOs would determine whether individuals presented at the SWB without documents sufficient for lawful admission pursuant to section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), but that AOs do not receive the same training as CBP officers regarding that section.

Response: The Departments acknowledge that statutory bars to asylum eligibility have not historically applied at the credible fear stage. However, the Departments have authority to apply conditions on asylum eligibility at that stage. The INA authorizes AOs to assess whether there is a significant possibility that the noncitizen could establish eligibility for asylum, INA 235(b)(1)(v), 8 U.S.C. 1225(b)(1)(v), which may include additional eligibility conditions that the Departments establish by regulation, *see* 88 FR at 11742. Moreover, the Departments believe that the rebuttable presumption of ineligibility under this rule is less complex than the mandatory bars provided in section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A) (barring from asylum eligibility noncitizens (1) who have participated in persecution; (2) who have been convicted of a particularly serious crime; (3) for whom there are serious reasons to believe committed a serious nonpolitical crime; (4) for whom there are reasonable grounds to regard as a danger to the United States; (5) who are described under certain provisions relating to terrorist activity; or (6) who were firmly resettled before coming to the United States). Also, most of the facts relevant to the applicability of, exceptions to, and means of rebutting the presumption involve circumstances at or near the time of the noncitizen's entry. Because credible fear interviews occur near the time of entry when the events and circumstances giving rise to the presumption's exceptions and rebuttal grounds occur, the Departments believe noncitizens will have a sufficient opportunity to provide testimony regarding such events and

circumstances while they are fresh in noncitizens' minds. Furthermore, delaying application of the presumption against asylum eligibility until the final merits stage would undermine the Departments' goals of incentivizing migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States or seek asylum or other protection in another country through which they travel.

This rule provides that AOs and IJs, not CBP officers, will assess whether noncitizens are subject to the rule's presumption of asylum ineligibility and can rebut the presumption. 8 CFR 208.33(b), 1208.33(b). Also, the Departments note that the ''significant possibility'' standard applied at the credible fear stage is lower than the ''more likely than not'' standard that was used by DHS to assess whether a noncitizen could be returned to Mexico pursuant to the MPP.[205] The Departments disagree that the rule requires AOs to assess whether noncitizens are inadmissible under section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), and subject to expedited removal. CBP officers will continue to determine whether a noncitizen is subject to, and will be placed in, expedited removal.

Comment: Commenters stated that the term ''rebuttable presumption'' as used in the rule is misleading and inaccurate and that the rule instead creates an outright bar with exceptions.

Response: The Departments believe that the description of the rule's main provision as a rebuttable presumption accurately reflects the operation of that provision, including the availability of exceptions and bases to rebut the presumption. Unlike the TCT Bar Final Rule, which included only narrow, categorical exceptions to its application, under this rule, if the noncitizen is not exempted from this rule's application, the lawful pathways condition may be rebutted where the noncitizen demonstrates to the adjudicator's satisfaction that exceptionally compelling circumstances are present. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). Because a noncitizen to whom the condition applies and for whom an exception is not available under 8 CFR 208.33(a)(2), 1208.33(a)(2), may nevertheless avoid its effect in certain non-categorical circumstances, the Departments believe that referring to it as a ''rebuttable presumption'' is accurate.

2. Grounds for Rebutting the Presumption

i. Acute Medical Emergency

Comment: Commenters expressed concerns regarding the acute medical emergency means of rebuttal. One commenter asserted that this was a novel concept under immigration law and that the NPRM's description of this ground of rebuttal made clear that this standard is designed to be impossible to meet. Some commenters stated that the proposed rule failed to provide definitions or guidance to inform assessments of what constitutes an acute medical emergency. Some commenters wrote that this means of rebuttal should include non-life-threatening and other non-medical needs. One commenter, who is a doctor, stated that the definition of ''medical emergency'' should include curable conditions that would be fatal in the short term and conditions that could be commonly treated in the United States to restore health and function, assuming that sufficient care would not be available in the originating country. Commenters expressed concern regarding how people living with HIV will be assessed under this provision, given that their condition could lead to a life-threatening emergency without treatment. Commenters also expressed concern that the proposed rule gave inadequate consideration to the unique attributes of children's physical and mental health and noted that signs differentiating a child with illness from one with severe illness are quite subtle. Some commenters also expressed concern that the proposed rule would not require that children be assessed by trauma-informed physicians. Another commenter expressed concerns that the rule would not account for potential emergencies for pregnant women.

Some commenters stated that the ''preponderance of the evidence'' standard for establishing an acute medical emergency is too high. Commenters said that the rule did not explain how an individual would prove that their medical issue was ''acute,'' and one stated that this determination is possible only after medical care is already being provided. Some commenters stated that noncitizens may lack medical documentation or knowledge of the severity of their condition and that AOs and IJs are not medical experts with the required expertise to evaluate these types of medical issues. Other commenters stated that the proposed rule does not specify which officials will be making this determination or whether any medical training or expertise would be required. Commenters expressed concerns that asking immigration officials to make medical assessments would yield inconsistent application of the rebuttable presumption and undermine the welfare of asylum seekers. Commenters expressed concern that this means of rebutting the presumption would require noncitizens to share private details about their medical histories and bodies with a stranger on the phone. One commenter said that an individual may not know that they are suffering an acute medical emergency, while another stated that a noncitizen's medical condition could worsen by the time that the AO decides whether the presumption has been rebutted. Some commenters added that the rule should specify what would occur in scenarios where families rebut the presumption based on the acute medical emergency ground and the individual with the medical emergency subsequently dies or the individual lacks access to medical care to address their medical emergency.

Commenters said that CBP had denied Title 42 health exceptions to those with acute medical needs, despite extensive documentation of their conditions, which raised the concern that the term ''acute medical emergency'' would also be applied stringently under the rule. Another commenter stated that the rule would ''restrict access to medical care and humanitarian aid if asylum seekers are denied by CBP,'' which would impede the gathering of evidence needed to rebut the presumption of asylum ineligibility.

Another commenter expressed concern that an acute medical emergency may also be easy to feign or fabricate, though the commenter did not provide any example of how that could be done.

Response: The Departments believe the acute medical emergency means of rebuttal at 8 CFR 208.33(a)(3)(i)(A) and 1208.33(a)(3)(i)(A), is drafted so that those noncitizens with acute medical emergencies can rebut the condition on asylum eligibility. In general, as stated in the NPRM, acute medical emergencies include situations in which someone faces a life-threatening medical emergency or faces acute and grave medical needs that they cannot adequately address outside of the United States. *See* 88 FR at 11723. If a noncitizen rebuts the presumption based on the acute medical emergency of a family member with whom they were traveling, the noncitizen's

[205] USCIS, *PM 602–0169, Policy Memorandum: Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols* (Jan. 28, 2019), *https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf.*

eligibility for asylum will not change if the family member who faced the medical emergency subsequently passes away; this is because the language of the rebuttal circumstance focuses on whether the family member faced an acute medical emergency ''at the time of entry.'' 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i).

The Departments believe that, in general, broadening this means of rebuttal would undermine the purpose of the rule, which is to incentivize noncitizens to utilize lawful, safe, and orderly pathways of migration. A medical condition that is not an acute emergency would not ordinarily or necessarily justify failing to pursue a lawful pathway. However, while an acute medical emergency is a per se example of an exceptionally compelling circumstance to rebut the presumption of ineligibility, AOs and IJs may determine, on a case-by-case basis, whether less severe health-related situations also qualify as ''exceptionally compelling circumstances.'' *See* 8 CFR 208.33(a)(3), 1208.33(a)(3).

The Departments also disagree with comments concerning the ability of AOs and IJs to properly assess this rebuttal ground and the ability of noncitizens to establish it. As discussed in Section IV.D.1.iii of this preamble, AOs will apply the ''significant possibility'' standard during credible fear interviews to determine whether a noncitizen would be able to rebut the presumption because they faced an acute medical emergency at the time of entry. Again, the Departments emphasize that noncitizens may be able to rebut the presumption of asylum ineligibility through testimony alone, and the rule does not require any particular evidence to rebut the presumption under 8 CFR 208.33(a)(3) and 1208.33(a)(3). AOs are trained to elicit all relevant testimony in a non-adversarial manner, which will necessarily include testimony related to this ground for rebuttal.[206] As discussed earlier in Section IV.B.5.iii.a of this preamble, AOs frequently assess physical and psychological harm when adjudicating asylum applications and are trained to do so in a sensitive manner. As discussed in Section IV.B.5.iii.c of this preamble, the rule does not require adjudicators to make a formal medical diagnosis or analyze whether a noncitizen meets specific medical criteria to determine whether a noncitizen has rebutted the rule's condition on eligibility. Instead, adjudicators will make a factual determination of whether an acute medical emergency existed at the time of entry. 8 CFR 208.33(a)(3)(i)(A), 1208.33(a)(3)(i)(A). To the extent that a noncitizen experienced such a medical emergency during their time in CBP custody, AOs may be able to consult CBP records. Specifically, if a noncitizen experiences a medical issue during their time in CBP custody, CBP medical staff will evaluate the noncitizen, and, if appropriate based on the severity of the issue, refer them to a local medical facility. This treatment would be documented.[207] Regarding the concerns raised about sharing private medical details, noncitizens in credible fear proceedings, as discussed in Section IV.B.5.v of this preamble, are advised of the confidential nature of the interview. As noted earlier in Sections IV.B.5.i and IV.E.1 of this preamble, credible fear determinations undergo multiple levels of review to ensure consistency, and decisions made in section 240 proceedings are subject to administrative appeal.

The Departments note that, like all exceptionally compelling circumstances, AOs in credible fear proceedings or IJs in immigration court, not CBP officers at POEs, will determine whether a noncitizen faced an acute medical emergency. Accordingly, to the extent commenters are concerned by how CBP officers have considered medical issues in the context of the application of the Title 42 public health Order, such concerns are inapplicable to this rule. Additionally, CBP will process all noncitizens who arrive and seek admission at a POE without regard to whether the presumption may ultimately be found to apply.

Regarding concerns of fraud, the commenter did not provide any explanation or example of how an acute medical emergency would be easy to fabricate, and AOs and IJs will assess the credibility of any claims that the noncitizen faced an acute medical emergency. INA 208(b)(1)(B)(2), 8 U.S.C. 1158(b)(1)(B)(2); INA 240(c)(4)(B), 8 U.S.C. 1229a(c)(4)(B); 8 CFR 208.30(e)(2).

ii. Imminent and Extreme Threat to Life and Safety

Comments: Commenters expressed concern over the high level of risk required to rebut the presumption based on an imminent and extreme threat to life and safety. Some commenters stated this means of rebuttal requires a higher degree of risk than is required for eligibility for asylum or statutory withholding of removal. One commenter stated that it would require migrants to ''predict the future'' in deciding whether to wait for an appointment at the border, which can be dangerous because violence happens randomly and unexpectedly. Some said that, if an asylum seeker is forced to remain in Mexico until a threat is imminent, it may well be too late to avoid such harm, thus putting the person in a ''catch-22.'' A commenter stated that the rule appears to exclude anyone who has already been gravely harmed while in Mexico but who cannot prove that another harm is ''imminent,'' while others recommended that if an individual circumvents other pathways to cross the U.S.-Mexico border due to the severity of past threats or harms, the ''imminent and extreme threat'' ground should automatically apply. Another commenter stated that, due to the complicated and lengthy regulatory definition of torture, that term should be replaced with ''severe pain or suffering.''

Commenters also expressed concern about the ability for specific populations to meet this rebuttal ground. Commenters stated that the rule forces LGBT and HIV-positive people, who already face significant hostility in Mexico, to put themselves in even worse danger to satisfy the imminence requirement of the ''imminent and extreme'' ground for rebuttal. Commenters wrote that this rebuttal ground should be broadened so that adjudicators may favorably consider circumstances involving threats to life or safety that might not necessarily be considered imminent or extreme. For example, one commenter noted that there are many forms of gender-based harm that are unlikely to meet the requirement that the threat to life or safety is ''imminent and extreme'' because such forms of harm are not always highly violent acts. One commenter wrote that pervasive discrimination or physical abuse—as, for example, experienced by LGBT individuals in Mexico, where discrimination against such persons is still commonplace—would not meet the threshold of ''imminent and extreme threat to life and safety'' if experienced in either a transit country or their home country. The commenter also stated that individuals forced to hide their identity

[206] USCIS, *Eliciting Testimony* 12 (''In cases requiring an interview, although the burden is on the applicant to establish eligibility, equally important is your obligation to elicit all pertinent information.''); USCIS, *Non-Adversarial Interview* 13 (''You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.'')

[207] CBP, *Directive 2210–004, Enhanced Medical Support Efforts* (Dec. 31, 2019), *https://www.cbp.gov/document/directives/directive-2210-004-cbp-enhanced-medical-efforts.*

to avoid discrimination would be hindered in their ability to meet this ground for rebuttal.

Commenters expressed concern that noncitizens would not have sufficient evidence to show an ''imminent and extreme'' threat to rebut the presumption. Similar to their comment regarding the ''acute medical emergency'' means of rebuttal, one commenter asserted that the ''imminent and extreme'' threat means of rebuttal is a novel concept under immigration law and that the description of this ground of rebuttal in the NPRM made clear that this standard is designed to be impossible to meet. One commenter stated that proving a specific threat may be near impossible because individualized threats are frequently made orally and in person, not in writing, and hence are not amenable to proof in a formalized setting. The commenter also stated that such threats are usually directly followed by the harm itself. One commenter wrote that the most deserving individuals in the asylum process will be hard-pressed to produce evidence of an ''imminent threat'' because persecution frequently does not leave documentary evidence. A few commenters emphasized that survivors of sexual assault would face extreme difficulty in obtaining documentation to meet the evidentiary burden from another country unless they had others assisting them; some survivors, for example, may have only their own account of the assault. A legal services provider expressed concern that survivors of violence would not necessarily have the proof, language, or support needed to explain what imminent danger they faced, leading to the denial of bona fide asylum claims and the refoulment of individuals facing extreme persecution.

Commenters expressed concerns that the lack of definition of an ''extreme and imminent threat to life or safety'' left adjudicators with an inordinate amount of discretion. One commenter stated that asylum seekers in Mexican border regions so often face a serious risk to their safety that it is unclear what an asylum seeker would need to show to establish an ''imminent and extreme'' threat to life. Commenters expressed concern that this ground of rebuttal calls for a subjective assessment of the temporality and qualitative extremity of the threats faced by asylum seekers, which may exclude many genuine refugees.

Other commenters stated concerns that this means of rebuttal was overly broad or would lead to fraud. One commenter said that AOs and IJs would have difficulty determining whether someone has fabricated evidence to support a claim that they faced an imminent threat to life or safety, especially when strong evidence exists that migrants who travel to the U.S.-Mexico border by way of smuggling networks are frequently subject to such violence. Another commenter stated that the journey to the southwest border of the United States is inherently a journey where migrants will face extreme threats to life and safety from beginning to end; adding this means of rebuttal would thus exempt the entire population of migrants who have traveled with the assistance of smugglers and other criminal enterprises.

Response: The Departments acknowledge these concerns but believe that only imminent and extreme threats to life or safety should constitute a per se ground to rebut the presumption of asylum ineligibility. For threats that are less imminent or extreme, noncitizens may attempt to demonstrate on a case-by-case basis that they otherwise present ''exceptionally compelling circumstances'' that overcome the presumption of ineligibility. Including lesser threats in the per se grounds for rebuttal would undermine the Departments' goal of incentivizing migrants to use lawful, safe, and orderly pathways to enter the United States or seek asylum or other protection in another country through which they travel.

As noted in the NPRM, threats cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer posed an immediate threat at the time of entry. 88 FR at 11707 n.27. The term ''extreme'' refers to the seriousness of the threat; the threat needs to be sufficiently grave, such as a threat of rape, kidnapping, torture, or murder, to trigger this ground for rebuttal. *Id.* Where the noncitizen is a member of a particularly vulnerable group (*e.g.,* LGBT or HIV-positive people), their membership in such a group may be a relevant factor in assessing the extremity and immediacy of the threats faced at the time of entry. In response to the recommendation that the word ''torture'' be replaced with ''severe pain and suffering,'' the Departments note that the imminent and extreme threats to life and safety listed in the rule are not exhaustive and that this means of rebuttal may in certain circumstances encompass imminent and extreme threats of severe pain and suffering.

The Departments disagree that noncitizens will have to ''predict the future'' to rebut the presumption against asylum in this manner. For this per se rebuttal ground to apply, the noncitizen must demonstrate there was an imminent and extreme threat to life or safety, not that the feared harm was actively taking place or certain to occur. *See* 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). The Departments also note that ''imminent'' and ''extreme'' are standards that are commonly used in asylum adjudications. *See, e.g., Fon* v. *Garland,* 34 F.4th 810, 813 (9th Cir. 2022) (''[P]ersecution is an extreme concept'' (quoting *Ghaly* v. *INS,* 58 F.3d 1425, 1431 (9th Cir. 1995))); *Li* v. *Att'y Gen. of U.S.,* 400 F.3d 157, 164 (3d Cir. 2005) (''[U]nfulfilled threats must be of a highly imminent and menacing nature in order to constitute persecution'' (citing *Boykov* v. *INS,* 109 F.3d 413, 416–17 (7th Cir. 1997))). As already discussed in Section IV.E.1 of this preamble, noncitizens may be able to rebut the presumption against asylum eligibility through credible testimony alone. In response to commenter concerns about inconsistent application of the rule, the Departments note that an AO's decision is subject to supervisory and potentially IJ review, and determinations made in section 240 proceedings may be administratively appealed.

The Departments acknowledge commenters' concern about fraud, but during credible fear screenings, AOs will assess the credibility of a noncitizen's testimony regarding dangers faced at the time of entry, which will necessarily include an evaluation of the whether a claimed threat is fraudulent. As discussed earlier in Section IV.D.1.iii of this preamble, whether a noncitizen is able to establish an exception to the rule or rebut the presumption will generally involve a straightforward analysis, and the Departments expect that, except in rare cases, application of the ''significant possibility'' standard will not meaningfully differ from application of the ultimate merits standard. The Departments believe that this ground of rebuttal is sufficiently narrow to prevent broad application to all citizens who attempt to enter the United States from Mexico across the SWB or adjacent coastal borders.

iii. Other Exceptionally Compelling Circumstances

Comment: Some commenters stated that the provision allowing a noncitizen to show ''exceptionally compelling circumstances'' to rebut the presumption was not sufficiently defined and hence that applying it would lead to disparate results amongst adjudicators. One commenter stated that

the rule does not clarify whether the exceptionally compelling circumstance must be one that prevented the asylum seeker from scheduling an appointment or whether it may be an equitable factor that mitigates in favor of granting humanitarian protection. Another commenter expressed concerns that the adverb ''exceptionally'' is redundant or excessive and would result in different interpretations by adjudicators. The same commenter stated that applying the term ''exceptionally compelling circumstances'' would also be difficult because the term is rarely used in immigration law and is restrictively defined by the Departments.

While some commenters expressed concern that requiring noncitizens to show ''exceptionally compelling circumstances'' by a preponderance of the evidence would be too demanding of a standard, which they asserted renders the provision inaccessible to many asylum seekers and will result in unfair denials, other commenters claimed that the standard would, in practice, allow for any official to create an exemption for any reason.

Response: The Departments respectfully disagree with commenters' concerns about the ''exceptionally compelling circumstances'' standard being insufficiently defined or not amenable to consistent determinations. The rule provides that a noncitizen necessarily demonstrates exceptionally compelling circumstances if, at the time of entry, they or a family member with whom they were traveling (1) had an acute medical emergency; (2) faced an imminent and extreme threat to life or safety; or (3) satisfied the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). The non-exhaustive nature of this list preserves flexibility and ensures that the rule does not foreclose adjudicators from considering facts giving rise to exceptionally compelling circumstances.

The Departments emphasize that exceptionally compelling circumstances are not limited to the examples enumerated in 8 CFR 208.33(a)(3)(i) and 1208.33(a)(3)(i). In fact, the rule recognizes additional per se exceptionally compelling circumstances in section 240 removal proceedings to, along with other provisions in the rule, eliminate the possibility that this rule will cause separation of family members who traveled together or long-term separation that would result by preventing family members from following to join principal applicants who would be granted asylum but for the presumption. 8 CFR 1208.33(c).

The Departments also note that AOs and IJs regularly apply various standards in the course of their adjudications, such as the ''extraordinary circumstances'' standard to determine whether an asylum applicant qualifies for an exception to the one-year filing deadline, *see* INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), and the discretionary ''compelling reasons'' standard to determine whether an applicant who has suffered past persecution but lacks a well-founded fear of future persecution should be granted asylum in the exercise of discretion, *see* 8 CFR 208.13(b)(1)(iii)(A); 1208.13(b)(1)(iii)(A). Hence, although the Departments acknowledge the concerns of some commenters about noncitizens' ability to demonstrate ''exceptionally compelling circumstances,'' the Departments believe that the best way to assess the variety of fact patterns presented by noncitizens is to use a fact-specific approach on a case-by-case basis. Using this fact-specific approach on a case-by-case basis is consistent with other aspects of asylum adjudication, such as establishing an exception to the one-year filing deadline, *see* INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), determining whether harm rises to the level of persecution, *see Stevic,* 467 U.S. at 423 n.18, or determining whether an individual was harmed on account of a protected ground, *see* 8 CFR 208.13(b)(1).

AOs receive extensive training that is designed to enable them to conduct non-adversarial interviews, assess testimony, and exercise their judgment in a fair and impartial manner.[208] Likewise, IJs have extensive experience and training in applying such concepts to individual cases.[209] Accordingly, the Departments strongly believe that IJs and AOs will fairly and competently examine the facts and circumstances of an individual's case to determine whether they demonstrated exceptionally compelling circumstances to rebut the lawful pathways presumption of asylum ineligibility. In response to commenter concerns about consistency of determinations, credible fear determinations, as noted above, are subject to review by a Supervisory AO, and determinations made in section 240 proceedings are subject to administrative appeal.

[208] *See* USCIS, *Non-Adversarial Interview.*

[209] *See* 8 CFR 1003.0(b)(1)(vii) (EOIR Director's authority to ''[p]rovide for comprehensive, continuing training and support'' for IJs); 8 CFR 1003.9(b)(1) and (2) (Chief Immigration Judge's authority to issue ''procedural instructions regarding the implementation of new statutory or regulatory authorities'' and ''[p]rovide for appropriate training of the [IJs] . . . on the conduct of their powers and duties''); DOJ EOIR, *Legal Education and Research Services Division* (Jan. 3, 2020), *https://www.justice.gov/eoir/legal-education-and-research-services-division* (''The Legal Education and Research Services Division (LERS) develops and coordinates headquarters and nationwide substantive legal training and professional development for new and experienced judges, attorneys, and others within EOIR who are directly involved in EOIR's adjudicative functions. LERS regularly distributes new information within EOIR that includes relevant legal developments and policy changes from U.S. government entities and international organizations.'').

iv. Victim of Severe Form of Trafficking in Persons

Comment: A number of commenters stated concern about noncitizens' ability to rebut the presumption by satisfying the definition of a ''victim of a severe form of trafficking in persons.'' Some commenters stated that trafficking victims cannot be expected to have evidence prepared to demonstrate, by a preponderance of the evidence, that they were trafficked. A few commenters expressed concern that it would be very difficult for the population that is vulnerable to trafficking to rebut the presumption due to lack of evidence and the exemption being narrowly applied. Others stated that the NPRM's reference to 8 CFR 214.11, which defines victims of severe forms of trafficking, was not sufficiently specific. Some commenters wrote that this ground of rebuttal should be broadened to apply to circumstances in which individuals may be at risk of trafficking and to apply regardless of severity. One commenter stated that the victims of trafficking rebuttal ground is very narrow and fails to take into account the many other forms of gender-based persecution, including domestic violence, sexual assault, stalking, female genital cutting, and forced marriage. A few other commenters expressed concerns that officials may retraumatize individuals in the process of validating a claim for rebutting the presumption and may end up returning them to their traffickers if they find that the noncitizen did not rebut the presumption of asylum ineligibility. One commenter wrote that, because the severity of human trafficking is hard to ''grade,'' it is important to apply the broadest understanding of new trends and definitions provided under the universal human rights instruments to prevent underreporting and insufficient identification of victims of this human rights violation.

One commenter wrote that the definition of ''victim of a severe form of trafficking'' is highly technical and requires a thorough analysis of several components usually (in the T nonimmigrant status context, from

which the definition derives) completed after review of a complete application package, including extensive supporting evidence and briefing prepared by legal counsel. The same commenter added that a survivor presenting at the border under the circumstances described above is unlikely to be able to meet this standard. Some commenters stated that the rule would force trafficking victims to rebut the presumption at a higher legal standard—preponderance of the evidence—rather than ''any credible evidence'' as would be required if they were already in the United States and applying for T nonimmigrant status.

One commenter stated that the Departments should remove the trafficking rebuttal ground because migrants who voluntarily utilized smugglers would falsely claim to have been trafficked to qualify for the exception.

Response: The Departments acknowledge commenters' concerns about victims of human trafficking but disagree that the existing rebuttal ground should be revised or expanded.

As described in the NPRM, *see* 88 FR at 11730, the presumption in this rule is necessarily rebuttable in certain circumstances, including if, at the time of entering the United States, the noncitizen satisfied the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11. *See* 8 CFR 208.33(a)(3)(i)(C), 1208.33(a)(3)(i)(C). The Departments disagree with the premise that this rule's reference to the definition of ''victim of a severe form of trafficking in persons'' found in 8 CFR 214.11 is insufficiently specific. This final rule relies upon, and is consistent with, the definition used in the T nonimmigrant status context, which itself is consistent with the applicable statutory definition.[210]

The Departments also emphasize that they are not applying the ''preponderance of the evidence'' standard to trafficking victims who are initially seeking to rebut the lawful pathways presumption during credible fear screenings. The standard of proof applied in credible fear screening is a ''significant possibility . . . that the alien could establish eligibility for asylum,'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), which also applies to ''exceptionally compelling circumstances.'' During credible fear screenings, then, a noncitizen would have to show a significant possibility that they could satisfy the definition of victim of a severe form of trafficking by a preponderance of the evidence in a full hearing. The Departments recognize that many victims of trafficking are unlikely to possess written evidence of their trafficking; however, the credible fear screening process involves eliciting testimony from individuals seeking protection and does not require noncitizens to provide written statements or other documentation. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); 8 CFR 208.30(d). Moreover, the Departments note that, in addition to receiving extensive training in substantive law and procedure, AOs are also trained to identify and interview vulnerable individuals, including victims of trafficking.[211] For merits adjudications, both AOs [212] and IJs [213] receive training and have experience assessing evidence and the credibility of noncitizens who appear before them for interviews or hearings, even in the absence of other documentation. Indeed, the INA explicitly provides that ''testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration.'' INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii).

With respect to the commenter's suggestion that the Departments should remove the trafficking-victims ground for rebuttal because the commenter believed that noncitizens who are smuggled will falsely claim they are trafficked, the Departments strongly believe it is important to treat trafficking as an exceptionally compelling circumstance. The Departments included this provision to allow this vulnerable population to rebut the lawful pathways presumption and seek protection in the United States. The Departments note that the commenter did not include any reliable evidence or data to support their allegation that individuals who are smuggled will falsely claim to be trafficked. In addition, the TCT Bar IFR also included a limited exception for victims of severe forms of trafficking, and the Departments are unaware of evidence that it was abused while that IFR was in effect.

Commenters' suggestions regarding broadening the grounds to rebut the presumption are addressed below in Section IV.E.3 of this preamble.

3. Exceptions to the Presumption

i. Proposed Exceptions for Migrants Facing Danger in Third Countries

Comment: Commenters expressed concern that the rule contains no exceptions for asylum seekers who would face danger in transit countries even though many asylum seekers are at serious risk in common transit countries. Multiple commenters suggested that the exemption for imminent threat of rape, kidnapping, torture, or murder should be expanded to include general threats of violence, as many individuals within the asylum process would be forced to stay in Mexico or other countries where general threats of violence are much more common and put their lives or safety at risk. Another commenter stated that, when asylum seekers are waiting in some of the most dangerous towns and cities in the world, they face real threats that the rule should recognize as an exception to the presumption.

Several commenters noted that the members of one family, when using the Title 42 exception process, tried to travel more than 1200 miles across Mexico and were kidnapped and taken hostage during that travel, only to be expelled from the United States when they sought help from the USBP. Another commenter noted that movement along the U.S.-Mexico border is notoriously difficult and unsafe. In contrast, one commenter stated that reports of localized violence in certain areas of Mexico are not indicative of the conditions in Mexico as a whole.

Response: The Departments acknowledge the concerns raised by commenters and reiterate that noncitizens who face an extreme and imminent threat to life or safety in Mexico at the time of entry can rebut the presumption of asylum ineligibility, *see* 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B), without needing to

[210] *See* 8 CFR 214.11(b) (cross-referencing INA 101(a)(15)(T)(i), 8 U.S.C. 1101(a)(15)(T)(i)).

[211] *See* USCIS, *RAIO Directorate—Detecting Possible Victims of Trafficking Lesson Plan* (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Trafficking_LP_RAIO.pdf; see also* USCIS, *Asylum Division Training Programs* (Dec. 19, 2016), *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs.*

[212] USCIS, *RAIO Directorate—Officer Training: Decision Making* (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Decision_Making_LP_RAIO.pdf.*

[213] *See* 8 CFR 1003.0(b)(1)(vii) (EOIR Director's authority to ''[p]rovide for comprehensive, continuing training and support'' for IJs); 8 CFR 1003.9(b)(1) and (2) (Chief Immigration Judge's authority to issue ''procedural instructions regarding the implementation of new statutory or regulatory authorities'' and ''[p]rovide for appropriate training of the [IJs] . . . on the conduct of their powers and duties''); DOJ EOIR, *Legal Education and Research Services Division* (Jan. 3, 2020), *https://www.justice.gov/eoir/legal-education-and-research-services-division* (''[LERS] develops and coordinates headquarters and nationwide substantive legal training and professional development for new and experienced judges, attorneys, and others within EOIR who are directly involved in EOIR's adjudicative functions. LERS regularly distributes new information within EOIR that includes relevant legal developments and policy changes from U.S. government entities and international organizations.'').

qualify for any additional exception. In addition, the rule provides that they may rebut the presumption by showing that, at the time of entry, they faced an acute medical emergency or were victims of a severe form of trafficking. *See* 8 CFR 208.33(a)(3)(i)(A) and (C), 1208.33(a)(3)(i)(A) and (C). However, the Departments decline to enumerate additional, broader ways to rebut the presumption, such as a ground based on general threats of violence; and the Departments likewise believe that they need not enumerate additional exceptions to the presumption. In the absence of other exceptionally compelling circumstances, *see* 8 CFR 208.33(a)(3)(i), 1208(a)(3)(i), the Departments believe that danger in Mexico generally would justify failing to pre-schedule a time and place to appear at a POE and eschewing lawful and orderly pathways for entering the United States only when it amounts to an extreme and imminent threat to life or safety. For noncitizens who face dangers in other countries besides Mexico, or who face less imminent and extreme threats in Mexico, there ordinarily remain reasonable opportunities to take advantage of other lawful pathways contemplated by the rule. To the extent a noncitizen's individual circumstances make lawful pathways unavailable, or otherwise warrant rebuttal of the presumption, noncitizens may attempt to demonstrate as much on a case-by-case basis under the ''exceptionally compelling circumstances'' means of rebuttal. Noncitizens may choose to apply for asylum or other protection in a different country where they do not face dangers or schedule appointments to appear at a SWB POE using the CBP One app. CHNV nationals may also apply for advanced authorization for parole while outside their country of nationality. With regard to concerns about traveling along the U.S.-Mexico border to access available CBP One app appointments, CBP intends to increase the number of available appointments when the Title 42 public health Order is lifted, as detailed in Section IV.E.3.ii.a of this preamble. As detailed in Section IV.E.3.ii.b of this preamble, CBP is implementing updates to the CBP One app process that will enable noncitizens to request a preferred POE to schedule an appointment, thus helping noncitizens avoid unpredictable travel along the U.S.-Mexico border.

ii. Concerns About the Exception for Scheduled Arrivals at Ports of Entry

a. General Comments Regarding the CBP One App

Comment: One commenter, a legal services provider, expressed concern about the future impact of the CBP One app based on their experiences with the use of the app in the context of seeking Title 42 exceptions. Specifically, the commenter stated that the use of the app had barred ''thousands'' from seeking exceptions to the Title 42 public health Order. This commenter stated that, before January 2023, it was able to schedule appointments for its clients with POEs directly, without using the app. The organization said that this process was ''orderly and calm'' and that clients rarely waited more than four to six weeks for an appointment. The organization stated that, following the implementation of the scheduling capability, many of their clients had been unable to secure appointments, and the process takes longer. The organization stated that CBP did not provide notice that the CBP One app would be the sole way to seek exceptions to Title 42.

Response: To the extent that commenters have concerns about the processing of individuals seeking exceptions to the Title 42 public health Order at POEs, including concerns about the number of appointments available under the Title 42 exception process, these concerns are outside the scope of this rule. This rule is designed to manage the anticipated increase in the number of individuals expected to travel to the United States without documents sufficient for lawful admission following the termination of the Title 42 public health Order and will take effect once the Title 42 public health Order is lifted. At that time, CBP will inspect and process all noncitizens who arrive at a POE under Title 8 authorities, which include the INA, as required by statute. Title 42 is a separate statutory scheme that operates separately from Title 8.

Additionally, following the termination of the Title 42 public health Order, CBP intends to increase the number of available appointments in the CBP One app and is committed to processing as many noncitizens as is operationally feasible. Further, in no instance will CBP turn a noncitizen away from a POE, regardless of whether they utilize the CBP One app.

Comment: Commenters expressed concern about the security of the personally identifiable information (''PII'') that users submit through the CBP One app. A commenter asserted that the CBP One app poses serious privacy concerns regarding the collection, storage, and use of private personal information and alleged that requiring use of the CBP One app is ''another means of enlarging what is an already expansive surveillance infrastructure that relentlessly targets immigrant communities.'' A commenter also stated that, while the Departments have previously indicated that use of the CBP One app is voluntary, the rule will significantly expand use of the app, with the result that it will be the only way for certain noncitizens to seek asylum in the United States and thus that ''many people do not have a genuine choice in whether to consent.'' Commenters questioned the wisdom of encouraging migrants to disclose personal details while in transit in temporary shelters and non-secure settings.

Particularly in light of a recent ICE data breach, commenters expressed concern about what measures CBP and DHS will take to secure the PII that applicants will have to provide in order to secure an appointment through the CBP One app. The commenters expressed concern that a similar breach regarding CBP One app data could place applicants waiting for appointments outside the United States at a greater risk than individuals affected by the recent breach, who were primarily in the United States. Commenters alleged that this risk could have a chilling effect on otherwise meritorious applications.

Commenters expressed a range of PII-related concerns regarding the use of the CBP One app in the context of asylum seekers and asylum applications. For example, a commenter expressed concern that use of the CBP One app and the need to rely on publicly accessible internet connections may violate 8 CFR 208.6, which establishes limits on the disclosure to third parties of information contained in or pertaining to records related to credible fear determinations, asylum applications, and similar records. Another commenter similarly noted that use of the app may be tracked by government officials or persecutors, placing migrants in further danger.

A commenter also expressed concern that the lack of privacy may be particularly harmful for those fleeing domestic violence and that use of a smart device to access the CBP One app may permit GPS tracking and put the noncitizen at heightened risk of being located by their abuser, as well as put them at risk of financial abuse. A commenter expressed concern that information provided by migrants through the CBP One app could be

shared with law enforcement agencies beyond CBP, which are not bound by CBP privacy and information-sharing policies. A few commenters expressed concern with requiring the use of a *Login.gov* account because the underlying provider for that site has a history of data breaches.

Response: The Departments disagree with the statement that migrants must use, or are unable to meaningfully consent to using, the CBP One app. While noncitizens who present at a POE without scheduling an appointment using the CBP One app will be subject to the rebuttable presumption unless otherwise excepted, noncitizens are not required to use the app in order to be processed at a POE.[214] The Departments note that the rebuttable presumption does not apply to noncitizens who either were provided authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process or who sought asylum or other protection in a country through which they traveled and received a final decision denying that application. 8 CFR 208.33(a)(2)(ii)(A) and (C), 1208.33(a)(2)(ii)(A) and (C). The presumption also does not apply to noncitizens who arrive at a port of entry without scheduling an appointment if the scheduling system was not possible to access or use due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B).

For those who choose to utilize the CBP One app to schedule an appointment, CBP has taken steps to protect users' information. First, in accordance with DHS policy, apps developed by DHS—including the CBP One app—must meet certain baseline privacy and security requirements.[215] These requirements include app-specific privacy and notice policies; limitations on the collection of sensitive content, including PII; and appropriate encryption for the transmission of data.[216] The app was reviewed for compliance prior to development and is reviewed again every time a change is made that impacts the collection and use of PII.[217] All CBP systems have undergone comprehensive testing and evaluation to assess the respective security features and have been granted an Authority to Operate (''ATO'').[218] In particular, the app serves only as a tool for the collection of information.[219] Once the information is received, CBP temporarily retains the submitted CBP One app photographs of undocumented individuals within the Automated Targeting System (''ATS''). Upon an individual's arrival at a POE, the advance information is imported into a Unified Secondary (''USEC'') event.[220] The information is then verified by an officer and stored as part of standard CBP processes.[221] All data in ATS and USEC is treated and retained in accordance with the relevant retention schedules.[222] These systems are subject to continuous evaluation of security protocols so that CBP may quickly respond if there is a change in the risk posture in any of the systems. The information CBP collects via the CBP One app and transmits to downstream systems is the same information CBP already collects when a noncitizen encounters a CBP officer at a POE—it is simply collected earlier to make processing at the POE more orderly and efficient.[223] CBP has published a Privacy Impact Assessment (''PIA'') for the CBP One app generally and a standalone, function-specific PIA for the collection of advance information from certain undocumented noncitizens.[224]

With regard to the commenters' concerns regarding privacy notices related to biometrics and facial recognition technology, CBP takes such concerns seriously. In the referenced GAO audit, GAO–20–568, GAO made five recommendations to CBP, with which CBP concurred. Three of the recommendations were related to privacy considerations, including (1) ensuring privacy notices are complete and current, (2) ensuring notices are available at all locations using facial recognition technology, and (3) developing and implementing a plan to audit its program partners for privacy compliance.[225] At the time of the publication of the NPRM, all of these privacy-related recommendations had been implemented, and the recommendations were closed by GAO.[226] CBP has since created a new website that outlines the locations (air, land, and seaports) where CBP uses facial comparison technology, and CBP continues to take steps to ensure that appropriate notice is provided to travelers.[227]

With regard to commenters' concerns about *Login.gov*, the Departments note that *Login.gov* is owned and operated by the General Services Administration (''GSA''),[228] and thus the Departments have no control over the data privacy or data security considerations of that platform. However, the Departments note that GSA has a system security plan for *Login.gov*, and *Login.gov* has an ATO.[229]

Comment: At least one commenter raised a concern that the CBP One app is an untested pilot program.

Response: The Departments respectfully disagree. The CBP One app was initially launched in October 2020 to serve as a single portal to access CBP services.[230] In May 2021, CBP updated the app to provide the ability for certain NGOs to submit information to CBP on

[214] *See, e.g.,* CBP, *DHS/CBP/PIA–076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 18 (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.*

[215] *See* DHS, *Instruction 047–01–003 (Rev. 00.1), Privacy Policy for DHS Mobile Applications* 7–10 (Dec. 14, 2018), *https://www.dhs.gov/publication/privacy-policy-dhs-mobile-applications.*

[216] *Id.*

[217] *See id.* at 10.

[218] *See* DHS, *DHS 4300A Sensitive Systems Handbook* 47 (Nov. 15, 2015), *https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook.*

[219] *See* CBP, *DHS/CBP/PIA–068, Privacy Impact Assessment for CBP One™ Mobile Application* 4 (Feb. 19, 2021), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf.* CBP has updated this impact assessment multiple times since February 19, 2021.

[220] *See id.* at 15.

[221] *See* CBP, *DHS/CBP/PIA–076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 11–12, 21 (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.*

[222] *See* CBP, *DHS/CBP/PIA–076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 10, 13 (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.*

[223] *See id.* at 17–18.

[224] CBP, *DHS/CBP/PIA–068, Privacy Impact Assessment for CBP One™ Mobile Application* (Feb. 19, 2021), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf;* CBP, *DHS/CBP/PIA–076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.*

[225] *See* GAO, *Facial Recognition: CBP and TSA are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues* 72–73 (Sept. 2020), *https://www.gao.gov/assets/gao-20-568.pdf.*

[226] GAO, *Facial Recognition: CBP and TSA are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues, https://www.gao.gov/products/gao-20-568* (reporting on the changes that CBP made that resulted in closure of the recommendations).

[227] CBP, *Say Hello to the New Face of Speed, Security and Safety: Introducing Biometric Facial Comparison, https://biometrics.cbp.gov/* (last visited May 1, 2023).

[228] *See* GSA, *Privacy Impact Assessment for Login.gov* 1, 5 (Mar. 17, 2023), *https://www.gsa.gov/cdnstatic/Logingov_PIA_March2023.pdf.*

[229] *See id.* at 27.

[230] CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), *https://www.cbp.gov/about/mobile-apps-directory/cbpone.*

behalf of an undocumented noncitizen and schedule a time for such undocumented noncitizens to present at a POE to be considered for an exception from the Title 42 public health Order.[231] This functionality included submitting individuals' information in advance, including a photo, and scheduling a date and time to present at a POE.[232] In April 2022, CBP expanded the ability for noncitizens to directly submit information and schedule appointments to present at a land border POE to noncitizens seeking to enter the United States under the U4U process.[233] To further expand the accessibility of the CBP One Title 42 exception process, in January 2023, the advance information submission and scheduling process was made publicly available to all undocumented noncitizens seeking to travel to a land POE to be considered for an exception to the Title 42 public health Order.[234] Significant enhancements and changes to the CBP One app have been and will continue to be made in response to user and stakeholder feedback.[235]

Comment: Commenters stated that the CBP One app is not workable. For example, commenters stated that there are more migrants seeking asylum than there are appointments available, that the number of appointments was entirely too limited, that the rule does not provide for a minimum number of appointments, and that after a final rule is issued, demand for appointments would only increase. Another commenter noted that the INA does not limit the number of people who may arrive at a POE, nor does the rule provide information about how the government will apportion daily appointments. This commenter also noted that the number of appointments at the border is currently ''capped,'' but that this limitation is not legally binding and could be increased. At least one commenter said it would be ''inherently unjust to demand'' that individuals use an information system that cannot handle the number of people expected to use it. Commenters argued that requiring use of this system will create a backlog and require people to wait for their appointments for a significant period of time in Mexico.

Other commenters raised concerns about flaws in the CBP One app and suggested it would empower smugglers. Commenters noted that the CBP One app was created for other purposes and not as an appointment system for asylum seekers. A commenter noted that some individuals have to create a new account every day because of flaws in the app. Another commenter asserted that there is a significant risk that appointments will be resold, pointing to a lack of security within the app that would permit such resale. Commenters also stated that CBP indicated that criminal groups were creating fraudulent appointments to obtain information and funds from asylum seekers seeking entry to the United States. A commenter stated that requiring use of the CBP One app has already led to increased exploitation by criminal groups and others who seek to take advantage of migrants and is likely to push individuals to travel by more dangerous routes. Another commenter noted that the availability of appointments only at certain POEs had led to migrants traversing dangerous parts of Mexico to travel to a POE for their appointment. The commenter stated that traversing Mexico was particularly difficult because transportation companies and Mexican authorities impede migrants' ability to travel through Mexico. Another commenter recommended the creation of a process parallel to the CBP One app process for highly vulnerable migrants to be considered for entry into the United States in an expedited manner. At least one commenter stated that the CBP One app should allow for prioritization based on vulnerability. Another commenter stated that smugglers will have more power because of the limited number of appointments, as people will pay smugglers to find alternate routes into the United States.

Response: The Departments acknowledge that there are currently many migrants waiting to present at a POE and that demand for CBP One app appointments may exceed the number of appointments that can reasonably be made available on a given day. However, CBP is committed to processing as many individuals at POEs as operationally feasible, based on available resources and capacity, while executing CBP's mission to protect national security and facilitate lawful trade and travel.[236] While the Title 42 public health Order remains in effect, the CBP One app is being used to schedule appointments for individuals who are seeking to present at a land POE to be considered for an exception from the Title 42 public health Order. During this time, the number of appointments available has been limited. However, when the Title 42 public health Order is lifted, CBP intends to increase the number of available appointments and anticipates processing several times more migrants each day at SWB POEs than the 2010 through 2016 daily average, including through use of the CBP One app.[237] While CBP recognizes and acknowledges that demand for appointments may exceed the number of appointments that can reasonably be made available on a given date, there has been a large number of migrants waiting in Mexico to enter the United States since long before the introduction of the app, and CBP expects that use of the app will help facilitate the processing of such individuals. The CBP One app is a scheduling tool that provides efficiencies and streamlines processing at POEs. Additionally, while CBP acknowledges that some noncitizens who are unable to schedule an appointment might conceivably turn to smuggling or more dangerous routes, CBP is implementing changes to the CBP One app to permit noncitizens to select a preferred arrival POE in an effort to mitigate any perceived need to travel to another location. Additionally, CBP is transitioning scheduling in the CBP One app to a daily appointment allocation process to allow noncitizens additional time to complete the process. This process change will allow noncitizens to submit a request for an appointment, and available appointments will then be allocated to those who made such a request, and the app will now provide a 23-hour period

[231] CBP, *DHS/CBP/PIA–076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 4 (Jan. 19, 2023), *https://www.dhs.gov/publication/dhscbppia-076-collection-advance-information-certain-undocumented-individuals-land.*

[232] *Id.*

[233] CBP, *DHS/CBP/PIA–068, Privacy Impact Assessment for CBP One™ Mobile Application* 16–17 (Feb. 19, 2021), *https://www.dhs.gov/publication/dhscbppia-068-cbp-one-mobile-application.*

[234] *Id.* at 17–18.

[235] CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), *https://www.cbp.gov/about/mobile-apps-directory/cbpone.*

[236] Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), *https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf.*

[237] *See* CBP STAT Division, *U.S. Customs and Border Protection (CBP) Enforcement Encounters—Southwest Border (SBO), Office of Field Operations (OFO) Daily Average* (internal data report, retrieved Apr. 13, 2023); Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), *https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf.*

for individuals allotted appointments to complete the scheduling process and confirm their appointments. In addition to the increased number of appointments made available after the end of the Title 42 public health Order, it is anticipated that these changes will reduce the likelihood of noncitizens seeking to travel by alternate routes.

The capacity to process migrants at POEs and the utilization of the CBP One app to secure appointments are separate and distinct issues. Officers will process all individuals who present at a POE regardless of a CBP One app appointment. Although a noncitizen who presents at a POE without an appointment may be subject to the rebuttable presumption under this rule, they will be able to present any protection claims, as well as any evidence to rebut the presumption or establish an exception to its application—including evidence related to their inability to access the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle—during either expedited removal or section 240 removal proceedings, with an AO or IJ, as applicable. Processing times will vary based on capacity and available resources, and those without a CBP One app appointment may be subject to longer wait times before being processed by a CBP officer.

With regard to commenters' suggestions regarding the prioritization of vulnerable individuals, the Departments decline to adopt such a process. As an initial matter, the Departments reiterate that the CBP One app is a method of facilitating entry into the United States. Once individuals are present in the United States at a POE, CBP must inspect and process all noncitizens, regardless of vulnerability. *See, e.g.,* INA 235(a)(3), 8 U.S.C. 1225(a)(3); 8 CFR 235.1(a). While in some cases an individual who is particularly vulnerable may warrant more expeditious processing, such prioritization and processing does not occur until the individual is physically present in the United States. In other words, while an individual's vulnerability may, in some cases, be a factor in the noncitizen's processing disposition at the time of processing, this vulnerability is not validated or taken into account prior to a migrant's arrival in the United States in the context of the CBP One app.

Comment: Commenters raised concerns about limitations on where and when an appointment can be made using the CBP One app. One commenter noted that the geofencing portion of the app does not perform accurately, as indicated by individuals who are present in Mexico receiving error messages saying they are not. Another commenter noted that, since the geofencing limits where people can be to make appointments, they have no option but to make a dangerous journey before they even begin a lawful process; the commenter urged instead that individuals be permitted to schedule appointments prior to embarking on their journey to ensure that appointments are provided in a fair manner. At least one commenter expressed concern that individuals would use Virtual Private Networks to do an end run around the geofencing. Another commenter stated that the app allows for scheduling appointments up to 13 days in advance, but that individuals accessing the app from their home countries may not be able to make it to the United States in 13 days. Similarly, a commenter stated that, although the rule contemplated expanding CBP One access to locations beyond the SWB, such an expansion would not alleviate the risk of harm that migrants face, as it would not be possible for the migrant to schedule a date and time to present at a POE before leaving their home country, and migrants seeking to access the app from their home countries would lack access to NGOs and other entities at the SWB that could provide assistance.

Response: At this time, the ability to schedule an appointment through the CBP One app is available only to migrants located in central and northern Mexico.[238] The geofenced area allows migrants to remain in shelters and other support networks instead of congregating at the border in unsafe conditions, facilitating a safe and orderly presentation at POEs. The app does not facilitate travel to Mexico in order to schedule an appointment to present at a POE. Individuals outside northern and central Mexico are encouraged to use various pathways available to lawfully travel to the United States, and they will be able to use the app once they are in the geofenced area and thus closer to the United States.

CBP is aware of reports of users attempting to circumvent the geofenced area and has taken steps to prevent this from occurring. CBP has also received reports of users who were in Mexico in close proximity to the SWB, but whose phones were showing that they were within the United States, thus generating error messages. To address this issue, CBP adjusted the geofencing to accommodate individuals located in Mexico in close proximity to the SWB.

Comment: Some commenters stated that requiring people to wait in Mexico until their appointment date is dangerous, as indicated, for example, by the number of violent attacks on migrants who have been turned back under the Title 42 public health Order since President Biden took office and the dangers that individuals faced in Mexico during MPP. One commenter expressed concern that the rule included no exception to the rebuttable presumption for asylum seekers' inability to secure a timely opportunity to present themselves, even though CBP One appointments have been ''extremely difficult to access'' and have taken weeks or months to secure. Another commenter noted that the first-come, first-served scheduling design is haphazard, and that there is no priority for migrants who have been waiting for longer periods of time.

Another commenter cited a Human Rights First study that found that there were 1,544 reported cases of violence against asylum seekers—including two murders—during the first two years of MPP. One commenter stated that the delays caused by the CBP One app increase the dangers for those waiting for a POE appointment in Mexico. Commenters stated that asylum seekers who are unable to secure appointments through the CBP One app will be forced to remain indefinitely at the border in dangerous conditions, including conditions where they have no access to or must rely on third parties for safe housing, food, electricity, internet, or stable income, all while continuing to try to make an appointment. One commenter noted that this was particularly problematic for those with chronic or serious health problems because access to health care in areas where individuals must wait is limited. Commenters expressed concern that criminal organizations, including cartels, could exploit individuals during the period that they must remain in northern Mexico waiting for an appointment. Another commenter expressed concern that those individuals in Mexico awaiting an appointment are at risk of deportation to their home countries, where they could experience persecution.

A commenter also stated that the United States Government should engage with the Government of Mexico to ensure that noncitizens waiting in Mexico for a CBP One app appointment have documents authorizing a

[238] *See* CBP, *DHS/CBP/PIA–076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 6 n.24 (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.*

temporary stay in Mexico for that purpose and that the lack of official documents regarding status in Mexico leaves noncitizens at risk of fraud and abuse. Another commenter recommended that CBP provide instruction on the use of the app to personnel in Mexico.

Response: The Departments acknowledge that individuals seeking to make an appointment to present at a POE will generally need to wait in Mexico prior to their appointment. The Departments also acknowledge that, in some cases, the conditions in which such individuals wait may be dangerous. However, noncitizens are currently waiting in northern Mexico, and, as addressed in the NPRM, the Departments anticipate that larger numbers of individuals will seek to enter the United States after the lifting of the Title 42 public health Order. *See* 88 FR at 11705. Therefore, as noted in the NPRM, the Departments have concluded that this anticipated influx warrants the implementation of a more transparent and efficient system for facilitating orderly processing into the United States. Although the use of the CBP One app may, as commenters noted, sometimes cause delays, the Departments believe that, on balance, the benefits of the more transparent and efficient system created by use of the app outweigh the drawbacks and that use of the app will ultimately inure to noncitizens' benefit by allowing the Departments to more expeditiously resolve their claims. CBP has conducted extensive outreach and communication with stakeholders who may be able to assist noncitizens in accessing the CBP One app to register and schedule an appointment, including shelters and other entities in Mexico.

The Departments also note that migrants are not categorically required to preschedule an appointment to present at a POE, and all migrants who arrive at a POE, regardless of whether they have an appointment, will be inspected and processed. Migrants who present without an appointment may be subject to the presumption, but, among other exceptions, the presumption will not apply for those for whom it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Additionally, migrants who demonstrate ''exceptionally compelling circumstances,'' such as an imminent and extreme threat to their life or safety, an acute medical emergency, or status as a victim of a severe form of trafficking, may rebut the presumption, in accordance with 8 CFR 208.33(a)(3)(i)(A) through (C), 1208.33(a)(3)(i)(A) through (C).

b. CBP One App Accessibility

Comment: Commenters expressed a range of concerns regarding the accessibility of the CBP One app for migrants seeking to enter the United States.

Many commenters stated the CBP One app is not available to all migrants, especially those who do not have smartphones, reliable internet access, or passports, and that all appointments are claimed almost immediately because the supply is insufficient. Multiple commenters suggested that many low-income individuals do not have access to a working phone or the internet in their home country, making use of the CBP One app infeasible. Commenters stated that many oppressive regimes limit access to the internet and asked how the Departments planned to provide access to the CBP One app to migrants in such countries. Relatedly, at least one commenter conveyed, anecdotally, that some migrants with limited economic means are forgoing food so that they can purchase enough data to attempt to make an appointment on the CBP One app to cross the SWB and seek asylum in the United States. Some commenters noted that many migrants become victims of crime while traveling to the United States, and their phones may be stolen, lost, or broken. Another commenter pointed out that some individuals may have phones but cannot afford to pay for telephone services for the phone. A commenter stated that it was unreasonable to place the burden on migrants to obtain internet and broadband access, as some migrants must choose between ''sustenance and digital access.'' The commenter stated that this requirement perpetuated the crisis of unequal access to justice. At least one commenter noted that individuals may dispose of their cell phones out of concern that those they fear could track them using that phone and so no longer have a smartphone to use the CBP One app. One commenter suggested finding donors to provide phones for families to schedule appointments.

Others stated concerns with relying on a web and mobile application because technology can fail. At least one commenter stated that the Departments should not rely only on the CBP One app because cellular signals along the SWB are inconsistent and Wi-Fi options are limited, and some migrants, such as Afghans who travel through South and Central America, do not have local connectivity. At least one commenter asked how having a cell phone with good coverage so a migrant can obtain an appointment relates to the merits of their asylum claim, while another stated that migrants without internet access would effectively be held to a higher standard than those with internet access, which many would not be able to overcome due to the lack of legal representation in initial screenings.

Another commenter stated that the rule did not provide sufficient information on how the Government conducted a study of the number of migrants who may have smartphones. Another asserted that the study had a sampling bias since it only surveyed individuals seeking a Title 42 exception, which they claimed required the use of the CBP One app. A commenter provided data comparing the percentages of smartphone ownership in Mexico, Cuba, Haiti, Nicaragua, and Venezuela, which, they stated, showed that while Mexico and Haiti had a high percentage of users, Nicaragua and Venezuela did not. On the other hand, at least one commenter noted that cell phones, including smartphones, are very common and that as a result people should be able to apply for CBP One app appointments.

Other commenters noted that people who cannot use the application would be at a serious risk of being turned away at the border and disagreed with the Departments' statements to the contrary.

A commenter claimed that CBP has yet to implement a desktop version of the app and has provided little clarity on whether and when such a version would be available. The commenter also stated that many migrants lack regular access to desktop computers.

Response: The Departments disagree that the CBP One app is a barrier to seeking asylum. The Departments also disagree with the contention that this rule sets up a linkage between access to an adequate cell phone or internet and the merits of an individual's asylum claim. Rather, the CBP One app is a tool that DHS has established to process the flow of noncitizens seeking to enter the United States in an orderly and efficient fashion. CBP intends to increase the number of available appointments when the Title 42 public health Order is lifted and anticipates processing several times more migrants each day at the SWB POEs than the 2010–2016 daily average, including through use of the CBP One app.[239] Further, noncitizens who

[239] *See* CBP, CBP STAT, *U.S. Customs and Border Protection (CBP) Enforcement Encounters—Southwest Border (SBO), Office of Field Operations (OFO) Daily Average* (internal data report, retrieved

present at a POE without using the CBP One app are not automatically barred from asylum.[240] The determination of whether the rebuttable presumption applies will be determined by an AO during the credible fear process or by an IJ in section 240 removal proceedings, at which time the noncitizen can demonstrate it was not possible to use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. CBP officers will not be making determinations about whether the rebuttable presumption is applicable.

The CBP One app is free to use and publicly available. As noted in the NPRM, a limited study conducted at two POEs in December 2022 found that individuals had a smartphone in 93 out of 95 Title 42 exception cases. At the time of this survey, migrants were not required to utilize the CBP One app to schedule an appointment to be considered for a Title 42 exception; that requirement was implemented in January 2023.[241] Additionally, independent studies demonstrate that approximately two-thirds of individuals worldwide had smartphones by 2020.[242] The Departments acknowledge that other studies provided by commenters show varying rates of smartphone access among migrants, that not all migrants may have access to a smartphone or be able to easily use the CBP One app, and that lack of smartphone access may hinder a migrant's ability to use the CBP One app. However, individuals who do not have a smartphone or who have other phone-related problems can seek assistance from trusted partners, who may be able to share their phones or provide translation or technical assistance if needed to submit information in advance. In addition, CBP has conducted extensive engagement with NGOs and stakeholders and has received feedback and information about the challenges associated with the use of the CBP One app. Throughout these engagements, access to smartphones has been raised, although not as a significant concern for most individuals. CBP is aware that NGOs provide support and assistance with access to mobile devices and internet connectivity. CBP notes that from January 12, 2023, when appointment scheduling launched, through the end of March 2023, over 74,000 noncitizens have scheduled an appointment via the CBP One app.[243]

Nevertheless, CBP acknowledges there can be connectivity gaps and unreliable Wi-Fi in central and northern Mexico. CBP reiterates that the use of the app to schedule an appointment to present at a POE is geofenced to only those migrants who are present in central and northern Mexico, and so commenters' concerns regarding internet censorship in other countries are misplaced. However, in response to feedback about connectivity issues, on February 18 and 23, 2023, CBP released updates to the CBP One app to improve the submission and scheduling process for individuals with lower bandwidth. In addition, based on user and stakeholder feedback, CBP will transition CBP One scheduling to a daily appointment allocation process to allow noncitizens additional time to complete the process. This process change will allow noncitizens to submit a request for an appointment, and then available appointments will be allocated to those who made such a request. Individuals who are issued an appointment will have a 23-hour period to complete the scheduling process and confirm their appointment. Each day, unconfirmed appointments will be reallocated among the current pool of registrations. This change will reduce the burden on the noncitizen to have connectivity at the precise moment of the daily appointment release, as is currently the case. This process will also enable noncitizens to request a preferred POE at which to schedule an appointment. Future and ongoing enhancements to the app are expected based on user and stakeholder feedback to ensure equity in the scheduling process.

The Departments acknowledge concerns about the availability of a desktop app for scheduling appointments. There is currently a desktop version of the CBP One app,[244] but it is not currently available for noncitizens to submit advance information. CBP is updating the desktop capability to provide the ability for undocumented noncitizens to register via the desktop version. This update is expected to be available in summer 2023. However, CBP does not have plans to enable users to schedule an appointment using the desktop version of the CBP One app because the desktop version does not allow for specific requirements that CBP has determined are needed such as geofencing and a live photo. This scheduling functionality will only be available via a mobile device.

CBP notes that commenters' concerns about access to the CBP One app are misplaced. Noncitizens seeking to schedule an appointment to present at a land POE are not required to have a passport.[245] Other functions of the CBP One app, including the Advance Travel Authorization (''ATA'') functionality used as part of the CHNV parole processes, require an individual to provide their passport information.[246]

Comment: One commenter expressed concerns that the Departments relied on use of the CBP One app among the Venezuelan population as part of the CHNV parole processes to justify use of the CBP One exception in this rule. In particular, the commenter asserted that the use of the app among the Venezuelan population seeking to travel to the United States to seek parole was not a good indicator of the app's use among other populations of migrants, many of whom were less technically savvy and required more assistance with the app.

Response: This commenter's concern is misplaced because the Departments have not relied on any data regarding Venezuelan migrants' access to CBP One in this rule. The Departments acknowledge and agree that use of the CBP One app in the ATA context is not comparable to the use of the app to seek an appointment to present at a POE and note that the ATA process is separate and distinct from the use of the CBP One app to schedule an appointment to present at a POE.

Comment: Commenters also stated that use of the CBP One app is particularly difficult for families who

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Apr. 13, 2023); Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off of Field Operations, CBP, from Troy A. Miller, Acting Comm'r, CBP, *Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), *https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf.*

[240] In addition, under this rule, any noncitizen will be able to present at a POE, and CBP will not turn away any individuals—regardless of manner of entry into the United States—or deny them the opportunity to seek admission to the United States. However, those who arrive at a POE without an appointment via the CBP One app may be subject to longer wait times for processing depending on daily operational constraints and circumstances.

[241] *See* CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), *https://www.cbp.gov/about/mobile-apps-directory/cbpone.*

[242] Allan Jay, *Number of Smartphone and Mobile Phone Users Worldwide in 2022/2023: Demographics, Statistics, Predictions* (Mar. 16, 2023), *https://financesonline.com/number-of-smartphone-users-worldwide/.*

[243] CBP, *CBP Releases March 2023 Monthly Operational Update* (Apr. 17, 2023), *https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-2023-monthly-operational-update.*

[244] *See* CBP, *DHS/CBP/PIA–068, Privacy Impact Assessment for CBP One™ Mobile Application* 15 (2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf.*

[245] *See id.* at 15 n.18.

[246] *See id.* at 21–22.

may be unable to make appointments together. Another commenter stated that families may not have time to register together before all of the appointments are taken. Other commenters noted that family separation may occur because of both stress and confusion. Another commenter noted that CBP officers told individuals that they had the option of leaving children behind, trying to get another appointment, or sending children alone, underscoring that the CBP One app increases the likelihood that families will separate themselves in order to get appointments or to enter the United States. At least one commenter noted that there should be an adequate number of appointments set aside for families. Commenters also stated that the CBP One app is insufficient as a lawful pathway because it does not allow families to register together. One commenter, a legal services provider, stated that it had raised concerns to CBP about the length of time that families were waiting to seek an appointment. The commenter stated that CBP told the entity that the delay for families was likely a result of criminal groups making fraudulent appointments, which the commenter concluded was evidence that expansion of the CBP One app would increase exploitation of migrants. One legal services clinic stated that it had been informed by a CBP Field Office on the SWB in March 2023 that officers had not interviewed any families with more than six members, which was concerning given the number of larger families waiting to enter. A commenter stated that children should not be held responsible, through their eligibility for asylum, for whether their parents used the CBP One app to enter. One commenter noted that in February 2023 a family was not permitted to enter because the appointment did not list the children's names.

Response: CBP acknowledges the concerns regarding the ability of families to submit appointments together and has been working to address such concerns. Following the initial implementation, CBP received feedback that the app was timing out during the registration process of families with babies or young children and determined that this was caused by delays in the third-party liveness verification (that is, the process to verify that each person listed is, in fact, a live person). In February 2023, CBP updated the workflow in the app to address this issue by removing liveness detection as part of the registration process. Users are now only required to take a still photo of each traveler at the time of registration, the same action as if taking any photo from a mobile device, which only takes a few seconds. Following this update to remove liveness detection from the registration process, CBP has received feedback from NGOs that there are fewer reported errors.

CBP has also consolidated appointment slots to increase the number of available appointments at the same time, where feasible, making it easier for family units to get an appointment together. For example, if a POE previously had two separate appointment times with 10 appointments each, they might have been combined to create one appointment time with 20 slots, making it easier to accommodate larger groups.

CBP continues to advise users and NGOs that one member of the family should create a registration on behalf of the entire family. While each member of a family must have a unique appointment, one member of a family can create the submission on behalf of the entire family group and complete the scheduling process, including the photo capture, to secure appointments for all registered family members. Functionally, this is similar to buying airline tickets. A designated person accesses the website, the website ensures there are seats for the indicated number of people, and the designated person provides the details for each individual to complete the purchase. At this stage, only the individual submitting the registration on the family's behalf is required to provide a live photograph.

Following the rollout of these enhancements, as of April 18, 2023, CBP data show that, for appointments scheduled from March 8, 2023, through May 1, 2023, groups make up an average of 83 percent of the CBP One scheduled appointments. Families or groups who do not register together on one CBP One account may not be accommodated at the same POE or on the same date. The Departments acknowledge that challenges remain for larger families, but the Departments believe that these changes have significantly ameliorated the concerns raised by commenters that family groups have been unable to obtain appointments.

CBP shares commenters' concerns about fraud and exploitation and has taken several steps to try to mitigate such issues. Specifically, the app uses 1-to-1 facial matching, meaning that it compares still photos submitted by users during the registration process to subsequent photos submitted by the same users while scheduling an appointment. This photo matching helps to ensure that the individual making an appointment is the same person who registered for the appointment. Additionally, the app's liveness detection verifies that a person submitting an appointment is, in fact, a live person. Finally, users have a limited number of submissions per *Login.gov* authenticated identity, helping to prevent one individual from submitting bulk appointment requests.

With respect to the comment stating that children should not be held responsible for whether their parents used the CBP One app to enter, the Departments note that they have exempted from this ongoing application of the rebuttable presumption noncitizens who entered the United States during the two-year period while under the age of 18 and who later seek asylum as principal applicants after the two-year period. 8 CFR 208.33(c)(2), 1208.33(d)(2).

Comment: Commenters noted that the app is only available in English, Spanish, and Haitian Creole, which limits accessibility for many, such as speakers of indigenous languages or other languages outside this limited list. A commenter referred to a study that, in January 2021, identified more than forty different languages spoken by individuals with pending MPP proceedings, which, according to the commenter, rendered it ''alarming'' that the app was available in only three. One commenter stated that, as of January 2023, the app was not available in Creole. Other commenters expressed concern about those who may be illiterate who are still seeking to access the app, including those who may not be literate in one of the languages available on the app. At least one commenter noted that *Login.gov* is also only available in English, Spanish, and French, noting that based on at least one report these are not the most common languages and that third party assistance does not adequately address this concern. Another commenter stated that due to limited resources and high demand, it is not clear whether non-profit service providers will be able to help asylum seekers overcome the CBP One app's language barriers.

Commenters also expressed concern about specific portions of the CBP One app that they stated are only available in English. Specifically, commenters stated that the CBP One app's advisals regarding the terms and conditions of use and the repercussions of fraud or willful misrepresentation are presented exclusively in English. Other commenters said that all answers entered into the app must be in English, resulting in many individuals requiring assistance, including Spanish and Haitian Creole speakers, even though

the CBP One app is available in their native language. Other commenters noted that the app's error messages are only in English, even if the user selects a different language, which makes using the app difficult for asylum seekers who cannot understand English. Commenters expressed that the limited availability of interpreters and the time required to enter information using interpreters added to difficulties in obtaining appointments through the CBP One app for non-English speakers. Commenters maintained that translating the CBP One app into additional languages would not resolve access issues for individuals with no or limited literacy.

Commenters also expressed concern about migrants' ability to meet the language barrier exception. One commenter stated that asylum seekers will struggle to meet the language barrier exception because the rule does not provide a clear process for how they can demonstrate that they were unable to use the CBP One app due to language issues. The commenter stated it is unclear whether the asylum seekers must show that they sought help from a third party before presenting themselves at a POE. One commenter stated that the rule does not explain how noncitizens with language, literacy, or technology issues can access this exception.

Response: As commenters noted, the CBP One app is currently available in English, Spanish, and Haitian Creole. The addition of Haitian Creole, on February 1, 2023, was based on stakeholder feedback. The translation of terms and conditions into all three languages was added on April 6, 2023. Initial analysis conducted in March 2023 indicated the current three languages account for 82 percent of the application users, with the next most common language being Russian, at 9 percent. Currently, CBP has not received any requests to make the app available in Russian. However, CBP will continue to consider the inclusion of additional primary languages, which will be made available based on analysis of populations encountered at the border and user feedback. Additionally, outside entities, including NGOs, or other persons may provide assistance with the appointment scheduling process in the CBP One app.

CBP is also implementing the translation of all drop-down menus as well as allowing for special characters, which is expected to be complete by May 11, 2023. This update will also allow users to input answers in the three available languages. While most of the error messages are translated, CBP acknowledges that not all messages are translated, as a few system errors stem from different sources that do not have translation capabilities. However, CBP also has detailed user guides—which are available in English and Spanish (and Haitian Creole by the end of May 2023)—fact sheets—which are available in English, Spanish, Haitian Creole, Portuguese, and Russian—and video introductions available for free on the *CBP.gov* website, which provide visual overviews on how to submit information in advance.[247]

With regard to *Login.gov*, that website is an independent authentication service for government mobile applications, and therefore CBP has no authority to make changes to it. However, CBP has submitted a request to GSA to consider adding Haitian Creole as an additional language.

The Departments acknowledge commenters' concerns about application of the exception to the rebuttable presumption of asylum ineligibility for those who can demonstrate that it was not possible to access or use the CBP One app due to language barrier, illiteracy, or another serious and ongoing obstacle, 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B), and such concerns are discussed further in Section IV.E.3.ii.d of this preamble.

Comment: Commenters stated that the CBP One app is inaccessible for many migrants, particularly the most vulnerable. A commenter stated that they had done volunteer work with asylum seekers from a few African countries and from many Spanish-speaking countries, and that reliance on the CBP One app is unfair because it assumes that migrants have a level of literacy, electricity, and time that are often unavailable to those desperately seeking safety. Another commenter noted that those with mental impairments or physical impairments, including arthritis, may not be able to use the CBP One app. One commenter stated that there is no rebuttal available for people with educational, mental, or psychological disabilities or who are unable to secure a timely appointment. One commenter stated that the proposed rule does not provide reasonable accommodations related to difficulties of using the CBP One app for people with disabilities, which the commenter asserted violated section 504 of the Rehabilitation Act, 29 U.S.C. 701 *et seq.*

Response: CBP acknowledges that certain individuals may have difficulty accessing the CBP One app. However, CBP has taken several steps to facilitate awareness of and access to the app. In particular, CBP has conducted extensive engagement with NGOs and stakeholders and has provided several opportunities to non-profit and advocacy organizations to provide feedback and receive information about the use of the CBP One app. Such entities may also serve as a resource for technological, humanitarian, and other assistance to migrants accessing the app. Management at POEs where the app is being utilized are also in regular contact with these support organizations to address any issues and concerns in real time.

Additionally, the CBP One app is undergoing a compliance review under section 508 of the Rehabilitation Act of 1973, which is expected to be completed by the end of May 2023. CBP expects a final certification by the end of August 2023. There are also several assistive technologies that can be utilized to translate the app independently, such as free apps that provide screen readers, magnification, and translation.

c. CBP One Technological Issues and Functionality

Comment: Commenters expressed concerns that the CBP One app has multiple glitches and problems, most notably that it allegedly does not capture or register darker skin tones and does not allow some individuals to upload their photos, instead displaying error messages. Some commenters referred to studies that demonstrated racial bias in facial recognition technology. One commenter stated that certain disabilities or conditions, including blindness and autism, prevented users from effectively capturing a live photograph for the app. A commenter expressed concern that transgender individuals may present differently at the border than they did at the time their photograph was taken.

Response: The Departments are committed to equal access to the CBP One app for individuals of all races and ethnicities. At this time, CBP has not found any indication of meaningful discrepancies in app functionality based on skin tone. The predominant reason for error messages during the photo process was the volume of submissions at one time with low connectivity and bandwidth of other technological platforms that supported the app. To ensure equity for all nationalities in the photo process, CBP is continuing to assess and study the software's performance.

For additional context, there are two photo capture technologies utilized in the CBP One process: the Traveler Verification Service (''TVS'') and

[247] CBP, *CBP One™ Mobile Application, https://www.cbp.gov/about/mobile-apps-directory/cbpone.*

''liveness detection.'' TVS is a facial recognition technology that allows a CBP One submitter's photo to be compared against subsequent submitted photos to ensure it is the same individual each time a photo is submitted.[248] This system is utilized at two different points in the process: (1) during the process of scheduling an appointment, to verify that the photo submitted matches the photo previously provided during registration; and (2) upon a noncitizen's arrival at a POE, where officers take another photo of the individual as part of the inspection process and verify that that photo matches the photograph submitted at the time of scheduling. However, there are alternative methods to verify that the individual presenting at the POE matches the individual who scheduled through CBP One if facial matching is not possible. For example, an officer can enter the unique confirmation number provided by the CBP One application or biographic data.[249] Additionally, CBP has partnered with the National Institute of Standards and Technology, the DHS Science and Technology Directorate, and the DHS Office of Biometric Identity Management to assess and test facial recognition technology and algorithms as part of efforts to improve the effectiveness of the process.[250] Additional information is publicly available in the TVS Privacy Impact Assessment.[251]

CBP One also relies on ''liveness detection.'' The vast majority of feedback CBP has received regarding issues identifying people of color were identified as related to liveness detection during the registration process. As explained in more detail below, CBP One previously utilized liveness detection during both the registration and scheduling processes. For context, the CBP One app utilizes third-party software to verify ''genuine presence'' or ''liveness'' during registration and scheduling an appointment.[252] The liveness verification confirms the user is a live person and is not taking a photo of a photo or video.[253] Such verification ensures that appointments are given to bona fide individuals and family groups, rather than brokers or middlemen who might seek to book appointments in bulk and then sell them to migrants.

When the scheduling capability was initially implemented in January 2023, CBP originally required users to take a live photograph at the time they input their biographic information to register for the app, and, if they were unable to schedule an appointment at the same time, they were required to take a live photograph again at the time they scheduled an appointment. This requirement took significant bandwidth, which resulted in many users experiencing difficulty. However, based on feedback from users and stakeholders, and consistent with its security protocols, CBP has determined the liveness check is no longer required during the registration process and implemented this change in February 2023. Therefore, while users are required to submit a photo at the time of registration, this photo does not need to be a live photo. Rather, the user is only required to submit a live photo at the time of scheduling an appointment, so that the liveness check and facial matching only occur during the scheduling of the appointment. When scheduling an appointment on behalf of a family or group, only one member of that family group is required to submit a live photograph. At that time, the CBP One app utilizes the live photo and facial matching technology to match the photo submitted during scheduling to the original photo submitted upon initial registration to verify that both photos are of the same person. Thus, an individual must only present similarly in photographs at the time of registration and the time of submission. Following this change, as well as others made during February 2023 to increase bandwidth, CBP has received feedback that there are fewer errors.

In addition, with regard to concerns about disparities based on skin tone, the third-party vendor has conducted their own equality study, which was provided to CBP, and concluded that across their global platform, differences in performance between ethnicities are on the order of tenths of a percent. As of the end of March 2023, Haitians are one of the top three nationalities using the CBP One app.[254] Regarding concerns about the ability of the app to capture a live photograph from individuals with certain disabilities or conditions, including blindness and autism, such individuals are not required to submit a live photograph if they are part of a family or group, as another member of that family or group can submit the live photograph on their behalf. In the event that an individual is unable to submit a live photograph as part of the submission process, they are encouraged to seek assistance from another person to take the photo for them. In addition, CBP consistently evaluates the registration and scheduling process, including the use of live photographs, and will continue to make enhancements and adjust the process based on feedback and operations.

Comment: Commenters noted a range of technology-related concerns with the CBP One app. Commenters described the CBP One app as very difficult to use, stating that it often crashes or is prone to glitches. Another commenter stated that there have been reports of the CBP One app freezing when noncitizens try to send confirmation of their interview dates. Some commenters noted that those seeking to enter the United States may not have the technical ability to navigate the app. A commenter noted that, although the Departments stated in the NPRM that CBP had conducted ''extensive testing'' of the app's technical capabilities, such statement was not supported by any publicly available studies or information. Commenters also recommended that CBP develop timely and effective mechanisms to receive and address reports of errors in the CBP One app.

Response: The Departments recognize commenters' frustration with the CBP One app. As noted above in Section IV.E.3.ii.a of this preamble, CBP systems

[248] *See* CBP, *DHS/CBP/PIA–076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 10 (2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf;* CBP, *DHS/CBP/PIA–056, Privacy Impact Assessment for the Traveler Verification Service* (2018), *https://www.dhs.gov/publication/dhscbppia-056-traveler-verification-service.*

[249] See CBP, *DHS/CBP/PIA–076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 10–11 (2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.*

[250] *See* CBP, *DHS/CBP/PIA–056, Privacy Impact Assessment for the Traveler Verification Service* 15–16 (2018), *https://www.dhs.gov/publication/dhscbppia-056-traveler-verification-service.*

[251] *See generally id.*

[252] *See, e.g.,* CBP, *DHS/CBP/PIA–076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 23 (2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf; see also* DHS, *News Release: DHS S&T Awards IPROOV $198K to Pilot Genuine Presence Detection and Anti-Spoofing Capability* (Nov. 6, 2020), *https://www.dhs.gov/science-and-technology/news/2020/11/06/news-release-st-award-genuine-presence-detection-and-anti-spoofing.*

[253] DHS, *News Release: DHS S&T Awards IPROOV $198K to Pilot Genuine Presence Detection and Anti-Spoofing Capability* (Nov. 6, 2020), *https://www.dhs.gov/science-and-technology/news/2020/11/06/news-release-st-award-genuine-presence-detection-and-anti-spoofing.*

[254] *See* CBP, *CBP Releases March 2023 Monthly Operational Update* (Apr. 17, 2023), *https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-2023-monthly-operational-update.*

undergo comprehensive testing and evaluation to assess the respective security features as part of the process of being granted an ATO.[255] The advanced information and scheduling capabilities addressed in this rule in particular have undergone various rounds of testing prior to and post deployment. CBP also conducted limited user testing both internally and in partnership with an NGO partner. The primary issues identified by users since the app's implementation have been caused by issues that cannot be fully identified in a testing environment.

CBP continues to make improvements to the app based on stakeholder feedback, including updates to enhance usability in low bandwidth and connectivity scenarios, and to streamline the submission and scheduling process. CBP primarily receives reports of errors or other concerns through three mechanisms. The first and primary mechanism is the CBP One email inbox,[256] to which users may send an inquiry or concern about any capability within the CBP One app. Since CBP One has many capabilities and functionalities, and is available to a diverse audience, the inbox initially responds by asking the author to select the appropriate topic pertaining to their specific issue. Emails related to the ability to schedule appointments at POEs are addressed by one of three teams: CBP Customer Service, CBP's Office of Information Technology, or the CBP One team within CBP's Office of Field Operations. CBP also receives reports of errors or issues through recurrent briefings and sessions with NGOs. Third, CBP personnel both at local POEs and within CBP Headquarters receive direct email communications from NGOs.

The reported issues are a result of the volume of activity and the strain this may put on local bandwidth and connectivity. In an effort to improve app performance in low or limited bandwidth and connectivity situations, CBP determined the live photo could be removed as part of the registration process. This change was implemented in February 2023, and based on feedback from NGOs and stakeholders, it has reduced the number of reported errors users experienced. CBP is actively working to improve application hang-up-error logging and reporting to better inform on user complaints and application improvements.

d. Exception for Certain Failures To Pre-Schedule a Time and Place To Present at a POE[257]

Comment: Commenters provided comments on the proposed exception to the presumption for individuals who present at a POE and demonstrate that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or another serious and ongoing obstacle.

Regarding the ''illiteracy'' and ''language barrier'' provisions, commenters questioned how noncitizens would prove that they cannot understand any of the languages offered by the CBP One app, and whether testimony about their language proficiency would suffice as evidence for an exemption. One commenter said the proposed rule does not provide a standard for how officials will determine asylum seekers' language proficiency, which could lead to erroneous denials. Another commenter said it is unclear whether asylum seekers with language barriers must show that they sought help from a third party before presenting themselves at a POE. A commenter expressed concern that refugees who have basic communication skills in English or Spanish, but who cannot read or write proficiently in either of those languages, would wrongly be found to not have a language barrier that would exempt them from the requirement to use the app. Another commenter wrote that the exemptions based on illiteracy and language barriers are reasonably clear but the rule should clarify that literacy in the dominant language of a country should not be presumed for citizens of that country because, for example, many indigenous people in Guatemala do not speak Spanish. One commenter expressed concern that individuals with limited English proficiency would face difficulty establishing this exception due to the unavailability of qualified interpreters and recommended that if the Government cannot obtain interpreters for individuals, they should be placed directly in section 240 removal proceedings.

Multiple commenters said the proposed rule fails to clearly define what constitutes a ''significant technical failure.'' Several commenters said the proposed rule did not outline how individuals could document technical difficulties such as app malfunctions or inaccessibility. A commenter said it may not be possible to screenshot the app to document a glitch if the app is frozen and producing this evidence would be hard for migrants in detention where they may not have access to their phones. Another commenter asked if this exception would include inability to afford a smartphone, having a phone stolen or broken, or inability to access stable Wi-Fi. Another commenter stated that additional usage of the CBP One app after the Title 42 public health Order is terminated would likely exacerbate technical problems, leading migrants to irregularly cross the border and claim that the rebuttable presumption does not apply due to technical difficulties.

One commenter stated that the Departments should update the regulatory text to specify that ''significant technical failure'' refers to an inability of the DHS scheduling system to provide, on the date that the noncitizen attempted to use it, an appointment for entry within the two weeks after such attempt, together with the failure of that system, when access to it is sought at the POE at which the noncitizen has presented, to provide an appointment at that POE within the following two weeks. A commenter similarly recommended that, for the first 12–18 months after the lifting of the Title 42 public health Order, the Departments should assess the application of the exception based on a ''more liberal'' standard than the preponderance of the evidence, based on an assumption that the CBP One app is likely to have numerous technical failures.

Commenters stated that the proposed rule failed to clearly define what constitutes an ''ongoing and serious obstacle.'' Commenters questioned whether a failed attempt to make an appointment using the CBP One app is likely to be considered sufficient. A commenter also stated that the Departments should specify certain foreseeable obstacles in the regulations as ongoing and serious obstacles, such as mental impairments or physical conditions that affect one's ability to use a smartphone. One commenter questioned whether the dangers that marginalized asylum seekers face in parts of central and northern Mexico

[255] *See* DHS, *DHS 4300A Sensitive Systems Handbook* 47 (2015), *https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook.*

[256] *See* CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), *https://www.cbp.gov/about/mobile-apps-directory/cbpone.*

[257] This section describes comments and responses related to the exception to the rebuttable presumption for noncitizens who present at a POE without having pre-scheduled a time and place for an appointment. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Currently, as explained in the NPRM, the only available system for scheduling such an appointment is the CBP One app. 88 FR at 11723. Accordingly, this section's comments and responses are focused on the use of the CBP One app for this exception, although the exception would apply similarly to any other scheduling system developed for this purpose.

would be deemed an ongoing and serious obstacle. Another commenter said the Departments should provide a list of anticipated obstacles to prevent arbitrary and inconsistent determinations and recommended that the list ''include, for example, mental impairments; physical impairments such as severe arthritis of the hands that prevent the use of a cell phone or other device to access the CBP One app; lack of access to such a device coupled with poverty such that the noncitizen could not reasonably purchase such a device; and a continuing lack of appointments in the near future to enter at the POE at which the noncitizen has presented.''

One commenter recommended that if the app is crashing or the available appointments are so limited near where the asylum seeker is located that they cannot promptly obtain an appointment, then the affected asylum seeker should not have the burden of proving the impossibility of accessing the system. That commenter proposed that USCIS should assign an official to monitor the app and capacity of processing facilities and post on a public website whether the app was functioning and the availability of appointments. According to that commenter, this public information, showing that the app was functioning and that prompt entry appointments were available, would create a presumption that no significant failure had occurred. Similarly, another commenter suggested that the exception should also take into account the potential for human error, specifically referring to a situation in which a migrant believes they have an appointment, the app failed to register that appointment, and a CBP officer permits the individual to enter the POE. The commenter stated that, in such a case, the migrant ''should not be punished when they are following the rules'' and should not be required to show that there were significant technical failures. The commenter suggested amending the regulatory text so that the rebuttable presumption would not apply if the noncitizen shows ''that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or human error.'' The commenter also recommended amending the regulatory text to include a statement that ''such evidence may include data on the performance of the CBP One app which DHS will make publicly available as well as records of problems reported by users.''

Commenters also noted potential procedural concerns with application of this exception. Some commenters stated that it will be difficult for noncitizens to meet the burden of demonstrating this exception, since the issue will arise in credible fear interviews when people are not likely to be represented. One commenter said it was impossible for asylum seekers to show they meet this exception because it would require them to prove a negative. Another commenter stated that CBP often confiscates people's phones while they are in CBP custody or people may have borrowed phones to access the app, meaning that they would not have access to the evidence they need to prove they encountered obstacles using the CBP One app.

Commenters said it is unclear who will determine if this exception applies and expressed concern that some individuals would be turned away without the chance to seek asylum. One commenter wrote that it was unclear if the failure of an individual to indicate that they qualify for an exemption would be counted against them when an AO reviews their case. Another commenter recommended the creation of a standardized form of questions for officials to use when determining whether individuals should be exempted from the CBP One appointment requirement. One commenter wrote that the NPRM failed to consider the practicality of conducting the analysis for this exception at the credible fear interview stage.

Some commenters expressed concern that the exception is too broad or easy to exploit. One commenter stated that applying the significant possibility standard for this exception could result in ''carte blanche'' acceptance of testimony that such an obstacle was present and thereby undermine the intent of the rulemaking. Others said that this exception was broad and easy to exploit because it could encompass a wide variety of difficult-to-verify claims, such as losing one's mobile phone, losing access to cell service, and being unable to pay for a new mobile phone or data plan. One commenter also said that the CBP One app's publicized technical issues would make it easy to claim the exception. Another commenter stated that, based on the app's rating in the app store, the app almost appeared to be ''designed to fail,'' to permit noncitizens to take advantage of the exception. Another commenter expressed general support for the inclusion of exceptions but predicted confusion and that migrants would prefer to present at a POE with an exception given the frequency of instances where it is not possible to access or use the DHS scheduling system. One commenter disagreed with the proposed exception relating to language barriers to accessing the CBP One app, asserting that migrants would take advantage of this exception to appear at a POE without an appointment. Another commenter stated that the rule ''impermissibly'' shifts the burden onto DHS to refute a noncitizen's assertion that it was not possible to use the app and therefore expressed concern about ''exploitation'' of the standard.

Some commenters recommended that the Departments should expand the exception for failure to use the CBP One app when it is not possible to do so to include noncitizens who enter the United States without inspection, rather than only applying to noncitizens who present at a POE.

Response: The rule provides the same exception set forth in the NPRM to the applicability of the rebuttable presumption if the noncitizen presented at a POE and demonstrates by a preponderance of the evidence that it was not possible to access or use the CBP One app due to language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacle. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). This exception captures a narrow set of circumstances in which it was truly not possible for the noncitizen to access or use the CBP One app. *See* 88 FR at 11723 n.173.

The Departments appreciate the commenters' suggestions about the scope of the exceptions in 8 CFR 208.33(a)(2)(ii)(B) and 1208.33(a)(2)(ii)(B). With regard to the ''illiteracy'' exception, the Departments acknowledge and agree that citizenship is not necessarily a proxy for literacy in a particular language, and there is no presumption in the CBP One app or in this rule regarding a particular migrant's language. The Departments note, however, that individuals may seek assistance, including translation assistance, in using the app. And, to the extent that an individual is unable to access the app due to their language barriers, they may be excepted from the presumption, as discussed earlier in this preamble. The Departments decline to specify precise ways by which a noncitizen must prove, or particular language standards by which an AO or IJ must assess, that the noncitizen qualifies for a language barrier or illiteracy exception. This is to preserve flexibility and account for the unique circumstances of certain noncitizens who are illiterate or who face language barriers. Exceptions under this part of the rule will be assessed on a case-by-case basis.

The Departments also acknowledge that the parameters of the exception do not include a specific definition of ''significant technical failure'' and thank the commenter for their suggested definition. However, the Departments decline to add this definition to the regulatory text, as the Departments believe that there may be any number of ways that an individual could show a ''significant technical failure.'' The Departments also note that this exception is intended to cover technical failures of the app itself—*e.g.,* the app is not available due to a CBP network or server issue causing it to crash—rather than a situation in which a migrant is unable to schedule an appointment due to high demand or one where there is a fleeting, temporary technical error. In such a situation, the Departments encourage noncitizens to continue seeking to schedule an appointment, but, to the extent that they are prevented from doing so because of exigent circumstances, they may be able to show that they have experienced another ''ongoing and serious obstacle,'' such that they are excepted from the presumption. The Departments likewise decline to amend the regulatory text to take into account human error or specific data on the performance of the CBP One app. As noted above, there may be any of number of ways to show a significant technical issue, or, as described in more detail below, an ''ongoing and serious obstacle,'' which may be specific to the individual user. As noted below, the determination of whether the presumption applies will be made on a case-by-case basis.

The Departments appreciate commenters' concerns about what constitutes an ''ongoing and serious obstacle.'' The Departments agree that an individual with a mental or physical impairment may have difficulty accessing the app but decline to add a new categorical exception to the regulatory text for individuals with mental or physical impairment. This is in part because the Departments do not intend to limit the exception to a specified category or group of conditions, and AOs and IJs will determine the application of the exception on an individualized basis. The Departments also decline to create further rules regarding which situations will generally or categorically qualify for this exception, including on the basis of failed attempts to make an appointment through the CBP One app. This will preserve flexibility and account for the unique circumstances that noncitizens may face while attempting to schedule an appointment to appear at different POEs at different times. Exceptions under this part of the rule will be assessed on a case-by-case basis.

The Departments respectfully disagree with commenters' concerns as to noncitizens' ability to establish this exception. First, with regard to the commenters' concerns about access to counsel in credible fear interviews, that issue is discussed earlier in Section IV.B.5.ii of this preamble. The Departments decline to alter the burden of proof required for a migrant to show that it truly was not possible for them to access the CBP One app. As an initial matter, the Departments note that noncitizens outside of the United States have no freestanding right to enter, and no right to enter in a particular manner or at a particular time. *See, e.g., Shaughnessy,* 338 U.S. at 542. The CBP One app does not alter this longstanding principle, but rather is intended to incentivize and facilitate an orderly flow of travel into the United States. Thus, the Departments decline to change the burden of proof from the noncitizen to the Government or adopt a more liberal standard for noncitizens who enter the United States during the initial months after the rule takes effect.

Concerns about who will assess whether the exception applies are misguided. The rule tasks AOs and IJs, not CBP officers, with determining whether a noncitizen meets this exception to the rule. 8 CFR 208.33(b)(1) (''The asylum officer shall first determine whether the alien is covered by the presumption . . . .''); *id.* 1208.33(b)(2) (''The immigration judge shall first determine whether the alien is covered by the presumption . . . .''). So too are concerns as to an inability to access physical evidence to prove the exception while in custody. Noncitizens may be able to establish that they meet the exception through testimony so long as it is credible, persuasive, and refers to specific facts to establish the exception. INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). A noncitizen also does not need to affirmatively raise this issue to qualify for the exception; adjudicators are trained to elicit testimony relevant to establishing a credible fear, as described in Section IV.B.5 of this preamble. However, if a noncitizen fails to disclose a technical failure or other obstacle when questioned about their failure to schedule an appointment using the CBP One app, this could potentially affect the credibility of their testimony if they later claim an exception in subsequent proceedings.

The Departments also disagree with commenters who claimed this exception is too broad or easy to exploit. The Departments disagree with the assertion that this exception will cause noncitizens to appear at a POE without an appointment. Noncitizens are not required to make an appointment in the CBP One app to present at a POE, and in no instance will an individual be turned away from a POE. All noncitizens who arrive at a POE will be inspected for admission into the United States. 8 CFR 235.1(a). Those, however, who present at a POE without making an appointment in the CBP One app, and do not meet another exception, will be subject to the presumption. For the exception to apply, the noncitizen must do more than merely assert that they could not access the scheduling system for one of the identified reasons, without further explanation. Rather, AOs and IJs will assess whether the noncitizen has demonstrated that they meet the exception on a case-by-case basis as part of the credible fear process or in section 240 removal proceedings. Additionally, the Departments note the app is not intended or designed to ''fail,'' and that AOs and IJs will evaluate on a case-by-case basis whether a noncitizen has shown that it was not possible to access the app due to language barriers, illiteracy, significant technical failure, or other ongoing serious obstacle.

Finally, the Departments decline to expand this exception to noncitizens to enter the United States without inspection instead of presenting at a POE. The Departments believe this would undermine the rule's purpose of incentivizing migrants to use lawful, safe, and orderly pathways to enter the United States. In cases where it was truly not possible for a noncitizen to access or use the CBP One app due to one of the rule's enumerated reasons, the Departments believe it would be preferrable to incentivize that noncitizen to seek admission at a POE rather than attempt a potentially dangerous entry between POEs. The latter could require the assistance of smugglers or traffickers and could place further strain on DHS resources in apprehending the noncitizen and commencing removal proceedings.

iii. Adequacy of Parole

Comment: While many commenters expressed support for the parole processes referenced in the NPRM, many also expressed a range of concerns about the role of the parole processes in the rule's rebuttable presumption. A commenter stated that the parole processes only account for small numbers of potential asylum seekers. One commenter stated that the parole programs have little bearing on asylum

access at the SWB or the Departments' stated goal to reduce border apprehensions. The commenter also stated that those who have the time and means to use these parole programs are not the same people who flee and approach the SWB. Another stated that the parole processes should not be the only way for migrants to come to the United States and petition for asylum. Another commenter stated that while Afghan migrants might be able to apply for humanitarian parole, the wait for the applications to be processed is too long for those who are living in danger in their country, and alleged that nearly 90 percent of humanitarian parole applications filed from outside the United States in the last year were denied.

Commenters stated that the CHNV parole processes are flawed because (1) they are limited to CHNV nationals; (2) they have a monthly cap, limiting the number of people who may enter the United States each month; (3) they require applicants to hold unexpired passports, which is uncommon for most citizens of Latin America and the Caribbean because of financial constraints; (4) they require a U.S.-based contact with the financial wherewithal to sponsor the applicant, which favors wealthy applicants and those with a broader network of support in the United States; (5) the applicant will need additional financial resources to afford a plane ticket and to meet vaccination and other requirements; and (6) humanitarian parole is not a substitute for asylum. Commenters stated that government officials may confiscate passports or target passport applicants at government offices, and noncitizens may not be able to wait for a passport or for receipt of advanced authorization due to the risk of harm or death. One commenter stated that huge backlogs related to the parole program have overwhelmed Haiti's passport system.

One commenter stated that the rule's impact on those who have been pre-approved by CBP to present for parole at POEs under section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), due to urgent humanitarian reasons or significant public benefit is unknown because the rule does not clarify whether those pre-approved to present for parole by port officials will face the presumption of asylum ineligibility.

Another commenter expressed concern that the CHNV parole processes would simply add to the population of migrants present in the United States without status, which according to the commenter would impose a burden on American taxpayers, and that the parole processes simply ''kicks the can down the road.''

Response: The parole processes established for CHNV nationals are available lawful pathways—though not the only available lawful pathways—for qualifying individuals seeking to come to the United States. Each month, DHS issues advance travel authorizations for up to 30,000 CHNV nationals to travel to the United States to be considered by CBP on a case-by-case basis for a temporary grant of parole for a period of up to two years. Once the individuals have arrived in the United States, they may apply for immigration benefits for which they may be eligible, including asylum and other humanitarian protections. The Departments recognize that the parole processes are not universally available, even to the covered populations; in addition, the parole processes established for CHNV nationals and Ukrainians are distinct from applying for asylum and are not a substitute for applying for asylum. Although noncitizens who are eligible for these processes may apply for asylum after being paroled into the United States, there is no requirement that they do so. These processes do, however, represent one lawful, safe, and orderly pathway available to certain CHNV nationals seeking to enter the United States.

Similarly, while DHS recognizes that several commenters have raised concerns about the adequacy of the parole processes, this rule's reference to the parole processes is not intended to suggest that the parole processes are an alternative to or replacement for asylum. Rather, the parole processes are lawful, safe, and orderly pathways that the Departments wish to encourage in light of the urgent circumstances presented. Eligible noncitizens may use these processes to seek entry into the United States, and, thereafter, apply for asylum if desired. Moreover, with respect to the commenters' concern about the ongoing status of CHNV parolees—including obstacles they face in seeking parole and the impact that allowing parolees into the country will have on taxpayers—such concerns are outside the scope of this rulemaking because the parole processes exist separate and apart from this rule. To the extent that this rulemaking encourages noncitizens to use those parole processes and thereafter apply for asylum, rather than migrating irregularly, parolees who do so may remain in the United States to await the adjudication of any pending asylum application, and during that time may be eligible for employment authorization. *See* 8 CFR 274a.12(c)(11) (employment authorization available for duration of parole); *id.* 274a.12(c)(8) (employment authorization available for asylum applicants).

With respect to the commenter's suggestion that the CHNV parole processes have little bearing on the Departments' goal of reducing irregular migration, the Departments note that these processes have substantially reduced the number of encounters between POEs. For instance, between the announcement of the CHN processes on January 5, 2023, and January 21, 2023, the number of daily encounters between POEs of CHN nationals dropped from 928 to 73, a 92 percent decline.[258] CHN encounters between POEs continued to decline to an average of fewer than 17 per day in March 2023.[259] The Departments offer further metrics in support of these processes' efficacy in Section II of this preamble.

While CHNV and Ukrainian nationals who lack a supporter cannot take advantage of these parole processes, such individuals can present at a POE by using a DHS scheduling mechanism to schedule a time to arrive at POEs at the SWB and not be subject to the presumption of ineligibility. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). If the noncitizen can establish that the scheduling mechanism is not possible to access or use due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle, then the noncitizen can present at a POE to seek asylum without a pre-scheduled appointment, and not be subject to the presumption of ineligibility. *Id.* This process is available to all noncitizens seeking protection, regardless of their nationality.

With respect to the commenters' concern about individuals ''pre-approved'' by CBP to present at the SWB, the Departments note that the rebuttable presumption does not apply to any noncitizen who presents at a land POE, pursuant to a pre-scheduled time and place. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33 (a)(2)(ii)(B). This is not limited to those who schedule a time through the CBP One app. Therefore, in the rare circumstance that noncitizens have scheduled a time to present at such a POE through another means, they would not be subject to the rebuttable presumption. Additionally, the Departments reiterate that the presumption does not apply to a noncitizen who has been provided appropriate authorization to travel to seek parole pursuant to a DHS-approved parole process, including the CHNV

[258] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[259] *Id.*

processes. *See* 8 CFR 208.33(a)(2)(ii)(A), 1208.33 (a)(2)(ii)(A).

Comment: Commenters recognized that the parole processes had positive results in the decrease of CHNV nationals encountered at the SWB, but predicted that the deterrence would decrease as more applicants are denied.

Commenters also stated that the requirement to travel directly to the United States by air may for some noncitizens be more challenging than traveling to the SWB, and raised the concern that the rebuttable presumption would apply to individuals who have received advance travel authorization under the CHNV processes, if those individuals arrive at the SWB rather than traveling directly by air. A commenter asserted that such a ''disqualification'' would be based on a ''technicality,'' not on any material facts.

Commenters cited statistics stating that since January 2023, Haitian nationals had 11,300 approved paroles, but only 5,100 of those traveled to the United States. Commenters noted that parolees would add to the backlog of asylum applicants.

Response: With respect to commenters' caution that the magnitude of the CHNV processes' impact on unauthorized arrivals at the SWB may change over time, as discussed in Section II of this preamble, the CHNV parole processes have remained effective since the rollout of the Venezuela process in October. The Departments disagree that this will necessarily change as more applicants are denied, because any intending migrant who cannot access the CHNV parole processes may still be dissuaded from migrating irregularly because even those applicants who are denied authorization to travel under those processes may respond to the disincentives to irregular migration made possible by those processes and this rule. The Departments acknowledge, however, that since mid-April, there has been an increase in Venezuelan migrants crossing between POEs at the SWB, while others continue making the treacherous journey through the Darién Gap to reach the United States—even as encounters of Cubans, Nicaraguans, and Haitians remain near their lowest levels this year.[260] The Departments believe that this increase in Venezuelan migration has been driven in part by the current limited availability of CBP One appointments and misinformation campaigns by smugglers, in the aftermath of the fire in a Mexican government facility that killed a number of Venezuelan migrants in March.[261] Although the number of CBP One app appointments available has been limited while the Title 42 public health Order has been in place, as detailed in Section IV.E.3.ii.a of this preamble, when the Title 42 public health Order is lifted, CBP intends to increase the number of available appointments. In addition, as discussed in more detail in Section II.A of this preamble, DHS and the Department of State announced new measures on April 27, 2023, that are expected to significantly expand lawful pathways, which, along with the expanded ability to present at a land POE pursuant to a pre-scheduled time and place, are expected to further reduce the overall volume of irregular migration. The Departments also note that there has not been a similar rise in encounters of CHN nationals, and believe that the rule's approach of incentivizing the use of safe, orderly, and lawful pathways while imposing a meaningful consequence for those who fail to do so and cannot otherwise rebut the presumption against asylum eligibility will reduce the number of noncitizens seeking to cross the SWB without authorization.

With respect to commenters' objection regarding the CHNV parole processes' stated requirements with respect to air travel to an interior POE, the Departments are aware that some noncitizens may have trouble securing air travel, but also note the potentially significant costs associated with irregular migration, including substantial fees that some migrants pay to smugglers and cartels to facilitate such travel.[262] The specific requirements for participation in the CHNV parole processes are outside the scope of this rulemaking, but DHS is actively monitoring the effects of the processes and may make adjustments as necessary.

The Departments also acknowledge that parolees who apply for asylum will add to the number of pending asylum applications; however, as discussed in Section II of this preamble, the net effect of the CHNV parole processes has been to significantly reduce rates of irregular migration and avoid a corresponding increase in the immigration court backlog.

Comment: A commenter stated that the Departments must consider how they would ensure that those migrants who use a parole program to enter the United States, such as Venezuelans or Nicaraguans, are not falling prey to scams. The commenter stated that there is reporting that those who do not have friends or relatives in the United States are going online to try to find sponsors, and stated that ''there are posts online demanding up to $10,000.00 USD for financial sponsorship.'' The commenter stated that if the Departments require use of the parole processes, the Departments should make efforts to ''end the financial abuse of potential parolees,'' similar to efforts to end human smuggling.

Response: As an initial matter, the specific requirements for participation in the CHNV parole processes are outside the scope of this rulemaking. In any event, the Departments recognize that immigration processes can be complex and that applicants, petitioners, and requestors are at risk of becoming victims of scams or fraud. The United States Government takes immigration scams and fraud seriously and is engaged in regular efforts to combat such behavior.[263] Additionally, the Departments conduct public-facing communications to advise all applicants to ensure that they only accept legal advice on immigration matters from an attorney or an accredited representative working for a DOJ-recognized organization.[264] The Departments also provide information to help applicants avoid immigration scams.[265]

DHS notes in public communications that access to the parole processes is free; neither the U.S.-based supporter nor the beneficiary is required to pay the United States Government a fee to

[260] *See* Reyes Mata III & Nick Miroff, *Surge of Migrants Strains U.S. Capacity Ahead of May 11 Deadline,* Wash. Post. Apr. 28, 2023, *https://www.washingtonpost.com/nation/2023/04/28/border-migrants-biden-title-42/.*

[261] *See, e.g., id.;* Nicole Acevedo & Albinson Linares, *Misinformation Fuels False Hopes Among Migrants after Deadly Fire in Mexico,* NBC News, Mar. 30, 2023, *https://www.nbcnews.com/news/latino/misinformation-fuels-false-hopes-migrants-mexico-fire-rcna77398* (''Over 1,000 migrants lined up outside international bridges to El Paso, Texas, on Wednesday afternoon [March 29, 2023] after false information spread on social media and by word of mouth that the U.S. would allow them to enter the country.'').

[262] *See, e.g.,* Ariel G. Ruiz Soto et al., *Charting a New Regional Course of Action: The Complex Motivations and Costs of Central American Migration* (Nov. 2021), *https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit_migration-motivations-costs_final.pdf.*

[263] *See, e.g.,* USCIS, *Fraud Detection and National Security Directorate* (last updated June 15, 2022), *https://www.uscis.gov/about-us/organization/directorates-and-program-offices/fraud-detection-and-national-security-directorate.*

[264] *See, e.g.,* USCIS, *Find Legal Services* (last updated Mar. 27, 2023), *https://www.uscis.gov/scams-fraud-and-misconduct/avoid-scams/find-legal-services.*

[265] *See, e.g.,* USCIS, *Avoid Scams* (last updated Feb. 17, 2023), *http://www.uscis.gov/scams-fraud-and-misconduct/avoid-scams.*

file the Form I–134A or to be considered for travel authorization, or parole.[266] DHS also provides a list of resources for victims of abuse, violence, or exploitation, as well as advice for protecting against immigration scams.[267]

Comment: One commenter noted the pending litigation regarding the CHNV parole processes and stated that the proposed rule presumes that the processes will continue to exist. If the parole processes are ultimately found to be unlawful, the commenter asserted that an injunction would nullify a central premise of the rule. The commenter also noted that the rule extends into the first several months of the next administration, which may end the parole processes. Another commenter argued that the parole processes are overbroad and contrary to statute, and that it is ''improper'' for the Departments to cite the parole processes as effective tools in support of the rule.

Response: The parole processes that DHS established in 2022 and 2023 for Ukrainian and CHNV nationals provide lawful pathways for individuals seeking to enter the United States. The Departments recognize that there is currently litigation over the CHNV parole processes. *See Texas* v. *DHS,* No. 6:23–cv–00007 (S.D. TX filed Jan. 24, 2023). The Departments are vigorously defending the processes as permitted under section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), and believe that the CHNV parole processes are permitted under the statute, for the reasons described in the **Federal Register** notices announcing each process. Should this litigation result in an injunction or other hold on any parole process, the Departments do not believe that such an injunction or hold would affect the application of this rule.

The parole processes established for CHNV nationals do not represent the only available options for noncitizens seeking entry to the United States. If these parole processes are enjoined, Ukrainian and CHNV nationals would still be able to avoid the rebuttable presumption if they present at a POE pursuant to a pre-scheduled time and place. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Moreover, if the noncitizen establishes that the mechanism for scheduling was not possible to access or use due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle, then the noncitizen can present at a POE without a pre-scheduled appointment and would not be subject to the presumption of ineligibility for asylum. *Id.* Similarly, these noncitizens would also be excepted from the presumption of ineligibility if they sought asylum or other protection in a country through which they traveled and received a final decision denying that application. 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). The Departments believe that these alternative pathways for a noncitizen to be excepted from or rebut the presumption against asylum eligibility are sufficient, such that the rule would be justified even if the CHNV parole processes were to end. The rule incentivizes migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways, not simply the CHNV parole processes, to enter the United States, or seek asylum or other protection in another country through which they travel and thus reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States.

As stated at 8 CFR 208.33(d) and 1208.33(e), the Departments intend for the provisions of this rule to be severable from each other such that if a court holds that any provision is invalid or unenforceable as to a particular person or circumstance, the presumption will remain in effect as to any other person or circumstance. *See also* 88 FR 11726–27. This intention for maximum severability extends to the parole processes themselves, which are authorized separate from this rulemaking and would exist even in the absence of 8 CFR 208.33(a)(2)(ii)(A), 1208.33(a)(2)(ii)(A).

iv. Third Countries

a. 1951 Convention and 1967 Protocol Signatories Alone Insufficient

Comment: A commenter stated that migrants may not be able to apply for protection in third countries if such countries do not have functioning asylum systems. A commenter suggested that the Departments revise the rule to except noncitizens who demonstrate that the country or countries through which the noncitizen traveled, that are party to the 1951 Convention or 1967 Protocol, did not provide a minimally safe, orderly, expeditious, and effective protection process in the noncitizen's circumstances. Another noted that while many countries in South and Central America are taking on a significant portion of the burden of migration in the Western Hemisphere, many of these countries cannot be considered ''safe'' for asylum seekers. Numerous commenters expressed a belief that the conditions and options in most or all third countries are insufficient to provide true or reasonable alternatives to seeking protection in the United States. Commenters stated that government records and NGO reports both make it clear that ''these countries have not developed working asylum systems and that, for many migrants, it would be pointless and life-threatening to stay and apply.'' Commenters noted that these conditions are the reason many migrants are fleeing and seeking to come to the United States in the first place. Further, some commenters noted that while Costa Rica has a successful asylum system, Costa Rica has significantly more asylum seekers per capita than the United States, and expressed a belief that Costa Rica is unlikely to be able to absorb more.

Response: The Departments do not agree with the commenter's suggestion to add an exception for noncitizens who demonstrate that a country did not provide an adequate protection process in that noncitizen's circumstances. First, the rule provides for several exceptions to, and means to rebut, the condition on asylum eligibility beyond having sought and been denied asylum or other protection in a third country. Second, the rule does not require that a noncitizen seek protection in any particular country. Finally, a noncitizen who seeks protection in a country through which they traveled, believes that the protection process was unfair in that country, and receives a final decision denying asylum or other protection from that country would still qualify for an exception to the presumption against asylum ineligibility.

The Departments do not agree with the generalizations that the nations through which a noncitizen might transit, including Mexico and countries in South and Central America, lack functioning asylum systems and invariably cannot be considered safe for those who apply for asylum in those countries. Many of these countries have taken substantial and meaningful steps in recent years that demonstrate their willingness to provide protection to those who need it, which is reflected in their international commitments and their efforts as described later in this response. To be relevant for the rebuttable presumption analysis, the country through which the noncitizen transited must be a party to the Refugee Convention or Protocol. Noncitizens traveling through the Western

[266] *See* USCIS, *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans* (last updated Mar. 22, 2023), *https://www.uscis.gov/CHNV.*

[267] *Id.*

Hemisphere have many options in this regard; of the countries in North, Central, and South America, only one is not party to the Convention or the Protocol.[268] Several countries through which noncitizens may transit have also joined the non-binding Cartagena Declaration on Refugees (''Cartagena Declaration'').[269] Delegations from Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela joined the Declaration on November 22, 1984.[270] Among other things, the Cartagena Declaration includes a pledge to promote the adoption of national laws and regulations facilitating the application of the 1951 Convention and the 1967 Protocol.[271] The Cartagena Declaration also expands the definition of ''refugee'' to include those fleeing ''generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.'' [272] This ''refugee'' definition is more expansive than that in U.S. law, *see* 8 U.S.C. 1101(a)(42)(A), thus providing some who may apply for protection, such as asylum, with more grounds on which to make their claim than they would have in the United States.

Nations throughout the Hemisphere are continuously demonstrating their commitment to providing protection to refugees, migrants, and asylum seekers. Colombia, Belize, and Mexico have made significant strides in developing their asylum systems and expanding protections for migrants. In 2021, Colombia adopted legislation that allows Venezuelans to apply for temporary protection status, which grants Venezuelans 10-year residency and allows them to access public education, health care, and employment.[273] By February 2022, about 2.4 million Venezuelans had applied for that status, and Colombian migration authorities had approved nearly 1.4 million by July 2022.[274] Belize offers an amnesty program for registered asylum seekers and certain irregular migrants that provides permanent residence and a path to citizenship.[275] The Government of Mexico has made exceptional strides to improve conditions for asylum seekers, migrants, and refugees within its borders. Mexico's Federal Public Defender's Office offers legal counseling and support to asylum seekers and migrants who have filed claims with Mexico's Commission for Refugee Assistance (''COMAR'') and has increased both its specialized staff and visits to migration stations.[276] Mexico has also committed to integrating 20,000 refugees into the Mexican labor market over the next three years and is expanding labor opportunities for Central American workers.[277]

Comment: Commenters stated that it is inhumane to require asylum seekers to first seek protection in third countries because they are particularly vulnerable in those countries to harms like exploitation, kidnapping, assault, rape, robbery, or extortion. Commenters noted that many transit countries struggle with high levels of violence, corruption, and ineffective judicial or political systems, citing a range of facts to illustrate political and other concerns in many transit countries, including the trial of Mexican officials for conspiracy with cartels and the extradition of the former Honduran president to face charges in the United States. One commenter asserted that requiring victims of persecution to expose their personal information to possibly corrupt or hostile governments is ''an extension of the persecution they fled in the first place,'' while another stated that the act of applying for asylum in a third country would make migrants targets of the governments they are fleeing. Commenters also noted that most immigrants to the United States only travel through countries that also have a large number of emigrants seeking to enter the United States, which the commenter believes demonstrates that those countries are not safe.

Response: The Departments recognize that certain noncitizens may feel unsafe seeking protection in certain nations through which they might transit, including Mexico and countries in South and Central America, due to the concerns commenters describe. However, as discussed above, the Departments do not agree with generalizations that these countries are universally unsafe and cannot provide protection to asylum seekers. The Departments also note that the rule does not require any noncitizen to seek protection in a country where they do not feel safe. Applying for, and being denied, asylum or other protection in a third country is one exception to the rebuttable presumption, but noncitizens who choose not to pursue this path may instead seek authorization to travel to the United States to seek parole pursuant to a DHS-approved process, or present at a POE at a pre-scheduled time or place (or demonstrate that it was not possible to do so for a reason covered by the rule). *See* 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii).

Noncitizens may also rebut the presumption by showing that exceptionally compelling circumstances exist, including an acute medical emergency or an imminent and extreme threat to life or safety at the time of entry. 8 CFR 208.33(a)(3), 1208.33(a)(3). Although the Departments expect that many migrants seeking protection will be able to access asylum or other protection in at least one transit country, they recognize that not every country will be safe for every migrant and have provided other exceptions and means for rebutting the presumption to account for those circumstances. Although noncitizens may prefer to apply for asylum in the United States, it is not unreasonable to expect that they would pursue other safe options.[278]

b. Concerns About Length of Process and Documentation Provided by Third Countries

Comment: Several commenters stated that third countries are not efficient in providing proper documentation for asylum seekers, thus increasing wait times and creating additional issues in overcoming the presumption at the SWB. Another raised concerns that

[268] *See* Maja Janmyr, *The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda,* 33 Int'l J. Refugee L. 188, 189 (2021); UNHCR, *States Parties, Including Reservations and Declarations, to the 1951 Refugee Convention, https://www.unhcr.org/us/media/38230* (last visited Apr. 25, 2023).

[269] *See* Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 19–22, 1984, *https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.*

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] Int'l Crisis Group, *Hard Times in a Safe Haven: Protecting Venezuelan Migrants in Colombia* (Aug. 2022), *https://www.crisisgroup.org/latin-america-caribbean/andes/colombia-venezuela/hard-times-safe-haven-protecting-venezuelan.*

[274] *Id.*

[275] Government of Belize, *Amnesty Background Information* (Dec. 7, 2022), *https://immigration.gov.bz/amnesty-background-information.*

[276] Comprehensive Regional Protection and Solutions Framework, *MIRPS in Mexico* (Aug. 2022), *https://mirps-platform.org/en/mirps-by-country/mirps-in-mexico.*

[277] Government of Mexico, Secretary of External Relations, *Mexico to Expand Labor Mobility Programs and Integrate Refugees into its Labor Market* (June 10, 2022), *https://www.gob.mx/sre/prensa/mexico-to-expand-labor-mobility-programs-and-integrate-refugees-into-its-labor-market?idiom=en.*

[278] *See* UNHCR, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries* 1 (Apr. 2018), *https://www.refworld.org/pdfid/5acb33ad4.pdf* (''[R]efugees do not have an unfettered right to choose their 'asylum country.' '').

requiring migrants to first apply and be rejected for asylum in a third country could force them to wait for that third country's asylum adjudication for months before they can continue their journey to the SWB. One commenter stated that the proposed regulations require a noncitizen to produce documentation (paper or electronic) to show denial of asylum in a third country, which the commenter stated is contrary to the INA's specification that noncitizens may establish asylum eligibility though testimony alone. One commenter expressed concern that the Departments have given no assurances that a denial of asylum in another country will not be used against an asylum applicant here in the United States, where our asylum eligibility guidelines are many times more stringent.

Response: To determine if an applicant has met their burden to demonstrate that they sought asylum or protection in a third county and were denied, adjudicators may weigh an applicant's credible testimony with other evidence. *See* INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). Even when an applicant's testimony is credible, an adjudicator may, where appropriate, request evidence to corroborate this credible testimony, including documentation of the final denial. In that case, the applicant is not required to provide the evidence if they do not have the evidence and cannot reasonably obtain it. *Id.*

Regarding commenters' statements that requiring migrants to seek asylum in third countries will increase wait times, the Departments believe that wait times would likely be significantly longer in the absence of this rulemaking. For those who are unwilling or unable to seek asylum or other protection in a third country and wait for a final decision, the Departments note that there are multiple ways to avoid or rebut the rule's presumption of ineligibility, only one of which involves seeking asylum or other protection in a third country. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). Noncitizens who do not feel comfortable or safe applying for asylum outside the United States may avoid the rebuttable presumption by seeking parole under one of the authorized parole processes or using the CBP One app to present themselves at a pre-scheduled time at a POE. *See id.* 208.33(a)(2)(ii)(A) and (B), 1208.33(a)(2)(ii)(A) and (B). Additionally, noncitizens may rebut the presumption in exceptionally compelling circumstances, including where they faced an immediate and extreme threat to life and safety at the time of their entry into the United States. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). Those who are not excepted from and are unable to rebut the presumption of ineligibility may still pursue statutory withholding of removal and protection under the CAT.

With respect to the comment the Departments have given no assurances that a denial of asylum in another country will not be used against an asylum applicant here in the United States, the Departments note that AOs and IJs will consider the noncitizen's fear of returning to their country of origin on a case-by-case basis through the noncitizen's credible testimony and other relevant evidence demonstrating a fear of persecution.

c. Concerns About Differential Treatment of Migrants

Comment: Commenters raised concerns about unintended inequitable treatment of migrants under the rule. For example, commenters raised concerns that the rule arbitrarily disfavors migrants who live farther away, stating that it would be unfair to penalize those who do not have the good fortune of living in a nation close enough to the United States that they do not have to pass through a third country in their journey to the SWB. Another commenter noted that migrants who travel through third countries en route to the United States have necessarily traveled a lengthy distance, which may suggest that their claims are in fact more likely than others' to be meritorious. Similarly, commenters noted that a migrant who does not live close to a country that provides strong protections may not realize until after they passed through a third country that they should have applied for asylum in that country, and that many migrants cannot afford what may be a months-long process of applying for protection in a third country.

Some commenters stated that the United States should not summarily deny asylum claims based on whether migrants have passed through another ''safe third country,'' as the third country may not have been safe for each individual migrant, especially for vulnerable populations. At least one commenter stated that requiring migrants to seek asylum in third countries on their journey to the SWB is counterintuitive if the migrant has relatives or another support system in the United States. One commenter also noted that individuals with conditions that may cause cognitive difficulties or deficits, such as post-traumatic stress disorder, depression, or head trauma, may not be able to find the medical services that would allow them to participate in the asylum process of a country through which they transited, even if those countries had a functioning asylum system.

Response: The rule's primary purpose is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. Migrants who do not avail themselves of such a lawful pathway or seek protection in a country through which they travel will be subject to a rebuttable presumption of ineligibility for asylum. That said, the Departments recognize that many migrants face challenging circumstances in their home countries and en route to the United States, and appreciate that not every country will be viable for every migrant, including those who may apply for asylum or other protection, depending upon their individual circumstances. With regards to concerns that migrants may not receive sufficient notice of the exception to seek and be denied asylum or other protection in a transit country, the Departments note that this is only one of multiple exceptions and means of rebuttal that the rule allows. As discussed in Section IV.B.5.iv of this preamble, the rule does not deprive noncitizens of notice in violation of the Fifth Amendment Due Process Clause.

With respect to concerns about ''requiring'' migrants to seek protection in a third country when they have relatives already in the United States, the Departments reiterate that the rule does not require any migrant to seek protection elsewhere; there are multiple ways to avoid or rebut that presumption of ineligibility, only one of which involves seeking asylum or other protection in a third country. Eligible noncitizens who cannot safely apply for asylum outside the United States may (while residing in any country) seek parole under an authorized parole process. Alternatively, they may use the CBP One app to present themselves at a pre-scheduled time at a POE. Additionally, the presumption may be rebutted in exceptionally compelling circumstances, such as by demonstrating that one faces an acute medical emergency or imminent and extreme threat to life or safety at the time of entry, or by satisfying the definition of a victim of a severe form of trafficking in persons under 8 CFR 214.11(a). 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). Those who are not excepted from and are unable to rebut the presumption of ineligibility may still pursue statutory withholding of

removal and protection under the CAT. The Departments are not aware, however, of any evidence establishing a direct link between distance traveled and validity of protection claims.

Finally, the Departments note that a location that may be unsafe for one person may not only be safe for, but may offer a much-needed refuge to, others. For example, some countries in the region may have a larger number of individuals who leave the country to seek protection elsewhere than who seek protection in the country, perhaps because those specific individuals experience a targeted threat of violence or fear of persecution in that country. At the same time, such a country may demonstrably provide protection for other individuals or groups of individuals, particularly those originating from third countries, who consider the country to be a safe option where they can be free from persecution or torture. To the extent commenters raise concerns about the ability of certain individuals to participate in the asylum processes of third countries, the Departments note that, as discussed above, many regional partners have protection frameworks that are in some respects more expansive than those of the United States. As detailed in the preamble to the NPRM, *see* 88 FR at 11720–23, many countries in the region have significantly increased protection options to address the unprecedented movement of migrants throughout the hemisphere. Finally, humanitarian protection is not the only available lawful pathway to intending migrants. In some instances, employment-based migration may be the best option for migrants for whom economic issues are a key factor motivating them (which studies have shown are a high percentage of those moving through the region).[279]

Further discussion of the potential effects of this rule with respect to specific groups is contained in Section IV.B.4 of this preamble.

d. Concerns About Conditions and Asylum Process in Third Countries Generally

Comment: Commenters stated that lawful pathways in third countries do not necessarily promote family unity, and that opportunities for family unity depend on the specific pathway.

Response: The Departments acknowledge that countries in the region have differing asylum systems and requirements. However, this rule does not require that noncitizens apply for asylum or other protection in a specific third country in order to preserve family unity. Rather, such an application is one of multiple options for noncitizens under the rule. DHS-approved parole processes represent another set of options available to some noncitizens. Additionally, any noncitizen may present at a POE via an appointment that includes a pre-scheduled time and place or may present at a POE without a pre-scheduled time and place and be excepted from the presumption if the noncitizen demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. The Departments also note the discussion in Section IV.E.3.ii.b of this preamble of CBP's ongoing efforts to improve CBP One app functionality for families.

Comment: Numerous commenters stated that the third country exception would cause serious bodily harm to noncitizens, lengthening the amount of time noncitizens spend in unsafe transit countries, and exposing them to further risks of persecution, torture, and death in third countries. Multiple commenters expressed concern that the rule ignores the realities asylum seekers face, including violence, persecution, and inadequacy of asylum systems in third countries, and reflects a misunderstanding of the conditions of noncitizens fleeing persecution. Multiple other commenters stated that applying for asylum and awaiting a subsequent denial in a third country is nearly impossible for noncitizens. Several commenters argued that requiring noncitizens to apply for asylum in third countries and wait for a decision would prolong their journey to safety. Another commenter stated that it was unreasonable to require noncitizens to wait for extended periods of time in third countries and suggested that the Departments revise the rule to except noncitizens who waited for six months or more without a decision. Similarly, a commenter stated that the third country exception was a way to delay the safety and stability of noncitizens. A commenter also stated that prior ''safe third country'' policies relating to Guatemala, among other places, forced asylum seekers into dangerous situations in third countries. A commenter said that although the NPRM states that preventing human trafficking is a consideration for the rule, the third country exception would drive people further into traffickers' hands. Numerous commenters provided narrative examples of noncitizens who had successfully gained asylum in the United States, and added that it would not have been possible for them to gain asylum if the third country exception was enacted.

Response: Regarding comments stating that ''safe third country'' and similar policies force those who might otherwise apply for asylum in the United States into dangerous situations in third countries, the Departments recognize that not all third countries will be safe for all noncitizens seeking asylum and acknowledge that some migrants may feel that the dangers noted by commenters, or the risk that a particular country's asylum system would be unduly delayed or leave them vulnerable to refoulement, make applying for protection in that country untenable. However, the rule does not require any noncitizen to seek protection in any particular country and therefore the Departments likewise decline to add an exception for noncitizens who waited for a certain period of time in a third country without a final decision.

The Departments also strongly disagree that the third country exception will heighten risks of human trafficking. Rather, the Departments expect that the rule will reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain, including via human trafficking. If a noncitizen does not believe it would be safe to apply for asylum or related protection in any third country, they may avoid the presumption against asylum eligibility by availing themselves of any of the other available lawful pathways, or, if applicable, they may be able to rebut the presumption of ineligibility by demonstrating exceptionally compelling circumstances.

Comment: Some commenters oppose the rule because they believe it encourages individuals to remain in countries where they may not be safe and are closer to their feared persecutor(s) to avoid being disqualified from asylum should they try to enter at the SWB. For example, one commenter cited the experiences of individuals who are being imminently threatened by gangs and have to flee and therefore are unable to remain in their country to apply for a lawful pathway to the United States. Similarly, many

[279] *See, e.g.,* Ariel G. Ruiz Soto et al, *Charting a New Regional Course of Action: The Complex Motivations and Costs of Central American Migration,* 18 (Nov. 2021), *https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit_migration-motivations-costs_final.pdf* (reporting that 92 percent of respondents to a UN World Food Programme household survey ''cited economic reasons related to their livelihoods as being key motivating factors'' for migration).

commenters stated that it was unfair and unrealistic to expect noncitizens to seek asylum in areas that are unsafe and do not have meaningful protections for refugees.

Response: The Departments disagree that the rule encourages noncitizens to remain in dangerous conditions or remain close to their feared persecutors so as to preserve their chance to be eligible for asylum in the United States. The Departments understand that in some cases it would be dangerous for a noncitizen to remain in their home country while they seek a safe, orderly, and lawful pathway into the United States, but note that eligible migrants who have already left their country of origin may apply for the CHNV processes, and all migrants may, if within the appropriate area in Mexico, schedule an appointment to present at a POE. Moreover, the Departments note that lawful pathways such as applying for asylum in a country they transited through or scheduling an appointment through the CBP One app to present at a POE are recognized by the rule and are available to migrants who have already left their country of origin. The Departments do not agree that this rule creates a strong incentive for those facing danger to remain in their home countries.

e. Concerns About Conditions and Asylum Process in Mexico Specifically

Comment: Several commenters expressed concerns about the adequacy of the asylum process in Mexico in particular. For example, one commenter stated that they had worked as a lawyer with migrants in Mexico for a year, and that COMAR is extremely overwhelmed and lacks the staff and funds to process the hundreds of thousands of asylum applications they have received from people in Mexico in the past few years. The commenter stated that they had personally witnessed the inability to receive a timely decision, or even to get access to COMAR in order to file an application in many parts of Mexico. The commenter also stated that Mexican civil society cannot meet the legal and social service needs of hundreds of thousands of asylum seekers, because such organizations are underfunded and under-resourced and cannot begin to meet the basic humanitarian and legal needs of the many people in need of protection who transit through Mexico. Other commenters stated that COMAR is underfunded and that immigration advocates have documented mismanagement and instances of denials of meritorious claims.

One commenter stated that Mexico's asylum system is not prepared to actually grant asylum to refugees from South and Central American countries, stating that conditions for refugees in Mexico are ''harsh'' and that Mexico does not provide refugees with ''legal residence or adequate legal rights to keep them free of exploitation.''

A commenter stated that unless an applicant is granted a transfer request by COMAR, they cannot leave the geographical area where they applied for asylum. The commenter added that many applicants move due to safety or economic concerns, and as a result, their cases are considered abandoned. The commenter stated that an abandoned case would not be considered a denial under Mexican law, and that a person who abandoned their application would not qualify under the NPRM. A commenter stated that they have not seen evidence that the Departments have reviewed the ability of asylum seekers to obtain protection in Mexico and that failure to do so would lead to arbitrary and capricious rulemaking.

Response: The Departments recognize that managing migration is a collective responsibility and, as part of a whole-of-government approach, requires working closely with countries throughout the region to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration throughout the Western Hemisphere. With regard to Mexico's ability to handle asylum claims, as stated in the NPRM, 88 FR at 11721, Mexico is the third highest recipient of asylum claims in the world; in 2022, COMAR reported receiving 118,478 applicants for refugee status.[280] Of applications completed in 2021, COMAR granted asylum in 72 percent of cases; an additional two percent of applicants were granted complementary protection (a form of protection available to those who are not eligible for refugee status).[281] Of applications completed in 2022, COMAR granted asylum in 61 percent of cases; an additional two percent of applicants were granted complementary protection.[282] The average case takes 8–12 months to adjudicate.[283] With United States Government funding and the support of international organizations, Mexico has also substantially increased its Local Integration Program, which relocates individuals granted asylum to safe areas of Mexico's industrial corridor and integrates them into such areas. These individuals are then matched with jobs and provided apartments, and their children are enrolled in local schools. In May 2022, the program reached the milestone of reintegrating 20,000 asylum seekers in Mexico.[284] And in June 2022, Mexico committed to support local labor integration for an additional 20,000 asylees over the next three years.[285] The Government of Mexico has announced substantial increases to its labor visa programs over the past two years to help those seeking protection enter the labor market.[286] The Departments acknowledge that, like the United States, Mexico has a significant asylum backlog. Nonetheless, it remains a viable option for many seeking protection in Mexico.[287]

As it relates to the comment regarding abandoned claims, the Departments note that, as discussed in Section IV.E.3.iv.f of this preamble, under this rule, a final decision does not include a determination by a foreign government that the noncitizen abandoned the claim. *See* 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). A noncitizen who has abandoned their asylum claim in Mexico would not qualify, on that basis, for an exception to the rebuttable presumption. Such noncitizens may nonetheless qualify for another exception to the rebuttable presumption or be able to rebut the presumption. For these reasons, the Departments have declined to revise the rule in response to this comment.

Comment: Other commenters stated that towns along Mexico's northern border are not equipped to provide food, shelter, health care, and sanitation services to migrants waiting for an

[280] Government of Mexico, La COMAR en Números, Diciembre 2022 (Jan. 16, 2023), *https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022__31-Dic.__1.pdf.*

[281] *See id.;* UNHCR, *Asylum Capacity Support Group, Mexico: Granting Complementary Protection, https://acsg-portal.org/tools/mexico-granting-complementary-protection/* (last visited Apr. 26, 2023).

[282] Government of Mexico, La COMAR en Números, Diciembre 2022 (Jan. 16, 2023), *https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022__31-Dic.__1.pdf.*

[283] Refugees Int'l, *Mexico's Use of Differentiated Asylum Procedures: An Innovative Approach to Asylum Processing* (July 20, 2021), *https://www.refugeesinternational.org/reports/use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing-#_ftn5.*

[284] UNHCR, *Más de 20.000 Reubicaciones como Parte de los Esfuerzos de Integración de Personas Refugiadas en México (*May 25, 2022), *https://www.acnur.org/noticias/press/2022/5/628e4b524/mas-de-20000-reubicaciones-como-parte-de-los-esfuerzos-de-integracion-de.html.*

[285] *See* L.A. Declaration Fact Sheet.

[286] *See id.*

[287] *See* Global Compact on Refugees, *Mexico, https://globalcompactrefugees.org/gcr-action/countries/mexico* (last visited Mar. 9, 2023); Government of Mexico, Law on Refugees, Complementary Protection, and Political Asylum, Article 28, January 27, 2011, *https://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP.pdf.*

asylum hearing. Commenters also stated that migrant camps in Mexico are dangerous, unsanitary, and negatively impact migrants' mental health. A commenter stated that organized crime operates across Central America and Mexico with impunity, and that a target of organized crime fleeing one location would likely be found and targeted in Mexico as well. Another commenter stated that persecutors have followed asylum seekers into Mexico and harmed them there.

Commenters also stated conditions in Mexico are unsafe, especially for asylum seekers. Specifically, commenters stated that the proposed rule would cause additional harm for migrants forced to wait in Mexico before applying for asylum in the United States due to the risk of rape, murder, kidnapping, extortion, robbery, and other violence; violent detention by Mexican government officials; denial of medical care for serious illnesses; displacement and homelessness; discrimination or harassment due to race, gender, and sexual orientation; abusive employment arrangements; and denial of access to basic services and protections due to language barriers. One commenter expressed concern that migrants in Mexico face discrimination from drug cartels and other criminals as well as from Mexican authorities, including police and immigration officials. Some commenters pointed to advisories issued by the U.S. Department of State warning U.S. citizens not to travel to areas in Mexico, and stated that there are many examples of migrants being seriously harmed while waiting for asylum in Mexico or for the chance to enter the United States.

Commenters also stated that these risks were further heightened for members of vulnerable groups, such as women and children, Black, brown, and indigenous persons, and LGBT persons.

Response: The Departments recognize commenters' concerns about potential harm to migrants in Mexico, particularly for members of vulnerable groups, but again note that more than 100,000 individuals felt safe enough to apply for asylum in Mexico in 2022. The Departments also emphasize that the rule does not require any noncitizen to apply for asylum or other protection in Mexico or any other country. Applying for and being denied protection in Mexico is only one of multiple ways to be excepted from or rebut the presumption of ineligibility for asylum. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). The rule also provides that the presumption of asylum ineligibility can be rebutted by noncitizens who do not utilize a lawful pathway but who face an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder or who were victims of a severe form of trafficking in persons. *See* 8 CFR 208.33(a)(3)(i)(A) through (C), 1208.33(a)(3)(i)(A) through (C).

For further discussion of this rule and vulnerable populations, please see Section IV.B.4 of this preamble.

Comment: A commenter expressed concern that Mexican asylum seekers would have to wait for an appointment with CBP in the same country where they are experiencing persecution.

Response: This concern is based on a misunderstanding of the rule. The rebuttable presumption only applies to noncitizens who travel through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, and that is a party to the Refugee Convention or Protocol, and thereafter enter the United States from Mexico at the SWB or adjacent coastal borders without documents sufficient for lawful admission. *See* 8 CFR 208.33(a)(1), 1208.33(a)(1). Mexican nationals would not have traveled through a country other than Mexico en route to the SWB, and therefore are not subject to the rebuttable presumption. *See* 8 CFR 208.33(a)(1)(iii), 1208.33(a)(1)(iii).

f. Final Decision of Foreign Government is Undefined

Comment: Commenters asked how U.S. officials would know the adjudication and appeal processes of third countries, such that they could confirm that a noncitizen's application for asylum or other protection in a third country had been denied in a final decision. Commenters stated that a requirement for a final decision could introduce years of uncertainty depending on the backlogs and resources of third countries. One commenter stated that proving the denial of protection in a third country may be entirely impossible in the context of a credible fear interview.

Response: The Departments agree that further clarity on the meaning of the term ''final decision'' will help noncitizens understand, and IJs and AOs apply, this provision. The Departments are therefore revising 8 CFR 208.33(a)(2)(ii)(C) and 1208.33(a)(2)(ii)(C) to except from the rebuttable presumption noncitizens who ''[s]ought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant's claim for asylum or other protection through one or more of that government's pathways for that claim. A final decision does not include a determination by a foreign government that the noncitizen abandoned the claim.''

The Departments also acknowledge that, like the United States, many countries have asylum backlogs that contribute to significant wait times for applicants. However, this rule does not require noncitizens to apply for asylum in a third country and wait for a final decision before applying for asylum in the United States; rather, that is simply one of the lawful pathways recognized by the rule. As an alternative to applying for asylum in a third country and seeking a final decision before migrating to the United States, noncitizens can utilize the CBP One app to pre-schedule an appointment to present at a POE or seek parole pursuant to a lawful parole process (such as the CHNV parole processes). *See* 8 CFR 208.33(a)(2)(ii)(A) and (B), 1208.33(a)(2)(ii)(A) and (B). The rule also allows noncitizens to whom the presumption applies to rebut it in exceptionally compelling circumstances. 8 CFR 208.33(a)(3), 1208.33(a)(3).

The Departments acknowledge that each of the lawful pathways outlined in the rule is subject to limitations, including, *e.g.,* capacity constraints, limitations on eligibility, and geographic availability. The Departments further acknowledge that the pathways' combined limitations could constrain some individuals' ability to access pathways at a given time or place, and that some of those individuals may also not be able to establish an exception to, or rebut, the presumption. However, the Departments have concluded that the interests of migrants and the immigration system as a whole, including the asylum system, are best promoted by incentivizing noncitizens to pursue safe, orderly, and lawful pathways to enter the United States rather than failing to take adequate actions to respond to a potential further surge of irregular migrations at the SWB that threatens to overwhelm the immigration system and prevent orderly processing of claims for protection.

Comment: Commenters stated that the proposed exception for those who sought and were denied asylum or ''other protection'' was unduly vague, because the term ''other protection'' is undefined. Commenters stated that if a migrant applied for and was denied an immigration status other than asylum, they would not necessarily know such

denial would qualify them for an exception to the rebuttable presumption. Commenters further stated that the absence of a definition would result in inconsistent application of the exception.

Response: The preamble of the NPRM described the United States' efforts throughout the region to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration, including access to international protection. Such efforts are put forward in three policy-setting documents: the U.S. Strategy for Addressing the Root Causes of Migration in Central America;[288] the CMMS;[289] and the L.A. Declaration. The NPRM provided a detailed discussion of increased access to protection and other pathways in the region, specifically identifying available programs and processes in Mexico, Guatemala, Belize, Costa Rica, Colombia, Ecuador, and Canada. *See* 88 FR at 11720–23. While these countries provide an opportunity for individuals to apply for asylum or refugee status, they also offer other protection that is not dependent on the applicant meeting the definition of a refugee as provided by the Refugee Convention. For example, Mexico offers protection to individuals whose lives are in danger or where there are well-founded reasons to believe that they would be in danger of being subjected to torture or other cruel, inhuman, or degrading treatment or punishment.[290] Colombia, Costa Rica, and Ecuador have also offered other protection via regularization programs for individuals of specific nationalities.[291]

Because such protection and other pathways in the region are country-specific and, as exemplified by the increased access to protection in the region as a result of the CMMS and L.A. Declaration, are subject to change, the Departments have determined that appropriate pathways and other protections are best determined on a case-by-case basis, considering the evidence presented relating to the nature and basis of the noncitizen's application for protection in the third country. Nevertheless, the Departments note that the ''final decision denying asylum or other protection'' is intended to include denials of asylum and other forms of humanitarian protection related to fear of returning to one's home country as well as other temporary protections akin to that of temporary protected status under section 244 of the INA, 8 U.S.C. 1254a.

Comment: Commenters stated that the proposed rule gives preference to applicants who were denied asylum by another country over those who did not apply or who did apply and received asylum. Commenters stated that the proposed rule would not filter out people with weak asylum claims, as commenters believe the Departments intend, but would rather prevent the most vulnerable people from seeking asylum altogether.

Response: The Departments disagree with the assertions that this rule necessarily gives preference to applicants who were denied asylum by another country over those who do not apply and disagree that the rule would prevent the most vulnerable people from seeking asylum altogether. The rule imposes consequences on certain noncitizens who enter the United States without availing themselves of a lawful pathway for entering the United States. Seeking protection and receiving a final decision in a country through which a noncitizen traveled is one of the lawful pathways recognized by the rule, but it is not the only lawful pathway available. A noncitizen who does not seek protection in a third country may nonetheless establish an exception to the presumption—just as a noncitizen who has sought and been denied such protection would—by presenting at a POE at a pre-scheduled time, or by pursuing a DHS-approved parole process.

The rule incentivizes intending migrants to pursue lawful pathways as part of a regional approach to migration management, including by incentivizing migrants to seek protection in countries through which they travel. With respect to any concern that noncitizens denied protections in a third country are less deserving of protection here, the Departments do not agree that a denial in a third country necessarily means that the applying individual would not merit protection under U.S. law.

In addition, the Departments do not agree that the rule necessarily gives preference to applicants who have been denied asylum in another country. Rather, the rule incentivizes migrants to avail themselves of lawful alternatives to irregular migration and see them through to completion (*e.g.,* receiving a final decision in another country). Those noncitizens meeting that requirement who are ultimately granted asylum or other protections in other countries would have no need to continue on to the United States and may, in many cases, be subject to the firm resettlement bar to asylum, and thus, in the Departments' view, such noncitizens need not be excepted from the rebuttable presumption. However, those who have been denied may still have a need for protection in the United States. Therefore, the Departments believe that maintaining asylum eligibility in the United States for those who have been denied asylum in third countries is appropriate and supports the larger goal of incentivizing noncitizens to pursue available lawful pathways, as part of an effort to build a regional approach to migration management.

Moreover, as noted above, there are additional lawful pathways to which noncitizens could avail themselves to avoid application of the rebuttable presumption as well as multiple circumstances in which the presumption of asylum ineligibility could be rebutted. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). The Departments acknowledge that each of the lawful pathways outlined in the rule is subject to limitations and that the pathways' combined limitations could constrain any individual's ability to access them at a given time or place. However, the Departments have concluded as a matter of policy that the interests of migrants and the immigration system as a whole are best promoted by incentivizing noncitizens to pursue safe, orderly, and lawful pathways to enter the United States rather than failing to take adequate actions to respond to a potential further surge of irregular migration at the SWB that threatens to overwhelm the immigration system and prevent orderly processing of claims for protection.

g. Pursuit of Lawful Pathways May be Improperly Used as Evidence

Comment: Some commenters expressed concern that taking time to

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[288] The White House, *U.S. Strategy for Addressing the Root Causes of Migration in Central America* (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf.*

[289] The White House, *Collaborative Migration Management Strategy* (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf?utm_medium=email&utm_source=govdelivery.*

[290] Government of Mexico, Law on Refugees, Complementary Protection, and Political Asylum, Article 28, January 27, 2011, *https://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP.pdf.*

[291] UNHCR, *Temporary Protection Status in Colombia (November 2021)* (Dec. 3, 2021), *https://reliefweb.int/report/colombia/temporary-protection-status-colombia-november-2021-0;* Costa Rica, *Special Temporary Category for Nationals of Cuba, Costa Rica and Nicaragua with Pending or Denied Refugee Claims* (Apr. 17, 2023), *https://www.migracion.go.cr/Paginas/Categor%C3%ADa%20Migratorias%20(Extranjer%C3%ADa)/Categor%C3%ADa-Especial-Temporal.aspx;* Reuters, *Ecuador Begins Regularization Process for Thousands of Venezuelan Migrants* Sept. 1, 2022, *https://www.reuters.com/world/americas/ecuador-begins-regularization-process-thousands-venezuelan-migrants-2022-09-01/.*

pursue lawful pathways may be used as evidence that noncitizens who do not flee their country immediately do not have a legitimate well-founded fear of persecution.

Response: The Departments disagree that the rule will increase the likelihood of adverse determinations against those noncitizens who choose to remain in their home countries while seeking access to one of the enumerated lawful pathways. As noted elsewhere in this section, this rule does not discourage any person from fleeing a dangerous circumstance, and in fact highlights the options potentially available to persons who do so. Moreover, such migrants may still provide relevant evidence to support their eligibility for asylum, including a well-founded fear of future persecution, notwithstanding their decision to remain in their country to seek a lawful pathway to the United States. *See* 88 FR at 11737; *see also* 8 CFR 208.13. In short, despite assertions made by some commenters, this rule will not result in the elimination of claims for asylum based on a well-founded fear of future persecution, even for applicants who spend some amount of time in their country of origin attempting to access an orderly and lawful pathway to the United States. AOs and IJs will still consider the noncitizen's fear of returning to their country of origin on a case-by-case basis through the noncitizen's credible testimony and other relevant evidence demonstrating a fear of persecution.

v. Unaccompanied Children

Comment: Commenters disagreed with the exception for UCs, stating that children need their parents to keep them safe during their journey to the SWB and that the proposed rule would discourage whole families from seeking asylum together. Some commenters stated that the UC exception would encourage family separation, arguing that families often separate as a perceived means to obtain protection for their children. Specifically, commenters stated that excepting UCs from the rebuttable presumption would incentivize families to send their children on a dangerous journey to the SWB unaccompanied, leading to a surge in the number of UCs arriving at the SWB. Similarly, commenters expressed that in lieu of waiting together in Mexico, many families may choose, or be ''forced'' by the lack of sufficient appointment slots for family members or concerns related to their children's safety, to send their children unaccompanied to the SWB while waiting to schedule their own appointment through the CBP One app. Commenters pointed to reports of such voluntary separations under MPP and the Title 42 public health Order and said that the proposed rule would lead to similar outcomes, and that implementing a policy that would foment such separations would be inhumane and unacceptable. Commenters stated that family separations can cause severe emotional trauma to children and may increase the risk that a child will be exploited or trafficked.

Some commenters suggest that the Departments should remove the UC exception and instead award a higher priority to family unit applications, as this would keep family units together, grant asylum to those that qualify, and disincentivize sending UCs to the SWB. Other commenters asserted that accompanied children should also qualify for an exception, since the exception for UCs creates a perverse incentive to send children alone to the border if families are not first successful together. Another noted that children arriving with their families do not choose where to cross the border or whether to first obtain an appointment, nor do they choose whether to first apply for asylum in another country, especially when fleeing danger.

Response: The Departments fully agree with commenters that keeping families unified and avoiding family separation and the associated trauma is an important goal, but disagree that the rule, including the exception for UCs, will increase separations of families and result in more UCs arriving in the United States. *See, e.g.,* E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 5, 2021). As noted in the preamble of the NPRM, applicability of the rebuttable presumption will be considered during the credible fear process for those noncitizens processed for expedited removal, as well as applied to merits adjudications. 88 FR at 11707. Pursuant to section 235 of the Trafficking Victims Protection Reauthorization Act of 2003 (''TVPRA''), UCs whom DHS seeks to remove cannot be processed for expedited removal and, thus, are never subject to the credible fear process. 8 U.S.C. 1232(a)(5)(D). As UCs are already excluded from expedited removal, the Departments do not expect—based on their experience implementing current law concerning expedited removal and asylum—that this exclusion of UCs from the rebuttable presumption would serve as a significant incentive for families to send their children unaccompanied to the United States.

In addition, under this rule, families may avail themselves of lawful pathways and processes to enter the United States to avoid application of the rebuttable presumption. The rule also states that if one member of a family travelling together, including both parents and children, is excepted from the presumption or has rebutted the presumption, all members of the family are treated as excepted from or as having rebutted the presumption. 8 CFR 208.33(a)(2)(ii) and (3)(i), 1208.33(a)(2)(ii) and (3)(i); 88 FR at 11730 (providing that ''if one member of a family traveling together is excepted from the presumption that the condition applies or has rebutted the presumption, then the other members of the family as described in 8 CFR 208.30(c) are similarly treated as excepted from the presumption or as having rebutted the presumption''); *see* 8 CFR 208.30(c)(2) (''The asylum officer in the officer's discretion may also include other accompanying family members who arrived in the United States concurrently with a principal [applicant] in that [applicant's] positive fear evaluation and determination for purposes of family unity.'').

To the extent commenters suggest that all children, including those traveling with a parent or legal guardian, be excluded from applicability of the rule, the Departments agree that children may have limited agency in their manner of arrival in the United States. The Departments have therefore added a provision to the rule that allows principal asylum applicants who were under the age of 18 at the time of entry to avoid the condition on asylum eligibility for applications if they file as principal applicants after May 11, 2025, as discussed in more detail at Section II.C.2 of this preamble. 8 CFR 208.33(c)(2), 1208.33(d)(2). However, the Departments do not wish to create an incentive for adults to arrive at the border with children falsely claiming to be a family unit in order to be excepted from the rule or for parents or legal guardians to bring their children with them on the dangerous journey to the United States when they otherwise would not do so, and therefore decline to add an exception for all accompanied minors. The Departments seek to encourage families that may choose to travel to the United States together to travel via a lawful pathway rather than by entrusting smugglers or criminal organizations to facilitate a potentially dangerous journey.

vi. Other General Comments on Exceptions

Comment: Several commenters stated that the exceptions to the rebuttable presumption are too narrow and, therefore, would preclude many noncitizens from obtaining asylum. One commenter suggested creating a broad fourth exception that would exempt particularly vulnerable demographics from the rebuttable presumption, much like the proposed rule already exempts unaccompanied children. Another commenter suggested creating an exception for the elderly, who are significantly less likely to be repeat unauthorized crossers.

Response: The Departments believe that the rule will generally offer opportunities for those with valid claims to seek protection, and decline to add additional exceptions to the rule. The Departments believe that the existing exceptions to application of the rebuttable presumption against asylum eligibility at 8 CFR 208.33(a)(2) and 1208.33(a)(2) provide the desired incentive for noncitizens seeking to enter the United States do so via safe, orderly, and lawful pathways, and that additional exceptions, particularly broad exceptions such as those suggested by commenters, would be contrary to the purpose of the rule. Regardless of whether certain populations may be more or less likely to be repeat, unauthorized border crossers, the Departments believe that all noncitizens seeking to enter the United States should do so via safe, orderly, and lawful pathways if possible.

The Departments also note that in addition to the enumerated exceptions, the rule includes means of rebutting the presumption against asylum eligibility at 8 CFR 208.33(a)(3) and 1208.33(a)(3) where exceptionally compelling circumstances exist, including where at the time of entry the noncitizen or a member of their family with whom they are traveling faced an acute medical emergency, faced an imminent and extreme threat to life or safety, or were a victim of a severe form of trafficking in persons. The Departments believe that together, the exceptions and grounds for rebuttal strike the correct balance between incentivizing use of safe, orderly, and lawful pathways for entry into the United States while also recognizing that in certain limited circumstances use of these pathways may not be feasible.

4. Other General Comments on the Rebuttable Presumption

Comment: At least one commenter suggested that the Departments should permit an applicant to override the lawful pathways condition if they establish a reasonable possibility of persecution or torture.

Response: To best effectuate the policy aims underpinning this rulemaking, the Departments believe that even those noncitizens who establish a reasonable fear of persecution or torture generally should remain subject to this asylum eligibility condition. Such noncitizens remain eligible for statutory withholding of removal or for CAT protection, consistent with U.S. non-refoulement obligations under the Refugee Convention and Protocol and Article 3 of the CAT. *See Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *Cazun* v. *U.S. Att'y Gen.,* 856 F.3d 249, 257 n.16 (3d Cir. 2017). Additionally, as discussed in Section IV.E.7.ii of this preamble, the Departments have included protections for family members of principal asylum applicants who are eligible for statutory withholding of removal or CAT protection and would be granted asylum but for the lawful pathways rebuttable presumption, where an accompanying spouse or child would not qualify for asylum or other protection from removal on their own or where the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), if the applicant were granted asylum. In that context, the Departments have determined that the possibility of separating the family would constitute an exceptionally compelling circumstance that rebuts the lawful pathways presumption of ineligibility for asylum. *See* 8 CFR 1208.33(c).

Comment: One commenter stated that the United States and Mexico should establish certain parameters for non-Mexicans waiting in Mexico for an appointment or for entry by other means, which must take into account safety, security, and humanitarian conditions in the locations where asylum seekers may be forced to wait. The commenter suggested that those parameters should include permission to remain lawfully in Mexico while awaiting appointments and ensuring relevant standards of protection and treatment under the Refugee Convention and international human rights standards.

Response: It would be the Government of Mexico's prerogative to establish any such parameters. The Departments remain committed to continuing to work with foreign partners on expanding their legal options for migrants and expanding the Departments' mechanisms for processing migrants who lawfully arrive in the United States. *See* 88 FR at 11720.

5. Screening Procedures and Review

i. Requests for Reconsideration

Comment: Some commenters opposed eliminating noncitizens' ability to seek reconsideration of a negative fear determination by USCIS and contended that the proposed rule would eliminate AO reconsideration of negative credible fear determinations. Commenters stated that the use of reconsiderations is needed to safeguard the rights of and due process for asylum seekers where the AO in the first instance issues an erroneous decision. Commenters stated that reconsideration has shielded asylum seekers from deportation to persecution and torture for decades, and observed that between FYs 2019–21 requests for reconsideration resulted in 569 reversals of negative credible fear determinations. One commenter stated that even one reversal in the request for reconsideration process is significant enough. One commenter wrote that, contrary to the proposed rule's "theory that" requests for reconsideration "are a waste of resources because so few are granted," their experience was that so few are granted because migrants cannot adequately state their fear in the initial interview nor access assistance with the process. Another commenter said the elimination of the possibility of reconsideration leaves an applicant's fate entirely to the quality and circumstances of the initial interview. Another commenter stated that the Departments should not use USCIS's "abysmal grant rate to justify eliminating this critical opportunity for justice and to right a wrong in an asylum seeker's application for protection." Another commenter expressed concern that this proposed rule would apply only to people who receive negative credible fear determinations due to this proposed rule, thereby creating different sets of procedural rules for asylum seekers denied under this proposed rule and those denied for other reasons.

Response: At the outset, the Departments note that contrary to some commenters' assertions, the rule does not eliminate reconsideration of negative credible fear determinations. If the IJ upholds the AO's negative

determination, USCIS can still exercise its discretion to reconsider a negative determination. *See* 8 CFR 208.33(b)(2)(v)(C). The rule does eliminate the ability to request such reconsideration for noncitizens deemed ineligible for asylum by operation of the rebuttable presumption. While the Departments acknowledge concerns about eliminating a noncitizen's ability to request reconsideration in this context, they believe it is important to efficiently resolve credible fear cases that are subject to the rebuttable presumption against asylum eligibility. The rule's effectiveness in channeling migration into safe and orderly pathways depends in part on the efficient resolution of credible fear cases, and the inclusion of further review procedures in this context would unnecessarily prolong the credible fear process.

In response to concerns about fairness, the Departments note that there remain multiple safeguards to ensure that the process is fair and to guard against inadvertent error for those subject to the rule. All credible fear determinations undergo initial review by a Supervisory AO. 8 CFR 208.30(e)(8). If the supervisor concurs with the negative determination, the noncitizen can request review of that determination by an IJ. *See* 8 CFR 208.33(b)(2)(iii) through (v). Those who are found subject to the presumption against asylum eligibility but who are still placed in section 240 removal proceedings can seek a de novo decision regarding the presumption. *See* 8 CFR 1208.33(b)(4). Furthermore, the Departments note that few requests for review of negative credible fear determinations ultimately result in the reversal of those determinations. *See* 87 FR at 18132; 88 FR at 11747. The Departments assess that, in light of the safeguards in place and the low rate of reversal, efficiency interests outweigh the interest in providing further opportunity to request reconsideration; the Departments therefore respectfully disagree with the commenter stating that even one reversal would be significant enough to warrant the ability to request reconsideration. Regarding the claim that few requests for reconsideration are granted due to noncitizens' lack of opportunity to state their fear during the initial interview and lack of assistance with the process, the commenter offered only anecdotal evidence for this. Moreover, this assertion does not change the Departments' assessment that providing further opportunity to request reconsideration carries insufficient benefits to justify its costs. To the extent that commenters argued that these limits on reconsideration implicate the due process rights of noncitizens, as explained previously in Section IV.B.5.i of this preamble, the Supreme Court has held that the due process rights of noncitizens applying for admission at the border are limited to ''only those rights regarding admission that Congress has provided by statute.'' *Thuraissigiam,* 140 S. Ct. at 1983 (citing INA 235(b)(1)(B)(ii) and (v), 8 U.S.C. 1225(b)(1)(B)(ii) and (v)). The INA provides no statutory right to reconsideration of an AO's negative credible fear determination. *See* INA 235(b)(1), 8 U.S.C. 1225(b)(1).

The Departments acknowledge that noncitizens who are not subject to the presumption are subject to different rules for reconsideration. *See* 8 CFR 208.30(g)(1)(i). However, the Departments note that the decision to reconsider a negative credible fear determination under that rule is still subject to USCIS discretion and is also time limited. *Id.* By contrast, there are no time limits for USCIS to reconsider negative determinations in cases subject to this rule. 8 CFR 208.33(b)(2)(v)(C). And due to the exigent circumstances discussed throughout this rule, including in Sections II.A and IV.B.2 of this preamble, the Departments believe it necessary to limit requests for reconsideration in cases subject to this rule.

ii. ''Significant Possibility'' Standard and Mechanisms for Evaluating Asylum and Withholding of Removal

Comment: Some commenters alleged that the rule would elevate the ''significant possibility'' standard established by Congress to the ''reasonable possibility'' standard, which is much harder for asylum seekers to meet. One commenter stated that the complexity of the presumption of ineligibility will require ''intensive factual analysis'' during credible fear interviews and stated that application of the reasonable possibility standard for screenings for withholding of removal or CAT protection violates the Global Asylum Rule injunction. Other commenters suggest that it will be ''an extremely onerous undertaking'' for the Departments to apply a ''reasonable fear'' standard in cases where the lawful pathways condition applies, which could lead to more complex and resource-intensive credible fear screening interviews with a ''high risk of error that would send bona fide refugees back to danger.'' Another commenter stated that, by applying the ''reasonable possibility'' standard to cases subject to the rule, the rule would essentially turn the credible fear interview, which is intended to be a low-bar screening, into an asylum merits hearing for these individuals. One commenter said that procedural and judicial errors are likely to increase as AOs are asked to apply the more onerous ''reasonable possibility'' standard.

A commenter stated that the rule may not be necessary as long as statutory withholding of removal and protection under CAT are available, as migrants would not distinguish between asylum, withholding, and CAT protection and instead would arrive at the SWB with the intention of seeking whatever relief is available to them. Other commenters expressed concern that those who cannot rebut the presumption would then be forced to meet a more difficult standard to be able to present a claim to lesser protections in the form of statutory withholding of removal or CAT protection. One commenter stated that the fact that the Departments have long applied the higher standard in reasonable fear screenings is ''inapposite,'' reasoning that the rule is not about reasonable fear screenings, which impact those who were previously ordered removed and then re-entered without inspection.

Response: To the extent commenters suggest that the ''reasonable possibility'' standard will apply at the credible fear stage to asylum claims under this rule, they are incorrect. The statutory ''significant possibility'' standard will continue to apply to such asylum claims. *See* Section IV.D.1.iii of this preamble. The rule would apply a ''reasonable possibility'' standard only to screen for claims of withholding of removal and CAT protection, and only where a noncitizen has failed to establish a significant possibility that they would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception to or can rebut the presumption of ineligibility. *See* 88 FR at 11724.

That said, the Departments acknowledge commenters' concerns that certain noncitizens will be subject to a higher burden of proof for statutory withholding of removal and CAT protection. The Departments acknowledge that use of the ''reasonable possibility'' standard is a change from the practice currently applied in the expedited removal context as articulated in the Asylum Processing IFR; however, it is the same standard used in other protection screening contexts. *See* 8 CFR 208.31; *see also* 88 FR 11742–44. Notably, this higher screening standard

accords with the higher standard a noncitizen must meet for statutory withholding of removal and protection under CAT in section 240 removal proceedings, 8 U.S.C. 1229a. *See INS.* v. *Cardoza-Fonseca,* 480 U.S. 421 (1987). As explained in the NPRM, the Departments therefore believe that the ''reasonable possibility'' standard ''better predicts the likelihood of succeeding on the ultimate statutory withholding or CAT protection application than the 'significant possibility' of establishing eligibility for the underlying protection standard, given the higher burden of proof.'' 88 FR at 11746–47. The application of standards tailored to the type of relief or protection that the noncitizen is eligible for will not foreclose an opportunity for those with meritorious claims to seek protection.

While the INA specifies the ''significant possibility'' standard for the purpose of screening for potential asylum eligibility in credible fear proceedings, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the INA does not specify a standard to be used in screening for potential eligibility for statutory withholding of removal or CAT protection. Congress did not require the same eligibility standards for asylum, statutory withholding of removal, and protection under the CAT in the ''credible fear'' screening process. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* The Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, 112 Stat. 2681–822. Thus, the Departments have determined that, where the rebuttable presumption of asylum ineligibility applies and has not been rebutted, applying the ''reasonable possibility'' of persecution or torture standard to screen claims for statutory withholding of removal and CAT protection would better advance the Departments' systemic goal of processing protection claims in a manner that is efficient, orderly, and safe.

The Departments acknowledge that in multiple rulemaking efforts in recent years, the Departments promulgated divergent standards for screening for potential eligibility for asylum as compared with statutory withholding of removal and CAT protection, along with variable standards for individuals barred from certain types of protection, which are currently not in effect.[292] In June 2020, the Departments published the Global Asylum Rule, which amended provisions relating to the expedited removal and credible fear screening process, including raising the standards of proof for screening all claims for statutory withholding of removal and CAT protection to a ''reasonable possibility'' of persecution or torture and applying all mandatory bars to asylum and statutory withholding of removal during the credible fear screening. *See* Global Asylum Rule, 85 FR at 80277–78. The Global Asylum Rule continues to be the subject of lawsuits challenging the rule on multiple grounds.[293] Most of the changes to the credible fear process in expedited removal made by the Global Asylum Rule were superseded by the Asylum Processing IFR. As explained in the NPRM, the considerations that led to those decisions do not apply here. *See* 88 FR at 11744. This rule implements the new condition on eligibility in credible fear screenings through a stand-alone provision rather than a catch-all as the Departments sought to do through the Global Asylum Rule. Moreover, the Departments have determined that it would be appropriate to apply the lawful pathways condition on asylum eligibility during the credible fear screening stage such that the ''reasonable possibility'' of persecution or torture standard would then be used to screen the remaining applications for statutory withholding of removal and CAT protection. *See id.*

The Departments disagree with commenters' assertions that applying a higher burden of proof to screen for statutory withholding of removal and CAT protection where the presumption of asylum ineligibility applies and is not rebutted will result in errors. AOs and IJs have long applied, and continue to apply, the ''reasonable possibility'' of persecution or torture standard successfully to noncitizens who are subject to administrative removal orders under section 238(b) of the INA, 8 U.S.C. 1228(b), or reinstated orders under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5). *See generally* 8 CFR 208.31 and 1208.31. There is therefore no reason to conclude that AOs and IJs will not be able to appropriately apply that standard successfully in the context of this rule.

The Departments disagree with commenters' suggestion that the rule will increase irregular migration because noncitizens will still travel to the United States to pursue any avenue of relief available to them. The rule's primary purpose is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule, coupled with an expansion of lawful, safe, and orderly pathways, is expected to reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States. The rule is intended to reduce the level of irregular migration to the United States without discouraging migrants with valid claims from applying for asylum or other protection. The Departments believe the rule will generally offer opportunities for those with valid claims to seek protection.

The Departments' application of a higher standard for statutory withholding and CAT protection in ''reasonable fear'' screenings, *see* 8 CFR 208.31 and 1208.31, is not inapposite in the context of this rule, where a noncitizen does not meet an exception to or rebut the presumption of asylum ineligibility. As in the ''reasonable fear'' context, this standard would be applied only where noncitizens are ineligible for asylum—and because the standard for showing entitlement to statutory withholding and CAT protection (a probability of persecution or torture) is significantly higher than the standard for asylum (well-founded fear of persecution), the Departments have determined that the screening standard adopted for initial consideration of withholding and deferral requests in these contexts should also be higher.

In promulgating this rule, the Departments considered and drew upon the established framework for considering the likelihood of a grant of statutory withholding of removal or CAT protection in the reasonable-fear context. *See* 88 FR at 11743. The Departments have authority to establish screening procedures and standards for statutory withholding of removal and CAT protection. *See* INA 103(a)(1), 8 U.S.C. 1103(a)(1). The Departments have frequently invoked these authorities to

[292] *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934, 55939, 55943 (Nov. 9, 2018) (''Proclamation Bar IFR''); Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019) (''Third Country Transit (TCT) Bar IFR''); Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (''TCT Bar Final Rule''); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020) (''Global Asylum NPRM''); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020) (''Global Asylum Rule''); Security Bars and Processing, 85 FR 84160 (Dec. 23, 2020) (''Security Bars Rule'').

[293] *See Pangea Legal Servs.* v. *U.S. Dep't of Homeland Sec.,* 501 F. Supp. 3d 792 (N.D. Cal. 2020); *Immigration Equality* v. *U.S. Dep't of Homeland Sec.,* No. 3:20–cv–09258 (N.D. Cal. filed Dec. 21, 2020); *Human Rights First* v. *Mayorkas,* No. 1:20-cv-3764 (D.D.C. filed Dec. 21, 2020); *Tahirih Justice Ctr.* v. *Mayorkas,* No. 1:21–cv–00124 (D.D.C. filed Jan. 14, 2021).

establish or modify procedures in expedited removal proceedings. *See id.* Noncitizens who establish a reasonable fear of persecution or torture would still be able to seek protection in proceedings before IJs. *See* CFR 1208.33(b)(2)(ii).

Comment: One commenter supported the Departments' assessment that applying the higher standard would lead to fewer noncitizens with non-meritorious claims being placed in section 240 removal proceedings, and that using this standard would further systemic goals without violating statutory or international obligations. However, the commenter recommended that DHS raise the screening standard from ''significant possibility'' to ''reasonable possibility'' for statutory withholding of removal and CAT protection during all credible fear interviews. The commenter reasoned that such an approach would be consistent with the INA, the FARRA, and U.S. non-refoulement obligations, and would reduce ''historic and unsustainable strains'' on the U.S. asylum system by deterring unauthorized immigration into the United States.

Response: The Departments decline to apply the ''reasonable possibility'' standard to screen all withholding of removal and CAT claims. The Departments believe that continuing to use the ''significant possibility'' standard to screen for all three types of claims—asylum, statutory withholding of removal, and CAT protection—when the noncitizen is excepted from or has overcome the presumption would avoid AOs and IJs applying divergent standards to the same sets of facts in a credible fear interview, thus simplifying the screening process for those noncitizens.

The commenter did not provide any explanation or evidence regarding how applying a higher standard during the credible fear screening to all claims for protection will reduce fraudulent claims. While the Departments acknowledge the commenter's concern, the Departments emphasize that the rule's primary intent is not to identify fraudulent asylum claims, but rather to reduce the level of irregular migration to the United States without discouraging migrants with valid claims from applying for asylum or other protection.

6. Effective Date, Temporary Period, and Further Action

Comments: Commenters raised concerns regarding the effective date of the rule and the two-year temporary duration of the rule. Several commenters expressed a concern that the two-year period is unexplained. Some commenters argued that two years was too short of a time period to assess the effectiveness of the program. Another commenter stated that the two-year temporary duration of the rule allowed for sufficient time to assess the effects of the rule and to deter migrants. Some commenters questioned why the rule would expire after two years and requested further explanation, stating that if the Departments believe it is sound policy, it is not clear why the changes are not permanent. Others stated that the two-year period was too long for a ''temporary'' program designed to address ''exigent circumstances,'' and stated that the Departments should have considered a much shorter duration, such as 30 days or 90 days, reconsideration every 6 months, or a sunset before the end of 2025. Another commenter stated that the Departments should specify conditions that would trigger the expiration of the rule. Commenters also expressed concern that the rule does not sufficiently lay out the criteria for determining whether the rule should be extended at the end of the 24-month period, or that the criteria are highly subjective. Commenters also noted that previous immigration policies, including MPP and those stemming from the Title 42 public health Order, have been difficult to sunset.

Response: The Departments intend for the rule to address the surge in migration that is anticipated to follow the lifting of the Title 42 public health Order. For that reason, and consistent with the Departments' initial assessment as stated in the NPRM, *see* 88 FR at 11727, the rule will only cover those who enter during a specific time period, applying to those who enter the United States at the SWB during the 24-month period following the rule's effective date. The Departments believe that a 24-month period provides sufficient time to implement and assess the effects of the policy contained in this rule. In addition, the Departments believe that a 24-month period is sufficiently long to impact the decision-making process for noncitizens who might otherwise pursue irregular migration and make the dangerous journey to the United States, while a shorter duration, or one based on specified conditions, would likely not have such an effect.

During this time, the United States will continue to build on the multi-pronged, long-term strategy with our foreign partners throughout the region to support conditions that would decrease irregular migration, work to improve refugee processing and other immigration pathways in the region, and implement other measures as appropriate, including continued efforts to increase immigration enforcement capacity and streamline processing of asylum seekers and other migrants. Recognizing, however, that there is not a specific event or demarcation that would occur at the 24-month mark, the Departments will closely monitor conditions during this period in order to review and make a decision, consistent with the requirements of the APA, whether additional rulemaking is appropriate to modify, terminate, or extend the rebuttable presumption and the other provisions of this rule. Such review and decision would consider all relevant factors, including the following: current and projected migration patterns, including the number of migrants seeking to enter the United States or being encountered at the SWB; resource limitations, including whether the number of noncitizens seeking or expected to seek to enter the United States at the SWB exceeds or is likely to exceed the Departments' capacity to safely, humanely, and efficiently administer the immigration system, including the asylum system; the availability of lawful, safe, and orderly pathways to seek protection in the United States and partner nations; and foreign policy considerations. The Departments expect to consider their experience under the rule to that point, including the effects of the rebuttable presumption on those pursuing asylum claims. In addition, the Departments expect to consider changes in policy views and imperatives, including foreign policy objectives, in making any decision regarding the future of the rule. The Departments do not believe that establishment of specific metrics for renewal ex ante would be appropriate, given the dynamic nature of the circumstances at the SWB and the multifaceted domestic and foreign policy challenges facing the Departments.

Comment: Commenters expressed concern about the rationale for adopting the two-year duration and potential extensions of the rule in subsequent administrations. Some commenters stated that the Departments' rationale for the two-year temporary duration was pretextual, with the true motivations being political and partisan in nature. One commenter disagreed with allowing the rule to be effective after the end of the current presidential term because it could be indefinitely extended, and another similarly stated that the fact that the rule is ''temporary'' does not mean that a subsequent presidential administration could not renew it.

Commenters stated that, by sunsetting the rule after the end of the current presidential term, the Departments were inviting such a result.

Response: The Departments disagree that the rationale for the 24-month duration of the rule is political, partisan, or pretextual in nature. The rule's primary purpose is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule is needed because, absent this rule, after the termination of the Title 42 public health Order, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. The 24-month duration of the rule is discussed in more detail in Section IV.E.6 of this preamble.

Comment: Commenters questioned how the temporary nature of the rule would practically work, noting the range of new procedures, training, and other Notices required to start and stop such a large program. These commenters hypothesized that the time spent training and making other updates for implementation would directly cut into the limited time the rule would be in effect, reducing its effectiveness.

Response: The Departments agree that implementation of the rule requires training and guidance, and are taking steps to ensure that it can be implemented in a timely, fair, and efficient manner after it goes into effect. The Departments are confident that the new procedures required can be put into effect with minimal disruption or delay in both merits adjudications and credible fear screenings.

Comment: Commenters stated that although the rule proposed a two-year effective period, it would have a permanent impact. A few commenters expressed concern about the potential for two identical asylum seekers to be treated differently based on whether they seek asylum before or after the sunset date of the rule. One commenter urged the Departments to provide clarity regarding adjudications that take place after the rule's sunset date for individuals that entered prior to the sunset date.

Response: The Departments appreciate commenters' concerns that the rule, which would only apply to those entering during a specified, time-limited date range, could lead to confusion, and appreciate the opportunity to clarify how it will be implemented. The Departments also recognize that due to the nature of the rule, noncitizens who enter during the specified date range will be subject to its terms while those who enter before or after the period will not. However, the Departments disagree that the effects of the condition should be time-limited in duration. The rule was designed to apply to anyone who entered during the specified time period in order to avoid the possibility of individuals entering without documents sufficient for lawful admission during the time period covered by the rule, then waiting out the condition imposed by the rule before applying for asylum, thereby contributing to the existing immigration court backlog and rendering the rule ineffective in its aims of reducing unauthorized arrivals to the SWB and encouraging utilization of available lawful pathways. To clarify to noncitizens and adjudicators that the rebuttable presumption has continuing effect, the Departments added language to the regulations stating that the rebuttable presumption will continue to apply to all asylum applications filed by people who enter in the specified manner during the 24-month period regardless of when the application is filed and adjudicated. *See* 8 CFR 208.33(c)(1), 1208.33(d)(1). To further clarify, and in response to commenters' concerns in relation to individuals who enter as minors in a family unit who may have entered during the rule's effective period through no fault or agency of their own, the Departments have added language to the rule to ensure children brought to the United States during the 24-month effective period are not subject to the lawful pathways rebuttable presumption of asylum ineligibility in the rule if they file an application for asylum as a principal applicant after expiration of the 24-month period. 8 CFR 208.33(c)(2), 1208.33(d)(2).

Comment: Several commenters stated that the rule is contrary to international law, and that its temporary nature, or the emergency rationale behind it, do not justify or excuse such a violation.

Response: For discussion of the rule's compliance with international law and U.S. treaty obligations, please see Section IV.D.3 of this preamble.

7. EOIR Proceedings

i. EOIR IJ Credible Fear Review Procedures

Comment: Commenters objected to the provision in the proposed rule that would require noncitizens to affirmatively request IJ review of negative credible fear determinations, which differs from existing procedures where review is given to those who do not affirmatively decline review. Commenters stated that IJ review of negative credible fear determinations is an important safeguard that is guaranteed by statute, pointing to data detailing how many negative credible fear determinations were overturned by IJs. Commenters stated that this change favors expedience over access to protection in the United States and would inevitably result in an increase in deportations to countries where asylum seekers have a credible fear of return. Commenters stated that negative credible fear determinations should automatically receive IJ review unless the noncitizen affirmatively declines it, as expecting a noncitizen to know to affirmatively ask for an IJ's review is unrealistic and effectively denies the noncitizen the opportunity for a judicial review. Commenters explained that many individuals may not request review, or know to request review, even if asked whether they wish to seek further review before an IJ, for a variety of reasons. The provided reasons included unfamiliarity with the immigration system; lack of counsel or education; inability to identify legal errors by the AO; language issues; time in custody; mental health conditions; confusion; trauma; and deference to authority; among others. Further, commenters also stated that changing the explanations of the right to IJ review would not serve as a sufficient safeguard.

Commenters also stated that the Departments did not give a reasoned justification for this policy change and that the rationale in the NPRM for requiring noncitizens to affirmatively request IJ review contradicts the Asylum Processing IFR, which, after the Global Asylum Final Rule implemented a requirement that noncitizens affirmatively request review, reinstated the default rule that negative determinations would be automatically referred for IJ review absent explicit declination by the noncitizen. Moreover, commenters asserted that this rule change would cause confusion as DHS officers would be required to apply the automatic credible fear review provision differently for asylum seekers with negative credible fear determinations based on the rebuttable presumption in this rule, as compared to determinations made on another basis. Commenters also expressed concern that the NPRM did not include statistics regarding automatic IJ credible

fear review, including how many asylum seekers succeeded in their review without having articulated a desire for IJ review to the AO, or how many IJ credible fear reviews were expeditiously resolved after the IJ explained the asylum seeker's rights and the asylum seeker chose to not pursue further review.

Separately, regarding credible fear reviews more generally, commenters stated that it was unclear whether an IJ could review the asylum ineligibility presumption during a credible fear review. Commenters also stated that the proposed rule would cause a significant increase in negative credible fear reviews at EOIR, and that such reviews would require more adjudication time due to application of the rebuttable presumption. Moreover, commenters stated that the proposed rule would allow IJs to engage in speculation by looking outside of the record of proceedings during the credible fear review.

Commenters also proposed an additional hearing, prior to or concurrent with the IJ review, assessing whether a noncitizen's documents were sufficient for lawful admission pursuant to section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7). In contrast, other commenters proposed generally eliminating IJ review of credible fear determinations, asserting this would reduce the backlog of cases within the immigration system and would reduce the pull factor created by lengthy adjudications. Similarly, other commenters stated that IJ review is not necessary if a noncitizen knowingly declines review, so long as the Departments provide expanded rights advisals and explain the consequences of declining such review.

Response: As stated in the NPRM, the Departments acknowledge that the procedure for IJ review of negative credible fear determinations established by this rule differs from the credible fear review procedures implemented by the Asylum Processing IFR. *See* 88 FR at 11744 (''[U]nlike the process adopted by the Asylum Processing IFR, noncitizens must affirmatively elect immigration judge review of a negative credible fear determination when that choice is presented to them; noncitizens who fail or refuse to indicate a request for immigration judge review will not be considered to have requested such review.''). While the Departments believe that ''the need for expedition under the current and anticipated exigent circumstances'' weighs in favor of requiring noncitizens to affirmatively request IJ review of a negative credible fear determination, they will also ''seek to ensure noncitizens are aware of the right to review and the consequences of failure to affirmatively request such review.'' *Id.* at 11747.[294]

In particular, if a noncitizen receives a negative credible fear determination after failing to rebut the presumption or to establish a ''reasonable possibility'' of persecution or torture, the rule requires AOs to provide noncitizens ''with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative credible fear determinations.'' 8 CFR 208.33(b)(2)(iii). The Departments believe that such notice sufficiently ensures that noncitizens who desire IJ review have the opportunity to elect it under this rule. Currently, USCIS explains to noncitizens that they may request review of a negative credible fear determination with an IJ, and that failure to do so may result in removal from the United States. USCIS also explains to noncitizens their right to consultation during the credible fear process, and provides noncitizens with a list of free or low-cost legal services providers whom they may wish to contact.[295] To ensure that noncitizens—including, among others, noncitizens who are unfamiliar with the immigration system, have suffered trauma, are without counsel, or are unable to read or speak English—understand what review is available to them, DHS ''intends to change the explanations it provides to noncitizens subject to the . . . rule to make clear to noncitizens that the failure to affirmatively request review will be deemed a waiver of the right to seek such review.'' 88 FR at 11747. These explanations will be provided by trained asylum office staff through an interpreter in a language understood by the noncitizen. *See* 8 CFR 208.30(d)(5). As a result, the Departments believe that it is reasonable to conclude that noncitizens who do not request IJ review after receiving sufficient notice, *see* 8 CFR 208.30(d)(5), and the enhanced explanations described above do not wish for additional review. *See* 88 FR at 11747. The Departments note that, at the time that the Asylum Processing IFR was being considered, the Departments were assessing procedures that would require affirmative requests for IJ review through the lens of the Global Asylum Final Rule, which did not include a planned rollout of enhanced explanations for noncitizens. Under this rule, DHS is now planning different protocols for implementing the requirement that noncitizens affirmatively request review by providing the above-described explanations coupled with enhanced notice procedures. The Departments also do not believe this change will cause unnecessary confusion for DHS officers and staff, as they are well trained in expedited removal and credible fear procedures. *See, e.g.,* 8 CFR 208.1(b) (''Training of asylum officers'').

Separately, in response to more general comments about the IJ credible fear review process, the Departments clarify that IJs apply a de novo standard during credible fear reviews, including on the question whether the asylum ineligibility presumption applies. *See* 8 CFR 1208.33(b)(1) (stating that ''the immigration judge shall evaluate the case de novo''). More generally, the Departments do not believe that the application of the rebuttable presumption presents a risk of creating significant inefficiencies during the IJ credible fear review process that would warrant amending the rule, as IJs have significant experience conducting credible fear reviews and applying asylum-related standards. Additionally, IJs will be able to review relevant evidence provided at the initial credible fear interview before the AO in making any determinations regarding the rebuttable presumption. As discussed above, the Departments anticipate that any increases in the time that it takes to review a negative credible fear decision will be outweighed by other efficiencies created by this rule. The Departments disagree with commenters that the rule allows IJs to engage in ''speculation'' during credible fear reviews, as the relevant evidentiary standards in credible fear reviews predate this regulation. *See* 8 CFR 1003.42(d)(1) (explaining that the IJ may take into account ''such other facts as are known to the immigration judge'').

In response to other commenters, the Departments also decline to completely eliminate IJ credible fear review, which is provided by statute and acts as an important safeguard during the expedited removal process. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (''The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination . . . that the alien does not have a credible fear of persecution.''). Similarly, the Departments decline to add additional

[294] Regarding commenters' data requests, the Departments note that EOIR does not maintain data regarding how many IJ credible fear reviews were initiated after a noncitizen failed to request such review.

[295] *See* USCIS Form M–444, Information About Credible Fear Interview.

hearings regarding inadmissibility determinations, which are properly determined within existing procedures. *See* INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i) (requiring DHS officer to determine document-related inadmissibility during the expedited removal process).

Comment: Commenters raised a number of concerns about IJ credible fear review proceedings generally, including the sufficiency and reliability of the evidentiary record before the AO, the abbreviated nature of IJ credible fear reviews in light of the complexity of the issues presented, the lack of counsel or limited participation of counsel in IJ credible fear reviews, the level of deference IJs demonstrate towards to the AO's determination, and the lack of appeal of an IJ negative credible fear determination, among others.

Response: As an initial matter, the Departments note that this rule does not alter the existing IJ credible fear review process, and comments regarding unaltered existing processes are outside the scope of this rule. Regardless, with respect to commenters who characterized the existing credible fear screening and review process as deficient or contrary to due process, the Departments note that Congress has established an expedited removal process that includes neither BIA review nor judicial review and requires any IJ review of credible fear determinations to be prompt. *See* INA 235(b)(1)(B)(iii)(III), (C), 8 U.S.C. 1225(b)(1)(B)(iii)(III), (C). Additionally, existing regulations outline a robust process for IJ review of credible fear determinations. *See* 8 CFR 1003.42, 1208.30 (describing IJ review of credible fear determinations). Please also see discussion in Section IV.B.5 of this preamble responding to comments on the effects of the rule on due process.

As to the sufficiency and reliability of the record of determination, the Departments disagree with commenter contentions that this document does not provide a sufficient record for IJ review. The INA sets forth that the record of determination ''shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in light of such facts, the [noncitizen] has not established a credible fear of persecution.'' INA 235(b)(1)(B)(iii)(II), 8 U.S.C. 1225(b)(1)(B)(iii)(II). Further, as the record of determination is a government-created document, it is generally presumed to be reliable in the absence of evidence to the contrary. *See Matter of J–C–H–F–,* 27 I&N Dec. 211, 212 (BIA 2018) (citing *Espinoza* v. *INS,* 45 F.3d 308, 310 (9th Cir. 1995)). Should the reliability of a record of determination be challenged before the IJ, the IJ will consider the arguments raised as to its reliability. *Cf. id.* at 215–16 (setting forth the framework for IJ review when the reliability of a border interview is challenged); *see also Ye* v. *Lynch,* 845 F.3d 38, 45 (1st Cir. 2017) (requiring a totality-of-the-circumstances-based inquiry as to reliability of a DHS document); *Zhang* v. *Holder,* 585 F.3d 715, 725–26 (2d Cir. 2009) (requiring a factor-based inquiry as to reliability of a DHS document).

Moreover, during review of a negative credible fear determination, IJs are authorized to ''receive into evidence any oral or written statement which is material and relevant to any issue in the review.'' 8 CFR 1003.42(c). Accordingly, noncitizens who believe that their credible fear interview is inaccurately described or who wish to provide additional testimony, context, or explanation have the opportunity to do so before an IJ. Furthermore, as an additional procedural precaution for noncitizens, the IJ review of a negative credible fear determination itself is subject to preservation-of-records requirements, as the IJ must create a Record of Proceeding in which to memorialize their review. *See* 8 CFR 1003.42(b).

As stated in the NPRM and consistent with existing practice, IJs will continue to evaluate such credible fear determinations using a de novo standard of review. *See* 8 CFR 1003.42(d)(1), 1208.33(b)(1) (''[T]he immigration judge shall evaluate the case de novo, as specified in paragraph (b)(2) of this section.''); 88 FR at 11726. This includes reviewing an AO's determinations about the applicability of the presumption of asylum ineligibility and whether the presumption was rebutted. *See* 8 CFR 1208.33(b). Under 8 CFR 1208.33(b)(1), the IJ shall review de novo ''[w]here an asylum officer has issued a negative credible fear determination pursuant to 8 CFR 208.33(b), and the alien has requested immigration judge review of that credible fear determination.'' 8 CFR 208.33(b)(2)(v) (''Immigration judges will evaluate the case as provided in 8 CFR 1208.33(b).''). In such an instance, de novo review serves to protect noncitizens from incorrect or unwarranted negative credible fear determinations that may have in part relied upon the rebuttable presumption.

Further, with respect to commenter concerns about timelines in credible fear review proceedings, the expedited removal statute requires ''prompt review.'' INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). Additionally, the statute states that ''[r]eview shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the [negative credible fear] determination.'' *Id.*

Moreover, the Departments will not depart from existing procedures regarding IJ review of credible fear determinations to allow appeals from the IJs' review of such determinations. Prior to this rule, IJ decisions at the credible fear review stage were not reviewable, and this rule maintains that posture. *See* 8 CFR 1003.42(f) (2020)[296] (''No appeal shall lie from a review of an adverse credible fear determination made by an immigration judge.''); 208.33(b)(2)(v)(C) (''No appeal shall lie from the immigration judge's decision and no request for reconsideration may be submitted to USCIS.''). Such processes are in accordance with the INA. *See* INA 235(b)(1)(C), 8 U.S.C. 1225(b)(1)(C) (providing that removal orders issued under this section are not subject to administrative appeal other than review by an IJ). However, the Departments note that per the rule, USCIS retains the discretion to reconsider negative determinations. *See* 8 CFR 208.33(b)(2)(v)(C) (''Nevertheless, USCIS may, in its sole discretion, reconsider a negative determination.''). Because noncitizens can request IJ review of a negative credible fear determination, and USCIS retains discretion to reconsider negative determinations, the Departments continue to believe, as explained in the NPRM, that the rule appropriately balances the availability of review and the efficient use of limited agency resources. *See* 88 FR at 11747.

In sum, the Departments believe that the established process for IJ review of credible fear determinations provides sufficient opportunity for noncitizens to present the necessary evidence, including testimony, relevant for evaluating the applicability of the presumption of asylum ineligibility created by this rule.

ii. Section 240 Removal Proceedings

Comment: Commenters stated that the rule would create confusion in section 240 removal proceedings, as the rule states that a noncitizen who is subject

[296] This provision was amended by the Global Asylum Rule, which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea II,* 512 F. Supp. 3d at 969–70. This order remains in effect, and thus the 2020 version of this provision—the version immediately preceding the enjoined amendment—is currently effective.

to the presumption but demonstrates a ''reasonable possibility'' of persecution or torture may apply for asylum during subsequent removal proceedings. Commenters also expressed concern that under the proposed rule, an IJ might re-adjudicate the condition on eligibility in section 240 removal proceedings despite an AO initial determination during the credible fear process that the presumption of ineligibility was not applicable or was rebutted. Commenters stated that it would be unfair to require asylum applicants to repeatedly demonstrate that they are able to rebut the presumption before different adjudicators, suggesting an AO's determination that the presumption is inapplicable should be final for all future proceedings.

Response: The Departments reiterate that noncitizens who are subject to the presumption of asylum ineligibility during a credible fear determination, but who demonstrate a ''reasonable possibility'' of persecution or torture, can apply for asylum during any subsequent removal proceedings. *See* 8 CFR 1208.33(b)(4). However, the provisions of this rule governing the presumption of asylum ineligibility will still apply, and an IJ will apply the relevant provisions de novo during removal proceedings. *See generally* 8 CFR 1208.33.

The Departments do not believe that it is unfair for IJs to consider the presumption of asylum ineligibility de novo where the AO already determined that the presumption did not apply or was rebutted. The IJ's determination would be based on all available evidence after the noncitizen is given the opportunity to present and examine such evidence. *See* INA 240(b)(4)(B), 8 U.S.C. 1229a(b)(4)(B) (explaining a noncitizen's evidentiary rights in section 240 removal proceedings). The Departments thus decline to deviate from existing practice in section 240 removal proceedings requiring IJs to determine asylum eligibility de novo once a matter is referred to EOIR after a positive credible fear determination. *See, e.g.,* 8 CFR 1208.13(a) (''The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.'').

Comment: Commenters provided generally positive feedback on the inclusion of a family unity provision but raised concerns about the operation of the provision itself. Commenters were concerned that the family unity provision was insufficient because it would not apply to asylum applicants traveling without their families, including cases where family members are unable to travel together due to immediate danger, among other factors. Commenters stated that individual asylum applicants would be subject to the asylum ineligibility presumption and, as a result, would be unable to petition for eligible derivatives outside the United States if they are only able to receive statutory withholding of removal or CAT protection, providing anecdotal examples. In turn, commenters stated, this would result in family separation with spouses and children left in dangerous situations in their home country, unable to join their family members in the United States. Therefore, commenters suggested that the family unity provision should be expanded to individual asylum applicants who meet the provision's requirements if they have eligible derivatives abroad. Commenters also proposed that the rule include ''families'' as a general exception to application of the rebuttable presumption of ineligibility for asylum.

Commenters explained that, for the provision as currently drafted to apply, the noncitizen would have to first qualify for statutory withholding of removal or CAT withholding, which have higher standards of proof than asylum. Commenters stated that this would result in families with legitimate asylum claims being denied relief because they may be unable to meet the higher standards required for statutory withholding of removal or CAT withholding. Additionally, commenters claimed that this provision would create an inefficient and costly process, where noncitizens would be required to gather and present a significant amount of evidence on statutory withholding of removal and CAT withholding to meet their higher standards and IJs would have to adjudicate those forms of relief or protection separately before applying the exception, rather than potentially granting asylum in the first instance. Commenters noted that in removal proceedings, the family unity exception requires a determination that the noncitizen is eligible for withholding of removal or CAT withholding and that they would be granted asylum but for the presumption. Commenters also raised concerns that many applicants will face harm while those issues are adjudicated. Commenters raised further concerns that the family unity provision would only apply where no members of a family qualify for withholding of removal or CAT withholding, thus resulting in removal orders for entire families who qualified for those forms of protection. Lastly, commenters expressed concern that the provision does not address family unity concerns where family members traveling together may not qualify as derivatives due to their relationship status. Commenters explained that this would result in the rebuttable presumption of asylum ineligibility applying and, assuming certain non-derivative family members cannot meet the standards for statutory withholding of removal or CAT withholding, de facto separation.

Commenters also expressed confusion about whether the family unity provision could work retroactively to grant asylum to individuals with statutory withholding of removal if their spouse or child subsequently journeyed to the United States and underwent adjudication. Further, commenters stated that the proposed rule leaves outstanding questions about what independent relief would disqualify families from availing themselves of the family unity provision.

One commenter claimed that the family unity provision would incentivize the smuggling of children and suggested eliminating it entirely. Separately, some commenters claimed that the provision would increase the incentives for family migration.

Response: The Departments fully agree with commenters that keeping families unified and avoiding family separation is an important goal. *See, e.g.,* E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 5, 2021). This rule has been designed to eliminate the possibility that the rule's presumption will result in the separation of families.

With respect to family units traveling together, if any noncitizen in that family unit traveling together meets an exception to or is able to rebut the asylum ineligibility presumption, the presumption will not apply to anybody in the family traveling together. 8 CFR 208.33(a)(2)(ii), 208.33(a)(3)(i); *see also* 88 FR at 11749. Additionally, even where no family members that are traveling together meet an exception or are able to rebut the presumption, the rule includes a family unity provision that sets forth a unity-based ''exceptionally compelling circumstance'' to rebut the asylum ineligibility presumption for certain noncitizens in order to avoid separating asylum applicants from potential derivative beneficiaries. 8 CFR 1208.33(c). More specifically, under this family unity provision, where a principal asylum applicant is subject to the presumption but is eligible for

statutory withholding of removal or CAT withholding,[297] and would be granted asylum but for the presumption, and where an accompanying spouse or child does not independently qualify for asylum or other protection from removal, the presumption shall be deemed rebutted as an exceptionally compelling circumstance. *See* 8 CFR 1208.33(c). Such principal applicants and their accompanying derivatives can then proceed with their asylum claims consistent with general asylum procedures. *See* INA 208(b)(3), 8 U.S.C. 1158(b)(3).

Additionally, in light of commenters' concerns, the Departments have expanded this provision to also cover principal applicants who have a spouse or children who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A). 8 CFR 1208.33(c). As commenters noted, excluding asylum applicants who travel without their families may inadvertently incentivize families to engage in irregular migration together so as not to risk that the principal applicant would be prevented from later applying for their family members to join them. This may involve making a dangerous journey with vulnerable family members, such as children. The expansion to the provision would apply only to migrants who are subject to the presumption, who are ultimately found eligible for statutory withholding of removal or CAT withholding, and who have spouses or children who would be eligible to follow to join them in the United States.

However, the Departments decline to modify the rule to categorically exempt families from the rebuttable presumption of asylum eligibility. Given the existing and expanded protections in the rule, such a change is not necessary to ensure family unity. And the Departments have determined that making such a change would significantly diminish the effectiveness of the rule and incentivize families to migrate irregularly. *See* 88 FR at 11708–09 (describing the significant increase in families seeking asylum in the United States). Further, the Departments do not want to create an incentive for adults to present at the SWB with children fraudulently claiming to be a family unit.[298]

Overall, the Departments have designed the family unity provision at 8 CFR 1208.33(c) and the other protections against family separation to ensure that the rule does not cause the separation of families. With regard to the family unity provision, the Departments believe that requiring the lead asylum applicant to first establish eligibility for protection under the higher standards of proof for statutory withholding of removal or CAT withholding before qualifying for the family unity provision serves as an incentive to choose a lawful pathway. Choosing a lawful pathway would enable applicants to remain eligible for asylum, which requires a lower burden of proof and includes the ability to include derivatives on their application or utilize follow-to-join procedures set forth in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A).

To the extent that commenters claim that some family members who traveled together may have, but for the presumption, qualified for asylum but not statutory withholding of removal, and therefore would not qualify for the family unity exception if subject to the rebuttable presumption of asylum ineligibility, the Departments reiterate that the family unity provision in 8 CFR 1208.33(c) is but one protection for family units included in this rule. For example, the rule includes options for families to stay together if any member of a family traveling together: uses an available lawful pathway (8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii)); establishes an exception from or rebuts the presumption of ineligibility (8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3)); or, if they do not pursue a lawful pathway and are unable to establish an exception from or rebut the presumption, meets the higher standard required for statutory withholding of removal or CAT withholding. Notably, exceptions from and rebuttals to the presumption consider circumstances involving both the noncitizen and members of the noncitizen's family with whom they are traveling, for example, whether the noncitizen or a member of the noncitizen's family faced an acute medical emergency at the time of entry. *See* 8 CFR 1208.33(a)(2) and (3), 208.33(a)(2) and (3). To reiterate, the rule also includes options for family members who do not pursue a lawful pathway and are unable to rebut the presumption to stay together or reunite if a principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the presumption, if either (1) an accompanying spouse or child does not also independently qualify for asylum or other protection from removal, or (2) if the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant if granted asylum. These protections together ensure that the rule does not lead to the separation of families. The Departments strongly encourage noncitizens, including asylum-seeking families, to choose lawful pathways.

However, to the extent that some families may not use a lawful pathway, and are unable to rebut the presumption, the Departments believe that many noncitizens with approvable asylum claims would present claims for statutory withholding of removal or CAT protection on the same set of underlying facts, although the standards that apply to asylum, statutory withholding of removal, and CAT protection each differ from one another in some respects. *See* Regulations Concerning the Convention Against Torture, 64 FR 8478, 8485 (Feb. 19, 1999) (''Additionally, use of the Form I–589 will obviate the need for two separate forms that, in many cases, will elicit similar information. In many cases in which the alien applies both for asylum and withholding of removal under the Act and for withholding under the Convention Against Torture, the underlying facts supporting these claims will be the same.''); *Yousif* v. *Lynch,* 796 F.3d 622, 629 (6th Cir. 2015) (''An asylum claim and a withholding claim require consideration of 'the same factors' and proof of the same underlying facts about an applicant's probable persecution.'').

Separately, the Departments disagree with commenters that the family unity provision would encourage family

[297] The family unity provision at 8 CFR 1208.33(c) is not triggered by eligibility for deferral of removal under the CAT because a noncitizen only eligible for that form of CAT must be subject to a bar to CAT withholding, which would also bar the noncitizen from asylum. *See* 8 CFR 1208.17(a) (providing that someone who is eligible for CAT withholding but who is subject to the mandatory bars to statutory withholding of removal at 8 CFR 1208.16(d)(2) and (3) shall be granted CAT deferral); 8 CFR 1208.16(d)(2) (providing that an application for CAT withholding will be denied if the noncitizen is subject to a bar to statutory withholding of removal under section 241(b)(3)(B) of the INA, 8 U.S.C. 1231(b)(3)(B)). Compare INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B) (providing mandatory bars to statutory withholding of removal), with INA 208(b)(2), 8 U.S.C. 1158(b)(2) (providing mandatory bars to asylum). Thus, such a noncitizen would never be ineligible for asylum solely due to the rebuttable presumption.

[298] *See* Tech Transparency Project, Inside the World of Misinformation Targeting Migrants on Social Media (July 26, 2022), *https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media* (''A review of social media groups and pages identified by migrants showed . . . dubious offers of coyote or legal services, false claims about conditions along the route, misinformation about points of entry at which officials waive the rules, and baseless rumors about changes to immigration law.''); ICE, Press Release, *ICE HSI El Paso, USBP Identify More than 200 'Fraudulent Families' in Last 6 Months* (Oct. 17, 2019), *https://www.ice.gov/news/releases/ice-hsi-el-paso-usbp-identify-more-200-fraudulent-families-last-6-months.*

migration or child smuggling. The strong incentives of the lawful pathways described in the rule, coupled with the disincentive of the rebuttable presumption of asylum ineligibility, are designed to encourage noncitizens, including families, to pursue lawful pathways. For example, after implementation of the Venezuelan parole process for eligible Venezuelan nationals and their families, migratory flows with respect to this group fell dramatically. *See* 88 FR at 11712, 11718. Based on this trend and the implementation of other initial parole processes implementations discussed in the NPRM, the Departments believe that the rule will reduce irregular family migration as well as child smuggling as part of an overall reduction in irregular migration.

To the extent that commenters raised concerns that the family unity provision is inefficient in operation, the Departments believe that the benefits from inclusion of the provision outweigh any potential inefficiencies. The Departments also note that asylum, statutory withholding of removal, and CAT withholding are forms of relief and protection that generally rely on the same set of underlying facts. *See Yousif,* 796 F.3d at 629. Therefore, IJs who determine that a noncitizen is eligible for statutory withholding of removal or CAT withholding will be able to apply the family unity provision and efficiently consider whether to exercise their discretion to grant asylum on the same facts. Additionally, in response to commenter concerns about noncitizens facing harm while the family unity exception is being adjudicated, the Departments note that this rule does not amend existing follow-to-join procedures.

8. Adequacy of Withholding of Removal and CAT

Comment: Commenters stated that statutory withholding of removal and CAT protection are insufficient alternative forms of protection for individuals who would be ineligible for asylum pursuant to the proposed rule, asserting that these forms of protection are more difficult to obtain and provide fewer benefits than asylum.

For example, commenters stated that such forms of protection are not sufficiently available to all those who require protection. Specifically, commenters stated that statutory withholding of removal and CAT protection require applicants to meet a higher burden of proof than asylum, as they would need to demonstrate that it is ''more likely than not'' that they would face persecution or torture. Commenters stated that, because of this higher burden of proof, an applicant may be otherwise eligible for asylum, but be removed because they are unable to meet the burden for statutory withholding of removal or CAT protection. As a result, commenters alleged that an individual may be returned to a country where they would face persecution or death.

Commenters also stated that, even if an applicant were able to meet the higher burden of proof for statutory withholding of removal or CAT protection, the individual would not then be accorded the same benefits as asylees. For example, commenters expressed concern regarding the prohibition on international travel for recipients of statutory withholding of removal and CAT protection. Commenters noted that, unlike recipients of asylum, these individuals do not have access to travel documents and are unable to travel abroad.

Commenters also noted that recipients of statutory withholding of removal and CAT protection remain in a tenuous position because they are not granted lawful status, or any path to citizenship, to remain in the United States indefinitely. Commenters explained that recipients of statutory withholding of removal or CAT protection remain permanently subject to a removal order and may have their status terminated at any time. Commenters stated that the constant prospect of deportation or removal creates uncertainty for recipients of statutory withholding of removal or CAT protection, which can lead to community instability in the United States. Commenters stated that this uncertainty would prevent such noncitizens from processing the trauma that predicated their migration to the United States.

Similarly, commenters stated that recipients of statutory withholding of removal or CAT protection may be limited from fully participating in U.S. society. Commenters raised specific concerns about statutory withholding and CAT protection recipients' lack of access to public benefits, services, and healthcare. Commenters were also concerned about such individuals' need to apply annually and pay for work authorization and the impact that this requirement may have on related benefits, such as the ability to obtain a driver's license.

Commenters also claimed that granting statutory withholding of removal or CAT protection instead of asylum under the proposed rule would fail to ensure family unity. Commenters alleged that individuals who are granted statutory withholding of removal or CAT protection would be unable to reunite with family in the United States because these forms of relief do not allow the recipient to petition for derivative beneficiaries. Due to this, commenters stated that the proposed rule would institute another policy of family separation that permanently separates noncitizens from their family members. Commenters also stated that family members applying for statutory withholding of removal are not able to request that their cases be consolidated and adjudicated together like asylum applicants can and stated that moving separately through the legal system makes them more likely to have uneven results for different family members, which may result in some members being ordered removed while others remain protected in the United States. Some commenters stated that they have experience with clients who have been permanently separated from family members, including young children, because they were granted statutory withholding of removal or CAT protection instead of asylum.

Commenters further raised concerns about the effect the proposed rule would have on availability of bond to those subject to the presumption of asylum ineligibility. Commenters asserted that adjudicators are less likely to grant bond to those who are eligible only for statutory withholding of removal or CAT protection as overly high flight risks due to the comparatively higher standards of proof. Commenters also expressed confusion over whether, under the proposed rule, individuals subject to the presumption of ineligibility will be treated as having entered without inspection, leaving them eligible for bond, or as arriving aliens, leaving them ineligible for bond.

Response: As described in the NPRM, the purpose of this rule is to discourage irregular migration by encouraging migrants, including those who may seek asylum, to use lawful, safe, and orderly pathways to the United States. *See generally* 88 FR at 11706–07. To do so, the rule includes a number of exceptions to the rebuttable presumption of ineligibility for asylum for prospective asylum applicants outside the United States, including whether they or a member of their family with whom they traveled (1) sought asylum or other protection in third countries through which they first transit, to avoid the need to continue an often-perilous journey to the United States in pursuit of protection unless absolutely necessary; (2) obtained appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole

process; or (3) presented at a POE pursuant to a pre-scheduled date and time or presented at the POE without an appointment but established that it was not possible to access or use the DHS scheduling system for a specified reason. *See* 8 CFR 208.33(a)(2), 1208.33(a)(2). In other words, this rule provides numerous ways in which noncitizens covered by this rule may pursue asylum. And to the extent that a noncitizen may not be able to pursue a lawful pathway due to exceptionally compelling circumstances, they may be able to rebut the presumption. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3).

With respect to noncitizens, or family members with whom they traveled, who do not avail themselves of a lawful pathway or otherwise rebut the presumption, the Departments recognize that the standards for eligibility for statutory withholding of removal and CAT protection are each higher than that for asylum, as they require demonstrating it is more likely than not that noncitizens will be persecuted or tortured in another country, whereas asylum requires a lesser well-founded fear.[299] *See* 64 FR at 8485. Indeed, that difference in standards aligns with several objectives of this rule: to encourage noncitizens to avail themselves of the lawful pathways described above, where possible, as well as to discourage irregular migration, promote orderly processing at POEs, and ensure that protection from removal is still available for those who satisfy the applicable standards for mandatory protection under statutory withholding of removal or the regulations implementing CAT. *See, e.g.,* 88 FR at 11729 (''The Departments assess that the Government can reduce and redirect such migratory flows by coupling an incentive for migrants to pursue lawful pathways with a substantial disincentive for migrants to cross the land border unlawfully.''). The higher ultimate standards of proof for statutory withholding of removal and CAT protection therefore serve as a disincentive for noncitizens to forgo the lawful pathways detailed in this rule, as noncitizens would risk having to satisfy those comparatively higher standards in the first instance if the presumption applied to their case and were unrebutted.[300]

Similarly, the Departments recognize the comparatively fewer benefits of statutory withholding of removal and CAT protection as compared to asylum, including the following: (1) no permanent right to remain in the United States; (2) the inability to adjust status to become a lawful permanent resident and, relatedly, later naturalize as a U.S. citizen; (3) the inability to travel abroad; and (4) the need to affirmatively apply for, and annually renew, work authorization documents.[301] However, as explained above, the Departments promulgated this rule with the intention to encourage noncitizens to utilize a lawful pathway rather than a pathway that may limit them to statutory withholding of removal or CAT protection and their more limited benefits. The Departments also note the lack of derivative protection for statutory withholding of removal and CAT protection recipients.[302] *Compare* INA 208(b)(3)(A), 8 U.S.C. 1158(b)(3)(A) (providing for derivative asylum status for spouses and children), *with* INA 241(b)(3), 8 U.S.C. 1231(b)(3) (no derivative status for spouses and children under statutory withholding of removal), *and* 8 CFR 1208.16(c)(2) (no derivative status for spouses and children under the CAT).[303] The Departments are cognizant of these limitations and acknowledge the importance of family unity. *See, e.g.,* E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 5, 2021) (''It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States.''). To that end, as discussed in further detail at Section IV.E.7.ii in this preamble, this rule contains numerous measures to avoid the separation of family members, including applying any exceptions or rebuttals to the presumption to the entire family unit traveling together, as well as a ''family unity'' provision applicable in removal proceedings to ensure that the rule does not result in family separations when granting relief in the United States. *See* 8 CFR 1208.33(c) (''Family unity and removal proceedings.'').

Separately, because this rule does not impact procedures for bond eligibility or consideration, commenter concerns with respect to these issues are outside of the scope of this rulemaking. Nevertheless, the Departments note that bond determinations will continue to be made on a case-by-case basis in accordance with the governing statutes and regulations. Similarly, this rulemaking does not impact determinations of whether to consolidate cases, although the Departments note that consolidation of cases is not limited to those who are pursuing or are eligible for asylum, and that such determinations are made at the IJ's discretion. *See* ICPM, Chapter 4.21(a) and (b) (Nov. 14, 2022) (''The immigration court may consolidate cases at its discretion or upon motion of one or both of the parties, where appropriate. For example, the immigration court may grant consolidation when spouses or siblings have separate but overlapping circumstances or claims for relief.'').

9. Removal of Provisions Implementing the TCT Bar Final Rule

i. Support for Removal of Provisions Implementing the TCT Bar Final Rule

Comment: The Departments received several comments expressing opposition to the TCT Bar Final Rule and supporting removal of regulatory provisions implementing that rule. Some commenters expressed opposition to the TCT Bar Final Rule without explanation, while others asserted that the TCT Bar Final Rule conflicts with the INA and that the Departments lacked authority to promulgate the TCT Bar Final Rule. Commenters also objected to the TCT Bar as inconsistent with fundamental protections of refugee law, including the right to seek asylum, the principle of non-refoulement, and the prohibition against penalties for irregular entry. Commenters supporting the removal of provisions implementing

[299] As a general matter, the Departments note that this rule does not change any of the long-time standards relating to statutory withholding of removal and CAT protection outside of the initial credible fear screening stage.

[300] In response to commenters, the Departments note that they cannot quantify how many noncitizens subject to the asylum ineligibility presumption can qualify for statutory withholding of removal or CAT protection, as those are case-by-case, fact-specific determinations.

[301] *See, e.g.,* American Immigration Council, The Difference Between Asylum and Withholding of Removal at 2 (Oct. 2020), *https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf;* 8 CFR 274a.12(a) (explaining need for withholding recipients to affirmatively apply for work authorization).

[302] The Departments note that, although there is no derivative protection under statutory withholding of removal or CAT, certain U.S.-based qualifying parents or legal guardians, including those granted withholding of removal, may petition for qualifying children and eligible family members to be considered for refugee status and possible resettlement in the United States. *See* USCIS, Central American Minors (CAM) Refugee and Parole Program, *https://www.uscis.gov/CAM* (last visited Apr. 5, 2023).

[303] The Departments note that applicants will not be prevented from petitioning for family members because of this rule. Under the expanded family unity provision at 8 CFR 1208.33(c), any applicant who is found eligible for statutory withholding of removal or CAT withholding and who would be granted asylum but for the presumption will be deemed to have rebutted the presumption if they have a spouse or child who would be eligible to follow to join them, as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), and may pursue follow-to-join procedures if granted asylum.

that rule also faulted the Departments for not including proposed regulatory text removing the TCT Bar from the CFR. Many commenters who urged the Departments to withdraw the proposed rule did so while requesting that the Departments rescind the TCT Bar Final Rule.

Commenters suggested that the TCT Bar Final Rule is inconsistent with the INA because it conflicts with the safe-third-country exception to applying for asylum under section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), and noted that courts have enjoined the rule, finding it inconsistent with the INA. Commenters further noted that the court in *East Bay Sanctuary Covenant* v. *Barr,* 385 F. Supp. 3d 922, 945 (N.D. Cal. 2019), concluded that ''Congress requires reasonable assurances that any so-called 'safe' third country is actually safe, in line with the long-held understanding that categorical bars on asylum must be limited to people who have somewhere else to turn.''

Commenters also objected to the TCT Bar as inconsistent with fundamental protections of refugee law, including the right to seek asylum, the principle of non-refoulement, and the prohibition against penalties for irregular entry. Commenters agreed with removal of provisions implementing that rule and expressed concern that the TCT Bar Final Rule imposes a sweeping, categorical ban on asylum. Commenters further raised concerns that, while in effect, the TCT Bar disproportionately impacted people of color and Black and brown migrants. At least one commenter claimed that the TCT Bar Final Rule discourages noncitizens from reporting crimes. Many commenters expressed concern over the TCT Bar Final Rule's effect on children, both accompanied and unaccompanied, and some commenters stated that the TCT Bar Final Rule does not adequately explain why the Departments omitted an exemption for UCs.

Response: The Departments acknowledge these commenters' support. Although the Departments did not include proposed regulatory text in the NPRM, the Departments have included amendatory text in this final rule, which will result in the TCT Bar's removal from 8 CFR 208 and 1208.

Since the TCT Bar Final Rule was promulgated and then enjoined, the Departments have reconsidered its approach and have determined that they prefer the tailored approach of the rebuttable presumption enacted by this rule to the categorical bar that the TCT Bar IFR and Final Rule adopted. Even if the rebuttable presumption had not been adopted, the Departments would seek to remove provisions implementing the TCT Bar Final Rule as the Departments no longer agree with the approach taken in that rule. Additionally, in order to use the TCT Bar Final Rule, the Departments would have to continue litigating various appeals defending the policy, which the Departments now disagree with. Thus, the Departments consider the removal of provisions implementing that rule to be severable from the provisions of 8 CFR 208.13(f), 208.33, 1208.13(f), and 1208.33.

As discussed in Section IV.D.2 of this preamble, the TCT Bar IFR and Final Rule were enacted to address circumstances along the SWB. In the TCT Bar IFR, the Departments stated that increases in the number of noncitizens encountered along or near the SWB corresponds with an increase in the number of noncitizens claiming fear of persecution or torture, and that the processing of credible fear and asylum applications in turn ''consumes an inordinate amount of the limited resources of the Departments.'' 84 FR at 33831. The Departments also stated that the increase in credible fear claims has been complicated by a demographic shift in the noncitizen population crossing the southwest border from Mexican single adult males to predominantly Central American family units and UCs. *See id.* at 33838. The Departments explained that while Mexican single adults who are not eligible to remain in the United States can be immediately repatriated to Mexico, often without requiring detention or lengthy court proceedings, it is more difficult to expeditiously repatriate family units and UCs who are not from Mexico or Canada. *See id.* The Departments also explained that, over the past decade, the overall percentage of noncitizens subject to expedited removal who, as part of the initial screening process, were referred for a credible fear interview on claims of a fear of return has jumped from approximately 5 percent to more than 40 percent, and that the number of cases referred to DOJ for proceedings before an IJ also rose sharply, more than tripling between 2013 and 2018. *See id.* at 33831. In the TCT Bar IFR, the Departments further stated that the growing number of noncitizens seeking protection in the United States and changing demographics created an untenable strain on agency resources. *See id.* at 33838–39. The TCT Bar IFR stated that in FY 2018, USCIS received 99,035 credible fear claims, a 175 percent increase from five years earlier and an 1,883 percent increase from ten years earlier. *See id.* at 33838. In an attempt to address these increases in fear claims, the TCT Bar IFR reduced the availability of asylum to non-Mexicans entering or attempting to enter at the SWB by requiring most asylum seekers who transited through a third country to first seek protection in that transit country, subject to limited exceptions, and without recognizing other avenues for allowing migrants to access the U.S. asylum system.

In response to the TCT Bar IFR, the Departments received 1,847 comments. The commenters who expressed support for that rule indicated that it was an appropriate tool for processing noncitizens arriving at the SWB and would help close ''loopholes'' they asserted exist in the asylum process. *See* TCT Bar Final Rule, 85 FR at 82262. Those who expressed opposition to that rule raised concerns that the rule (1) was in conflict with the INA and U.S. obligations under international law; (2) imposed a sweeping and categorical ban on asylum; and (3) effectively denied asylum seekers the right to be meaningfully heard with respect to their asylum claims. *See id.* at 82263, 82270, 82275.

The Departments subsequently issued the TCT Bar Final Rule to address the comments received on the TCT Bar IFR. *See id.* at 82260. In the TCT Bar Final Rule, the Departments affirmed that they promulgated the IFR based on several policy objectives, including the following: (1) directing prompt relief to noncitizens who are unable to obtain protection from persecution elsewhere and noncitizens who are victims of a severe form of trafficking in persons; (2) the need to reduce the incentive for noncitizens with ''meritless or non-urgent asylum claims'' to seek entry to the United States; (3) relieving stress on immigration enforcement and adjudicatory authorities; (4) curtailing human smuggling; (5) strengthening the negotiating power of the United States regarding migration issues, including the flow of noncitizens into the United States; and (6) addressing humanitarian and security concerns along the SWB. *See id.* at 82285.

As also discussed in Section IV.D.2 of this preamble, a Federal district court vacated the TCT Bar IFR on June 30, 2020, in *Capital Area Immigrants' Rights Coal.* v. *Trump,* 471 F. Supp. 3d 25 (D.D.C. 2020). Additionally, in parallel litigation, on July 6, 2020, the Ninth Circuit Court of Appeals upheld an order enjoining the IFR. *See E. Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832 (9th Cir. 2020). After the TCT Bar Final Rule was issued, in February 2021, the U.S. District Court for the

Northern District of California also enjoined the Departments from implementing the TCT Bar Final Rule in its entirety. *See East Bay II,* 519 F. Supp. 3d at 668 (''Defendants are hereby *ordered and enjoined* . . . from taking any action continuing to implement the Final Rule and *ordered* to return to the pre-Final Rule practices for processing asylum applications.''). Thus, the TCT Bar Final Rule is not in effect. As discussed in Section IV.D.2 of this preamble, the injunction rested on a finding that the final rule is inconsistent with both the safe-third-country and firm-resettlement provisions of section 208 of the INA. *See id.* at 667–68; INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A); INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). The court also stated that the TCT Bar Final Rule exacerbated the risk that asylum seekers and migrants would suffer violence and deprived asylum seekers of procedural safeguards meant to protect them from arbitrary denials of their asylum claims. *See East Bay II,* 519 F. Supp. 3d at 664.

The Departments have removed regulatory text implementing the TCT Bar Final Rule from the CFR because the Departments no longer support the TCT Bar Final Rule as a means of addressing capacity and other issues at the SWB. Throughout the NPRM and this rule, the Departments have explained that, absent this rule, the lifting of the Title 42 public health Order is expected to lead to a surge of migration at the SWB. At the same time, the Departments recognize the opportunity afforded to migrants via the provided lawful pathways, as well as the unique vulnerabilities of asylum applicants, the high stakes involved in the adjudication of applications for asylum, and the fundamental importance of ensuring that noncitizens with a fear of return have access to the U.S. asylum system, subject to certain exceptions. *See, e.g., INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 449 (1987) (explaining that removing a noncitizen to their home country ''is all the more replete with danger when the [noncitizen] makes a claim that [the noncitizen] will be subject to death or persecution if forced to return. . . .''); *Quintero,* 998 F.3d at 632 (''[N]eedless to say, these cases per se implicate extremely weighty interests in life and liberty, as they involve [noncitizens] seeking protection from persecution, torture, or even death.''); *Matter of O–M–O–,* 28 I&N Dec. 191, 197 (BIA 2021) (''The immigration court system has no more solemn duty than to provide refuge to those facing persecution or torture in their home countries, consistent with the immigration laws.''). These concerns are echoed in E.O. 14010, Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border. *See, e.g.,* E.O. 14010, 86 FR at 8267 (Feb. 5, 2021) (''Securing our borders does not require us to ignore the humanity of those who seek to cross them.''). Accordingly, the Departments believe that when evaluating changes to the asylum system, as well as processing at the POEs, the potential adverse impacts to legitimate asylum seekers should be carefully considered, as they have been in this rule. The Departments believe that this rule is better suited to address current circumstances than the TCT Bar Final Rule's categorical ban on asylum for nearly anyone who traveled through a third country without applying for asylum in that third country.

The Departments recognize that the TCT Bar was in effect for nine months, and although multiple factors influence migration trends over time, the Departments' review does not indicate that the bar had a dramatic effect on the number of noncitizens seeking to cross the SWB between POEs.[304] Given the success of the CHNV parole processes, which paired lawful pathways with consequences for not pursuing such pathways, in decreasing encounters, the Departments believe that the TCT Bar's lack of such alternative pathways may have contributed to its failure to dramatically decrease encounters between POEs. This informs the Departments' reasoning for adopting the more tailored approach in this rule—that is, pairing safe, orderly, and lawful pathways for entering the United States with negative consequences for forgoing those pathways, along with exceptions and means of rebutting the presumption against asylum eligibility where certain circumstances are present. Additionally, the fact that the TCT Bar has not been in effect for approximately three years undermines any assertion of reliance interests on the bar.

ii. Opposition To Removal of Provisions Implementing the TCT Bar Final Rule

Comment: Some commenters expressed general opposition to the removal of provisions implementing the TCT Bar Final Rule. Commenters stated that ''the concepts of limiting eligibility for asylum based on means of entry and criteria surrounding that entry are appropriate methods of controlling migrant flows at the southwest border'' and that the TCT Bar achieved this without including ''myriad of exceptions to effectively render it meaningless.'' Some commenters maintained the TCT Bar Final Rule was legally permissible and politically warranted based on factual conditions at the SWB. Commenters similarly urged the Departments to adopt on a permanent basis an amended version of the rule that would mirror the TCT Bar Final Rule's provisions, stating that this would better serve the NPRM's stated goal of ''distribut[ing] the asylum burden to countries that are able to provide protection against persecution within the Western Hemisphere.'' Commenters averred that this would limit asylum eligibility to those with the greatest need for protection and that the ''maintenance of effective deterrence policies is essential to stemming the flow of illegal immigration into the United States.''

Response: The Departments note these commenters' general opposition to rescinding the TCT Bar and their support for enforcing the Nation's immigration laws. The Departments believe that this rule results in the right incentives to avoid a significant further surge in irregular migration after the Title 42 public health Order is lifted, and that the approach taken in this rule is substantially more likely to succeed than the approach taken in the TCT Bar Final Rule. Specifically, the successful implementation of the CHNV parole processes has demonstrated that an increase in lawful pathways, when paired with consequences for migrants who do not avail themselves of such

[304] The Departments note that apprehensions along the SWB did not dramatically decrease while the TCT Bar IFR was in effect between September 11, 2019, and June 30, 2020. *See* CBP, *Southwest Border Migration FY 2019, https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019* (last visited Mar. 22, 2023); CBP, *Southwest Land Border Encounters, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters* (last visited Mar. 22, 2023). Encounters along the SWB increased dramatically starting in January 2019 until early May 2019, when they began to fall significantly. CBP, *Southwest Border Migration FY 2019, https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019* (last visited Mar. 22, 2023). The TCT Bar IFR, although issued on July 16, 2019, did not go into full effect until September 11, 2019, after encounters had already dropped from a high of 144,116 in May to 52,546 in September. *Id.* Encounters continued to trend downward more slowly from October 2019 to March 2020 when concerns over COVID–19 led to the suspension of MPP and the Title 42 public health Order and a steep decline of encounters to a low in April 2020. CBP, *Southwest Land Border Encounters, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters* (last visited Mar. 22, 2023). Thereafter, encounters increased steadily for the rest of the FY with no noticeable change after the TCT Bar IFR was enjoined and stopped being applied on June 30, 2020. Given this data, the Departments have no reason to believe that the TCT Bar IFR had any noticeable impact on encounters along the SWB while it was in effect.

pathways, can positively affect migrant behavior and undermine transnational criminal organizations, such as smuggling operations. This rule, which is fully consistent with domestic and international legal obligations, provides the necessary consequences to maintain this incentive under Title 8 authorities. In short, the rule aims to disincentivize irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in a third country.

As compared to the TCT Bar Final Rule, this rule has been more carefully tailored to mitigate the potential for negative impact of the rule on migrants to the extent feasible while also recognizing the reality of unprecedented migratory flows, the systemic costs that those flows impose on the immigration system, and the ways in which increasingly sophisticated smuggling networks cruelly exploit the system for financial gain. The Departments remain committed to ensuring that those who apply for asylum or seek protection who most urgently need protection from persecution are able to have their claims adjudicated in a fair, impartial, and timely manner and believe that this rule, including the removal of provisions implementing the TCT Bar Final Rule, will be a more effective and efficient means of doing so.

Comment: Commenters averred that the rule would be too lenient in comparison to the TCT Bar Final Rule and would lead to ''open borders.'' They claimed that the presumption of asylum ineligibility is not sufficiently stringent and therefore would be far less effective at disincentivizing unlawful migration.

Response: The Departments believe that the rule strikes the right balance in terms of incentivizing the use of lawful, safe, and orderly pathways to enter the United States while imposing negative consequences on a failure to do so. As has been shown with the CHNV parole processes, pairing such policies together can lead to meaningful decreases in the flow of irregular migration to the SWB.

10. Declining to Permanently Adopt the Proclamation Bar IFR

In addition to the 51,952 comments on this NPRM, the Departments received a total of 3,032 comments on the Proclamation Bar IFR and posted 3,000 of those comments. Of the 32 comments not posted, 30 were commenters' duplicates, one was untimely and did not address substantive or novel issues not already covered by other timely comments, and one was an internal test comment. Most of the comments came from one of three mass-mail campaigns, containing the same or closely related variations of the same standard language. While 18 comments supported the IFR specifically or the prior Administration's efforts generally, the vast majority of the comments opposed the IFR. Below, the Departments address these comments in addition to the comments relating to removal of provisions implementing the Proclamation Bar IFR received in response to the NPRM.

i. Support for Not Permanently Adopting the Proclamation Bar

Comment: Many commenters expressed general opposition to the Proclamation Bar IFR or support for removing provisions implementing that rule without providing any reasoning. Some commenters simply stated that their comments ''express [their] strong opposition to the new Interim Final Rule.'' Some commenters, in stating their general opposition to the Proclamation Bar IFR, also made unrelated, general criticisms regarding the prior administration's immigration policies. Commenters supporting the removal of provisions implementing the Proclamation Bar IFR also faulted the Departments for not including proposed regulatory text removing that rule from the CFR. Many commenters who urged the Departments to withdraw the proposed rule did so while requesting that the Departments rescind the Proclamation Bar IFR.

Commenters expressed concern that the Proclamation Bar IFR violates multiple laws. Specifically, commenters stated that the Proclamation Bar IFR violates multiple sections of the Act: INA 208(a), 8 U.S.C. 1158(a) (eligibility to apply for asylum); INA 235(b)(1), 8 U.S.C. 1225(b)(1) (inspection of noncitizens arriving in the United States and certain other noncitizens who have not been admitted or paroled); INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C) (additional limitations on granting asylum); INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C) (previous asylum exception to authority to apply for asylum); INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C) (codifying the TVPRA). Some commenters asserted that only Congress may act to amend the law and that the prior administration circumvented the legislative process by issuing the Proclamation Bar IFR. Commenters also argued that the Proclamation Bar IFR violates 5 U.S.C. 706(2)(A) in that it was promulgated in a manner inconsistent with the APA, and that it violates multiple provisions of the U.S. Constitution. In particular, commenters argued that the Proclamation Bar IFR violates due process rights, equal protection, and separation of powers; exceeds Executive authority; was promulgated with discriminatory intent; is similar to deterrence-focused policies that have been held unconstitutional; and is unlawful on the basis that the appointment of the then-Acting Attorney General violated the Appointments Clause. Commenters contended that the Proclamation Bar IFR also violates the APA by being arbitrary and capricious, in that it conditions asylum on a factor unrelated to persecution. Numerous commenters claimed that the Proclamation Bar IFR violates the APA's notice-and-comment requirements and that the good cause and foreign affairs exceptions do not apply. One commenter claimed that the Proclamation Bar IFR would, in fact, have federalism impacts, contrary to the Departments' federalism impact assessment, and some commenters disagreed with the Departments' position that it is not subject to the Congressional Review Act because its effect is less than $100 million. Commenters also expressed concern that the Proclamation Bar IFR violates international law, customary international law, and the Refugee Act.

Commenters noted that the court in *East Bay III* held that the Proclamation Bar directly conflicts with section 208(a) of the INA, 8 U.S.C. 1158(a), because ''[i]t is effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress.'' Commenters further noted the Ninth Circuit's holding in *East Bay III* that the fact ''[t]hat a refugee crosses a land border instead of a port-of-entry says little about the ultimate merits of her asylum application.'' They further cited *East Bay I* as holding that there is ''no basis to support 'categorically disbelieving' non-citizens, or declaring them 'not credible,' simply because of their manner of entry'' when applying the ''reasonable possibility'' standard to those who are determined ineligible for asylum.

Commenters voiced numerous policy concerns about the Proclamation Bar IFR. Specifically, commenters criticized the Proclamation Bar IFR as they believe that it relies on insufficient data or improperly interpreted data; exacerbates trauma by forcing migrants to remain indefinitely outside of the U.S. border in inhumane conditions; punishes those who lack the means to access designated POEs and the luxury to choose how and when they enter the United States; potentially increases risk of harm to children by narrowing safe options; forecloses legitimate asylum claims by

imposing an initial higher standard of proof on individuals who enter between POEs; fails to address the root causes of migration, for which some commenters believe the United States is at least in part responsible; violates religious and moral obligations; and is a ''shameful abdication of the United States' obligation to serve as a haven for those individuals who meet the internationally agreed upon definition of a refugee.'' Further, commenters stated that, contrary to its purpose, the Proclamation Bar IFR would not encourage admission at POEs due to safety and procedural concerns at the SWB and would impede state and local services and non-governmental organizations by undermining policies and programs, imposing substantial additional costs, and discouraging engagement. Commenters also voiced concern that the Proclamation Bar IFR would harm U.S. diplomatic efforts and undermine the United States' international credibility by inflaming tensions and hindering diplomatic relations with Mexico and other nations, as well as encouraging other nations to abandon their humanitarian protection practices. Commenters expressed their belief that the Proclamation Bar IFR is cruel, unnecessary, and overly harsh and was issued ''under the guise of streamlining the asylum process'' but was actually intended to intimidate asylum seekers from entering the United States ''out of fear that their presence in the United States guarantees inadmissibility.'' Additionally, commenters indicated that statutory withholding of removal and CAT protection are insufficient forms of relief.

Response: The Departments appreciate the commenters' submissions and agree that removal of provisions implementing the Proclamation Bar IFR is sound policy and accords with this Administration's priorities. Although the Departments did not include proposed regulatory text in the NPRM, the Departments have included amendatory text in this final rule, which will result in the Proclamation Bar's removal from 8 CFR 208 and 1208.

Since the Proclamation Bar IFR was promulgated, the Departments have reconsidered their approach and have determined that they prefer the tailored approach of the rebuttable presumption enacted by this rule to the categorical bar that the Proclamation Bar IFR adopted. Even if the rebuttable presumption were not paired with the decision not to adopt the Proclamation Bar permanently, the Departments would decline to permanently adopt the Proclamation Bar IFR and would remove the bar's language from the regulatory text as the Departments no longer view it as their preferred policy choice and are not inclined to continue defending the Proclamation Bar IFR in court in order to be able to implement it at some indeterminate point in the future. Thus, the Departments consider the decision not to adopt the Proclamation Bar on a permanent basis and to remove the bar's language from the CFR to be severable from the provisions of 8 CFR 208.13(f), 208.33, 1208.13(f), and 1208.33.

The Proclamation Bar IFR was promulgated to address circumstances along the SWB. In the Proclamation Bar IFR, the Departments stated that ''[i]n recent weeks, United States officials have each day encountered an average of approximately 2,000 inadmissible aliens at the southern border.'' 83 FR at 55935. They further noted ''large caravans'' of noncitizens, primarily from Central America, attempting to make their way to the United States, ''with the apparent intent of seeking asylum after entering the United States unlawfully or without proper documentation.'' *Id.* The Departments noted that nationals of Central American countries were more likely to enter between POEs rather than present at a POE. *Id.* The Departments enacted the Proclamation Bar IFR to ''channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner.'' *Id.* The Departments also stated that the Proclamation Bar IFR would ''facilitate the likelihood of success in future negotiations'' with Mexico. *Id.* at 55951.

Rather than barring entry on its own, the Proclamation Bar IFR only barred entry between POEs when a presidential proclamation or other presidential order under section 212(f) or 215(a)(1) of the INA, 8 U.S.C. 1182(f) or 1185(a)(1), suspended entry along the SWB. 83 FR at 55952–53. Any exceptions to the operation of the bar would be set out in the presidential proclamation or order and were not within the Departments' control. *Id.* at 5934 (''It would not apply to a proclamation that specifically includes an exception for aliens applying for asylum, nor would it apply to aliens subject to a waiver or exception provided by the proclamation.'').

The Proclamation Bar IFR was preliminarily enjoined soon after it became effective and was eventually vacated. *See generally O.A.* v. *Trump,* 404 F. Supp. 3d 109 (D.D.C. 2019) (recounting the history of the litigation over the Proclamation Bar IFR and vacating it). The Departments appealed the vacatur, and that case has been stayed since February 24, 2021, to allow for rulemaking by the agencies. *O.A.* v. *Biden,* No. 19–5272 (DC Cir. filed Oct. 11, 2019).

As stated in the NPRM, the Departments have reconsidered the Proclamation Bar IFR and decline to adopt it permanently. *See* 88 FR at 11728. As an initial matter, the Proclamation Bar IFR conflicts with the tailored approach taken in this rule because, in combination with the proclamation the President issued, the Proclamation Bar IFR barred from asylum all individuals who entered the United States along the SWB unless they presented themselves at a POE. *See* 83 FR at 55935 (''The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner.''). The Departments do not believe barring all noncitizens who enter between POEs along the SWB is the proper approach in the current circumstances and have instead decided to pair safe, orderly, and lawful pathways for entry into the United States with negative consequences for not taking those pathways, with exceptions and means of rebutting the presumption against asylum eligibility.

Even if the rule's rebuttable presumption were not finalized and given effect, the Departments would nevertheless remove provisions implementing the Proclamation Bar IFR. The bar's categorical nature did not allow for case-by-case judgments to determine whether it should apply, which the Departments consider important to ensure that such bars are applied fairly. The Departments believe that this consideration further supports removing the regulatory language implementing the Proclamation Bar IFR. Finally, U.S. negotiations with Mexico have changed, and the Departments no longer believe that the Proclamation Bar IFR is necessary for those negotiations.

ii. Opposition to Not Adopting the Proclamation Bar IFR Permanently

Comment: Some commenters expressed general support for the Proclamation Bar IFR. Commenters stated that the prior Administration had not done enough to deter irregular migration, resulting in the undermining of compliance with U.S. laws, the rule of law, and national security and safety.

Response: The Departments acknowledge commenters' concerns regarding national security and safety

and note the commenters' support for the Proclamation bar IFR. Nevertheless, the Departments, after due consideration, believe this rule to be more appropriate as a matter of policy and law. This rule serves to encourage the safe and orderly processing of migrants at the SWB and is consistent with the United States' legal obligations under the INA, international treaties, and all relevant legal sources. Because these particular comments failed to articulate specific reasoning underlying expressions of general support for the Proclamation Bar IFR, the Departments are unable to provide a more detailed response.

F. Statutory and Regulatory Requirements

1. Administrative Procedure Act

i. Length of Comment Period

Comment: Commenters raised concerns that this rule violated the APA's requirements, as set forth in 5 U.S.C. 553(b) through (d). Commentors stated that the 30-day comment period was not sufficient, arguing that the Departments should extend the comment period to at least 60 days or should reissue the rule with a new 60-day comment period. Numerous commenters requested additional time to comment, citing the complex nature of the NPRM, its length, and the impact of the rule on asylum-seekers and commenters. Other commenters, such as legal services organizations, noted that they have a busy workload and that 30 days was not a sufficient period to prepare the fulsome comment they would have prepared had the comment period provided more time. For example, a legal services organization indicated that it would have provided additional information about asylum seekers the organization has assisted in the past and data about the population the organization serves but that it did not have time to do so. Other organizations stated they also would have included information on issues such as their clients' experiences with the CBP One app and experiences in third countries en route to the United States and would have consulted with experts. Another organization stated that it had to choose between providing comments on the rule and helping migrants prepare for the rule's implementation, and another organization stated that it was unable to provide fulsome comments because the comment period coincided with the implementation of the CBP One app as a means by which its clients could seek exceptions to the Title 42 public health Order. Commenters argued that the Departments selected a 30-day comment period to reduce the volume of negative comments that will be filed in order to justify disregarding national sentiment against the rule.

Commenters asserted that the 30-day comment period is ''risking that public comments will not be seriously considered before the rule is implemented,'' and additional time is needed to meet APA requirements that agencies provide the public with a ''meaningful opportunity'' to comment. These comments referenced Executive Orders 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993) and 13563, Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011), which recommend a comment period of not less than 60 days ''in most cases,'' and case law, such as *Prometheus Radio Project* v. *FCC,* 652 F.3d 431 (3d. Cir. 2011), and *Centro Legal de la Raza* v. *EOIR,* 524 F. Supp. 3d 919 (N.D. Cal. 2021).

Commenters disagreed with the Departments' reliance on the impending termination of the Title 42 public health Order in May 2023 and the expected potential surge in migration that would result as justification for the 30-day comment period. These commenters emphasized that the Administration itself sought to formally end the Title 42 public health Order nearly a year ago and stated that the Departments have had sufficient time to prepare for the policy's end. For example, commenters cited to the December 13, 2022, statement issued by Secretary Mayorkas regarding the planning for the end of the Title 42 public health Order.[305]

Some commenters requested extension of the comment period due to reported technical difficulties with submitting comments and stated that technical problems had effectively shortened the comment period to less than 30 days or reduced the public's ability to fully participate in the rulemaking process. For example, one commenter stated that they had learned that there was a technical outage or other error in the application programming interface (''API'') technology used to allow third-party organizations to submit comments through *regulations.gov*. This commenter expressed a belief that an unknown number of comments had been ''discarded'' without the commenters' knowledge. Another commenter referenced an individual who had technical errors when trying to submit a comment online.[306] This commenter also noted that there was an alert banner on *regulations.gov* at 9:30 a.m. eastern time on March 27, 2023, that stated ''*Regulations.gov* is experiencing delays in website loading. We apologize for the inconvenience. While we are working on a fix, please try to refresh when you encounter slow responses or error messages.'' Overall, these commenters referenced possible technical errors with the submission of comments from as early as March 20, 2023, through the close of the comment period on March 27, 2023.

Finally, commenters further stated that the comment period for the USCIS fee schedule NPRM[307] (from January 4, 2023, through March 13, 2023) overlapped with the comment period for the NPRM in this rulemaking, which caused challenges for commenting on this rule in the 30-day comment period. In addition, commenters stated that the 30-day comment period did not provide commenters who do not regularly work in immigration law with sufficient time to fully analyze the effects of the rule, and that the Departments should extend the 30-day comment period to provide sufficient time for respectful observance of Ramadan, which began during the comment period.[308]

Response: The Departments believe the comment period was sufficient to allow for meaningful public input, as evidenced by the almost 52,000 public comments received, including numerous detailed comments from interested organizations.

The comment period spanned 33 days, from February 23, 2023, through March 27, 2023. The January 5, 2023, announcement of the impending

[305] DHS, *Statement by Secretary Mayorkas on Planning for End of Title 42* (Dec. 13, 2022), *https://www.dhs.gov/news/2022/12/13/statement-secretary-mayorkas-planning-end-title-42#:~:text=%E2%80%9CNonetheless%2C%20we%20know%20that%20smugglers,United%20States%20will%20be%20removed.*

[306] This commenter also referenced a second individual who was able to eventually submit a timely comment but who posted a photo on twitter that the commenter described as a screenshot of an error screen from *regulations.gov. https://twitter.com/argrenier/status/1639989637413490689/photo/1.* The Departments note that this photo is actually a screenshot from a different website (*federalregister.gov*) and not *regulations.gov*, which is the website the instructions in the NPRM told the public to use to submit a comment. *Id.*

[307] *See* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 88 FR 402 (Jan. 4, 2023); U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; Extension of Comment Period, 88 FR 11825 (Feb. 24, 2023) (extending the comment period until March 13, 2023).

[308] This commenter also stated the Departments should extend the comment period due to the holidays of Passover and Easter, but both Passover (April 5 through April 13, 2023) and Easter (April 9, 2023 or later) do not occur in whole or in part during the rule's comment period.

issuance of the proposed rule [309] also provided an opportunity for public discussion of the general contours of the policy.[310] In addition, commenters could begin to familiarize themselves with the rule before the rule was published during the period before the comment period opened when the rule was on public inspection.

The APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c), and although Executive Orders 12866 and 13563 recommend a comment period of at least 60 days, a 60-day period is not required. Much of the litigation on this issue has focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp.* v. *FCC,* 78 F.3d 620, 629–30 (D.C. Cir. 1996) (concluding 15 days for comments was sufficient); *NW. Airlines, Inc.* v. *Goldschmidt,* 645 F.2d 1309, 1321 (8th Cir. 1981) (finding 7-day comment period sufficient).

The Departments are not aware of any case law holding that a 30-day comment period is categorically insufficient. Indeed, some courts have found 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that, although a 30-day period is often the ''shortest'' period that will satisfy the APA, such a period is generally ''sufficient for interested persons to meaningfully review a proposed rule and provide informed comment,'' even when ''substantial rule changes are proposed.'' *Nat'l Lifeline Ass'n* v. *FCC,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984)). The Departments recognize, however, that some courts have held that a 30-day comment period was likely insufficient in certain circumstances. *See, e.g., Centro Legal de la Raza* v. *EOIR,* 524 F. Supp. 3d 919, 955 (N.D. Cal. 2021) (holding that DOJ's 30-day notice-and-comment period was likely insufficient for a rule that implemented extensive changes to the immigration court system and noting, inter alia, the arguments by commenters that they could not fully respond during the comment period, the effect of the COVID–19 pandemic, and allegations of ''staggered rulemaking''); *Pangea Legal Servs.* v. *DHS,* 501 F. Supp. 3d 792, 818–22 (N.D. Cal. 2020) (holding that the plaintiffs had at a minimum shown ''serious questions going to the merits'' of whether the 30-day comment period for a different asylum-related rulemaking was insufficient and noting, inter alia, the ''magnitude'' of the rule, that the comment period ''spanned the year-end holidays,'' the comment periods of other rules by DHS, the number of comments received, and allegations of ''staggered rulemaking'').

Here, even assuming these cases were correctly decided, the Departments have concluded that the concerns raised in those circumstances are not borne out. First, the significant number of detailed and thorough public comments is evidence that the comment period here was sufficient for the public to meaningfully review and provide informed comment. *See, e.g., Little Sisters of the Poor Saints Peter & Paul Home* v. *Penn.,* 140 S. Ct. 2367, 2385 (2020) (''The object [of notice and comment], in short, is one of fair notice.'' (citation and quotation marks omitted)). Second, the 30-day comment period did not span any Federal holidays, and while commenters noted that the Muslim month of Ramadan began during the comment period, the Departments find that there is no evidence that the occurrence of the month of Ramadan during the comment period would substantively impact the ability of Ramadan observants to submit a timely comment. Third, because the Departments had not recently published other related rules on this topic or that affect the same portions of the CFR that would affect commenters' ability to comment, this rule does not present staggered rulemaking concerns. The last asylum-related rulemaking, the Asylum Processing IFR, was published on March 27, 2022, and was effective on May 31, 2022. 87 FR 18078.[311] Accordingly, commenters did not have to contend with the interplay of intersecting rules and related policy changes when drafting their comments. And though the Departments recognize that the USCIS fee rule's comment period partially overlapped with this rule's comment period, this overlap does not render this rule's comment period unreasonable. The comment period for that rule—which addresses different subjects and portions of the CFR than this rule—opened on January 4, 2023, 50 days before opening of this rule's comment period, and ended on March 13, 2023, 14 days prior to the close of this comment period.

Finally, the Departments also believe that the 30-day comment period was preferable to a longer comment period since this rule involves concerns about the Departments' ability to safely, effectively, and humanely enforce and administer the asylum system and immigration laws given the surge of migrants that is expected to occur upon the lifting of the Title 42 public health Order if this rule were not in place. *Cf., e.g., Haw. Helicopter Operators Ass'n* v. *FAA,* 51 F.3d 212, 214 (9th Cir. 1995) (noting that the agency had good cause to not engage in notice and comment rulemaking at all because the rule was needed to protect public safety as demonstrated by numerous then-recent helicopter crashes). By proceeding with a comment period shorter than 60 days, the Departments were able to receive comments, review comments, and prepare a final rule to be promulgated in time for the May 11, 2023, expiration of the public health emergency and the corresponding expiration of the Title 42 public health Order. A 60-day comment period, on the other hand, would have run until April 24, 2023, and a final rule would have been impossible to prepare in the 17 days from April 24 to May 11, 2023. Having this rule in place for the expiration of the Title 42 public health Order will disincentivize the expected surge of irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in third countries in the region. The rule will thus prevent a severe strain on the immigration system, as well as protect migrants from the dangerous journey to the SWB and the human smugglers that profit on their vulnerability. Contrary to some commenters' allegations, the Departments did not select a 30-day comment period to limit public involvement on the rule.

The Departments disagree with commenters' statements that the Departments' reliance on the end of the Title 42 public health Order is inapt because ending Title 42 was a government choice, and the Departments should have had time to prepare without a 30-day comment period. First, the Departments note that the Title 42 public health Order is ending based on factual developments,

[309] DHS, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), *https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.*

[310] *See, e.g.,* Al Jazeera, *US Rights Groups Slam Bidens 'Unacceptable' Asylum Restrictions,* Jan. 6, 2023, *https://www.aljazeera.com/news/2023/1/6/us-rights-groups-slam-bidens-unacceptable-asylum-restrictions;* UN, *New US Border Measures 'Not in Line with International Standards', Warns UNHCR,* Jan. 6, 2023, *https://news.un.org/en/story/2023/01/1132247.*

[311] In addition, the Departments published a final rule extending the U.S.-Canada STCA on March 28, 2023, but that rule did not have any impact on the subject of this rule as it applies to the U.S.-Canada land border. 88 FR 18227.

and the Departments do not control either those factual developments or the decision to recognize those factual developments by terminating the public health Order. Second, litigation and the resulting injunctions over ending the Title 42 public health Order have made it difficult for the Departments to predict an exact end date. *See, e.g., Arizona* v. *Mayorkas,* 143 S. Ct. 478 (2022) (granting States' application for stay pending certiorari and preventing the District Court for the District of Columbia from giving effect to its order setting aside and vacating the Title 42 public health Order); *Louisiana* v. *CDC,* 603 F. Supp. 3d 406 (W.D. La. 2022) (granting States' motion for a preliminary injunction prohibiting enforcement of the CDC's order terminating Title 42). Accordingly, it was not until the Administration announced [312] its plan to have the public health emergency that underpins the Title 42 public health Order extend until May 11, 2023, and then expire that the end of the Title 42 public health Order changed from speculative to more concrete. The Departments then published the NPRM in short order, 24 days after the Administration's statement of intent. Finally, as discussed in the NPRM and elsewhere in this preamble, the CHNV parole processes that the Departments developed in October 2022 (Venezuela) and January 2023 (Cuba, Haiti, and Nicaragua) have shown significant success in reducing encounters and encouraging noncitizens to seek lawful pathways to enter the United States. This rule adopts a similar design as these programs—coupling the incentives of lawful pathways with disincentives for failing to pursue those pathways—based, in part, on the successes of those programs in decreasing irregular migration. Because those successes were not seen until as late as January 2023, commenters are incorrect that the Departments could have published it long before February 2023. Once the NPRM was published, it was reasonable to include a 30-day comment period in light of the impending end of Title 42 public health Order.

Finally, the Departments have investigated commenters' allegations of technical errors that led to comments being ''discarded'' or not submitted with the eRulemaking Program at the GSA. A GSA representative explained the following:

- The API, which allows the electronic submission of comments to regulations.gov by third-party software, was operating normally from March 20, 2023, to March 28, 2023.
- Commenters are incorrect that any submitted comments were ''discarded'' as comments that are received are not discarded.
- While some users reported errors on the submission of API comments, all unsuccessful transactions were successfully resubmitted within a maximum of 30 minutes.
- In addition, the eRulemaking Program accommodated one commenting organization with a temporary increase to the API posting rate limit so that the organization could submit approximately 26,000 comments by the close of the comment period.
- None of the help desk call logs reflect a call related to this rule nor a discussion indicating an unresolved error when posting comments.

Accordingly, the Departments do not believe that any technical errors prevented commenters from submitting comments within the 30-day comment period.

Overall, the Departments find that the time afforded by a 30-day comment period to prepare a final rule prior to the expiration of the Title 42 public health Order, which would not have been possible with a longer comment period, outweighs the arguments raised in support of a longer comment period by commenters. Commenters have provided numerous and detailed comments regarding the NPRM, and the Departments appreciate their effort to provide thorough commentary for the Departments' consideration during the preparation of this final rule.

ii. Insufficient Consideration of Public Comments

Comments: Commenters stated that the timeline for the rule risks that the Departments will not seriously consider public comments before implementing a final rule and gives the appearance that the Departments have predetermined the outcome of the NPRM. Many commenters stated that the short time span between the scheduled close of the comment period (at the end of March 27, 2023) and the anticipated issuance of the final rule (no later than May 12, 2023) suggested that the Departments would not meaningfully consider public comments. Commenters stated that the Departments should have issued a proposed rule earlier than February 2023 to give the Departments more time to carefully consider comments received and revise policy plans prior to the issuance of a final rule.

Response: The Departments have included an extensive discussion of comments received as part of this preamble. The Departments strongly disagree with the commenters' assertions that the Departments failed to meaningfully consider public comments in issuing this final rule. The Departments' receptivity to public comments is demonstrated by, for instance:

- The extensive and substantive discussion of public comments in this preamble;
- Multiple revisions made by the Departments to the policy contained in the NPRM, including clarifications of policy requested by commenters, a reorganization of the regulatory text for clarity, and other policy changes that are responsive to public comments; and
- The Departments' choice to seek public comment in the first instance, notwithstanding that this rulemaking involves a foreign affairs function of the United States and addresses an emergency situation for which the Departments would have good cause to bypass notice and comment.[313]

iii. Delayed Effective Date

Comments: Commenters stated that they anticipated that the Departments would issue the final rule in violation of the APA's requirement of a 30-day delayed effective date for substantive rules.[314] Commenters stated that by delaying so long in issuing the NPRM, the Departments had forfeited any argument for ''good cause'' to make the final rule effective immediately. Commenters noted that there has been litigation for years over the ongoing viability of Title 42 public health Order—itself an inherently temporary measure—and the April 2022 Title 42 termination Order. Commenters stated that the Departments could have conducted a notice-and-comment rulemaking with a 30-day delayed effective date had they begun this rulemaking sooner.

Response: As discussed in Section V.A. of this preamble, the Departments are invoking the foreign affairs and good cause exceptions for bypassing a 30-day delayed effective date. *See* 5 U.S.C. 553(a)(1) and (d). The Departments have determined that immediate implementation of this rule is necessary to fortify bilateral relationships and avoid exacerbating a projected surge in migration across the region following the lifting of the Title 42 public health Order.

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[312] Office of Mgmt. & Budget, Exec. Office of the President, *Statement of Administration Policy* (Jan. 30, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.*

[313] *See* 5 U.S.C. 553(a)(1), (b)(B); *see also* Section VI.A. of this preamble.

[314] *See* 5 U.S.C. 553(d).

Case law suggesting that an agency's delay can effectively forfeit the agency's ''good cause'' relates primarily to the separate good cause exception applicable to notice-and-comment rulemaking requirements under 5 U.S.C. 553(b)(B).[315] Such case law has no bearing on the foreign affairs exemption under 5 U.S.C. 553(a)(1). In addition, it is not dispositive as to the good cause exception at 5 U.S.C. 553(d), which serves ''different policies'' and ''can be invoked for different reasons.'' [316] Specifically, the 30-day delayed-effective-date requirement ''is intended to give affected parties time to adjust their behavior before the final rule takes effect,'' [317] but in this context, affected parties have been subject to the Title 42 public health Order for years, and cannot reasonably argue that they require an additional 30 days to adjust their behavior to the new approach taken in this rule.

Even if the forfeiture doctrine is applied in this context, however, the Departments have pursued this rulemaking without delay, and in fact have proceeded as rapidly as possible under the circumstances. As discussed at length in the NPRM, this rulemaking addresses a range of dynamic circumstances, including major recent shifts in migration patterns across the hemisphere, altered incentives at the SWB created by the application of the Title 42 public health Order (which has carried no immigration consequences and resulted in many migrants trying repeatedly to enter the United States), and ongoing litigation regarding the Title 42 public health Order.[318] The Departments have sought to address these circumstances in a variety of ways, including the six-pillar strategy outlined in the April 2022 DHS Plan for Southwest Border Security and Preparedness; the issuance of the Asylum Processing IFR, 87 FR 18078; the expansion of lawful pathways throughout the region and via the CHNV processes; and the introduction of the CBP One app, among other measures. The Departments' issuance of the proposed rule while the litigation over the Title 42 public health Order was ongoing, and within weeks of the Administration's announcement regarding the impending termination of that Order, reflects the high priority that the Departments have placed on issuing this rulemaking promptly via a notice and comment process.

2. Paperwork Reduction Act (''PRA'')

Comment: A commenter stated that the Departments had not posted to the public docket any proposed revisions to the collection of information under Office of Management and Budget (''OMB'') Control Number 1651–0140, *Collection of Advance Information from Certain Undocumented Individuals on the Land Border.* The commenter stated that such revision appeared particularly important given the NPRM's proposed codification of the required use of the CBP One app to access regular Title 8 asylum processing. The commenter stated that, as a consequence of the failure to post the proposed revisions, they were unable to comment on the proposed changes to the collection of information. A commenter expressed concern that CBP sought emergency approval to collect advance information on undocumented noncitizens and bypassed the standard notice and comment process.

Response: With respect to commenters' stated concerns about the public docket, the Departments note that like all proposed revisions to collections of information, the proposed revisions described in the NPRM were available for review throughout the comment period on OMB's website at *https://www.reginfo.gov,* under the Information Collection Review tab.[319] The Departments did not also post these comments to the public docket, but are unaware of any attempt by the commenter to request a copy of the proposed changes by using the contact information listed in the NPRM.

The Departments maintain that the nature of the proposed change to the collection of information was clear to commenters, as the proposed change was described at length in the NPRM and was the subject of many comments. The Supporting Statement that was available on OMB's website (and was the only document related to the information collection for which the Departments had proposed revisions) described an NPRM that, if finalized, ''would change the consequences, for some noncitizens and for a temporary period of time, of not using CBP One to schedule an appointment to present themselves at a POE.'' [320] The Supporting Statement explained that such noncitizens would ''be subject to a rebuttable presumption of asylum ineligibility, unless the noncitizen demonstrates by a preponderance of the evidence that it was not possible to access or use CBP One due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or that the noncitizen is otherwise not subject to the rebuttable presumption.'' [321] The Supporting Statement further clarified that ''[t]here is no change to the information being collected under this collection or the use of the information by CBP, but this change would alter the consequences of not using the collection, and thus increases the estimated annual number of responses in the collection.'' [322]

Regarding the concern with using the emergency PRA approval process for the collection of information via the CBP One app, CBP notes that, although the initial collection was approved on an emergency basis,[323] the relevant PRA approval for the collection that is being used for this rule (OMB Control Number 1651–0140) was subsequently done using the normal PRA process, which included two **Federal Register** notices and an opportunity for public comment.[324] Further, this collection is being revised again through this rule, and the public was given additional opportunity to comment on the information collection in this rulemaking. *See* 88 FR at 11749–50.

Members of the public are welcome to submit comments to OMB on the collection of information via *https://www.reginfo.gov* for a period of 30 days following issuance of this final rule.

Comment: A commenter expressed that the NPRM is not in compliance with the APA because the CBP One app

[315] *See, e.g., Envt'l. Def. Fund* v. *EPA,* 716 F.2d 915, 921–22 (D.C. Cir. 1983) (holding that because the agency ''failed to demonstrate that outside time pressures forced the agency to dispense with APA notice and comment procedures . . . the agency's action . . . [fell] outside the scope of the good cause exception''); *Nat'l Ass'n of Farmworkers Org.* v. *Marshall,* 628 F.2d 604, 622 (D.C. Cir. 1980) (rejecting a good cause argument for bypassing notice and comment because the time pressure cited by the agency ''was due in large part to the [agency's] own delays'').

[316] *Riverbend Farms, Inc.* v. *Madigan,* 958 F.2d 1479, 1485 (9th Cir. 1992) (The ''30-day waiting period in no way relates to the notice and comment requirement, but the federal courts have not always been careful to maintain the distinction'' (internal citation and quotation omitted)).

[317] *Id.*

[318] *See* 88 FR at 11708–14.

[319] *See* OMB, *ICR Documents: CLEAN Supporting Statement 1651–0140 Advance Information Collection NPRM Changes, https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202302-1651-001* (last visited Mar. 29, 2023).

[320] *Id.*

[321] *Id.*

[322] *Id.*

[323] *See* OIRA, *OIRA Conclusion, OMB Control No. 1651–0140, Collection of Advance Information from Certain Undocumented Individuals on the Land Border* (May 3, 2021), *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202104-1651-001.*

[324] *See* 86 FR 73304 (Dec. 27, 2021); 87 FR 53667 (Sept. 28, 2021). *See also* OIRA, *OIRA Conclusion, OMB Control No. 1651–0140, Collection of Advance Information from Certain Undocumented Individuals on the Land Border* (Dec. 18, 2022), *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202112-1651-001.* The OIRA *Conclusion* includes citations and links to the notices published in the **Federal Register**, as well as the comments received in response.

has not gone through the normal notice-and-comment period required by the APA. The commenter stated that the Departments had not clearly described the app in a way that would provide the public with the necessary information to understand how the app works and that a noncitizen's failure to use the app when presenting themselves at a port of entry has serious implications on immigration relief.

Response: The Departments disagree with the contention that the use of the CBP One app, whether separate from or as described in this rule, fails to comply with the APA. The CBP One app serves as a single portal to a variety of CBP services.[325] Because there is not an overarching CBP One information collection, CBP has sought OMB approval under the PRA of each information collection contained in the CBP One app, pursuant to standard procedures. Regarding the particular use of the CBP One app that is described in this rulemaking—*i.e.,* the use of the app as the current ''DHS scheduling system'' described in 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B), to collect information from certain undocumented individuals on the land border—the PRA information referenced above, and available to the public, provided information sufficient to understand how the app works, and how it would work in connection with this rulemaking. Similarly, the Departments provided a description of the presumption and its application, including to those who do not utilize CBP One, in the NPRM and invited comment thereon.

3. Impacts, Costs, and Benefits (Executive Orders 12866 and 13563)

Comment: A few commenters expressed that the Departments have not met their obligations under Executive Order 12866 and Executive Order 13563. A commenter requested that the Departments investigate and develop quantitative estimates regarding a range of potential regulatory effects, such as estimates of the rule's potential impact on family unity, the lifetime cost of work permit renewals for those who are granted withholding of removal instead of asylum under the rule; the impact of life-long inability to travel internationally for those granted withholding of removal rather than asylum; and the potential costs on States and localities of vastly increasing the class of individuals ineligible for public benefits, services, and healthcare. Another commenter requested that the Departments consider the downstream impacts of the rule on other noncitizens and their U.S. citizen family members who might be affected by additional backlogs in immigration court. A legal services provider expressed concern with the Departments' ''evident implication'' that the rebuttable presumption will not impact asylum seekers beyond their loss of a path to citizenship and inability to petition for family members to join them in the United States; the commenter cited challenges with retaining counsel and lost opportunities to collect evidence or consult family before an asylum decision is made. Some commenters stated that the rule's analysis of its costs and benefits is deficient because the rule lacked detailed estimates or further specifics with respect to costs for the Departments, the States, and other parties. Commenters stated that for this reason, the regulatory analysis in Section VI.A. of the NPRM's preamble failed to satisfy the requirements of Executive Order 12866.

Response: The Departments respectfully maintain that the regulatory analysis accompanying the NPRM adequately described the costs and benefits associated with this rulemaking. The concerns raised by the commenters have been addressed qualitatively in the preambles to the NPRM and this final rule. The Departments recognize that the rule will result in costs and benefits for the individual noncitizens who are subject to it, as well as a range of potential indirect effects on other persons and entities.[326] The Departments have further described these costs and benefits throughout this preamble. The Departments have also further revised the Executive Order 12866 discussion in Section VI.B. of this preamble to address some of the concerns described by the commenters, including concerns related to work permit renewal.[327]

Although the Departments have discussed the relevant policy considerations associated with this rulemaking at length, the Departments note that neither Executive Order 12866, nor any other executive order or law, requires more detailed quantitative analysis in these circumstances. The fact that preparation of a regulatory impact analysis under Executive Order 12866 is a matter of Executive Branch discretion is underscored by the terms of Executive Order 12866, section 10:

> Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Courts have recognized the internal, managerial nature of this and other similarly worded executive orders, and have concluded that actions taken by an agency to comply with such executive orders are not subject to judicial review. *See Cal-Almond, Inc.* v. *USDA,* 14 F.3d 429, 445 (9th Cir. 1993) (citing *State of Mich.* v. *Thomas,* 805 F.2d 176, 187 (6th Cir. 1986)).

i. Quantitative Impacts on Federal and State Governments

Comment: A group of State Attorneys General stated that the proposed rule ''completely ignores the increased costs to the States of higher levels of unlawful aliens precipitated by'' the NPRM. Quoting the proposed rule, the commenters stated that the Departments ''falsely claim[ed] that '[t]he costs of the proposed rule primarily are borne by migrants and the Departments.' '' *See* 88 FR at 11748. Commenters further stated that States have significant reliance interests in the Federal Government's enforcement of the immigration laws and that the Departments should withdraw the rule because the Departments did not consider this reliance in the proposed rule. Commenters stated that the rule would cause additional noncitizens to enter the United States where they would cause the States to expend additional funds on law enforcement, education, and healthcare than the States otherwise would have spent.

In support of this assertion, commenters stated that irregular migration imposes significant costs on States. Commenters cited a study that stated ''the net cost of illegal immigration to U.S. taxpayers is now $150.7 billion.'' Commenters provided specific examples of costs that the State of Indiana has incurred or could incur to provide services to noncitizens, including costs to provide English Language Learner Services and other education services. Commenters stated that as many as 5,000 family units that had been encountered and granted parole pursuant to the parole + ATD

[325] *See* CBP, *CBP One™ Mobile Application, https://www.cbp.gov/about/mobile-apps-directory/cbpone* (last visited Apr. 26, 2023).

[326] *See* Section VI.B of this preamble for a further discussion of the rule's costs and benefits.

[327] The Departments note that some, but not all, of the commenters that pressed for additional quantitative analysis expressed strong support for the TCT Bar IFR and Final Rule, which did not contain an Executive Order 12866 analysis due to their nexus to a foreign affairs function of the United States. *See* 84 FR at 33843 (IFR); 85 FR at 82289 (final rule).

policy settled in Indiana between July 2021 and February 2022. On the other hand, a state administrative agency wrote that immigrants and refugees are integral to that State's economy and generate $2.8 billion of business income and contribute over $21.4 billion in Federal, State, and local taxes, annually. The commenter wrote that immigrants and refugees have successfully rebuilt their lives and made positive social and economic contributions to the State by revitalizing neighborhoods and adding to the cultural vitality of the State and its communities.

Response: The Departments respectfully disagree with the characterization of the rule as precipitating higher levels of irregular migration. As discussed in the preamble to the proposed rule, *see, e.g.,* 88 FR at 11705–06, and in Section I of this preamble, in the absence of this rule, the Departments would anticipate a significant further surge in irregular migration after the Title 42 public health Order is lifted. This rule is expected to reduce irregular migration, not increase it.

This rule imposes a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States at the southwest land border or adjacent coastal borders after traveling through a third country during a designated period. This rule excepts from its rebuttable presumption noncitizens who enter the United States pursuant to a lawful pathway, but the rule does not newly introduce or authorize any lawful pathways to enter the United States. While it is true that the rule excepts from the rebuttable presumption those who use some lawful pathways, such pathways would exist irrespective of this rule. Indeed, as stated in the NPRM, the term ''lawful pathways'' refers to the ''range of pathways and processes by which migrants are able to enter the United States or other countries in a lawful, safe, and orderly manner and seek asylum and other forms of protection.'' 88 FR at 11706 n.15. One such lawful pathway is entry pursuant to the CHNV parole processes; such processes were established prior to and separate from the publication of the NPRM. In other words, the commenters have conflated the lawful pathways accounted for in this rule with the rule itself.

The Departments further note the evidence that the introduction of lawful pathways, particularly when coupled with a consequence for failing to use such processes, has significantly reduced levels of irregular migration. For instance, as noted in the proposed rule, in the week prior to the announcement of the Venezuela parole process on October 12, 2022, encounters of Venezuelan nationals between POEs at the SWB averaged over 1,100 a day from October 5–11. About two weeks after the announcement, encounters of Venezuelan nationals averaged under 200 per day between October 18 and 24.[328] The low trend continued with a daily average of 106 in March 2023.[329] Similarly, the number of CHN nationals encountered dropped significantly in the wake of the January 2023 announcement of new processes for those countries. Between the announcement of the new processes on January 5, 2023, and January 21, the number of daily encounters between POEs of CHN nationals dropped from 928 to 73, a 92 percent decline.[330] Encounters between POEs of CHN nationals continued to decline to a daily average of fewer than 17 per day in March 2023.[331] These reductions in encounters have been sustained for months while the Title 42 public health Order has remained in effect.

With respect to commenters' statement that States have significant reliance interests in the Federal Government's enforcement of the immigration laws, this rule does not set any policy against enforcement of the immigrations laws. Commenters' objections to other enforcement policies, or any lack thereof, have little relationship to this rule, which, as previously stated, creates a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States at the southwest land border or adjacent coastal borders after traveling through a third country during a designated period. The Departments are unaware of any existing policies altered by this rule in which States have a substantial reliance interest. For example, States cannot have substantial reliance interests in the Proclamation Bar IFR or TCT Bar Final Rule because neither rule is being enforced.

Ultimately, the commenters' objections are not to the proposed rule, but to the lawful pathways themselves, as well as to other aspects of the immigration system. The Departments believe that withdrawing the proposed rule would not achieve the Departments' or the commenters' goals.

[328] USBP encountered an average of 225 Venezuelans per day in November 2022 and 199 per day in December 2022. OIS analysis of OIS Persist Dataset based on data through March 31, 2023. Data are limited to USBP encounters to exclude those being paroled in through POEs.

[329] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[330] *Id.*

[331] *Id.*

Comment: Another group of State Attorneys General stated that if, as a consequence of the rule, noncitizens endure additional trauma seeking asylum in a third country or waiting at the SWB in potentially dangerous conditions for a CBP One appointment, such noncitizens will require more State-funded services, such as services related to healthcare, education, and legal assistance.

Response: The Departments acknowledge that various levels of government provide services to noncitizens for a range of purposes. The Departments have further revised the Executive Order 12866 discussion in Section VI.B of this preamble to note the potential effects on such entities.

Comment: Commenters stated that while the Departments acknowledge the cost and other impact that irregular migration has had on DHS operations, States and border communities, and NGOs, the Departments did not adequately consider the costs borne by other Federal agencies not directly associated with immigration enforcement. For example, commenters stated that some health programs (Medicaid; the Children's Health Insurance Program; the Supplemental Nutrition Assistance Program; and the Women, Infants, and Children program) and tax credits are available to noncitizens without employment authorization. Commenters also stated that UCs are eligible for a large number of Federal benefits immediately upon their entry. Commenters also stated that the expanded usage of humanitarian parole results in costs associated with providing parolees Federal benefits.

Response: The Departments agree that a high volume of irregular migration can have significant implications for other Federal agencies that provide services or assistance to migrants. For the reasons stated in the first comment response in Section IV.F.3.i of this preamble, however, the Departments do not believe it is reasonable to expect that the rule would result in an increase in irregular migration. This rule is designed to reduce levels of irregular migration, and to channel migrants into lawful, safe, and orderly pathways. In the absence of this rule, the Departments would anticipate a significant further surge in irregular migration after the Title 42 public health Order is lifted. This rule will reduce irregular migration and any costs associated with such migration, rather than increasing such migration and costs.

Comment: Some commenters also stated that the rule fails to adequately consider and address the administrative

costs that the Departments would incur in order to implement the rule. Regarding USCIS, these commenters stated that the Departments failed to consider, for instance, the following costs: new trainings, possible future hiring needs that could result from the rule, and possible collateral costs to petitioners before USCIS who could have adjudications delayed due to downstream delays. Some commenters expressed concern that USCIS, as a fee-funded agency, might have insufficient resources to implement the rule, and hypothesized that USCIS might seek to ask Congress for an appropriation to cover implementation costs, which would shift the burden of the cost to U.S. taxpayers. These commenters cited the requirements of the Anti-Deficiency Act and past reductions in USCIS fee revenues in support of the commenters' prediction of an appropriations request.

Regarding CBP, commenters stated that the Departments failed to consider, for instance, costs for training staff on the CBP One app and for app maintenance and updates.

Regarding ICE, commenters stated that if, as a result of the rule, more noncitizens receive negative credible fear determinations and request IJ review, there is a risk of overcrowding and other operational complications as bed space runs out for new arrivals. The commenters stated that this could increase the money paid by the U.S. taxpayer unnecessarily.

Regarding EOIR, these commenters stated that the Departments failed to consider, for instance, the following costs: training of IJs and staff; form updates; and an increase to the court backlog if adjudications take longer.

Response: The Departments agree that various agencies will expend resources to implement this rule. The discussion in Section VI.B of this preamble explains that the rule will require additional time for AOs and IJs, during fear screenings and reviews, respectively, to inquire into the applicability of the presumption and whether the presumption has been rebutted. Similarly, the rule will require additional time for IJs during section 240 removal proceedings. However, as discussed in the proposed rule and elsewhere in this preamble, in the absence of this rule, the Departments would anticipate a significant further surge in irregular migration after the Title 42 public health Order is lifted, which would require the expenditure of significant resources. This rule is therefore anticipated to substantially reduce net burdens on the Departments, including at the agencies referenced by the commenters.

4. Regulatory Flexibility Act (''RFA'')

Comment: At least one commenter disagreed with the certification in the NPRM that the proposed rule would not have a significant economic impact on a substantial number of small entities. *See* 88 FR at 11748. Some legal services providers gave examples of how the rule would impact their organization and workloads, without objecting to the RFA certification. But at least one commenter disputed the certification and wrote that as a nonprofit organization that helps asylum seekers prepare for credible fear interviews, IJ reviews, and merits hearings, the commenter would experience a significant time and cost burden associated with the new rule, such as the additional time spent gathering evidence from foreign countries, appearing at interviews and hearings, and explaining the law and outcome to clients and pro se respondents. The commenter stated that, as a consequence of the rule, the commenter would therefore be forced to serve fewer individuals, significantly reducing the number of people who would have access to legal services. The commenter further stated that due to the increased time burden, individuals would have to pay the commenter increased fees or donors would have to chip in more for each person.

Response: Consistent with longstanding case law, a regulatory flexibility analysis is not required when a rule has only indirect effects on small entities, rather than directly regulating those entities. *See, e.g., Mid-Tex Elec. Co-op., Inc.* v. *FERC,* 773 F.2d 327, 342–43 (D.C. Cir. 1985) (''[A]n agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule . . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.'').[332] This rule does not directly regulate any organizations; the rule imposes a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States at the southwest land border or adjacent coastal borders after traveling through a third country during a designated period. The RFA does not require the Departments to estimate the rule's potential indirect effects on legal service organizations, law firms, and other service providers whose clients may be subject to the rule. Because this rule does not regulate small entities themselves, the Departments reaffirm their conclusion that no regulatory flexibility analysis is necessary.

5. Other Regulatory Requirements

Comment: A group of State Attorneys General disputed the statement in the proposed rule, made pursuant to Executive Order 13132, Federalism, 64 FR 43255 (Aug. 4, 1999), that the proposed rule would not have a substantial direct effect on the States, the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. *See* 88 FR at 11749.

Response: The Departments maintain that this rule will not have a substantial direct effect on the States, the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule's only direct effects relate to asylum applicants and those being processed at the SWB. For the same reason, this final rule will not impose substantial direct compliance costs (indeed, any direct compliance costs) on State and local governments, or preempt State law. Accordingly, in accordance with section 6 of Executive Order 13132, this rule requires no further agency action or analysis.

Comment: A group of State Attorneys General stated that the Departments should withdraw the rule because it would impose significant unfunded mandates on the States but the Departments did not assess the impact on the States or their constituent local governments under the Unfunded Mandates Reform Act of 1995 (''UMRA''). Commenters disagreed with the Department's statement in the proposed rule that the rule would not

[332] *See also Cement Kiln Recycling Coal.* v. *EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001) (''The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply'. . . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.'' (citing *Mid-Tex,* 773 F.2d at 343)); *White Eagle Co-op. Ass'n* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009) (''[S]mall entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.'').

impose an unfunded mandate because ''[a]ny downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed'' by the rule. 88 FR 11748. Commenters cited cases regarding standing to sue in Federal court, such as *Department of Commerce* v. *New York,* 139 S. Ct. 2551 (2019) and *City & County of San Francisco* v. *USCIS,* 944 F.3d 773, 787 (9th Cir. 2019), arguing that if the fact patterns in those cases were sufficient to establish standing, they are sufficient to trigger the UMRA's requirements. Quoting 2 U.S.C. 1534(a), commenters stated that UMRA also requires that ''[e]ach agency . . . develop an effective process to permit elected officers of State, local, and tribal governments . . . to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates.'' The comments stated that the Departments never allowed elected leaders in their States to provide any such input.

Response: Case law on standing does not dictate UMRA's scope. The Departments maintain that the NPRM preamble's discussion of UMRA was correct. This rule does not contain a Federal mandate, or a significant Federal intergovernmental mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by the rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate contained in this rule, as that term is defined under UMRA.

G. Out of Scope

Comment: Commenters submitted a number of comments that were outside the scope of the rulemaking. For instance, some commenters stated that the United States should create a path to citizenship for undocumented immigrants; that the Government should otherwise engage in legislative immigration reform; that all noncitizens with disabilities should be eligible for asylum; that minors should not be released to individuals without lawful status; that the Government should focus on disparities among IJs in asylum grant rates; that the United States should expand resources focused on the development of civil society and governments in the Northern Triangle; that countries from which asylum applicants flee should help fund humanitarian aid for their citizens who resettle in the United States; that POEs are already overwhelmed so asylum-seekers should be allowed to enter in other places; that the Government needs to focus on granting ''Dreamers'' citizenship; that the Government should call on the military to forcibly repel migrants from the border; that the United States should end birthright citizenship; that the American workforce is becoming automated, putting American citizens out of work; that the United States should subsidize the implementation of machinery that would fill the jobs that normally ''attract'' migrants (*e.g.,* agricultural work); that migrant children are being forced into child labor; that the U.S. birthrate is low and we need more workers to maintain Social Security and Medicare; that the United States is selling land to China, and India is buying oil from Russia; that the United States should systematically fund research that evaluates the racial disparities that exist in the efficiency with which Ukrainian humanitarian parole applications have been reviewed and evaluated versus those of Afghan applicants; that American taxpayers are suffering the effects of the border crisis, particularly in schools; that the United States should expand legal immigration; that asylum seekers will receive in absentia removal orders due to difficulties in contacting asylum seekers for court hearings; that they objected to the number of noncitizens present in the United States without lawful status.

Response: Such comments address matters well beyond the scope of the proposed rule and do not require further response.

Comment: Several commenters made statements related to CBP custody conditions, noting for instance that they are overcrowded, lack adequate access to hygiene, lack adequate space so that families are separated by gender, are cold, lack adequate bedding, have lights on at night, and do not have adequate showers. At least one commentor noted that CBP facilities should have more child friendly reception areas.

Response: The Department acknowledges the commenters' concerns. However, this rule does not have any impact on whether or how individuals are in custody or detained, and these comments are outside the scope of the rulemaking.

V. Request for Comments on Proposed Extension of Applicability to All Maritime Arrivals

In addition to the changes made in this final rule described in Section IV.B.8.i of this preamble, the Departments are considering and request comment on whether to apply the rebuttable presumption to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at a maritime border,[333] whether or not they traveled through a third country. Such a modification would expand the scope of the rule's rebuttable presumption in two ways: both geographically (covering all entries by sea, not just those entering the United States from Mexico at coastal borders adjacent to the SWB) and with regard to the class of persons potentially subject to the rebuttable presumption (by covering persons who enter the United States by sea even if they did not travel through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees). In addition, the Departments are also considering and request comment on whether to expand the scope of the rule's rebuttable presumption geographically to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at any maritime border, while continuing to limit the presumption's applicability to those who traveled through another country before reaching the United States. Finally, the Departments are considering and request comment on whether to expand the scope of the presumption to noncitizens who enter the United States by sea, but to limit the scope of that expansion to noncitizens who departed from the Caribbean or other regions that present a heightened risk of maritime crossings.

The Departments are considering extending the rule's rebuttable presumption to maritime arrivals to encourage any migrants intending to reach the United States by sea to instead avail themselves of lawful, safe, and orderly pathways into the United States,

[333] The STCA and Additional Protocol controls and applies as to individuals who cross the U.S.-Canada land border between POEs, including certain bodies of water along or across the U.S.-Canada land border, as described in 88 FR 18227, 18234. The Departments' use of ''at a maritime border'' includes individuals who enter the United States by sea, as in the Atlantic and Pacific coasts of the United States.

or otherwise to seek asylum or other protection in another country. As discussed in more detail below, DHS has recently experienced high levels of maritime interdictions, primarily of Cuban and Haitian nationals in the Caribbean, and is concerned that rates of attempted entries to the United States by sea may soon increase to levels that would greatly stress DHS's available resources and may lead to devastating loss of life and other consequences. The Departments expect that extending the strategy of coupling an expansion of lawful, safe, and orderly pathways into the United States with this rule's consequence for noncitizens who do not avail themselves of one of those options would lead to a reduction in the numbers of migrants who would otherwise undertake a dangerous sea journey to the United States.

A. Maritime Migration Continues To Increase, With Devastating Consequences for Migrants

Total migrants interdicted at sea by the U.S. Coast Guard (''USCG'') increased by 502 percent between FY 2020 (2,079) and FY 2022 (12,521).[334] Interdictions continued to rise in FY 2023 with 8,822 migrants interdicted at sea through March, almost 70 percent of the total in FY 2022 within six months.[335] Interdictions occurred primarily in the South Florida Straits and the Caribbean Sea.[336]

Individuals departing from Cuba and Haiti make up the vast majority of maritime interdictions. Maritime migration from Cuba increased by nearly 600 percent in FY 2022, with 5,740 Cuban nationals interdicted at sea, compared to 827 in FY 2021.[337] Similarly, maritime migration from Haiti more than tripled in FY 2022, with 4,025 Haitian nationals interdicted at sea, compared to 1,205 in FY 2021 and 398 in FY 2020.[338] In the first six months of FY 2023, Cuban interdictions were nearly equal to the Cuban FY 2022 total, comprising 62 percent of all FY 2023 interdictions at sea; Haitian interdictions were over 60 percent of the Haitian FY 2022 total, comprising around 30 percent of all FY 2023 interdictions at sea.[339]

Meanwhile, USBP apprehensions of noncitizens who made landfall in southeast coastal sectors have also been increasing rapidly.[340] There were 5,978 such apprehensions in FY 2022, nearly triple the number of apprehensions in FY 2021 (2,045). And in FY 2023 to date, there have already been 6,364 USBP apprehensions of noncitizens who made landfall in southeast coastal sectors, more than the total for all of FY 2022.[341] Cuban and Haitian nationals made up 76 percent of these apprehensions in FY 2022 and 84 percent of apprehensions so far in FY 2023.

Several large group interdictions of Cubans and Haitians have caused challenges for the USCG in recent months. On January 22, 2023, the USCG interdicted a sail freighter suspected of illegally transporting migrants with nearly 400 Haitians aboard, necessitating repatriations of eligible individuals back to the Bahamas.[342] Days later, on January 25, the USCG interdicted and repatriated another 309 Haitians to Haiti.[343] USCG interdicted yet another large group of Haitians on February 15, resulting in the repatriation of all 311 Haitian migrants in that group,[344] and another group of 206 Haitians were repatriated on March 2 following two successive, separate interdictions on February 22 and 28.[345] On January 12, 2023, USCG repatriated 177 Cubans from 7 separate interdictions.[346] USCG repatriated an additional 67 Cubans between February 23–24 following prior interdictions.[347]

Interdictions in the maritime environment can pose unique hazards to life and safety. On March 23, 2023, Rear Admiral Jo-Ann Burdian, Assistant Commandant for Response Policy, testified before a Congressional panel, stating: ''Over the last year and a half, the Coast Guard observed an increase in irregular maritime migration, above historical norms, across our southern maritime border. This is a difficult mission for our crews. . . . For example, patrolling the waters of the South Florida Straits can be compared to patrolling a land area the size of Maryland with seven police cars limited to traveling at 15 miles per hour. It requires exceptional tactical coordination between aircraft, ships, boats, and supporting partners ashore.'' [348] Rear Admiral Burdian further stated that it is not uncommon for migrants encountered at sea to be non-compliant, threatening their own lives and those of other migrants on board to deter a Coast Guard rescue.[349] Additional challenges of maritime migration operations include ensuring adequate sanitation, security, and providing for food, medical, and shelter needs of migrants.[350]

Interdicting Haitian sail freighters poses unique challenges to DHS crews and migrants. *See* 88 FR at 26328. These types of vessels are often overloaded with more than 150 migrants onboard, including small children. *Id.* Because these vessels do not have sufficient safety equipment, including life jackets, emergency locator beacons, or life rafts in the event of an emergency, there is a great risk to human life if these vessels overturn or sink because such an overturning or sinking would create a situation where there could be hundreds of noncitizens in the water, many of whom may not know how to swim. *Id.* Often, noncitizens interdicted on these vessels have been at sea for several days, are dehydrated, need medical attention, or are otherwise experiencing elevated levels of stress. *Id.* These factors increase the risk to DHS personnel who rescue these migrants from these vessels because the number of migrants outnumber DHS crews. *Id.* DHS encounters with sail freighters are not uncommon, and because of sail freighter capacity to carry several hundred migrants, they can exceed the holding capacity of USCG cutters patrolling

[334] OIS analysis of USCG data through March 31, 2023.

[335] *Id.*

[336] Testimony of Jonathan Miller, ''Securing America's Maritime Border: Challenges and Solutions for U.S. National Security'' at 4 (Mar. 23, 2023), *https://homeland.house.gov/media/2023/03/3.23.23-TMS-Testimony.pdf.*

[337] OIS analysis of USCG data through March 31, 2023.

[338] *Id.*

[339] *Id.*

[340] Includes Miami, Florida; New Orleans, Louisiana; and Ramey, Puerto Rico sectors.

[341] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

[342] David Goodhue and Jacqueline Charles, *Coast Guard stops boat with 400 Haitians off the Bahamas and likely headed to Florida,* Miami Herald, Jan. 23, 2023, *https://www.miamiherald.com/news/nation-world/world/americas/haiti/article271514157.html.*

[343] USCG, *Coast Guard Repatriates 309 People to Haiti* (Jan. 31, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3281802/coast-guard-repatriates-309-people-to-haiti.*

[344] USCG, *Coast Guard Repatriates 311 People to Haiti (*February 20, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3302743/coast-guard-repatriates-311-people-to-haiti/.*

[345] USCG, *Coast Guard Repatriates 206 People to Haiti* (March 2, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3314530/coast-guard-repatriates-206-people-to-haiti/.*

[346] USCG, *Coast Guard Repatriates 177 People to Cuba* (Jan. 12, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3265898/coast-guard-repatriates-177-people-to-cuba/.*

[347] USCG, *Coast Guard Repatriates 29 People to Cuba* (Feb. 23, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3306722/coast-guard-repatriates-29-people-to-cuba/;* USCG, *Coast Guard Repatriates 38 People to Cuba* (Feb. 24, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3306850/coast-guard-repatriates-38-people-to-cuba/.*

[348] Testimony of Rear Admiral Jo-Ann F. Burdian, Assistant Commandant for Response Policy, ''Securing America's Maritime Border: Challenges and Solutions for U.S. National Security'' (Mar. 23, 2023), *https://homeland.house.gov/media/2023/03/2023-03-23-TMS-Testimony.pdf.*

[349] *Id.*

[350] *Id.*

southeastern maritime smuggling vectors, increasing the risk not only to the migrants, but to cutter crews as well. *Id.* While maritime interdictions declined somewhat in February 2023, DHS assesses that the weather played a significant role in this reduced maritime movement in the Caribbean. *Id.* Through much of February, weather conditions were unfavorable for maritime ventures, particularly on smaller vessels. *Id.* However, DHS assesses that this was only temporary. Increasing levels of maritime interdictions put lives at risk and stress DHS's resources, and the increase in migrants taking to sea, under dangerous conditions, has led to devastating consequences.

Human smugglers and irregular migrant populations continue to use unseaworthy, overly crowded vessels, piloted by inexperienced mariners, without any safety equipment—including, but not limited to, personal flotation devices, radios, maritime global positioning systems, or vessel locator beacons. In FY 2022, the USCG recorded 107 noncitizen deaths, including those presumed dead, as a result of irregular maritime migration. In January 2022, the USCG located a capsized vessel with a survivor clinging to the hull.[351] USCG crews interviewed the survivor, who indicated there were 34 others on the vessel who were not in the vicinity of the capsized vessel and the survivor.[352] The USCG conducted a multi-day air and surface search for the missing migrants, eventually recovering five deceased migrants, while the others were presumed lost at sea.[353] In November 2022, USCG and CBP rescued over 180 people from an overloaded boat that became disabled off of the Florida Keys.[354] They pulled 18 Haitian migrants out of the sea after they became trapped in ocean currents while trying to swim to shore.[355]

IOM's Missing Migrants Project reported at least 321 documented deaths and disappearances of migrants throughout the Caribbean in 2022, signaling the highest recorded number since they began tracking such events in 2014.[356] Most of those who perished or went missing in the Caribbean were from Haiti and Cuba.[357] This data represents a tragic 78 percent overall increase over the 180 deaths in the Caribbean documented in 2021, underscoring the perils of the journey.[358]

B. A Further Increase in Maritime Migration is Reasonably Foreseeable

The Departments assess that maritime migration is likely to increase absent policy changes such as those being considered. For instance, Haiti continues to experience security and humanitarian crises caused by rampant gang violence, food and fuel shortages, a resurgence of cholera, and an August 2021 earthquake that killed 2,000 people.[359] And Cuba is undergoing its worst economic crisis since the 1990s[360] due to the lingering impact of the COVID–19 pandemic, reduced foreign aid from Venezuela because of that country's own economic crisis, high food prices, and U.S. economic sanctions.[361] These crises will likely continue to fuel irregular maritime migration.

Although the establishment of the CHNV parole processes has significantly reduced SWB encounters with Cuban and Haitian nationals as described above in Section II.A, maritime interdictions of Cuban and Haitian nationals in the Caribbean have increased in recent years and persist at high levels, as just described. Unlike noncitizens encountered at the SWB, noncitizens who reach the United States directly by sea without traveling from Mexico or Canada have not been subject to the CDC's Title 42 public health Order.[362] Instead, they are (and will continue to be) processed under Title 8, which as described above may entail years spent in the United States before a final order of removal is issued. DHS recently announced that in response to the increase in maritime migration and interdictions, and to disincentivize migrants from attempting the dangerous journey to the United States by sea, individuals who have been interdicted at sea after April 27, 2023, are ineligible for the parole processes for Cubans and Haitians. 88 FR 26327; 88 FR 26329. The Departments expect that this step will help but that, in light of the complicated mix of factors driving maritime migration, more is needed to discourage maritime migration and encourage the use of safe, lawful, orderly processes.

C. Effects on Resources and Operations

USCG and its partners have surged assets to address the recent increase in maritime migration, but the increased flow of migrants overall led to a lower interdiction effectiveness rate (that is, the percentage of detected undocumented migrants of all nationalities who were interdicted by USCG and partners via maritime routes).[363] Between FY 2018 and FY 2020, USCG approached or exceeded its 75 percent effectiveness target.[364] In FY 2021 and FY 2022, effectiveness dropped to 47.2 percent and 56.6 percent, respectively, despite a surge response that resulted in 17 percent more interdictions in FY 2022 than in FY 2021.[365] That is, even though the USCG interdicted more migrants overall, those interdictions were a smaller percentage of total detected migrants on maritime routes than the USCG had interdicted between FY 2018 and 2019. A further surge in maritime migration risks further decreasing effectiveness (and thereby reducing deterrence of dangerous journeys by sea) and, as described below, would exacerbate USCG's overall capacity challenges and increase the risk to other key mission areas, such as counter-drug operations.

The United States Government's response to maritime migration in the Caribbean region is governed by executive orders, presidential directives, and resulting framework and plans that outline interagency roles and responsibilities. Homeland Security Task Force–Southeast (''HSTF–SE'') is primarily responsible for DHS's response to maritime migration in the Caribbean Sea and the Straits of Florida. Operation Vigilant Sentry is the DHS interagency operational plan for responding to maritime migration in the Caribbean Sea and the Straits of

[351] Adriana Gomez Licon, Situation 'dire' as Coast Guard seeks 38 missing off Florida, Associated Press, Jan. 26, 2022, *https://apnews.com/article/florida-capsized-boat-live-updates-f251d7d279b6c1fe064304740c3a3019.*

[352] *Id.*

[353] Adriana Gomez Licon, Coast Guard suspends search for migrants off Florida, Associated Press, Jan. 27, 2022, *https://apnews.com/article/florida-lost-at-sea-79253e1c65cf5708f19a97b6875ae239.*

[354] Ashley Cox, More than 180 people rescued from overloaded vessel in Florida Keys, CBS News CW44 Tampa, Nov. 22, 2022, *https://www.cbsnews.com/tampa/news/more-than-180-people-rescued-from-overloaded-vessel-in-florida-keys/.*

[355] *Id.*

[356] IOM, Missing Migrants in the Caribbean Reached a Record High in 2022 (Jan. 24, 2023), *https://www.iom.int/news/missing-migrants-caribbean-reached-record-high-2022.*

[357] *Id.*

[358] *Id.*

[359] *See, e.g.,* CRS, Haiti: Recent Developments and U.S. Policy, R47394 (Jan. 23, 2023), *https://crsreports.congress.gov/product/pdf/R/R47394.*

[360] The Economist, Cuba is Facing Its Worst Shortage of Food Since 1990s (July 1, 2021), *https://www.economist.com/the-americas/2021/07/01/cuba-is-facing-its-worst-shortage-of-food-since-the-1990s.*

[361] CRS, Cuba: U.S. Policy in the 117th Congress (Sept. 22, 2022), *https://crsreports.congress.gov/product/pdf/R/R47246.*

[362] *See* 86 FR at 42841 (Order applies only to certain persons ''traveling from Canada or Mexico'').

[363] DHS, U.S. Coast Guard Budge Overview, Fiscal Year 2024 Congressional Justification, at USCG–3.

[364] *Id.*

[365] *Id.*

Florida.[366] The primary objectives of HSTF–SE are to protect the safety and security of the United States, deter and dissuade noncitizens from attempting the dangerous journey to the United States by sea, achieve U.S. humanitarian objectives, maintain the integrity of the U.S. immigration system, and prevent loss of life at sea through mobilizing DHS resources, reinforced by other Federal, State, and local assets and capabilities.

The USCG supports HSTF–SE and views its migrant interdiction mission as a humanitarian effort to rescue those taking to the sea and to encourage noncitizens to pursue lawful pathways to enter the United States. By allocating additional assets to migrant interdiction operations and to prevent conditions that could lead to maritime mass migration, the USCG assumes certain operational risk to other statutory missions. Some USCG assets were diverted from other key mission areas, including counter-drug operations, protection of living marine resources, and support for shipping navigation. *See* 88 FR at 26329. A reduction in maritime migration would reduce the operational risk to USCG's other statutory missions.

Maritime encounters also strain other DHS resources. For instance, during times of increased encounters in the maritime environment, the U.S. Border Patrol executes lateral decompression flights for processing. Once the Title 42 public health Order is lifted, based on DHS encounter projections and throughput models, southwest border sectors will likely lose the ability to accept decompression flights from coastal border sectors. This in turn would result in overcrowding in coastal border sectors' short-term holding facilities and impact local communities not prepared to receive migrants.

D. Lawful, Safe, and Orderly Pathways

As discussed in detail earlier in this preamble, the United States has taken significant steps to expand safe and orderly options for migrants, including migrants from the Caribbean region, to lawfully enter the United States. The United States has, for example, increased and will continue to increase refugee processing in the Western Hemisphere; country-specific and other available processes for individuals seeking parole for urgent humanitarian reasons or significant public benefit, including the Cuba, Haiti, Nicaragua, and Venezuela parole processes; and opportunities to lawfully enter the United States for the purpose of seasonal employment. In addition, the United States has resumed the Cuban Family Reunification Program and resumed and increased participation in the Haitian Family Reunification Program.

The Departments are also aware that many individuals migrating out of island nations, such as Cuba and Haiti, do so via air travel.[367] For many individuals, travel by air to a third country may be an additional option for obtaining asylum or other protection. The Departments acknowledge, however, that there may be individuals for whom air travel is not an option. The Departments welcome data, other information, or comments on access to air travel and whether any aspect of this rule's presumption should be adjusted to account for differences among individuals in access to air travel.

E. Alternatives Under Consideration

The Departments are considering whether the rebuttable presumption should apply to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at any maritime border, whether or not they traveled through a third country. Under this approach, the presumption would apply to any covered noncitizen who reached the United States by sea, including Cuban or Haitian nationals traveling directly to the United States from Cuba or Haiti. The Departments acknowledge, however, that eliminating the third-country travel component for those arriving by sea would be a departure from the rest of the rule. The Departments are therefore considering whether this departure may be independently justified. The Departments believe that this additional measure could be warranted in light of the extreme hazard to both migrants and DHS personnel associated with maritime migration; the deterrence it would afford migrants who might undertake this dangerous journey to enter the United States irregularly and thus supplement interdiction efforts; the availability of lawful, safe, and orderly pathways for the primary populations at issue; and the safeguards incorporated into the rule. Applying the rule's rebuttable presumption of asylum ineligibility to persons who reach the United States by sea would not impose a categorical bar to asylum. To the contrary, the rule would still exempt noncitizens from the presumption if, instead of making a dangerous journey by sea, they arrived at the United States through a lawful pathway. It would also exempt certain noncitizens who arrive by sea, including unaccompanied children, and provide multiple ways for noncitizens to rebut the presumption, including in circumstances where—at the time the noncitizen entered the United States—the noncitizen or a member of their family with whom they were traveling faced an imminent and extreme threat to life or safety. The Departments request comment on how the various means of rebutting the presumption—including facing an "acute medical emergency," "imminent and extreme threat to life and safety," and "especially compelling circumstances"—should apply to noncitizens who reach the United States by sea. *See* 8 CFR 208.33(a)(3)(i); 8 CFR 1208.33(a)(3)(i).

The Departments are also considering whether to extend the geographic scope of the rule to certain noncitizens who enter the United States by sea, without regard to whether they departed from Mexico, while retaining the requirement that a noncitizen have traveled through another country on their way to the United States. This narrower application of the rule would limit covered noncitizens to those who, by and large, could have sought asylum or other protection in that other country. However, this alternative would mean that Cuban and Haitian nationals who reach the United States by sea directly from their country of origin would not fall within the rule's compass.

As another alternative, the Departments are considering whether to extend the scope of the presumption to certain noncitizens who enter the

[366] Homeland Security Task Force–Southeast, published through the U.S. Embassy in Cuba, *Homeland Security Task Force Southeast partners increase illegal migration enforcement patrols in Florida Straits, Caribbean* (Sept. 6, 2022), *https://cu.usembassy.gov/homeland-security-task-force-southeast-partners-increase-illegal-migration-enforcement-patrols-in-florida-straits-caribbean/.*

[367] *See, e.g.,* Reuters, *Nicaragua eliminates visa requirement for Cubans,* Nov. 23, 2021, *https://www.reuters.com/world/americas/nicaragua-eliminates-visa-requirement-cubans-2021-11-23/;* Ed Augustin, *Stars align for Cuban migrants as record numbers seek better life in US,* Guardian, June 12, 2022, *https://www.theguardian.com/world/2022/jun/12/cuban-migrants-us-record-numbers-migration* ("The U.S. Coast Guard has intercepted nearly 2,000 Cubans since October [2021]. But far more are flying to the Latin American mainland before journeying up to the U.S.-Mexico border: 114,000 have crossed into the U.S. since October [2021], according to U.S. Customs and Border Protection—1% of the island's entire population."); Julie Watson et al., *Charter business thrives as US-expelled Haitians flee Haiti,* AP, June 14, 2022, *https://apnews.com/article/covid-health-travel-caribbean-2e5f32f8781a06e74ef7ea7ec639785f;* Julie Watson et al., *Haitian trip to Texas border often starts in South America,* AP, Sept. 21, 2021, *https://apnews.com/article/technology-mexico-texas-caribbean-united-states-ac7f598bafd44b3f95b786d2d800f3ce* ("Nearly all Haitians reach the U.S. on a well-worn route: Fly to Brazil, Chile or elsewhere in South America [then] move through Central America and Mexico.").

United States by sea, but only if they departed from the Caribbean or another region that presents a heightened risk of maritime crossings. This alternative may be more tailored to the specific geographic regions that have caused the increase in maritime interdictions in recent months, but it would not expand the rule to other regions that could be a source of maritime crossings in the future.

Finally, if rates of maritime migration rise substantially prior to the end of this comment period or prior to the issuance of a final rule that responds to these comments, the Departments intend to take appropriate action, consistent with the APA, which may include issuance of a temporary or interim final rule that implements one of the proposed modifications.

VI. Regulatory Requirements

A. Administrative Procedure Act

This final rule is consistent with the notice-and-comment rulemaking requirements described at 5 U.S.C. 553(b) and (c). For the reasons explained below, the Departments have determined that this rule is exempt from the 30-day delayed-effective-date requirement at 5 U.S.C. 553(d).

1. Foreign Affairs Exemption

This rule is exempt from the APA's delayed-effective-date requirement because it involves a ''foreign affairs function of the United States.'' [368] 5 U.S.C. 553(a)(1). Courts have held that this exemption applies when the rule in question ''is clearly and directly involved in a foreign affairs function.'' [369] In addition, although the text of the APA does not require an agency invoking this exemption to show that such procedures may result in ''definitely undesirable international consequences,'' some courts have required such a showing.[370] This rule satisfies both standards.

The United States must work with foreign partners to address migration in the Western Hemisphere region, and this rule is clearly and directly related to, and responsive to, ongoing discussions with and requests by key foreign partners in the Western Hemisphere region in two ways. First, such partners have encouraged the United States to take action to address unlawful migration to the SWB, which is particularly necessary now in light of the anticipated lifting of the Title 42 public health Order.[371] And by responding to these requests, the rule facilitates a key foreign policy goal—fostering a hemisphere-wide approach of addressing migration on a regionwide basis. Though the specific details of these discussions are not appropriate for extensive elaboration here due to the sensitive nature of government-to-government discussions, such partners have expressed concern that the lifting of the Title 42 public health Order—which provided an immediate consequence for many of those attempting to cross the SWB irregularly—may be misperceived by migrants as an indication that the U.S. border is open, which, in turn, could spur a surge of irregular migrant flows through their countries as migrants seek to enter the United States. One foreign partner opined that the formation of caravans in the spring of 2022 were spurred by rumors of the United States Government terminating the Title 42 public health Order and then the officially announced plans to do so. Such increases in irregular migration would further strain limited governmental and nongovernmental resources in partner nations. Already, partner nations have expressed significant concerns about the ways in which recent flows are challenging their own local communities and immigration infrastructure; they have expressed serious concerns that a dramatic increase in migrant flows could be overwhelming.

Some partner countries also have emphasized the possibility that criminal human smuggling organizations may seek to intentionally misrepresent the end of the Title 42 public health Order as leading to the opening of the U.S.-Mexico border in order to persuade would-be migrants to participate in expensive and dangerous human smuggling schemes. Such activity would put migrants' lives in danger and also contribute to the above-referenced adverse consequences associated with increased irregular migratory flows.

In connection with such discussions, a number of countries have lauded the sharp reductions in irregular migration associated with the aforementioned CHNV processes—which, like this rule, imposed consequences for irregular migration alongside the availability of a lawful, safe, and orderly process for migrants to travel directly to the United States. Following the implementation of the Venezuela process in October 2022, some countries requested that the United States implement similar policies for other nationalities, which DHS did in January 2023. At the same time, however, partner nations have raised concerns that any changes to these processes or the circumstances in which they operate—including the perception that there will be no consequences for irregular entry once the Title 42 public health Order is no longer in place—will undermine their success.[372]

Implementation of this rule will therefore advance top foreign policy priorities of the United States, by responding to the aforementioned discussions with and feedback from foreign partners and demonstrating U.S. partnership and commitment to the shared goals of stabilizing migratory populations and addressing migration collectively as a region, both of which are essential to maintaining strong bilateral and multilateral relationships.[373] As noted earlier in this preamble and in the proposed rule, recent surges in irregular migration, including overland migration through the Darién Gap, have affected a range of regional neighbors, including Mexico, Colombia, Costa Rica, Peru, Ecuador, and Panama. *See, e.g.,* 88 FR 11710–11. A further spike in migration following the lifting of the Title 42 public health Order risks severely straining relations with the countries in the region, as each would be compelled to turn away from more sustainable policy goals, and employ its limited resources to address the humanitarian needs of a significant influx of irregular migrants.

Further, as described above, the United States faces constraints in removing nationals of certain countries—including Venezuela, Nicaragua, Cuba, and Haiti—to their home countries. With limited exceptions, such nationals can only be removed to a third country as a result. International partners have conveyed that their willingness to receive increased returns of migrants was contingent on expanding the model provided by the Venezuela process, which decreased irregular migration throughout the hemisphere by

[368] Although the Departments have voluntarily complied with the APA's notice and comment requirements, this rule is exempt from such requirements pursuant to the foreign affairs exception as well, for the same reasons that are described in this section.

[369] *See, e.g., Mast Indus.* v. *Regan,* 596 F. Supp. 1567, 1582 (C.I.T. 1984) (cleaned up).

[370] *See, e.g., Rajah* v. *Mukasey,* 544 F.3d 427, 437 (2d Cir. 2008).

[371] *See, e.g., Am. Ass'n of Exps. & Imps.* v. *United States,* 751 F.2d 1239, 1249 (Fed. Cir. 1985) (exemption applies where a rule is ''linked intimately with the Government's overall political agenda concerning relations with another country'').

[372] *See, e.g.,* Alfredo Corchado, *Ahead of Title 42's end, U.S.-Mexico Negotiations called 'intense,' 'round-the-clock,'* Dallas Morning News, Dec. 13, 2022, *https://www.dallasnews.com/news/2022/12/13/ahead-of-title-42s-end-us-mexico-negotations-called-intense-round-the-clock/.*

[373] *See* L.A. Declaration Fact Sheet.

increasing options for lawful pathways and adding consequences for noncitizens who bypass those opportunities to travel irregularly to the United States.[374]

In short, delaying issuance and implementation of this rule, including for purposes of incorporating a 30-day delayed effective date, would be inconsistent with the foreign policy imperative to act now. Such delay would not only forfeit an opportunity to fortify bilateral relationships, but would fail to address, and potentially exacerbate, DHS's projections of a surge in migration across the region following the lifting of the Title 42 public health Order. From a U.S. foreign policy perspective, such outcomes would have undesirable international consequences.

The Departments' invocation of the foreign affairs exemption here is consistent with recent precedent. For example, in 2017, DHS published a notice eliminating an exception to expedited removal for certain Cuban nationals, which explained that the change in policy was consistent with the foreign affairs exemption because the change was central to ongoing negotiations between the two countries.[375] DHS similarly invoked the foreign affairs exemption more recently, in connection with the CHNV parole processes.[376]

2. Good Cause

This rule is also exempt from the APA's delayed-effective-date requirement because the Departments have for good cause found that a delay associated with that requirement would be impracticable and contrary to the public interest.[377] The Title 42 public health Order is ending due to developments over which the Departments do not exercise any direct control. It would be impossible to incorporate a 30-day delayed effective date and issue a rule prior to the expiration of the Title 42 public health Order in that abbreviated time frame. As described above, such a delay would greatly exacerbate an urgent border and national security challenge that DHS has already taken multiple additional measures to address, and would miss a critical opportunity to reduce and divert the additional flow of irregular migration that is expected following lifting of the Title 42 public health Order.[378]

First, a 30-day delay of the effective date would be impracticable and contrary to the public interest because it would likely result in a significant further increase in irregular migration. As noted above, in recent years, the Departments, in coordination with other Executive Branch agencies and regional neighbors, have undertaken numerous measures to address such increases, which have been implemented via rulemakings,[379] voluntary processes paired with incentives against irregular migration,[380] and a wide range of significant resource surges and operational changes. A significant further increase in irregular migration, exacerbated by an influx of migrants from countries such as Venezuela, Nicaragua, and Cuba, with limited removal options, and coupled with DHS's limited options for processing, detaining, or quickly removing such migrants, would unduly impede DHS's ability to fulfill its critical and varied missions.

Such challenges were evident in the days following the November 15, 2022, court decision vacating the Title 42 public health Order.[381] Within two days of the court's decision, total encounters at the SWB reached 9,583 in a single day on November 17, 2022, a 17 percent increase from the day before.[382] The baseline number of encounters decreased in March 2023, from April 2022, and also consisted of a much lower share of nationals from countries that have stopped or limited returns of their own nationals.[383] A delayed effective date could result in a substantial increase in irregular migration across multiple national borders, including our own.[384] As detailed above, these levels of irregular migration risk overwhelming DHS's ability to effectively process, detain, and remove, as appropriate, the migrants encountered. This, in turn, would result in potentially dangerous overcrowding at CBP facilities. The attendant risks to public safety, health, and welfare provide good cause to issue this rule without delay.[385]

The Departments expect that this effect would be particularly pronounced if noncitizens know that there is a specific 30-day period between the termination of the Title 42 public health Order and the effective date of this rule. That gap would incentivize even more irregular migration by those seeking to enter the United States before the process would take effect. It has long been recognized that agencies may use the good cause exception where significant public harm would result from using standard APA procedures.[386]

[374] *See* The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023) (committing to increase joint actions to counter human smugglers and traffickers, address root causes of migration, and continue to combine expanded lawful pathways with consequences for irregular migration).

[375] *See* DHS, Eliminating Exception To Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 FR 4902 (Jan. 17, 2017).

[376] *See* 88 FR 1266 (Jan. 9, 2023); 88 FR 1243 (Jan. 9, 2023); 88 FR 1255 (Jan. 9, 2023); DHS, Implementation of Changes to the Parole Process for Venezuelans, 188 FR 1282 (Jan. 9, 2023); 87 FR 63507 (Oct. 19, 2022).

[377] 5 U.S.C. 553(d)(3). Although the Departments have voluntarily complied with the APA's notice and comment requirements, this rule is exempt from such requirements pursuant to the good cause exception at 5 U.S.C. 553(b)(B) as well, for reasons that are described in this section.

[378] The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for forgoing notice and comment rulemaking. *See Riverbend Farms, Inc.* v. *Madigan,* 958 F.2d 1479, 1485 (9th Cir. 1992) (noting "good cause [is] more easily found as to [the] 30-day waiting period" than the exception to notice and comment procedures)); *Am. Fed'n of Gov't Emps., AFL–CIO* v. *Block,* 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp.* v. *EPA,* 605 F.2d 283, 289–90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates either urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.,* 605 F.2d at 290; *United States* v. *Gavrilovic,* 511 F.2d 1099, 1104 (8th Cir. 1977).

[379] *See, e.g.,* 87 FR 18078 (Mar. 29, 2022) (amending regulations to allow U.S. immigration officials to more promptly consider the asylum claims of individuals encountered at or near the SWB while ensuring the fundamental fairness of the asylum process); 87 FR 30334 (May 18, 2022) (authorizing an additional 35,000 supplemental H–2B visas for the second half of FY 2022, of which 11,500 were reserved for nationals of Central American countries and Haiti); 87 FR 4722 (Jan. 28, 2022) (authorizing an additional 20,000 H–2B visas for FY 2022, of which 6,500 were reserved for nationals of Central American countries, with the addition of Haiti); 87 FR 76818 (Dec. 15, 2022) (authorizing nearly 65,000 additional visas, of which 20,000 are reserved for nationals of Central American countries and Haiti).

[380] *See, e.g.,* DHS, Implementation of a Parole Process for Venezuelans, 87 FR 63507 (Oct. 19, 2022) (parole process for certain Venezuelan nationals and their immediate family members); DHS, Implementation of the Uniting for Ukraine Parole Process, 87 FR 25040 (Apr. 27, 2022) (parole process for certain Ukrainian nationals and their immediate family members).

[381] *See Huisha-Huisha* v. *Mayorkas,* --- F. Supp. 3d ----, 2022 WL 16948610 (D.D.C. Nov. 15, 2022).

[382] OIS analysis of Persist Dataset based on data through March 31, 2023.

[383] *Id.*

[384] DHS SWB Encounter Planning Model generated April 18, 2023.

[385] *See, e.g., Hawaii Helicopter Operators Ass'n* v. *FAA,* 51 F.3d 212, 214 (9th Cir. 1995) (concluding agency's "concern about the threat to public safety" justified notice and comment waiver).

[386] *See, e.g., Mack Trucks, Inc.* v. *EPA,* 682 F.3d 87, 94–95 (D.C. Cir. 2012) (noting that the "good cause" exception "is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal—if, for example, announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent [or] in order to prevent the amended rule from being evaded" (cleaned up)); *DeRieux* v. *Five Smiths, Inc.,* 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1975) ("[W]e are satisfied that there was in fact 'good cause' to find that advance notice of the freeze was 'impracticable, unnecessary, or contrary to the

Continued

If, for example, advance notice of a coming price increase would immediately produce market dislocations and lead to serious shortages, advance notice (and comment) need not be given.[387] A number of cases follow this logic in the context of economic regulation.[388]

The same logic applies here, where the Departments are responding to exceedingly serious challenges at the border, and a gap between the termination of the Title 42 public health Order and the implementation of this rule would significantly increase the incentive, on the part of migrants and others (such as smugglers), to engage in actions that would compound those very challenges. The Departments' experience has been that in some circumstances when public announcements have been made regarding changes in our immigration laws and procedures that would restrict access to immigration benefits to those attempting to enter the United States along the U.S.-Mexico land border, there have been dramatic increases in the numbers of noncitizens who enter or attempt to enter the United States. Smugglers routinely prey on migrants using perceived changes in domestic immigration law.[389] And those sudden influxes overload scarce government resources dedicated to border security.[390]

For instance, on February 28, 2020, the Ninth Circuit lifted a stay of a nationwide injunction of MPP, a program implementing the Secretary's contiguous return authority under 8 U.S.C. 1225(b)(2)(C).[391] Almost immediately, hundreds of migrants began massing at POEs across the SWB attempting to immediately enter the United States, creating a severe safety hazard that forced CBP to temporarily close POEs in whole or in part.[392] Many others requested immediate entry into the country through their counsel, while others overwhelmed Border Patrol agents by attempting to illegally cross the SWB, with only some being apprehended successfully.[393] Absent the immediate and resource-intensive action taken by CBP, the number of migrants gathered at the border, whether at or between the POEs, could have increased dramatically, especially considering there were approximately 25,000 noncitizens who were in removal proceedings pursuant to MPP without scheduled court appearances, as well as others in Mexico that could have become aware of CBP's operational limitations and sought to exploit them.[394] And while CBP officers took action to resolve the sudden influx of migrants at multiple ports and prevent further deterioration of the situation at the border, they were diverted away from other critical missions, including detecting and confiscating illicit materials, and guarding efficient trade and travel.[395]

By contrast, as detailed above, immediate implementation of the parole process for Venezuelans was associated with a drastic reduction in irregular migration by Venezuelans. Had the parole process, and the consequence that accompanied it (*i.e.,* the return to Mexico of Venezuelan nationals encountered irregularly entering the United States without authorization between POEs) been announced weeks prior to its implementation, it likely would have had the opposite effect, resulting in many hundreds and thousands of Venezuelan nationals attempting to cross the border between the POEs before the process went into effect. *See* 87 FR at 63516.

The Departments' determination here is consistent with past practice. For example, in addition to the parole process for Venezuelans described above, DHS concluded in January 2017 that it was imperative to give immediate effect to a rule designating Cuban nationals arriving by air as eligible for expedited removal because ''[p]re-promulgation notice and comment would . . . endanger[ ] human life and hav[e] a potential destabilizing effect in the region.'' [396] DHS cited the prospect that ''publication of the rule as a proposed rule, which would signal a significant change in policy while permitting continuation of the exception for Cuban nationals, could lead to a surge in migration of Cuban nationals seeking to travel to and enter the United States during the period between the publication of a proposed and a final rule.'' [397] DHS found that ''[s]uch a surge would threaten national security and public safety by diverting valuable Government resources from counterterrorism and homeland security responsibilities. A surge could also have a destabilizing effect on the region, thus weakening the security of the United States and threatening its international relations.'' [398] DHS concluded that ''a surge could result in significant loss of human life.'' [399] Here, the Departments announced the proposed rule while a prior restrictive policy remained in place, but given the impending termination of the Title 42 public health Order, there is insufficient time for a delayed effective date.

Second, a delayed effective date is contrary to the public interest given that the anticipated termination of the Title 42 public health Order has drastically altered the framework governing processing of migrants. Courts find good cause satisfied where the immediate issuance of a rule is necessary to prevent public harm where a previously existing regulatory structure has been set aside by the courts.[400] A similar

public interest' within the meaning of § 553(b)(B). . . . Had advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct 'actual transactions'—or avoid them—before the freeze deadline.'' (cleaned up)).

[387] *See, e.g., Nader* v. *Sawhill,* 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975) (''[W]e think good cause was present in this case based upon [the agency's] concern that the announcement of a price increase at a future date could have resulted in producers withholding crude oil from the market until such time as they could take advantage of the price increase.'').

[388] *See, e.g., Chamber of Commerce of U.S.* v. *SEC.,* 443 F.3d 890, 908 (D.C. Cir. 2006) (''The ['good cause'] exception excuses notice and comment in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare.'' (citations omitted)); *Mobil Oil Corp.* v. *Dep't of Energy,* 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983) (''On a number of occasions . . . this court has held that, in special circumstances, good cause can exist when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare.'').

[389] *See* Nick Miroff and Carolyn Van Houten, *The Border is Tougher to Cross Than Ever. But There's Still One Way into America,* Wash. Post (Oct. 24, 2018); *See* Tech Transparency Project, *Inside the World of Misinformation Targeting Migrants on Social Media* (July 26, 2022), *https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media* (''A review of social media groups and pages identified by migrants showed . . . dubious offers of coyote or legal services, false claims about conditions along the route, misinformation about points of entry at which officials waive the rules, and baseless rumors about changes to immigration law.'').

[390] Declaration of Enrique Lucero ¶¶ 6–8, Dkt. 95–3, *Innovation Law Lab* v. *Wolf,* No. 19–15716 (9th Cir. Mar. 3, 2020); Declaration of Robert E. Perez, ¶ 15, Dkt. 95–2, *Innovation Law Lab,* No. 19–15716.

[391] *See Innovation Law Lab* v. *Wolf,* 951 F.3d 1073, 1095 (9th Cir. 2020), *vacated as moot sub nom. Innovation Law Lab* v. *Mayorkas,* 5 F.4th 1099 (9th Cir. 2021).

[392] *See* Declaration of Robert E. Perez, ¶¶ 4–15, Dkt. 95–2, *Innovation Law Lab,* No. 19–15716.

[393] *Id.* ¶¶ 4, 8.

[394] *Id.* ¶ 14.

[395] *Id.* ¶ 15.

[396] DHS, Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR 4769, 4770 (Jan. 17, 2017).

[397] *Id.*

[398] *Id.*

[399] *Id.; accord, e.g.,* Department of State, Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 4, 2016) (finding the good cause exception applicable because of similar short-run incentive concerns).

[400] *See, e.g., United States* v. *Dean,* 604 F.3d 1275, 1277–80 (11th Cir. 2010); *Mid-Tex Elec. Coop., Inc.* v. *FERC,* 822 F.2d 1123, 1124 (D.C. Cir.

circumstance exists here: the Title 42 public health Order is ending based on factual developments, and the Departments do not control either those factual developments or the decision to recognize those factual developments by terminating the public health Order. Until May 11, 2023, the Title 42 public health Order requires DHS to expel hundreds of thousands of migrants without processing them under Title 8. Once the Title 42 public health Order is lifted, however, the Government must pivot, quickly, to process all migrants under its Title 8 authorities, at a time when the number of migrants seeking to cross the SWB without lawful authorization to do so is expected to surge significantly. The Departments therefore find good cause to forgo a delayed effective date in order to prevent the adverse consequences resulting from the termination of the Title 42 public health Order.

The Departments reiterate that they have only invoked the foreign affairs and good cause exceptions for the delayed-effective-date requirement. The Departments have solicited public comments and have given careful attention to comments that were received during the comment period, as reflected in Section III of this preamble.

B. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)

Executive Order 12866, Executive Order 13563, and Executive Order 14094, Modernizing Regulatory Review, 88 FR 21879 (Apr. 6, 2023) direct agencies to assess the costs, benefits, and transfers of available alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Office of Information and Regulatory Affairs of OMB reviewed the rule as a significant regulatory action under section 3(f)(4) of Executive Order 12866, as amended.

The expected effects of this rule are discussed above. The rule is expected to result in significantly reduced incentives for irregular migration and illegal smuggling activity, and will help avert a significant further surge in irregular migration after the Title 42 public health Order is lifted. The rule will likely decrease the number of asylum grants and likely reduce the amount of time that noncitizens who are ineligible for asylum and who lack a reasonable fear of persecution or torture would be present in the United States. Noncitizens who establish a reasonable fear of persecution or torture would still be able to seek protection in proceedings before IJs.

The benefits of the rule are expected to include large-scale reductions in strains on limited national resources; preservation of the Departments' continued ability to safely, humanely, and effectively enforce and administer the immigration laws; a reduction in the role of exploitative transnational criminal organizations and smugglers; and improved relationships with, and enhanced opportunities to coordinate with and benefit from the migration policies of, regional neighbors. Some of these benefits accrue to migrants who wish to pursue safe, orderly, lawful pathways and processes, such as the ability to schedule a time to apply for admission at a POE. These migrants' ability to present their claims might otherwise be hampered by the severe strain that a further surge in irregular migration would impose on the Departments.

The direct costs of the rule are borne by migrants and the Departments. To the extent that any migrants are made ineligible for asylum under the presumptive condition established by the rule but would have received asylum in the absence of this rule, such an outcome would entail the denial of asylum and its attendant benefits, although such persons may continue to be eligible for statutory withholding of removal and withholding under the CAT. Unlike asylees, noncitizens granted these more limited forms of protection do not have a path to citizenship and cannot petition for certain family members to join them in the United States.[401] Such migrants may also be required to apply for work authorization more frequently than an asylee would. Migrants who choose to wait in Mexico for a CBP One appointment, rather than migrating irregularly across the southwest land border or adjacent coastal borders, also may incur some costs that are discussed earlier in this preamble, including potential safety risks for some migrants. The Departments note, in this regard, that noncitizens who establish "exceptionally compelling circumstances," including an imminent and extreme threat to life or safety or an acute medical emergency, can rebut the presumption against asylum eligibility. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). The Departments further note that there are also potential benefits for migrants who choose to wait in Mexico for a CBP One appointment (for instance, avoiding a dangerous cross-border journey and interactions with smugglers).

The rule will also require additional time for AOs and IJs, during fear screenings and reviews, respectively, to inquire into the applicability of the presumption and whether the presumption has been rebutted. Similarly, the rule will require additional time for IJs during section 240 removal proceedings. However, as discussed throughout this preamble, the rule is expected to result in significantly reduced irregular migration. Accordingly, the Departments expect the additional time spent by AOs and IJs on the rebuttable presumption to be mitigated by a comparatively smaller number of credible fear cases than AOs and IJs would otherwise have been required to handle in the absence of the rule.

Other entities, such as legal service organizations and private attorneys, will also incur some indirect costs as a result of the rule, such as familiarization costs and costs associated with assisting noncitizens who may be subject to the rule. There are other potential downstream effects of the rule, including effects on NGOs and state and local entities that interact with noncitizens, such as by providing services to such persons or receiving tax revenues from them. The nature and scale of such effects will vary by entity and should be considered relative to the baseline condition that would exist in the absence of this rule. As compared to the baseline condition, this rule is expected to reduce irregular migration.

The lawful, safe, and orderly pathways described earlier in this preamble are authorized separately from this rule but are expected to yield significant benefits for noncitizens who might otherwise seek to migrate irregularly to the United States. For instance, the ability to schedule a time to arrive to apply for admission at POEs

1987), *Nat'l Fed'n of Fed. Emps.* v. *Devine,* 671 F.2d 607, 608 (D.C. Cir. 1982), *Block,* 655 F.2d at 1154; *Bayou Lawn & Landscape Servs.* v. *Johnson,* 173 F. Supp. 3d 1271, 1284 (N.D. Fla. 2016) (collecting cases).

[401] As discussed previously in Section IV.E.7.ii of this preamble, the rule includes a specific provision to ensure that applicants who in section 240 removal proceedings who have a spouse or child who would be eligible to follow to join them under section 208(b)(3)(A), 8 U.S.C. 1158(b)(3)(A), will be able to rebut the presumption if the presumption is the only reason for denying their asylum application.

is expected to significantly improve CBP's ability to process noncitizens at POEs, and available parole processes allow prospective irregular migrants to avoid a dangerous and expensive overland journey in favor of an arrival by air to the United States. To the extent that such pathways and this rule result in a substantial reduction in irregular migration, the benefits of such pathways may also accrue to the various entities that incur costs as a consequence of irregular migration.

C. Regulatory Flexibility Act

The RFA requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. *See* 5 U.S.C. 601 *et seq.* ''Small entities'' are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. *Id.* 601(6). This rule does not directly regulate small entities and is not expected to have a direct effect on small entities. Rather, the rule regulates individuals, and individuals are not defined as ''small entities'' by the RFA. *Id.* While some employers could experience costs or transfer effects, these impacts would be indirect. In the proposed rule, the Departments certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. The Departments nonetheless welcomed comments regarding potential impacts on small entities. The Departments discuss comments from small entities earlier in the preamble, including in connection with the RFA. No such comments identified small entities that are subject to the rule within the meaning of the RFA. Accordingly, and for the same reasons stated in the proposed rule, the Departments certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

UMRA is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. 2 U.S.C. 1532(a). The inflation-adjusted value of $100 million in 1995 was approximately $177.8 million in 2021 based on the Consumer Price Index for All Urban Consumers (CPI–U).[402]

The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1), 658(6). A ''Federal intergovernmental mandate'' in turn is a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). *See id.* 658(5). And the term ''Federal private sector mandate'' refers to a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). *See id.* 658(7).

This rule does not contain a Federal mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to the entity's voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this proposed rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA. The requirements of title II of UMRA, therefore, do not apply, and the Departments have not prepared a statement under UMRA.

E. Congressional Review Act

OMB has determined that this rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not 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 on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The rule will be submitted to Congress and GAO consistent with the Congressional Review Act's requirements no later than its effective date.

F. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Departments believe that this proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (Feb. 5, 1996).

H. Family Assessment

The Departments have reviewed this rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. The Departments have reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local governments or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the agency determines a regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

The Departments have determined that the implementation of this rule will not impose a negative impact on family well-being or the autonomy or integrity of the family as an institution. Under the rule, adjudicators would consider the circumstances of family members traveling together when determining whether noncitizens are not subject to the presumption in §§ 208.33(a)(1) and 1208.33(a). The presumption will not apply to a noncitizen if the noncitizen or a member of the noncitizen's family who is traveling with the noncitizen establishes one of the conditions in § 208.33(a)(1)(i) through (iii). Similarly, the presumption in paragraph (a)(1) of those sections would be rebutted if the noncitizen demonstrates that, at the

[402] *See* BLS, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items by Month* (Dec. 2021), *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202112.pdf.*

time of entry, the noncitizen or a member of the noncitizen's family who is traveling with the noncitizen was subject to one of the circumstances enumerated in paragraph (a)(3).

Additionally, to protect against family separation, the Departments have determined that a principal applicant establishes an exceptionally compelling circumstance that rebuts the presumption of ineligibility for asylum where the principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the lawful pathways rebuttable presumption, and where denial of asylum on that ground alone would lead to the applicant's family being or remaining separated because an accompanying spouse or child would not qualify for asylum or other protection from removal on their own, or the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant if the applicant were not subject to the presumption. *See* E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273, 8273 (Feb. 5, 2021) (''It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States.'').

I. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This rule does not have ''tribal implications'' because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. E.O. 13175, Consultation and Coordination With Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000). Accordingly, Executive Order 13175 requires no further agency action or analysis.

J. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* the Departments must submit to OMB, for review and approval, any collection of information contained in a rule, unless otherwise exempt. *See* Public Law 104–13, 109 Stat. 163 (May 22, 1995). The proposed rule proposed a revision to a collection of information under OMB Control Number 1651–0140, *Collection of Advance Information from Certain Undocumented Individuals on the Land Border.* Comments pertinent to the collection of information are discussed earlier in this preamble.

As discussed in Section IV.E.3.ii.b of this preamble, CBP will transition CBP One scheduling to a daily appointment allocation process to allow noncitizens additional time to complete the process. CBP has revised the burden estimate for this collection consistent with this change. CBP continues to make improvements to the app based on stakeholder feedback.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Collection of Advance Information from Certain Undocumented Individuals on the Land Border.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* CBP.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individual undocumented noncitizens. Under this collection, CBP collects certain biographic and biometric information from undocumented noncitizens prior to their arrival at a POE, to streamline their processing at the POE. The requested information is that which CBP would otherwise collect from these individuals during primary and/or secondary processing. This information is provided by undocumented noncitizens, directly or through NGOs and International Organizations. Providing this information reduces the amount of data entered by CBP officers and the corresponding time required to process an undocumented noncitizen.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* This information collection is divided into three parts. The estimated annual number of respondents for the registration in the CBP One app is 500,000 and the estimated time burden per response is 12 minutes. The estimated annual number of respondents for the daily opt-in for appointments is 500,000 and the estimated time burden per response is 1 minutes. The estimated annual number of respondents for the confirmation of appointment in the app is 456,250 and the estimated time burden per response is 3 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 372,813 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $7,605,385.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; 8 CFR part 2; Pub. L. 115–218.

■ 2. Amend § 208.13 by removing and reserving paragraphs (c)(3), (4), and (5); adding and reserving paragraph (e); and adding paragraph (f), to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(3)–(5) [Reserved]

* * * * *

(e) [Reserved]

(f) *Lawful pathways condition.* For applications filed by aliens who entered the United States between May 11, 2023, and May 11, 2025, also refer to the provisions on asylum eligibility described in § 208.33.

§ 208.30 [Amended]

■ 3. Amend § 208.30(e)(5) by:

■ a. Amending paragraph (e)(5)(i) by removing the phrase ''paragraphs (e)(5)(ii) through (iv), or'' from the first sentence;

■ b. Removing paragraphs (e)(5)(ii) and (iii); and

■ c. Redesignating paragraph (e)(5)(i) as (e)(5).

■ 4. Add subpart C, consisting of § 208.33, to read as follows:

Subpart C—Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between May 11, 2023, and May 11, 2025

§ 208.33 Lawful pathways condition on asylum eligibility.

Notwithstanding any contrary section of this part, including §§ 208.2, 208.13, and 208.30—

(a) *Condition on eligibility.* (1) *Applicability.* A rebuttable presumption of ineligibility for asylum applies to an alien who enters the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission as described in section 212(a)(7) of the Act and whose entry was:

(i) Between May 11, 2023, and May 11, 2025,

(ii) Subsequent to the end of implementation of the Title 42 public health Order issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, and

(iii) After the alien traveled through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

(2) *Exceptions to applicability of the rebuttable presumption.* The rebuttable presumption described in paragraph (a)(1) of this section does not apply if:

(i) The alien was, at the time of entry, an unaccompanied alien child as defined in 6 U.S.C. 279(g)(2); or

(ii) The alien, or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(B) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(C) Sought asylum or other protection in a country through which the alien traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant's claim for asylum or other protection through one or more of that government's pathways for that claim. A final decision does not include a determination by a foreign government that the alien abandoned the claim.

(3) *Rebuttal of the presumption.* (i) An alien subject to the presumption described in paragraph (a)(1) of this section can rebut the presumption by demonstrating by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien demonstrates that, at the time of entry, the alien or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Faced an acute medical emergency;

(B) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(C) Satisfied the definition of ''victim of a severe form of trafficking in persons'' provided in § 214.11(a) of this chapter.

(ii) An alien who demonstrates by a preponderance of the evidence any of the circumstances in paragraph (a)(3)(i) of this section shall necessarily rebut the presumption in paragraph (a)(1) of this section.

(b) *Application in credible fear determinations*—(1) *Initial determination.* The asylum officer shall first determine whether the alien is covered by the presumption in paragraph (a)(1) of this section and, if so, whether the alien has rebutted the presumption in accordance with paragraph (a)(3) of this section.

(i) If the alien is covered by the presumption in paragraph (a)(1) of this section and fails to rebut the presumption in accordance with paragraph (a)(3) of this section, then the asylum officer shall enter a negative credible fear determination with respect to the alien's asylum claim and continue to consider the alien's claim under paragraph (b)(2) of this section.

(ii) If the alien is not covered by the presumption in paragraph (a)(1) of this section or has rebutted the presumption in accordance with paragraph (a)(3) of this section, the asylum officer shall follow the procedures in § 208.30.

(2) *Additional procedures.* (i) In cases in which the asylum officer enters a negative credible fear determination under paragraph (b)(1)(i) of this section, the asylum officer will assess whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion) or torture, with respect to the identified country or countries of removal identified pursuant to section 241(b) of the Act.

(ii) In cases described in paragraph (b)(2)(i) of this section, if the alien establishes a reasonable possibility of persecution or torture with respect to the identified country or countries of removal, the Department will issue a Form I–862, Notice to Appear.

(iii) In cases described in paragraph (b)(2)(i) of this section, if an alien fails to establish a reasonable possibility of persecution or torture with respect to the identified country or countries of removal, the asylum officer will provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative credible fear determinations.

(iv) The alien must indicate whether he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge.

(v) Only if the alien requests such review by so indicating on the Record of Negative Fear shall the asylum officer serve the alien with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. Immigration judges will evaluate the case as provided in 8 CFR 1208.33(b). The case shall then proceed as set forth in paragraphs (b)(2)(v)(A) through (C) of this section.

(A) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(b)(2)(i), the case shall proceed under 8 CFR 1208.30(g)(2)(iv)(B).

(B) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(b)(2)(ii), DHS shall issue a Form I–862, Notice to Appear, to commence removal proceedings under section 240 of the Act.

(C) Where the immigration judge issues a negative credible fear determination, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision and no request for reconsideration may be submitted to USCIS. Nevertheless, USCIS may, in its sole discretion, reconsider a negative determination.

(c) *Continuing applicability of condition on eligibility.* (1) Subject to

paragraph (c)(2) of this section, the condition on asylum eligibility in paragraph (a)(1) of this section shall apply to any asylum application filed by an alien who entered the United States during the time and in the manner specified in paragraph (a)(1) of this section and who is not covered by an exception in paragraph (a)(2) of this section, regardless of when the application is filed and adjudicated.

(2) The conditions on asylum eligibility in paragraph (a)(1) of this section shall not apply to an asylum application filed by an alien described in paragraph (c)(1) of this section if the asylum application is filed after May 11, 2025, the alien was under the age of 18 at the time of the entry referenced in paragraph (c)(1) of this section, and the alien is applying for asylum as a principal applicant.

(d) *Severability.* The Department intends that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, the Attorney General amends 8 CFR parts 1003 and 1208 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 5. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

§ 1003.42 [Amended]

■ 6. Amend § 1003.42 by removing paragraphs (d)(2) and (3) and redesignating paragraph (d)(1) as paragraph (d).

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 7. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; Pub. L. 115–218.

■ 8. Amend § 1208.13 by removing and reserving paragraphs (c)(3), (4), and (5), and by adding paragraph (f), to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(3)–(5) [Reserved]

* * * * *

(f) *Lawful pathways condition.* For applications filed by aliens who entered the United States between May 11, 2023, and May 11, 2025, also refer to the provisions on asylum eligibility described in § 1208.33.

§ 1208.30 [Amended]

■ 9. Amend § 1208.30 by removing and reserving paragraph (g)(1).

■ 10. Add subpart C, consisting of § 1208.33, to read as follows:

Subpart C—Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between May 11, 2023, and May 11, 2025

§ 1208.33 Lawful pathways condition on asylum eligibility.

Notwithstanding any contrary section of this part, including §§ 1208.2, 1208.13, and 1208.30—

(a) *Condition on eligibility.* (1) *Applicability.* A rebuttable presumption of ineligibility for asylum applies to an alien who enters the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission as described in section 212(a)(7) of the Act and whose entry was:

(i) Between May 11, 2023, and May 11, 2025,

(ii) Subsequent to the end of implementation of the Title 42 public health Order issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, and

(iii) After the alien traveled through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

(2) *Exceptions to applicability of the rebuttable presumption.* The rebuttable presumption described in paragraph (a)(1) of this section does not apply if:

(i) The alien was, at the time of entry, an unaccompanied alien child as defined in 6 U.S.C. 279(g)(2); or

(ii) The alien, or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(B) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(C) Sought asylum or other protection in a country through which the alien traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant's claim for asylum or other protection through one or more of that government's pathways for that claim. A final decision does not include a determination by a foreign government that the alien abandoned the claim.

(3) *Rebuttal of the presumption.* (i) The presumption in paragraph (a)(1) of this section can be rebutted if an alien demonstrates by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien demonstrates that, at the time of entry, the alien or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Faced an acute medical emergency;

(B) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(C) Satisfied the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11(a).

(ii) An alien who demonstrates by a preponderance of the evidence any of the circumstances in paragraph (a)(3)(i) of this section shall necessarily rebut the presumption in paragraph (a)(1) of this section.

(b) *Application in credible fear determinations.* (1) Where an asylum officer has issued a negative credible fear determination pursuant to 8 CFR 208.33(b), and the alien has requested

immigration judge review of that credible fear determination, the immigration judge shall evaluate the case de novo, as specified in paragraph (b)(2) of this section. In doing so, the immigration judge shall take into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge.

(2) The immigration judge shall first determine whether the alien is covered by the presumption at 8 CFR 208.33(a)(1) and 1208.33(a)(1) and, if so, whether the alien has rebutted the presumption in accordance with 8 CFR 208.33(a)(3) and 1208.33(a)(3).

(i) Where the immigration judge determines that the alien is not covered by the presumption, or that the presumption has been rebutted, the immigration judge shall further determine, consistent with § 1208.30, whether the alien has established a significant possibility of eligibility for asylum under section 208 of the Act, withholding of removal under section 241(b)(3) of the Act, or withholding of removal under the Convention Against Torture. Where the immigration judge determines that the alien has established a significant possibility of eligibility for one of those forms of relief or protection, the immigration judge shall issue a positive credible fear finding. Where the immigration judge determines that the alien has not established a significant possibility of eligibility for any of those forms of relief or protection, the immigration judge shall issue a negative credible fear finding.

(ii) Where the immigration judge determines that the alien is covered by the presumption and that the presumption has not been rebutted, the immigration judge shall further determine whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, political opinion, or membership in a particular social group) or torture. Where the immigration judge determines that the alien has established a reasonable possibility of persecution or torture, the immigration judge shall issue a positive credible fear finding. Where the immigration judge determines that the alien has not established a reasonable possibility of persecution or torture, the immigration judge shall issue a negative credible fear finding.

(3) Following the immigration judge's determination, the case will proceed as indicated in 8 CFR 208.33(b)(2)(v)(A) through (C).

(4) If, under 8 CFR 208.33(b)(2), DHS issues a Form I–862, Notice to Appear, to commence removal proceedings under section 240 of the Act, the alien may apply for asylum, withholding of removal under section 241(b)(3) of the Act, withholding of removal under the Convention Against Torture, or any other form of relief or protection for which the alien is eligible during those removal proceedings.

(c) *Family unity and removal proceedings.* In removal proceedings under section 240 of the Act, where a principal asylum applicant is eligible for withholding of removal under section 241(b)(3) of the Act or withholding of removal under § 1208.16(c)(2) and would be granted asylum but for the presumption in paragraph (a)(1) of this section, and where an accompanying spouse or child as defined in section 208(b)(3)(A) of the Act does not independently qualify for asylum or other protection from removal or the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the Act, the presumption shall be deemed rebutted as an exceptionally compelling circumstance in accordance with paragraph (a)(3) of this section.

(d) *Continuing applicability of condition on eligibility.* (1) Subject to paragraph (d)(2) of this section, the condition on asylum eligibility in paragraph (a)(1) of this section shall apply to any asylum application filed by an alien who entered the United States during the time and in the manner specified in paragraph (a)(1) of this section and who is not covered by an exception in paragraph (a)(2) of this section, regardless of when the application is filed and adjudicated.

(2) The conditions on asylum eligibility in paragraph (a)(1) of this section shall not apply to an asylum application filed by an alien described in paragraph (d)(1) of this section if the asylum application is filed after May 11, 2025, the alien was under the age of 18 at the time of the entry referenced in paragraph (d)(1) of this section, and the alien is applying for asylum as a principal applicant.

(e) *Severability.* The Department intends that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Dated: May 8, 2023.

Merrick B. Garland,

Attorney General, U.S. Department of Justice.

[FR Doc. 2023–10146 Filed 5–10–23; 8:45 am]

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